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THE NATIONAL LEGAL LANDSCAPE OF FLAVORED COMMERCIAL TOBACCO PRODUCTS



PUBLIC HEALTH
LAW CENTER
at Mitchell Hamline School of Law

TODAY'S PRESENTERS

WILLOW ANDERSON, J.D.









MARISA KATZ, J.D.



THE PUBLIC HEALTH LAW CENTER



LEGAL TECHNICAL ASSISTANCE

-  Legal Research
-  Policy Development, Implementation, Defense
-  Publications
-  Trainings
-  Direct Representation
-  Lobby

EQUALITY:

Everyone gets the same – regardless if it's needed or right for them.



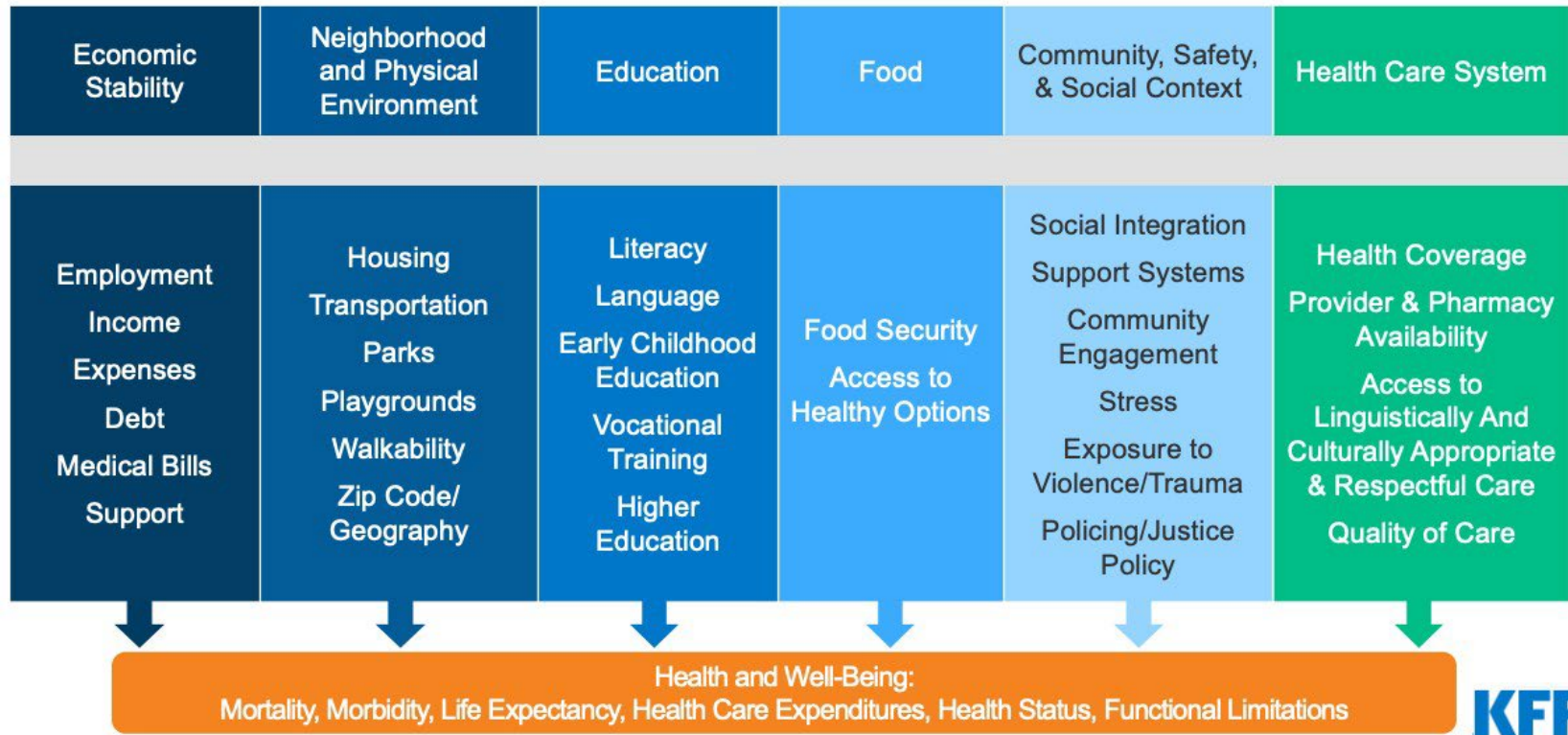
EQUITY:

Everyone gets what they need – understanding the barriers, circumstances, and conditions.



