

THE LEGAL LANDSCAPE OF FLAVORED COMMERCIAL TOBACCO PRODUCTS



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LAW CENTER
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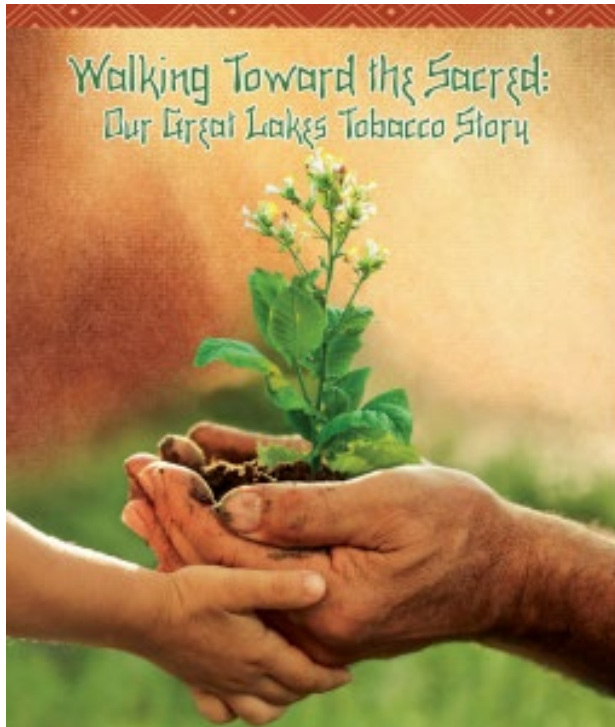
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THE PUBLIC HEALTH LAW CENTER



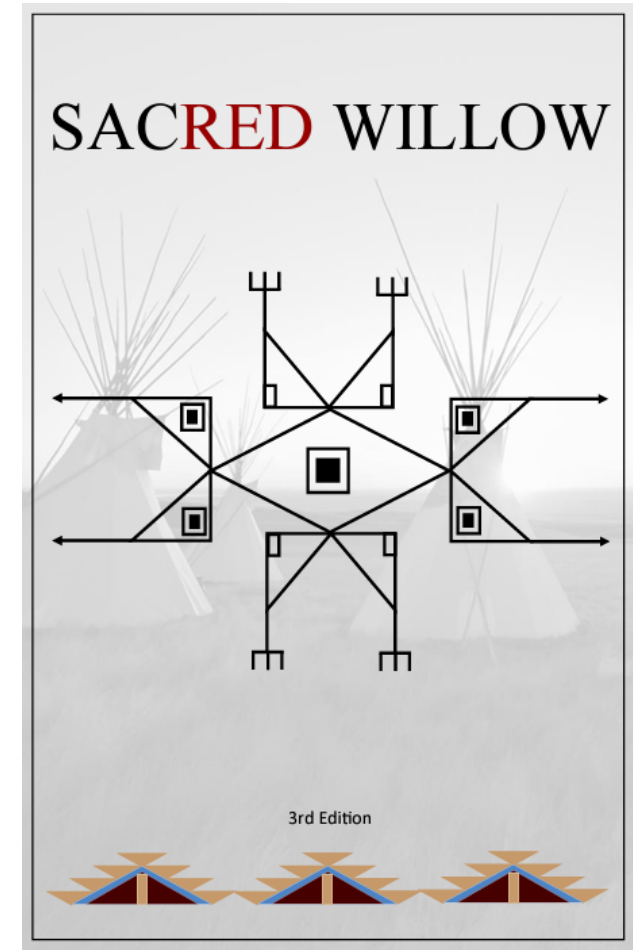
COMMERCIAL TOBACCO IS NOT TRADITIONAL TOBACCO



[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](#)

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.



