

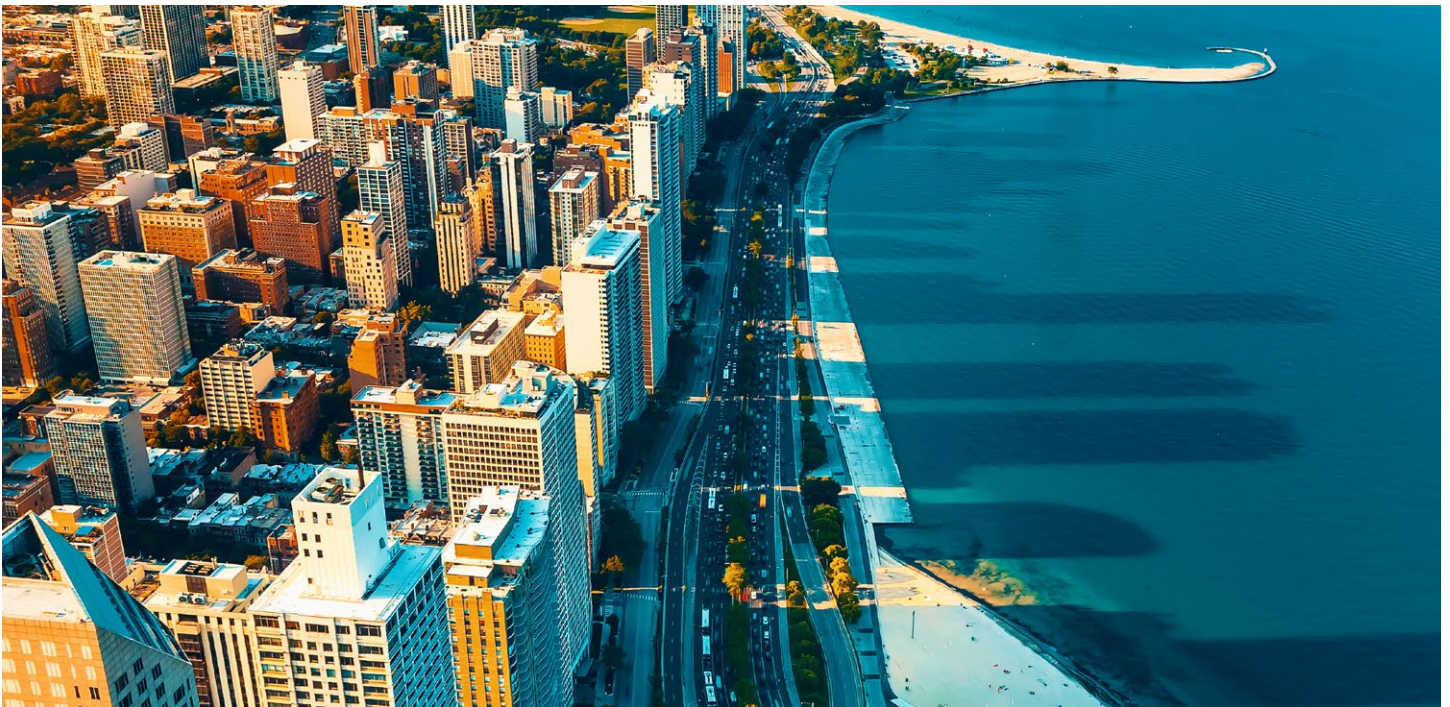
CHICAGO'S FLAVORED TOBACCO PRODUCTS POLICY

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



Laying the Groundwork for Action

Before Chicago instituted its flavor ban in 2013, studies found that 10.7 percent of Chicago high school students reported smoking.⁴ Although this statistic reflected a 3 percent decrease from a similar survey conducted in 2011,⁵ the number of high school students who smoke remained high and steeply skewed when it came to the popularity of menthol products among first-time smokers, Black individuals, and other racial and ethnic populations within the city.⁶ In Illinois overall, 14.1 percent of high school students reported smoking in 2012.⁷ At that time, nearly 10,600 Illinois kids were becoming new regular daily smokers each year.⁸

Chicago's Mayor Rahm Emanuel, who had tobacco control experience at the federal level, championed the City's efforts to address the youth menthol tobacco problem.⁹ Following the FDA's report on the impact of menthol, Mayor Emanuel called for the Chicago Board of Health and Department of Public Health to work quickly to identify "winnable" and "community driven" policy solutions to curb flavored tobacco use among youth in July 2013.¹⁰