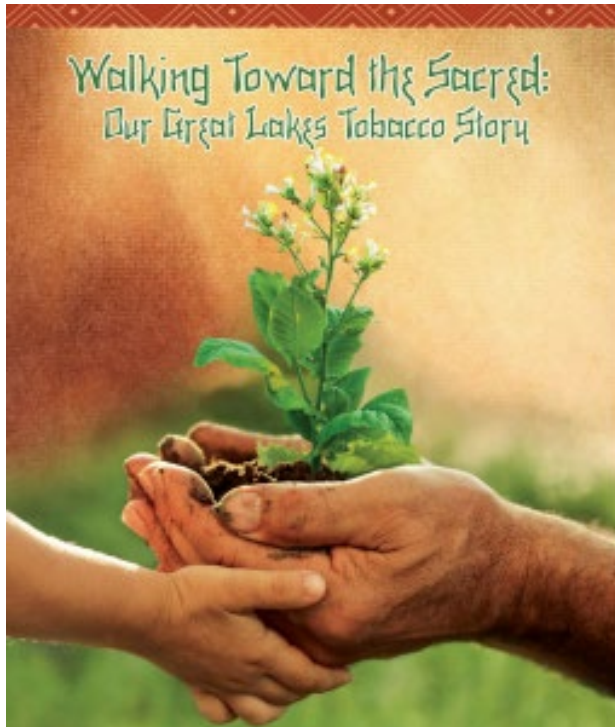
WHAT ARE WE TALKING ABOUT? HEALTH EQUITY, DISPARITIES

Social Determinants of Health



Source: [Kaiser Family Foundation](https://www.kff.org/)

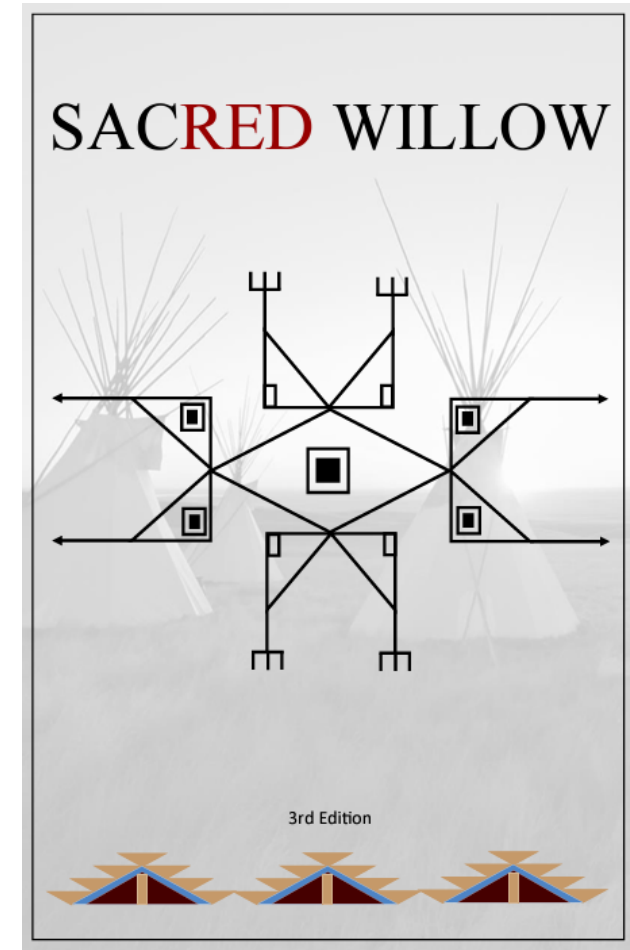
COMMERCIAL TOBACCO IS NOT TRADITIONAL TOBACCO



[Resource: Walking Toward the Sacred](#)



Top: Red Willow, Sacred Willow Publication.
Bottom: *Nicotiana rustica*, Solanaceae, Mapacho, flower.
Botanical Garden KIT, Karlsruhe, Germany. Wikimedia Commons.