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THE LEGAL LANDSCAPE OF FLAVORED TOBACCO PRODUCTS

AGENDA

- Background on Flavored Commercial Tobacco Products
- Federal Regulation of Flavored Products and Regulatory (In)action
- National Landscape of Flavored Product Regulation
- Flavored Product Regulation in Minnesota
- Legal Challenges to Flavored Product Prohibitions
- 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

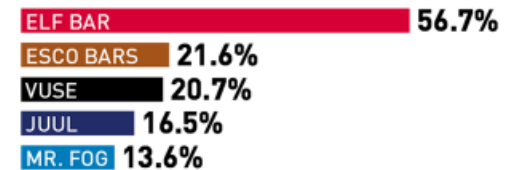
Among youth who reported current use of e-cigarettes:

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**

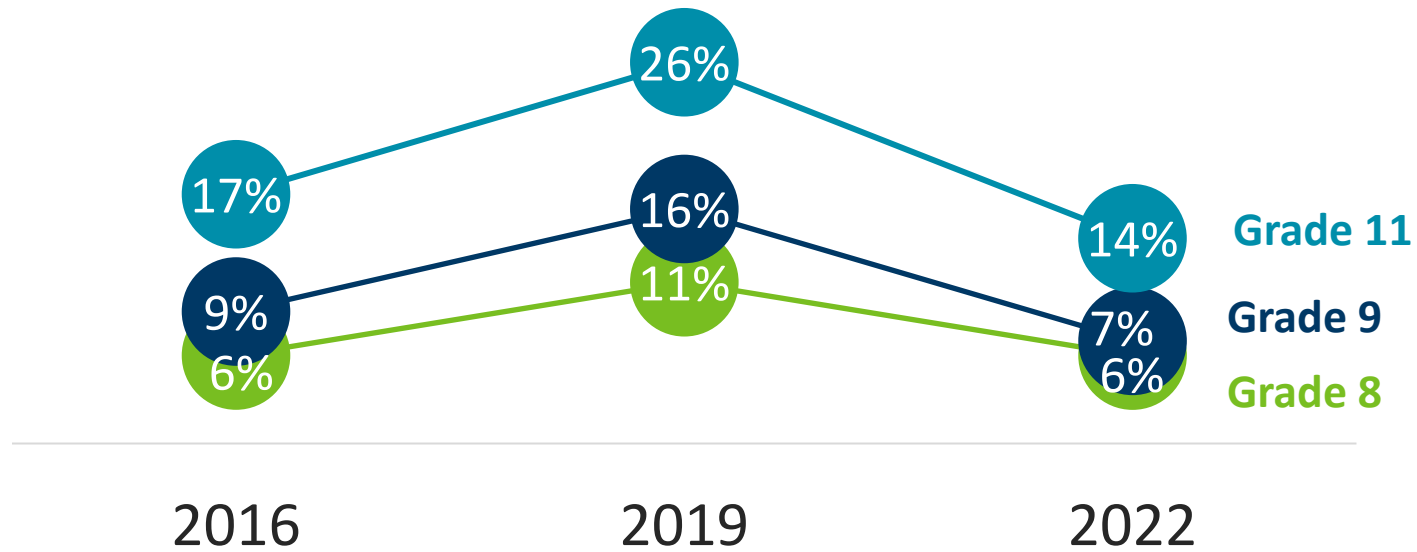


use flavored e-cigarettes

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

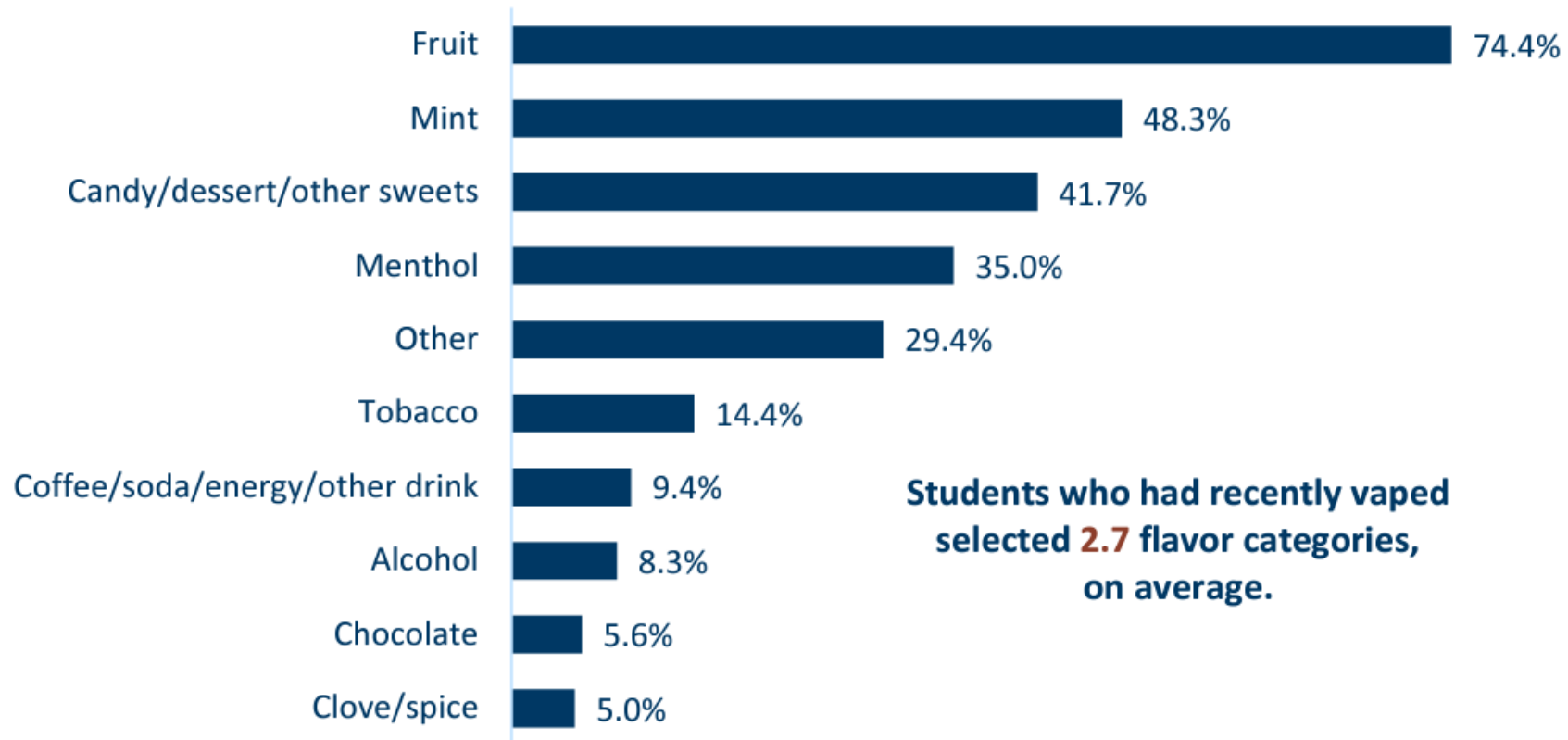
YOUTH VAPING IN MINNESOTA

MINNESOTA STUDENT SURVEY DATA



Credit: Minnesota Department of Health

PERCENTAGE OF MN TEENS WHO REPORTED USING E-CIG FLAVORS IN PAST 30 DAYS



Source: 2020 Minnesota Youth Tobacco Survey; denominator: students who reported having used e-cigarettes in the past 30 days (grades 6-12)

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.

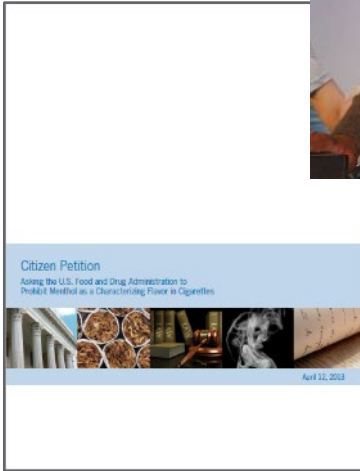
FEDERAL REGULATION CITIZEN PETITIONS



"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



FEDERAL REGULATION

CITIZEN PETITION TO ENACT MENTHOL & CIGAR RULES



PROPOSED FDA MENTHOL RULE

- Proposed FDA rule prohibits menthol as a characterizing flavor in cigarettes.
- Potential weaknesses:
 - Does not define characterizing flavor
 - Open to exempting certain cigarettes (VLN or heated tobacco).



PROPOSED FDA CIGAR RULE

- Proposed rule prohibits all characterizing flavors in cigars
- Potential weaknesses:
 - Does not address flavor additives
 - Does not define characterizing flavor
 - Open to exempting certain cigars
 - Does not cover other tobacco products, though the agency requested information about including waterpipes and pipe tobacco.



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.



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.”

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 counties 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.



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



STATES & LOCALITIES THAT HAVE RESTRICTED THE SALE OF FLAVORED TOBACCO PRODUCTS

Cigarettes with specific characterizing flavors, other than menthol, were prohibited in the U.S. on September 22, 2009, as part of the Family Smoking Prevention and Tobacco Control Act (TCA) that gave the U.S. Food and Drug Administration (FDA) authority over tobacco products. In addition to the federal ban on flavored cigarettes, states and localities can implement additional sales restrictions to address menthol cigarettes and flavored non-cigarette tobacco products and their appeal to youth and young adults.