By September 2013, Chicago public health officials had connected with more than twenty-four community organizations and several local policy makers, and had reached out to populations disproportionately affected by menthol cigarette use.¹¹ Four town hall meetings were held in neighborhoods with large Black, Latinx, and LGBTQ+ populations.¹² Spanish interpreters assisted at two of these meetings.¹³ Several hundred Chicagoans attended the meetings, including youth, health care workers, social service providers, faith leaders, and elected officials.¹⁴ Partnerships were formed with both traditional organizational stakeholders (such as the American Cancer Society) and with allies new to tobacco control (including the Coalition for Asian Substance Abuse Prevention, the Chicago Hispanic Health Coalition, the LGBT Advisory Council, and others).¹⁵

The City framed the menthol tobacco problem not just as a public health concern, but as a social justice issue,¹⁶ emphasizing that the tobacco industry had targeted communities and youth of color with its menthol marketing.¹⁷ Because of structural health care access barriers, this tactic targets youth who are more likely to become life-long smokers.¹⁸

Chicago's Menthol Ban

In the fall of 2013, the Chicago Board of Health and Department of Public Health released a comprehensive report that summarized its community engagement work and policy recommendations.¹⁹ One policy recommendation was a ban on the sale of all flavored tobacco products, *including menthol*, within a 500-foot radius of schools.²⁰ This policy was strongly endorsed by Mayor Emanuel and was ultimately adopted by the city council by a wide margin, though not without challenge.²¹

Preparing for Opposition

The flavor ban faced opposition from 377 tobacco retailers who would be impacted by the law.²² These retailers argued that including menthol cigarettes in the ban was unnecessary given that these products were already subject to all the same regulations as all cigarettes and because the disproportionate level of youth menthol use was due to enabling adults who purchase for minors, and the result of illicit (black market) sales.²³

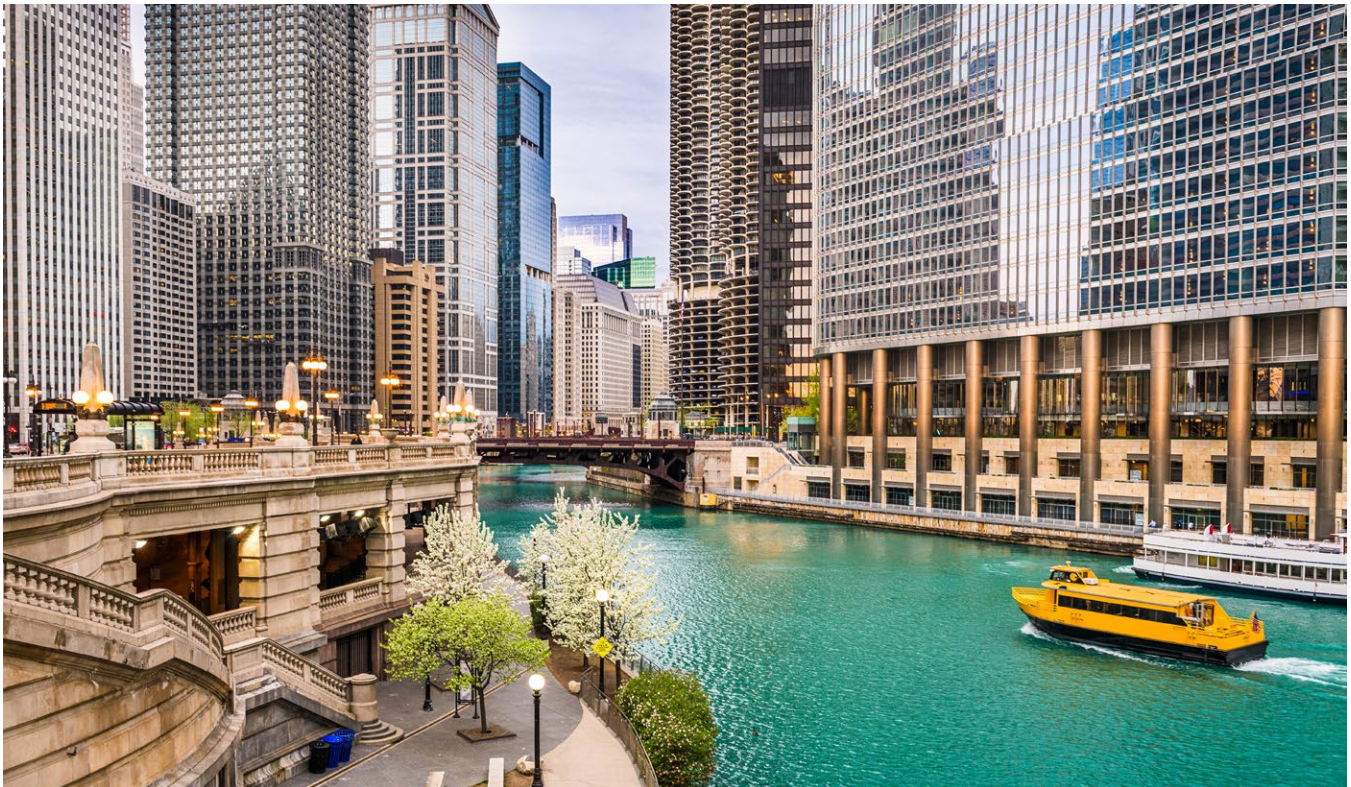
Furthermore, because menthol product sales make up a significant share of the tobacco market, litigation was anticipated.²⁴ To prepare, Chicago attorneys conducted legal research to establish that the City had authority to regulate flavored tobacco products.²⁵ A 2009 First Circuit appellate decision upholding New York City's flavor ordinance (which exempted menthol products and tobacco retailers) and a 2013 appellate decision from the Second Circuit affirming a similar flavor restriction in Providence, Rhode Island were encouraging.²⁶ Neither ordinance was found to be preempted by the federal Family Smoking Prevention and Tobacco Control Act.²⁷ Although this case law is not legally binding in Illinois's Seventh Circuit, and although both precedent ordinances did not include menthol products, the City of Chicago concluded that these rulings provided strong support for the role of state and local governments in restricting the sale and distribution of tobacco products more stringently than provided by federal law.²⁸