[Resource: Sacred Willow](#)

THE NATIONAL LANDSCAPE OF FLAVORED TOBACCO PRODUCTS

AGENDA

- Background on Flavored Commercial Tobacco Products
- Federal Regulation of Flavored Products and Regulatory (In)action
- State and Local Regulations of Flavored Products
- Legal Challenges to State and Local Sales Prohibitions
- Lessons Learned from Jurisdictions that Have Enacted Policies
- Discussion/Q&A

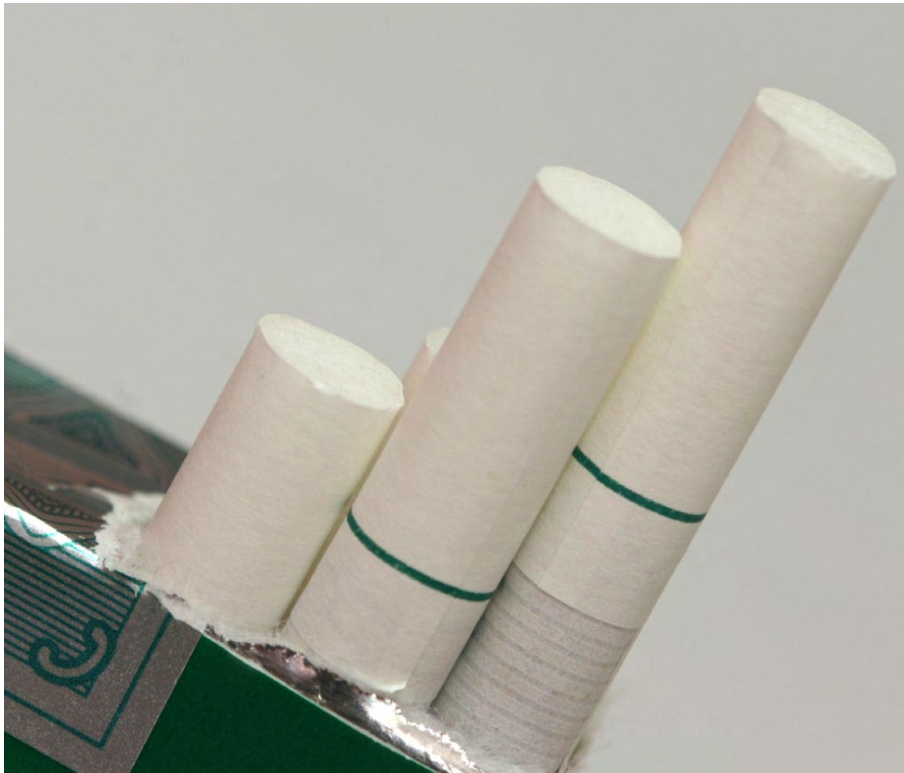
FLAVORED COMMERCIAL TOBACCO PRODUCTS 101

- **What are flavored tobacco products?**
 - Flavored E-Cigarettes
 - Menthol Cigarettes
 - Flavored Cigars
 - Flavored Smokeless Tobacco (e.g., snus)
 - Synthetic Nicotine Pouches
- **Why are these products problematic?**
 - Masks harshness of tobacco to improve taste
 - Allows for easy initiation of product use, particularly among youth



FLAVORED COMMERCIAL TOBACCO PRODUCTS

MENTHOL



Percentage of Smokers Using Menthol Cigarettes

- African-American, 84.6%
- Latino/a, 46.9%
- Asian-American, 38%
- White/Caucasian, 28.9%

- LBGTQ, 71%
- Teens, 50%
- African-American teens, 70%
- Latino/a teens, 50%+

FLAVORED COMMERCIAL TOBACCO PRODUCTS E-CIGARETTES

- 2.1 million youth use e-cigarettes.
- 90% of students vaping use flavored products, mostly fruit and candy flavors.
- Most popular brands are Elf Bar, Esco Bars, Vuse, JUUL.

NYTS
2023

More than **2.1 million**

youth currently use e-cigarettes,
with a decline in high school students currently using e-cigarettes in 2022-2023

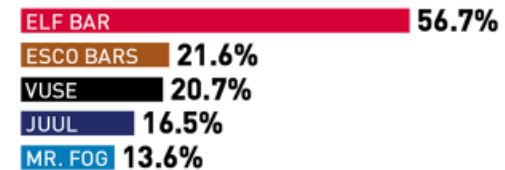
Among youth who reported current use of e-cigarettes:

More than **1 in 4**



use e-cigarettes daily

The most popular brands include disposable and cartridge-based products, and the most commonly reported products were:



Almost **9 out of 10**



use flavored e-cigarettes

Source: cdc.gov: ["Tobacco Product Use among Middle and High School Students — United States, 2023."](#)

FLAVORED E-CIGARETTE PRODUCTS NICOTINE CONTENT COMPARED TO CIGARETTES



Loon Air:
6000 puffs (13 ml x 60 mg)
= 26 packs of cigarettes



Loon Pluto: 2500+Puffs
(6 ml x 50 mg)
= 10 packs of cigarettes



Loon Juice Box:
4000+Puffs (14 ml x 50 mg)
= 23 packs of cigarettes

FEDERAL REGULATION

THE TOBACCO CONTROL ACT OF 2009 (TCA)



- The TCA prohibits cigarettes from containing any characterizing flavor.
- The law *exempts* menthol and tobacco flavors.
- The law does not apply to non-cigarette tobacco products.

