



**Beverly Hills City Council / Health and Safety Commission Liaison
Committee will conduct a Special Meeting, at the following time and place,
and will address the agenda listed below:**

**CITY HALL
455 North Rexford Drive
4th Floor Conference Room A
Beverly Hills, CA 90210**

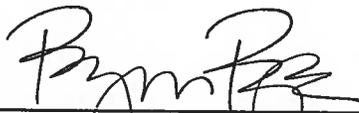
**Thursday, November 30, 2017
4:30 PM**

AGENDA

- 1) Public Comment**
Members of the public will be given the opportunity to directly address the Committee on any item listed on the agenda.

- 2) Flavored Tobacco Products**

- 3) Adjournment**



Byron Pope, City Clerk

Posted: November 22, 2017

***A DETAILED LIAISON AGENDA PACKET IS AVAILABLE FOR REVIEW IN THE
LIBRARY AND CITY CLERK'S OFFICE.***



In accordance with the Americans with Disabilities Act, Conference Room A is wheelchair accessible. If you need special assistance to attend this meeting, please call the City Manager's Office at (310) 285-1014 or TTY (310) 285-6881. Please notify the City Manager's Office at least twenty-four (24) hours prior to the meeting if you require captioning service so that reasonable arrangements can be made.



CITY OF BEVERLY HILLS
POLICY AND MANAGEMENT

MEMORANDUM

TO: City Council Health and Safety Commission Liaisons

FROM: Logan Phillippo, Senior Management Analyst

DATE: November 30, 2017

SUBJECT: Flavored Tobacco Products

ATTACHMENTS:

1. Local Tobacco Policies in the Retail Environment
2. Flavored Tobacco Products Fact Sheet
3. Menthol and Cigarettes
4. Focus on Flavors, Office of Attorney General of California

Representatives from the Los Angeles County Department of Public Health have indicated the Health Department's support of policies that restrict the sale of flavored tobacco products. Health Department staff have contacted the City Council to provide related information. Health Department Staff have already met with three councilmembers for the purposes of providing information on the topic. The Health Department will provide informational materials to discuss policy options that could restrict the sale of flavored tobacco products in the city. Representatives from the American Lung Association or American Cancer Society may also attend. The informational materials provided by the County Health Department to be discussed are attached to this report.

Attachment 1 provides a summary overview of policies related to tobacco product sales in various California cities.

Attachment 2 provides information related to the types of flavored tobacco products and usage among adolescents.

Attachment 3 provides information specific to menthol cigarettes and marketing tactics that target youth, female, and minority populations.

Attachment 4 provides an opinion from the California Attorney General regarding the authority of state or local government to restrict or prohibit the sale or distribution of flavored tobacco products.

There is no action requested on this item at this time. County Health Department representatives will present on the information and be available to answer questions.

Staff will provide the Commission with an update of this meeting at the next Health and Safety Commission Regular Meeting on December 18, 2017.

Local Tobacco Policies in the Retail Environment



AUGUST 2017

In order to reduce illegal sales of tobacco products to minors, many cities and counties in California have passed policies to regulate the sale of tobacco in the retail environment. One critical policy is a strong tobacco retailer licensing ordinance, which over 100 local communities have adopted. Some of these communities have also adopted additional measures to further regulate the retail environment and decrease youth use of tobacco products. For example, placing restrictions on what retailers can and cannot sell and where retailers can be located are important measures to counter Big Tobacco's efforts to attract new customers. These provisions can either be included as part of a tobacco retailer licensing ordinance or outside of it.

Throughout California, 156 cities and counties have one or more policies that provide additional protections in the retail environment. Of those communities, 111 have passed additional policies exclusively as part of their tobacco retailer licensing ordinance. Twenty-five don't have a tobacco retailer licensing ordinance but have passed additional policies as separate ordinances; these policies are usually part of the community's zoning or conditional use permit regulations. Twenty have tobacco retailer licensing ordinances and have passed a mix of additional policies, some of which are associated with the tobacco retailer license and some of which are separate. This document lists all 156 communities that have one or more of the following additional provisions:

1. Sales Near Youth-Populated Areas – Prohibits tobacco retailers from being located within a certain distance of schools, parks, etc.

2. Reducing Retailers by Location – Prohibits a tobacco retailer from being located within a certain distance of other retailers to avoid a high concentration in certain areas.

3. Reducing Retailers by Population or Overall Number – Limits the number of tobacco retailer licenses that can be issued, depending on population, to avoid a high concentration within communities or limiting the overall number of retailers located in a community.

4. Pharmacies – Prohibits the sale of tobacco products in stores containing a pharmacy in order to limit the number of locations where tobacco is available in a community.

5. Flavor Restrictions – Bans the sale of flavored tobacco products (not just cigarettes), which are attractive to youth.

6. Minimum Pack Size for Cigars – Prohibits the sale of cigars in individual or small packages, which increases the price and makes them less attractive to youth.