In building its case for the inclusion of menthol in its flavor restriction, Chicago emphasized its goal of reducing youth tobacco use.²⁹ Restricting menthol allowed the City to target products that are the source of addiction of *nearly half of all teen smokers*.³⁰ Also, by addressing tobacco retailers located around schools, the City was focusing on neighborhoods where youth (including a high number of youth of color) were exposed to marketing that promoted menthol cigarettes and other flavored tobacco products and helped ensure their disproportionate popularity.³¹

The Ordinance Itself

The flavor ban ordinance, introduced in November 2013, was passed by a 48 to 2 vote in December of that year.³² The ordinance prohibited anyone from selling, giving away, bartering, exchanging or otherwise dealing in "flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle or secondary school located in the City of Chicago."³³ (Five hundred feet is approximately 1.5 times the length of a football field or roughly two city blocks.)

All flavored tobacco products, including menthol cigarettes, electronic nicotine delivery devices, as well as cigars, pipe tobacco, and smokeless tobacco are covered by the ordinance.³⁴ Although existing retailers are not grandfathered in, an exception does exist for "retail tobacco" stores



dedicated primarily to the sale of tobacco.³⁵ If a retailer fails to comply with the ordinance, penalties could include the revocation or suspension of its retail license, as well as fines.³⁶

Implementation

While the flavor restriction ordinance passed in 2013, it was not set to take effect until July of 2014.³⁷ To prepare for the effective date, the City held public hearings in early 2014 to educate the community, specifically tobacco retailers about the ordinance.³⁸ In June, the Department of Public Health promulgated regulations to implement the new ordinance and letters were sent to all tobacco retailers in Chicago, informing them of the recent changes in tobacco law, and notifying affected retailers that they needed to stop selling flavored tobacco products.³⁹ In September, a citywide PSA campaign in collaboration with the Campaign for Tobacco-Free Kids was launched.⁴⁰

Challenges

Although the ordinance took effect in 2014, tobacco retailers were provided a grace period that extended into 2016.⁴¹ This was to allow retailers time to spend down their inventory.⁴² Beyond that, the City underestimated the amount of time needed to prepare for the implementation

of such a complex law.⁴³ Creating the list of nearly 12,000 restricted products proved time-consuming, as did identifying the City's vast number of private and charter schools and the surrounding retailers.⁴⁴