FEDERAL REGULATION

TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE

The TCA directed the TPSAC to study:

"[T]he issue of the impact of use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities."

In July 2011, the TPSAC concluded that **removing menthol cigarettes** from the marketplace **would benefit public health.**

FEDERAL REGULATION FDA (IN)ACTION ON MENTHOL & E-CIGARETTES



2013

- FDA conducts "preliminary independent scientific evaluation of existing data and research on menthol cigarettes."
- FDA's report confirms menthol cigarettes pose public health risk that exceeds the risk posed by non-menthol cigarettes.

2016 & 2017

- In 2016, FDA issues Deeming Rule, establishing regulatory authority over e-cigarettes but without prohibitions on flavored products.
- In 2017, FDA announces plan to prioritize regulation of youth-attractive flavors, including menthol, but no substantive action since announcement.

FEDERAL REGULATION

FDA (IN)ACTION ON MENTHOL & E-CIGARETTES



2020

- FDA orders removal of some flavored cartridge-based e-cigarettes from market.
- However, this does NOT prohibit the sale of:
 - Tobacco and menthol-flavored cartridge-based e-cigarettes
 - Flavored disposable e-cigarettes
 - Refillable flavored e-cigarettes

FEDERAL REGULATION CITIZEN PETITIONS



FDA Sued Over Inaction on Menthol Cigarettes

zoom

"Black people **ARE NOT** born with a Newport or Swisher Sweets in their mouth. The tobacco industry's pernicious persistent racial targeting of our community does that.

We're celebrating Juneteenth & want to be **FREE** of all these things damaging our community, especially menthol cigarettes."

- Carol McGruder, Co-Chair
African American Tobacco Control Leadership Council

Citizen Petition

Asking the U.S. Food and Drug Administration to Prohibit Menthol as a Characterizing Flavor in Cigarettes.

April 22, 2018



FEDERAL REGULATION

CITIZEN PETITION TO ENACT MENTHOL & CIGAR RULES



FEDERAL REGULATIONS CITIZEN PETITIONS

- April 2013 – PHLC + 18 other public health orgs file petition for FDA to add menthol to list of prohibited flavors.
- June 2020 – AATCLC and Action on Smoking and Health (ASH) file petition for FDA to act on 2013 petition.
- April 2021 – FDA announces it will grant 2013 petition and remove menthol from cigarettes and all flavors from cigars/cigarillos BUT does not commit to a deadline.
- April 2024 – AATCLC files another petition to compel FDA to act on rules.



FEDERAL REGULATIONS INDEFINITE DELAY



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FOR IMMEDIATE RELEASE
April 26, 2024

Contact: HHS Press Office
202-690-6343
media@hhs.gov

Secretary Becerra Statement on the Proposed Menthol Cigarette Rule

This rule has garnered historic attention and the public comment period has yielded an immense amount of feedback, including from various elements of the civil rights and criminal justice movement. It's clear that there are still more conversations to have, and that will take significantly more time.

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- HHS Secretary Becerra Statement on the Proposed Menthol Cigarette Rule



TOBACCO CONTROL ACT OF 2009

STATE AND LOCAL AUTHORITY

Preservation of State and Local Authority

Nothing in the Act limits state/local authority to enact laws “relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products... .” 21 U.S.C.S. § 387p(a)(1).

Preemption of State/Local Laws

No state/locality may establish “any requirement which is different from...any requirement under [the Act] relating to tobacco product standards.”

STATE AND LOCAL AUTHORITY

DILLON'S RULE, HOME RULE, AND PREEMPTION

HOME RULE JURISDICTIONS

- Protects against state preemption by granting local authority over certain matters
- Legal presumption against statewide preemption absent express state preemption

DILLON'S RULE JURISDICTIONS

- Considered an extension of the state and power distributed according to state constitution
- Local authority powers limited to those expressly granted by state legislature



NATIONAL LANDSCAPE OF FLAVORED PRODUCT REGULATION



SALES RESTRICTIONS

May 2023



U.S. SALES RESTRICTIONS ON FLAVORED TOBACCO PRODUCTS



This document provides select examples of U.S. states, cities, and counties¹ that restrict the sale of flavored tobacco products. For local jurisdictions, it focuses on those with a population over 75,000. The Public Health Law Center includes the following best practices in its model tobacco flavor restrictions policies: (1) covering the entire jurisdiction, (2) prohibiting menthol, (3) restricting flavors in all tobacco products, and (4) not including exemptions for certain retailers.