States

In November 2019, Massachusetts became the first state to restrict the sale of all flavored tobacco products, including menthol cigarettes. In 2020, New Jersey, New York and Rhode Island enacted bans on the sale of flavored e-cigarettes and California became the second state to prohibit the sale of both flavored e-cigarettes and menthol cigarettes.

- **Massachusetts**² (effective 11/27/19 for e-cigarettes; 6/1/20 for all other products)
- **New Jersey**⁴ (effective 4/20/20)
- **New York**^{4,7} (effective 5/18/20)
- **Rhode Island**⁴ (effective 3/26/20)
- **California**^{8,9} (effective 12/21/22)

Two additional states—Maryland and Utah—restrict the sale of some flavored e-cigarettes. Maryland prohibits the sale of all flavored cartridge-based and disposable e-cigarettes except for menthol-flavored products, and Utah prohibits the sale of flavored e-cigarettes in non-retail tobacco specialty businesses, except mint- and menthol-flavored products.

In 2019, eight states—Massachusetts, Michigan, Montana, New York, Oregon, Rhode Island, Utah and Washington—issued emergency rules to temporarily ban the sale of flavored e-cigarettes. As a result of legal challenges, these orders were blocked in Michigan, New York, Oregon and Utah. The Montana and Washington state orders have expired. Massachusetts, New York and Rhode Island later enacted permanent bans.

Prior to the enactment of the Tobacco Control Act, New Jersey had already restricted the sale of flavored cigarettes, excluding menthol and clove flavors. Maine prohibits the sale of flavored non-premium cigars.

Localities

Over 375 localities have passed restrictions* on the sale of flavored tobacco products, although laws differ in their application to specific products and store types (see endnotes). At least 190 of these communities—those listed in **bold**—restrict the sale of menthol cigarettes, in addition to other flavored tobacco products.

California (143)

California (cont'd)

California (cont'd)

Campaign for Tobacco Free Kids Resource: [CTFK States and Localities Restricting Sale of Flavored Tobacco](#)

NATIONAL LANDSCAPE OF FLAVORED PRODUCT REGULATION



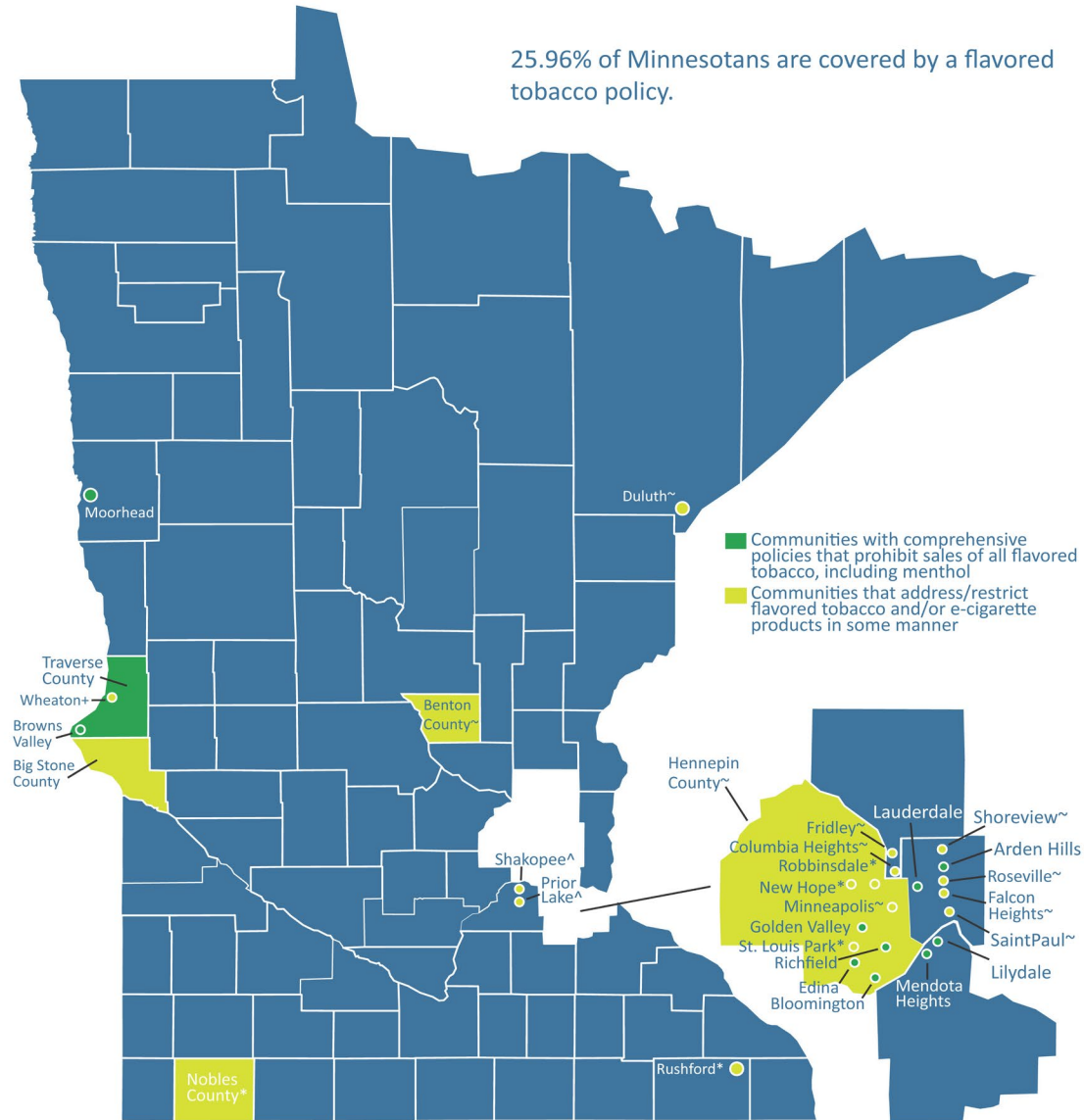
CURRENT STATE OF FLAVORED TOBACCO REGULATIONS IN MINNESOTA