In addition, and as expected, the ordinance was challenged in court. In the fall of 2014, opponents of the ordinance filed two lawsuits challenging the ordinance's constitutionality. The first case was brought by a group of convenience store owners while the second suit was filed by a trade association representing Chicago-based gasoline service stations.⁴⁵ In both cases, the plaintiffs sought to delay enforcement of the ordinance, contending that federal law preempted the City from passing this type of law and arguing, among other things, that the law would cause their businesses economic harm.⁴⁶ In June 2015, a judgment was rendered in favor of the City and both cases were dismissed with prejudice (meaning that neither plaintiff may refile their case).⁴⁷ The court found that the ordinance was not preempted by federal law because it did not entirely prohibit the sale of flavored products.⁴⁸

Epilogue

In 2016, the flavor restriction ordinance was relaxed to only include retailers within 500 feet of a public, private, or parochial secondary school — an action that reinstated the ability of retailers near elementary and middle schools to offer menthol and other flavored products.⁴⁹ The partial repeal of the ban was urged by retailers, several of whom testified before the city council stating that the flavor ban had forced them to lay off workers and had damaged their profit margins.⁵⁰ Under the modified flavor ban, 154 retailers are still prohibited from offering menthol and other flavored tobacco products. A 2017 study found that only 57 percent of these retailers were compliant with the ordinance and did not offer menthol cigarettes.⁵¹

Despite setbacks regarding the expansiveness of the flavor ban, Chicago has seen youth cigarette use drop to historic lows. In 2019, only 3.9 percent of Chicago high school students reported smoking cigarettes.⁵² This rate is lower than Illinois' overall rate of high school smokers (4.7 percent), suggesting that Chicago's tobacco control efforts are paying off.⁵³

The work, however, is not done. While cigarette smoking among Chicago youth is on the decline, e-cigarette use poses a new threat. In 2019, 16.2 percent of Chicago high schools reported using some sort of tobacco product (cigarettes, vape products, etc.), representing a 12 percent increase in general youth tobacco use since 2017.⁵⁴ To address this problem, Chicago banned the sale of flavored vaping products, including menthol, in September 2020.⁵⁵ This action is a continuance of Chicago's demonstrated commitment to addressing the public health threat that menthol and other flavored tobacco products pose.



Lessons Learned

Although Chicago's menthol and flavor restriction policy was a historic first, many other localities have since followed suit and have implemented policies that have drawn more praise from tobacco control advocates. When analyzing Chicago's flavor ban, it is important to both recognize how it paved the way for other cities to follow in its footsteps and to acknowledge the policy's limitations. Consider these important lessons learned:

- **Understand the political and legal landscape.** Thoroughly research the issue including statistics relevant to the locality. Consult with legal professions to ensure that the appropriate authority to implement the policy exists and to anticipate legal challenges. Foster strong support from public health leaders and legislative champions.

- **Engage stakeholders from diverse sectors of the community.** Reach out to the groups who are most affected by flavored tobacco products in your community both to create awareness and to amplify the voices of those populations. Consider creating multi-lingual resources on the matter. Use compelling ad campaigns to reach youth and other disaffected communities. Emphasize that this is a social justice issue.
- **Build a network of traditional and nontraditional partners.** Engage traditional partners at the local, state, and national levels. Get buy-in from local coalition partners, even if they are new to tobacco control. Educate and cultivate engagement among community members to build local capacity.
- **Ensure the legislation is clear, complete, and well-drafted.** Clearly describe the regulatory restrictions and responsibilities of all relevant parties and define all terms. Identify how the policy will be enforced and clarify the appeals process. Seek out legal assistance when needed.
- **Set up a well-planned implementation process.** Develop an implementation plan that includes a process for publicizing the policy and educating the community. Create an avenue for retailers to make their voices heard and identify a procedure for responding to complaints in a timely manner.⁵⁶ Allow sufficient time to establish necessary procedures for implementation and enforcement and notify affected businesses.
- **Continue community engagement and education efforts after the policy has gone into effect.** Use public education and evidence-based, culturally relevant cessation resources, particularly in underserved communities, to maximize public health gain. Ensure there are adequate resources to evaluate the policy and be transparent about its effectiveness and related health outcomes.
- **Use simple, comprehensive measures.** Chicago's policy applied only to certain retailers who fell within a specific radius of a school. Consider adopting a policy that can be evenly applied throughout an entire locality. Comprehensive regulation is often easier to implement (e.g., removes the need to determine which retailers must be compliant) and goes much further toward the ultimate goal of reducing flavored tobacco availability.
- **Consider unintended impacts up front and plan for addressing them.** Chicago rolled back its menthol sales restriction in response to retailers' concerns over the profitability of their businesses under the new regulation. Prior to implementation, consider potential consequences of the new policy and estimate their magnitude. Invite those who will be affected to the table and discuss what can be done to help mitigate negative impacts without compromising the effectiveness of the policy.