The first chart organizes jurisdictions based on how they address these four best practices.

The second chart organizes the jurisdictions by state, capturing variations among flavor restrictions in each of these four areas. The chart

also provides links to each jurisdiction's laws and summarizes relevant legal challenges.

A state or local government considering whether to adapt any language from the following policies should take care to ensure that the language is appropriate, practical, and legal for its jurisdiction. Please note that the Public Health Law Center does not endorse or recommend any of the following policies. We have included these examples to illustrate how various jurisdictions regulate the sale of flavored tobacco products and related electronic nicotine delivery devices.

This chart is not comprehensive. Feel free to contact the Public Health Law Center for more information about flavored tobacco restrictions where you live.



May 2024

RESTRICTIONS BY TYPE	3	Mendocino County	34	COLORADO	61	MONTANA	82
State Policies	3	Napa	34	Boulder	61	Missoula	82
Local Policies	4	Oakland	35	ILLINOIS	62	NEW JERSEY	83
CALIFORNIA	10	Oxnard	37	Chicago	62	Jersey City	84
Alameda	12	Palmdale	38	MAINE	64	NEW YORK	85
Alameda County	13	Pasadena	39	MARYLAND	65	Hempstead	86
Alhambra	14	Pleasanton	40	Montgomery County	66	Nassau County	87
Antioch	15	Redwood City	41	MASSACHUSETTS	67	Yonkers	89
Baldwin Park	16	Richmond	42	Massachusetts	68	OHIO	90
Berkeley	17	Sacramento	43	Boston	69	Columbus	90
Buena Park	18	Sacramento County	44	Brockton	70	Toledo	92
Burbank	19	San Diego	44	Cambridge	71	OREGON	93
Carson	20	San Diego County	45	Lawrence	72	Multnomah County	93
Chula Vista	21	San Francisco	47	Lowell	72	Washington County	94
Compton	21	San Jose	48	Lynn	73	PENNSYLVANIA	95
Contra Costa County	22	San Leandro	49	Newton	74	Philadelphia	95
El Monte	23	San Mateo	50	Somerville	75	RHODE ISLAND	96
Fremont	24	San Mateo County	51	Worcester	76	Providence	97
Glendale	25	Santa Ana	52	Bloomington	77	UTAH	98
Hayward	26	Santa Barbara County	53	Duluth	78	ENDNOTES	98
Hesperia	27	Santa Clara County	54	Hennepin County	79		
Irvine	28	Santa Cruz County	55	Minneapolis	80		
Livermore	29	Santa Maria	56	Saint Paul	81		
Long Beach	30	Sunnyvale	57				
Los Angeles	31	Ventura (San Buenaventura)	57				
Los Angeles County	32	Ventura County	58				
Marin County	33	Yolo County	59				
		WASHINGTON, D.C.	60				

[US-sales-restrictions-flavored-tobacco-products.pdf \(publichealthlawcenter.org\)](https://www.publichealthlawcenter.org/US-sales-restrictions-flavored-tobacco-products.pdf)



NATIONAL LANDSCAPE OF FLAVORED PRODUCT REGULATION

STATE POLICIES

State	Jurisdiction-wide ban?	Menthol prohibited?	All tobacco products?	Covers all retailers?	Effective date
Maine ¹	✓	✗	✗	✓	2009
Maryland ²	✓	✗	✗	✓	February 2020
Rhode Island ²	✓	✓	✗	✓	March 2020
New Jersey ²	✓	✓	✗	✓	April 2020
New York ²	✓	✓	✗	✓	May 2020
Massachusetts ³	✓	✓	✓	✗	June 2020
Utah ²	✓	✗	✗	✓	July 2024
California ^{3,5}	✓	✓	✗	✗	January 2023