30 local jurisdictions in Minnesota have implemented restrictions on flavored tobacco.

These ordinances are actively enforced and there have been no successful legal challenges against the bans.

Minnesota communities addressing the sale of flavored commercial tobacco products

25.96% of Minnesotans are covered by a flavored tobacco policy.



PROPOSED MN STATEWIDE BAN ON FLAVORED TOBACCO PRODUCTS MOVES AHEAD IN HOUSE



Copyright Minnesota House of Representatives. Photo by Andrew VonBank

Eugene Nichols of Minnesotans for a Smoke-Free Generation testifies before the House Health Finance and Policy Committee March 5, 2024 in support of a bill to prohibit the sale of flavored tobacco, nicotine, or lobelia products.

OF THE 30 LOCAL FLAVOR ORDINANCES, THERE HAVE BEEN FOUR LEGAL CASES

- In Arden Hills Tobacco Shop v. City of Arden Hills (2019), the parties reached a compromise delaying the implementation of the ban, which eventually took effect in 2020.
- In Prior Lake Tobacco v. City of Prior Lake (2021), the court dismissed the lawsuit, finding that the retailer failed to state a valid claim, and the ordinance remains in effect.
- In Northland Vapor Company v. City of Moorhead (2022), the parties agreed to delay implementing the ban for six months and the ordinance has been fully in effect since 2022.

TOBACCO AND VAPE SHOP CAUSES OF ACTION

1. Equal protection violation because it singles out the tobacco/vape shop.
2. Void for vagueness because the definition of “flavor” is subjective.
3. Unlawful bill of attainder because singles out and punishes the shop.
4. Regulatory “taking” because outlaws the sale of most of the shop’s products.