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcml.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 Tobacco Control Legal Consortium, *Chicago’s Regulation of Menthol Flavored Tobacco Products — Case Study*, Public Health Law Center 1 (Mar. 2016), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-Chicago-Regulation-of-Menthol-Case-Study-Update-2016.pdf> [hereinafter *Case Study*].
- 3 *Id.*
- 4 Mayor’s Press Off., *Mayor Emanuel Announces Record Drop in Chicago Youth Smoking Rates*, CITY OF CHI. (April 15, 2014), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2014/apr/mayor-emanuel-announces-record-drop-in-chicago-youth-smoking-rat.html.
- 5 *Id.*
- 6 *State and County QuickFacts — Chicago*, U.S. CENSUS BUREAU (2013), <https://www.census.gov/quickfacts/chicagocityillinois>.
- 7 *The Burden of Tobacco: Prevalence, Impact and Cost — 2013*, ILL. DEP’T OF HEALTH (2013), <https://dph.illinois.gov/content/dam/soi/en/web/idph/files/publications/tobacco-burden-2013-050216.pdf>.
- 8 *Key State-Specific Tobacco-Related Data & Ranking*, CAMPAIGN FOR TOBACCO-FREE KIDS (2014), <http://www.tobaccofreekids.org/research/factsheets/pdf/0176.pdf> (Data derived from Youth Risk Behavioral Survey).
- 9 Tobacco Control Act, § 907(a)(1)(A), 123 Stat. at 1799 (codified at 21 U.S.C. 387g(a)(1)(A)).
- 10 Letter from Rahm Emanuel, Mayor, City of Chicago, to Carolyn C. Lopez, President, Chicago Board of Health (July 25, 2013).
- 11 Chi. Board of Health, *Healthy Chicago: Transforming the Health of Our City*, Mayoral Report, CITY OF CHI. (Nov. 2013), https://www.chicago.gov/content/dam/city/depts/cdph/CDPH/Menthol%20Report%20_Final_%20Jan292014.pdf.
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Case Study*, *supra* note 2, at 3.
- 16 *Id.* at 4.
- 17 See, e.g., Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH 11- 21 (2012).

- 18 *Healthy Chicago: Transforming the Health of Our City*, *supra* note 11.
- 19 *Id.*
- 20 Chi., Ill., Ordinance No. 02013-9185 (2014), <http://www.cityofchicago.org/content/dam/city/depts/bacp/tobacco/flavoredtobaccord04212014.pdf>.
- 21 *Case Study*, *supra* note 2, at 4-5.
- 22 E-mail from Melissa Buenger, Policy Analyst, Chicago Dep’t Public Health to Kerry Cork, Staff Attorney, Tobacco Control Legal Consortium (Mar. 9, 2016, 04:55 p.m. CST) (on file with author). These numbers are subject to change as retailers and schools open or close and the City identifies other retailers to notify.
- 23 Ashely Hickey, *Parents OK With Emanuel’s Push Against Menthol Smoking, Against Criminalization*, CHI. BUREAU (Oct. 22, 2013).
- 24 *Case Study*, *supra* note 2, at 5.
- 25 *Id.*
- 26 N.Y.C., N.Y. ADMIN. CODE § 17-715; PROVIDENCE, R.I., CITY CODE § 14-309.
- 27 U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013) (rejecting preemption challenge to New York City ordinance governing sale of flavored tobacco products); Nat’l Assoc. Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013) (rejecting preemption challenge to Providence ordinance prohibiting most retail sales of flavored tobacco products other than cigarettes).
- 28 *See, e.g., U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 428 (“While [the Tobacco Control Act] prohibits the FDA from banning entire categories of tobacco products throughout the country,... the FSPTCA nowhere extends that prohibition to state and local governments. To the contrary, the preservation clause ... expressly preserves localities’ traditional power to adopt any measure relating to or prohibiting the sale of tobacco products.... As a regulation limiting the businesses at which flavored tobacco may be sold, the city ordinance establishes a ‘requirement[] relating to the sale ... of ... tobacco products’ within the plain meaning of the saving clause.... given Congress’ explicit decision to preserve for states a robust role in regulating, even banning, sales of tobacco products, we adopt a broad reading of the saving clause.”)
- 29 *Case Study*, *supra* note 2, at 6.
- 30 *See, e.g., Gary Giovino et al., Differential Trends in Cigarette Smoking in the USA: Is Menthol Slowing Progress?*, 10 TOBACCO CONTROL 1136/051159 (2013) (concluding that of the more than 16,000 youth nationally who become new daily smokers every year, roughly half begin by smoking menthol cigarettes).
- 31 The tobacco industry has a history of using urban culture and language to promote menthol cigarettes; sponsoring hip-hop bar nights, where samples of specialty menthol cigarettes are distributed; and targeting community members with direct mail promotions. *Smoking & Tobacco Use: Tobacco Industry Marketing*, CTRS. FOR DISEASE CONTROL & PREVENTION http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm#marketing (last visited Jul. 18, 2022).
- 32 Chi., Ill., Ordinance No. 02013-9185 (2014).
- 33 *Id.*
- 34 *Id.*
- 35 Under the Chicago Clean Indoor Air Act, a “tobacco retail establishment” is defined as “a retail establishment that derives more than 80 percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental.” CHI. ILL., MUN. CODE 4-64, §7-32-010, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2641927#JD_7-32-010.