1 Only covers non-premium flavored cigars

2 Only covers flavored e-cigarettes

3 Retailer exemptions for licensed smoking bars

4 Retailer exemption for specialty tobacco stores

5 Product exemptions for hookah, premium cigars, pipe tobacco.

NATIONAL LANDSCAPE OF FLAVORED PRODUCT REGULATION

LOCAL POLICIES

- 375+ cities and counties with ordinances restricting the sale of flavored tobacco products.
- 26 cities and counties with comprehensive ordinances:
 - jurisdiction-wide
 - prohibit menthol,
 - includes all tobacco products
 - no retailer exceptions
- Policies Vary: banning only menthol; retailer exceptions; product exceptions

NATIONAL LANDSCAPE OF FLAVORED PRODUCT REGULATION

LOCAL POLICIES

 PUBLIC HEALTH LAW CENTER
at Mitchell Hamline School of Law

MENTHOL & FLAVORED PRODUCTS

September 2022

CHICAGO'S FLAVORED TOBACCO PRODUCTS POLICY

A Case Study



In December 2013, Chicago became the first city in the U.S. to restrict the sale of all flavored commercial tobacco products,¹ including menthol.²

Part of Chicago's campaign to curb youth smoking, the ordinance restricted the sale of menthol flavored cigarettes and other flavored tobacco products within 500 feet of any school located in Chicago, except for retail tobacco stores dedicated primarily to the sale of tobacco.³



[Menthol-Case-Studies-Chicago.pdf \(publichealthlawcenter.org\)](#)

 PUBLIC HEALTH LAW CENTER
at Mitchell Hamline School of Law

MENTHOL & FLAVORED PRODUCTS

September 2022

SAN FRANCISCO'S FLAVORED TOBACCO PRODUCTS POLICY

A Case Study



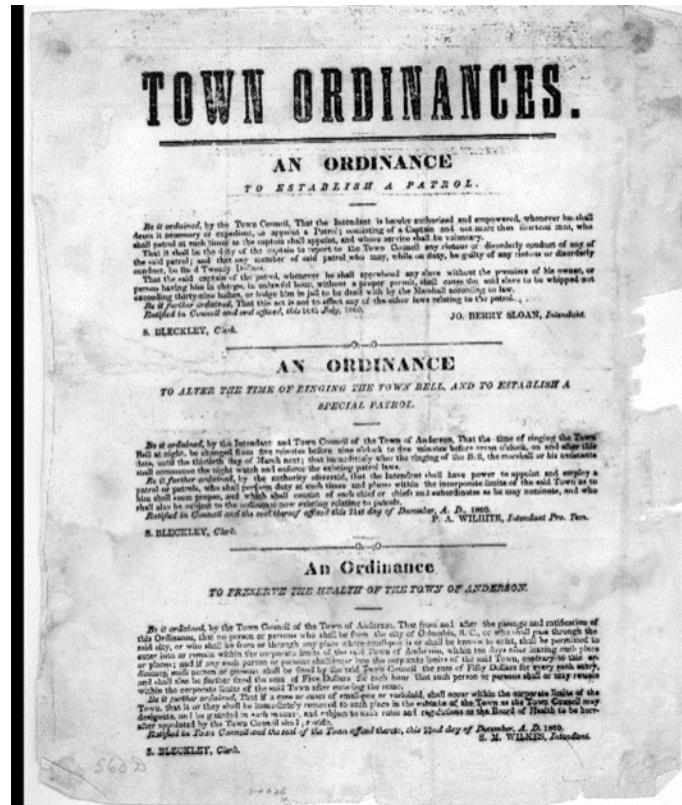
In June of 2017, the San Francisco Board of Supervisors unanimously passed the City's first law prohibiting the sale of menthol and all flavored commercial tobacco products.²

This law grew out of fervent advocacy and organizing from both local and national partners.³ Before the law took effect as scheduled in 2018, R.J. Reynolds Tobacco Company forced a referendum on the law, suspending its implementation, and at the same time funding a significant campaign urging San Francisco residents to vote it down.⁴ Defying the odds,



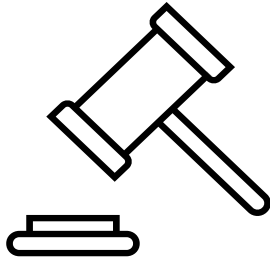
[Menthol-Case-Studies-San-Francisco.pdf \(publichealthlawcenter.org\)](#)

FLAVORED PRODUCT SALES RESTRICTIONS ARE LEGALLY DEFENSIBLE



OVERVIEW OF FLAVOR LEGAL CHALLENGES

RJ REYNOLDS V. BONTA (2023)



Preemption Types

1. Express
2. Implied
3. Conflict

R.J. REYNOLDS V. CITY OF EDINA

- In *R.J. Reynolds v. City of Edina* (2020), both the U.S. District Court and U.S. 8th Circuit Court of Appeals rejected the company's preemption and constitutional claims, reinforcing the city's local authority to prohibit the sale of flavored tobacco products. Edina's law remains in effect.