7. Electronic Cigarettes – Regulates the sale of electronic cigarettes the same as other tobacco products.

Though the matrix below notes whether a community has a tobacco retailer license (TRL), only communities that also have one of the seven policies listed above are included. For a full list of the communities in California with tobacco retailer licensing ordinances go to:

<http://center4tobaccopolicy.org/tobacco-policy/tobacco-retail-environment/>.

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
Alameda County								
Albany Population: 18,988	Feb 2009	Feb 2009* ^{NG} CUP						Feb 2009
Berkeley Population: 121,238	Dec 2002	Sep 2015 ¹			Sep 2015	Sep 2015 ²		Sep 2015
Dublin Population: 59,686	Nov 2012**	Dec 2012* Zoning						Nov 2012
Emeryville Population: 11,854		Mar 2007* ^{NG} Reg						
Fremont Population: 231,664			Dec 2015* ³ Zoning					Dec 2015*
Hayward Population: 161,040	Jul 2014	Jul 2014* CUP		Jun 2014		Jun 2014	Jun 2014	Jun 2014
Oakland Population: 426,074	Apr 2008	Apr 2008* CUP						Apr 2008
San Leandro Population: 88,274		Jul 2001* CUP	Jul 2001* CUP					
Union City Population: 73,452	Nov 2010	Jan 2010* CUP					Dec 2013	Dec 2013
Butte County								
Oroville Population: 18,037	Mar 2013	Mar 2013* Zoning		Mar 2013				Mar 2013
Contra Costa County								
Concord Population: 128,370	Sep 2006							Sep 2011
County of Contra Costa Population: 173,454	Jan 2003	Jul 2017 ²		Jul 2017	Jul 2017	Jul 2017	Jul 2017	Apr 2013
El Cerrito Population: 24,600	Sep 2015	Sep 2015	Sep 2015			Sep 2015	Sep 2015	Sep 2015
Pittsburg Population: 69,818		Nov 2016*						
Pleasant Hill Population: 34,657	Jul 2015**							Jul 2015
Richmond Population: 111,785	Jun 2009				Nov 2009*			Jun 2009
Del Norte County								
Crescent City Population: 6,389		Apr 2015* CUP						Apr 2015* CUP
Fresno County								
Firebaugh Population: 8,202	Aug 2009							Aug 2009
Selma Population: 25,156		Dec 2013* CUP	Dec 2013* CUP					
Inyo County								
Bishop Population: 3,954		Apr 2016 ³ *						Apr 2016*

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
Kern County								
Arvin Population: 21,157	Sep 2016							Sep 2016
California City Population: 14,248	Feb 2007							Feb 2007
County of Kern Population: 311,015	Nov 2006							Jul 2014
Delano Population: 53,152	Jun 2008							Jun 2008
Shafter Population: 18,868	Nov 2016							Nov 2016
Taft Population: 9,492	Aug 2016							Aug 2016
Tehachapi Population: 12,280	Feb 2007							Oct 2015
Wasco Population: 26,980	Mar 2007							Mar 2007
Los Angeles County								
Baldwin Park Population: 75,537	Oct 2008							Oct 2008
Beverly Hills Population: 34,646	Aug 2010							Feb 2014
Burbank Population: 105,033	Feb 2007							Feb 2007
Calabasas Population: 24,202	Jun 2009	Jun 2009						Jun 2009
Carson Population: 93,674	Nov 2006							Jan 2015 ⁴
Compton Population: 100,050	Jul 2007							Jul 2007
Covina Population: 49,011		Apr 2014* CUP	Apr 2014* CUP					Apr 2014*
Culver City Population: 40,103	Jul 2009							Jul 2009
Duarte Population: 22,033	May 2013							Aug 2014
El Monte Population: 114,268	Nov 2011							Nov 2011
Gardena Population: 60,721	Jul 2008						Jul 2008	Jul 2008
Glendale Population: 201,748	Sep 2007							Sep 2007
Hawaiian Gardens Population: 14,753	Jul 2011							Jul 2011
Huntington Park Population: 59,383	Nov 2011	Nov 2011	Nov 2011	Nov 2011			Nov 2011	Nov 2011

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
Inglewood Population: 114,900	Oct 2007							Oct 2007
La Canada Flintridge Population: 20,497	Jun 2009							Sep 2015 ⁴
La Mirada Population: 49,434		Nov 2007* CUP						
Lancaster Population: 157,820	Jun 2006							Jun 2006
LaVerne Population: 33,174	Jan 2017							Jan 2017
Lomita Population: 20,403	May 2007							May 2007
Long Beach Population: 480,173	Feb 2008							Mar 2014 ⁴
Los Angeles Population: 4,041,707	Sep 2005							Dec 2013
Lynwood Population: 71,997	Oct 2012	Oct 2012	Oct 2012	Oct 2012				Oct 2012
Malibu Population: 12,742	Nov 2011							Nov 2011
Manhattan Beach Population: 35,488	Jan 2016**	Dec 2015	Dec 2015			Dec 2015		
Maywood Population: 28,016	Aug 2006**							Aug 2006
Montebello Population: 63,917	Sep 2009							Sep 2009
Monterey Park Population: 61,606	Apr 2010							Aug 2014 ⁴
Palmdale Population: 158,605	Jan 2010	Jan 2010* CUP						Jan 2010
Pasadena Population: 143,333	Feb 2004	Feb 2004* CUP						
Santa Monica Population: 93,834	Nov 2008							Jun 2014
South Pasadena Population: 25,992	Dec 2013	Dec 2013						Feb 2009
Temple City Population: 36,389	Dec 2012	Oct 2014* ^{NG} Zoning	Oct 2014*					
West Hollywood Population: 35,882	Oct 2016	Oct 2016	Oct 2016				Oct 2016	Oct 2016
Marin County								
County of Marin Population: 69,214	May 2012	Feb 2002* CUP			Aug 201			
Mill Valley Population: 14,910	Sep 2012							Sep 2012
Novato Population: 54,522	Jan 2017	Apr 2001* Zoning			Jan 2017	Jan 2017	Jan 2017	Jan 2017