- 36 CHI., ILL., MUN. CODE § 4-64-240; Chi., Ill., Ordinance No. 02013-9185, §§ 4-64-100, 4-64-101, 4-64-180, 4-64-181, 4-64-190, 4-64-200, 4-64-205, 4-64-210 and 4-64-220; CHI., ILL., MUN. CODE § 4-64-330.
- 37 *Case Study*, *supra* note 2, at 6, 8.
- 38 *Id.* at 7-8.
- 39 *Id.* at 8.
- 40 *Id.* at 9.
- 41 Lauren Czaplicki et al., *Compliance with the City of Chicago's Partial Ban on Menthol Cigarette Sales*, 28 TOBACCO CONTROL 161-167 (2018).
- 42 *Case Study*, *supra* note 2, at 8.
- 43 *Id.*
- 44 *Id.*
- 45 *Id.* at 9.
- 46 76 Enterprises, Inc. et al. v. City of Chicago, Case No: 14 C 08306 (2014); Indeps. Gas & Serv. Stations Ass'ns, Inc. v. City of Chicago, 112 F. Supp 3d 749 (N.D. Ill. 2015).
- 47 *Indeps. Gas & Serv. Stations*, 112 F. Supp. 3d 749.
- 48 *Id.*
- 49 CHI., ILL., MUNICIPAL CODE § 4-64-515.
- 50 Hal Dardick, *Retailers Want Mayor, Aldermen to Allow Menthol Cigarette Sales Near Schools*, Chi. Tribune (Dec. 9, 2016), <https://www.chicagotribune.com/politics/ct-chicago-menthol-tobacco-sales-near-schools-met-1210-20161209-story.html>; Heather Cherone, *Relax Ban on Tobacco Sales Near Elementary Schools: Finance Committee*, DNA INFO: WICKER PARK & BUCKTOWN (Dec. 12, 2016), <https://www.dnainfo.com/chicago/20161212/wicker-park/relax-ban-on-tobacco-sales-near-elementary-schools-finance-committee>.
- 51 *Compliance with the City of Chicago's Partial Ban on Menthol Cigarette Sales*, *supra* note 41.
- 52 Chi. Dep't of Public Health, *Healthy Chicago Data Brief 2019 Youth Tobacco Use*, CITY OF CHI. (2019), https://www.chicago.gov/content/dam/city/depts/cdph/statistics_and_reports/27114_11_Youth_Tobacco_Use_Flyer_C.2.pdf.
- 53 *Id.*
- 54 *Id.*
- 55 Mayor's Press Off., *City Council Passes Ordinance Banning the Sale of Flavored Vaping Products as The City Takes Another Important Step to protect the Health of Young People*, CITY OF CHI. (Sep. 9, 2020), https://www.chicago.gov/city/en/depts/cdph/provdrs/healthy_living/news/2020/september/city-council-passes-ordinance-banning-the-sale-of-flavored-vapin.html.
- 56 See Lauren M. Czaplicki, *Behind the Point of Sale: A Case Study of Chicago's Menthol Cigarette Sales Ban from the Perspective of the Retail Store* (Aug. 7, 2018) (Ph.D. dissertation, Johns Hopkins University) (finding that retailers felt the communication from the City of Chicago regarding the menthol ban was one-sided).