MINNESOTA V. JUUL



UNDERSTANDING BIG TOBACCO'S CONSTITUTIONAL CLAIMS TO GUIDE THE DEVELOPMENT OF LEGALLY DEFENSIBLE FLAVOR REGULATIONS

PREEMPTION



JUNE 22, 2009

Family Smoking Prevention and Tobacco Control Act Signing

President Obama signed the Family Smoking Prevention and Tobacco Control Act. The Act gives the U.S. government broad regulatory power.

VIOLATION OF THE COMMERCE CLAUSE

ARTICLE I, SECTION 8, CLAUSE 3:
[THE CONGRESS SHALL HAVE POWER]

TO REGULATE COMMERCE WITH FOREIGN NATIONS,
AND AMONG THE SEVERAL STATES,
AND WITH THE INDIAN TRIBES;

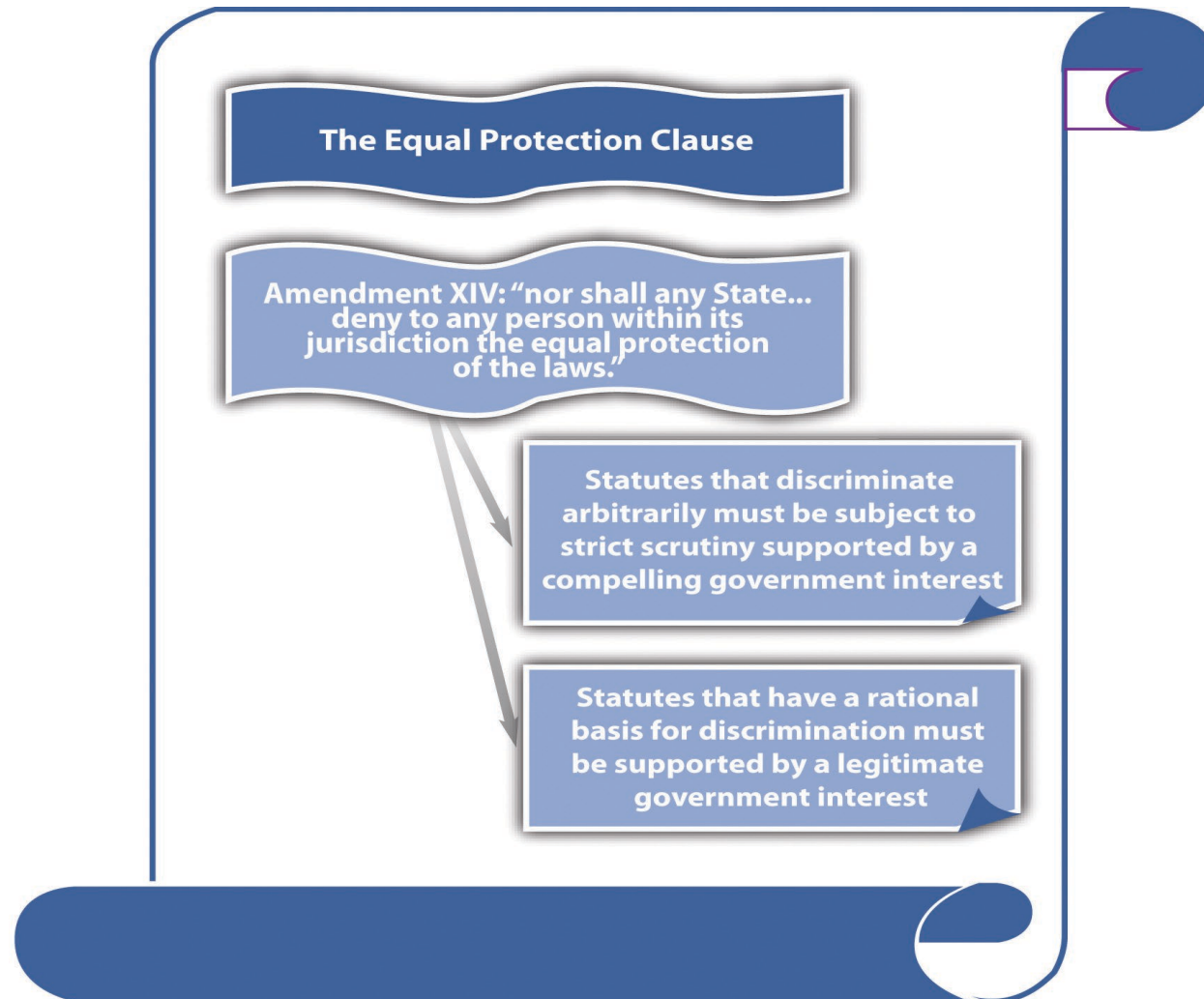
FIRST AMENDMENT CHALLENGES

Commercial Speech Doctrine:

The U.S. Supreme Court has established a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) to determine when the government may regulate commercial speech:

- The speech must concern lawful activity and not be misleading.
- The governmental interest in regulation must be substantial.
- The regulation must directly advance the governmental interest asserted.
- The regulation must not be more extensive than necessary to serve that interest.

EQUAL PROTECTION CLAUSE VIOLATIONS



VAGUENESS AND OVERBREADTH



DUE PROCESS VIOLATIONS



TAKINGS CLAUSE VIOLATIONS

COMPENSATION



LESSONS LEARNED

LESSONS LEARNED IN CRAFTING FLAVOR RESTRICTIONS

- Enforcement
- Notice and Lead Time
- Notification Process
- Complex Forfeiture Process
- Public Health Department Involvement
- Safety Concerns & Tobacco Product Waste
- Attractive Nuisance
- Evaluation and Monitoring
- Continual Adaptation
- Collaboration
- Public Education
- Learning from Other Jurisdictions

IS IT WORTH IT?

FLAVORED PRODUCTS ARE LURING A NEW GENERATION INTO ADDICTION

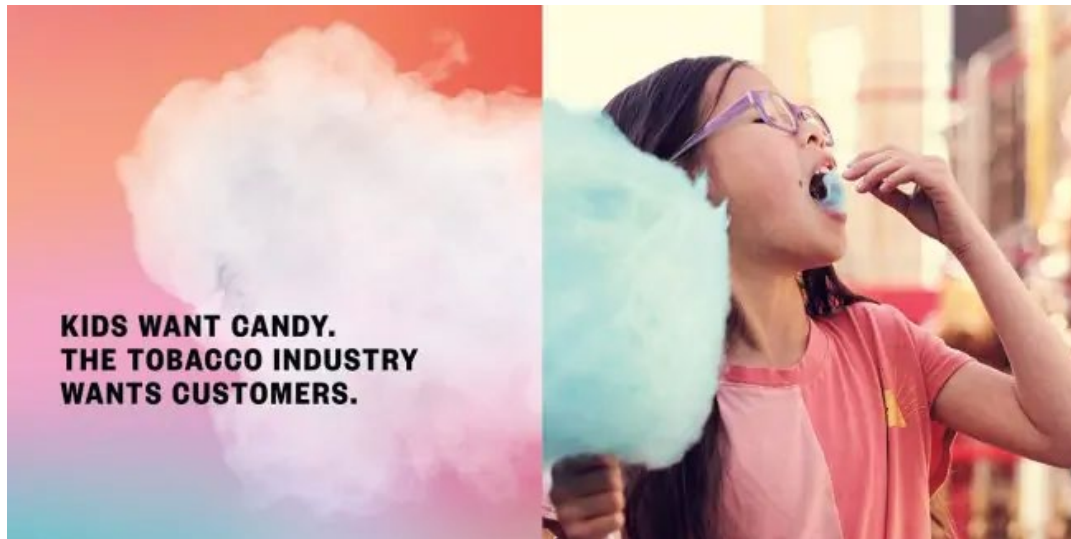


Photo Credit: Campaign for Tobacco Free Kids

- 81% of youth who have ever used tobacco initiated with a flavored product.
- 87% of youth tobacco users used a flavored tobacco product in the past month.
- At least two-thirds of youth tobacco users report using tobacco products “because they come in flavors I like.”
- Half of youth who have ever smoked initiated with menthol cigarettes.

RESOURCES

- [Flavors on Trial: A Look at the Legal Status of Flavored Commercial Tobacco Regulation in Minnesota and Beyond](#)
- [Edina's Flavored Tobacco Products Policy: A Case Study](#)
- [U.S. Sales Restrictions on Flavored Tobacco Products](#)
- [Flavor Cards and Their Significance for Comprehensive Commercial Tobacco Control Laws](#)
- [Sensing Flavor: R.J. Reynolds's Latest Efforts to Undermine California's Flavored Tobacco Policy](#)

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