R.J. REYNOLDS V. CITY OF EDINA

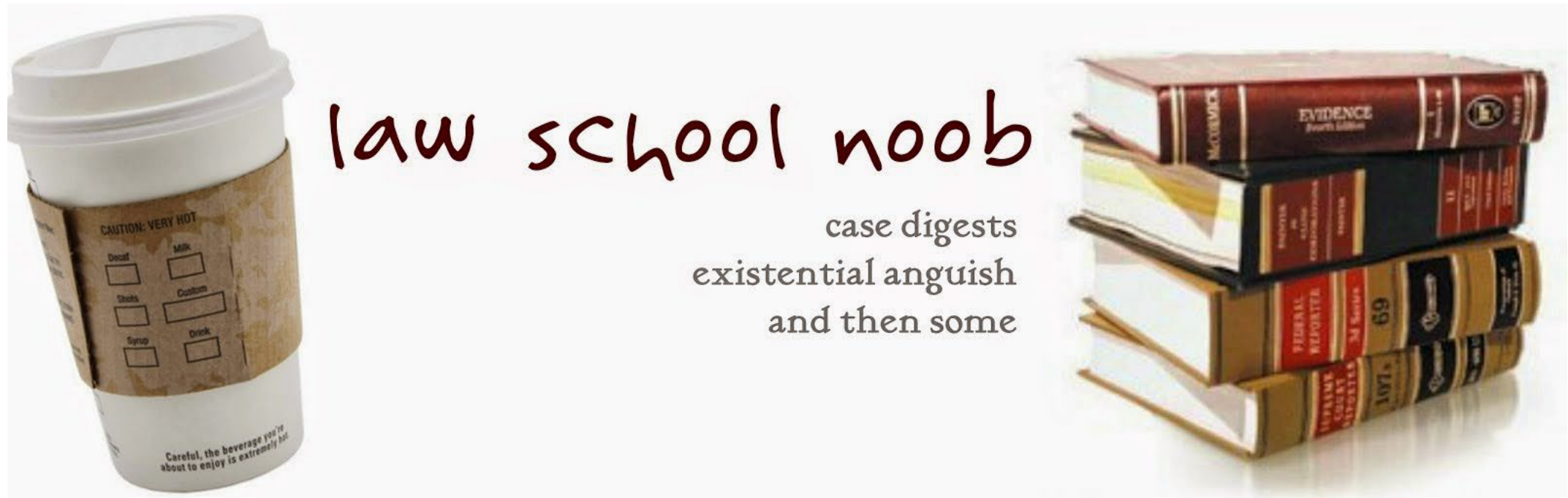
- In *R.J. Reynolds v. City of Edina* (2020), both the U.S. District Court and U.S. 8th Circuit Court of Appeals rejected the company's preemption and constitutional claims, reinforcing the city's local authority to prohibit the sale of flavored tobacco products. Edina's law remains in effect.



MINNESOTA V. JUUL



COMMON BIG TOBACCO LEGAL ARGUMENTS



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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;

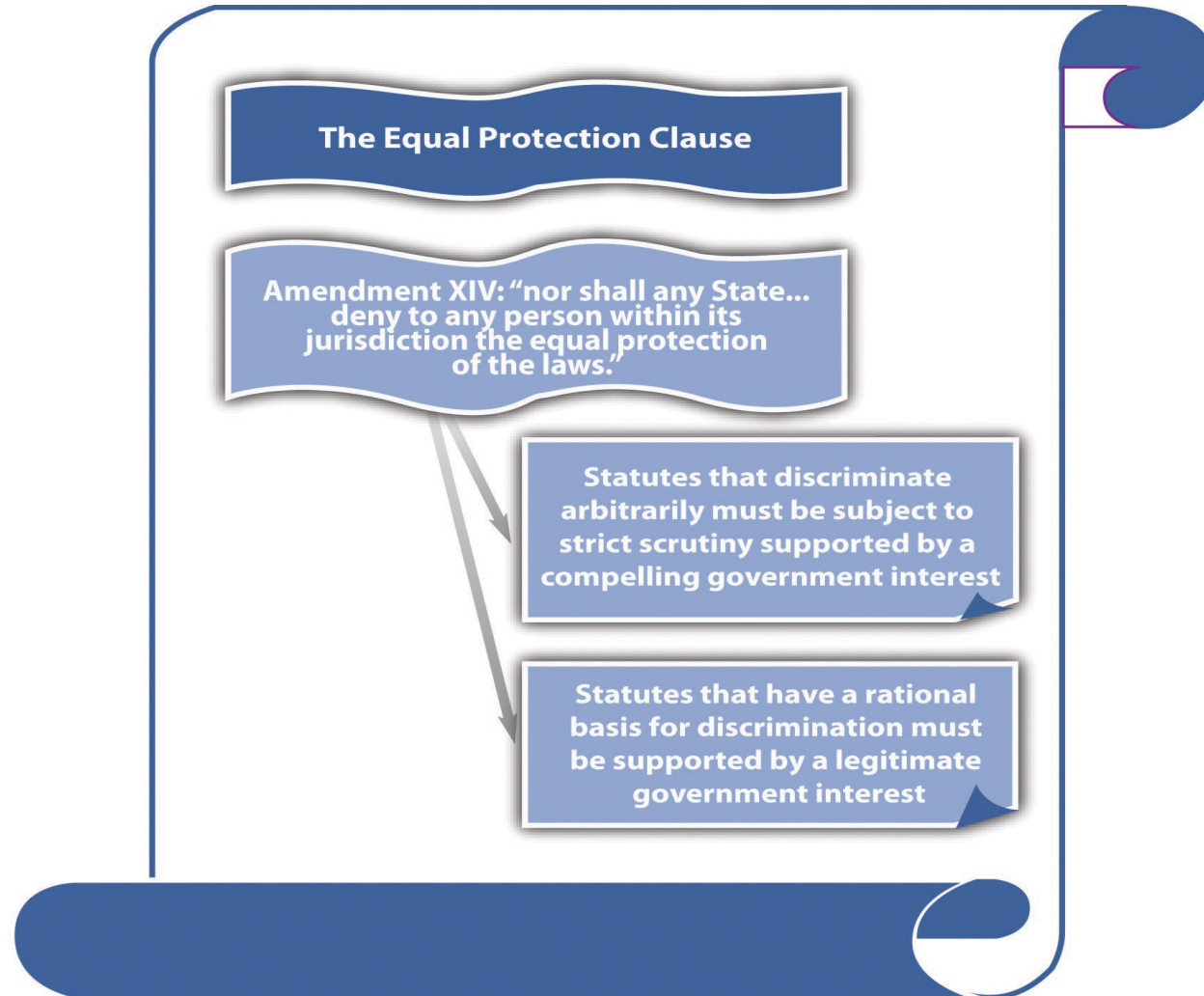
FIRST AMENDMENT CHALLENGES

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



NON LEGAL LESSONS



IS IT WORTH IT?



Image Credit: Minnesota by [Nick Youngson](#) CC BY-SA 3.0 Alpha Stock Images

FLAVORED PRODUCTS ARE LURING A NEW GENERATION INTO ADDICTION

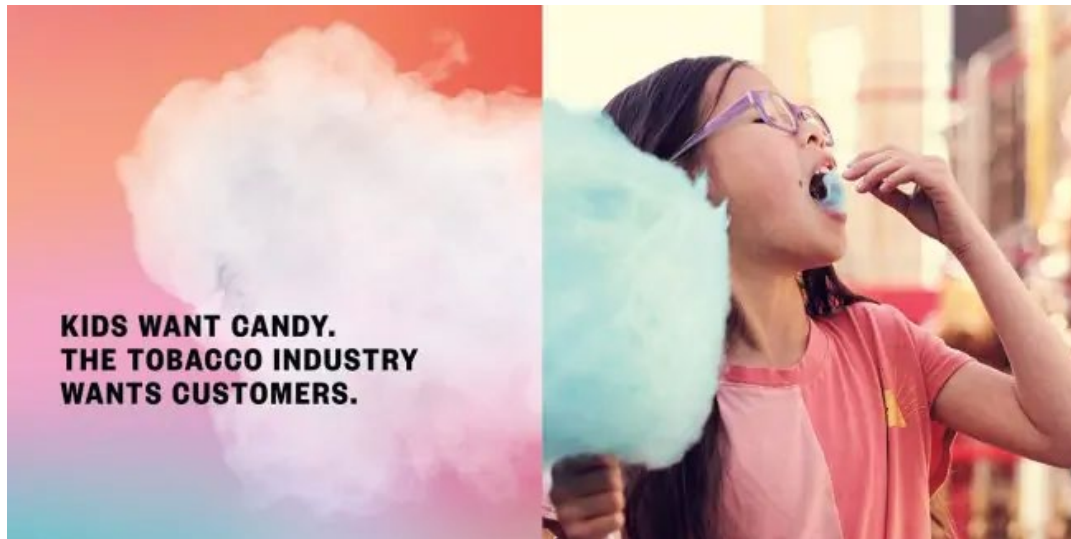


Photo Credit: Campaign for Tobacco Free Kids

- In Minnesota, one in seven 11th graders uses e-cigarettes, and 88 percent of those students use flavored e-cigarettes.
- More than 70 percent of youth who use e-cigarettes in Minnesota are showing signs of nicotine dependence.
- More than 80 percent of youth who ever tried tobacco reported starting with a flavored tobacco product.

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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