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
San Rafael Population: 60,842	Aug 1999	Feb 2003* CUP						
Mendocino County								
Fort Bragg Population: 7,772	Dec 2012							Nov 2016
Merced County								
Merced Population: 84,464		Jul 2016*						Jul 2016*
Modoc County								
Alturas Population: 2,660	Feb 2017							Feb 2017
Monterey County								
Carmel-by-the-Sea Population: 3,842	Oct 2013							Oct 2013
County of Monterey Population: 107,009	May 2012							May 2012
Monterey Population: 28,828	Nov 2014							Nov 2014
Salinas Population: 162,470	Jan 2015							Jan 2015
Seaside Population: 34,165								Apr 2015*
Napa County								
American Canyon Population: 20,570			Jan 2016*					Jan 2016*
Nevada County								
Grass Valley Population: 12,859	Nov 2009							Nov 2009
Nevada City Population: 3,208	Nov 2006		July 2016			July 2016		Nov 2007
Orange County								
Anaheim Population: 358,546		Jun 2013* CUP						
Costa Mesa Population: 114,044		Sep 2015* Zoning						
Santa Ana Population: 341,341	Oct 2006							Oct 2006
Seal Beach Population: 24,890			Mar 2014* CUP					Mar 2014*
Westminster Population: 93,533		Jul 2014* CUP						Jul 2014*
Placer County								
Rocklin Population: 64,417		Sep 2015* Reg						Sep 2015*
Plumas County								

Community	Tobacco Retailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
County of Plumas Population: 17,692	Sep 2016**							Sep 2016
Riverside County								
Banning Population: 31,068	Aug 2006							Aug 2006
Beaumont Population: 46,179	Jun 2006							June 2008
Calimesa Population: 8,637	Jun 2007							Jun 2007
Cathedral City Population: 54,557	Aug 2016							Aug 2016
Coachella Population: 45,551	Jul 2007							Jul 2007
Corona Population: 167,759	Oct 2005							Oct 2005
Desert Hot Springs Population: 29,111	Aug 2007							Aug 2007
Eastvale Population: 64,613	Oct 2010							Jan 2011
Hemet Population: 81,868	Mar 2008							Mar 2008
Lake Elsinore Population: 62,092	Aug 2007							Aug 2007
Menifee Population: 90,660	Dec 2009							Dec 2009
Moreno Valley Population: 206,750	Sep 2007							Sep 2007
Murrieta Population: 114,914	May 2006							May 2006
Norco Population: 26,882	Mar 2006							Mar 2006
Perris Population: 75,739	Aug 2008							Aug 2008
Riverside Population: 326,792	May 2006							May 2006
San Jacinto Population: 47,925	Jun 2006							Jun 2006
Temecula Population: 111,024	Jun 2006							Jun 2008
Wildomar Population: 35,782	Jul 2008							Jul 2008
Sacramento County								
Rancho Cordova Population: 73,872	Feb 2005							Jun 2014
Sacramento County Population: 584,729	May 2004		Jul 2015* Zoning					

Community	Tobacco Re-tailer License	Sales Near Youth- Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
Sacramento Population: 493,025	Mar 2004	Jun 2012* CUP						
San Benito County								
Hollister Population: 36,677	May 2006				Feb 2015			May 2006
San Bernardino County								
Adelanto Population: 34,273		May 2010* Zoning						
San Diego County								
El Cajon Population: 102,803	Jun 2004	Mar 2014**NG Zoning						Jun 2004
San Diego Population: 1,406,318	Nov 2007**							Nov 2014 ⁴
San Marcos Population: 94,042	Jul 2016							Jul 2016
Solana Beach Population: 13,527	Jul 2009							Jul 2009
Vista Population: 101,797	May 2005	Jun 1997* Zoning						Oct 2013
San Francisco County								
San Francisco Population: 874,228	Nov 2003	Jan 2015	Jan 2015	Jan 2015	Aug 2008	June 2017		Mar 2014
San Luis Obispo County								
Arroyo Grande Population: 17,736	Feb 2005							Feb 2005
County of San Luis Obispo Population: 120,549	Oct 2008							Aug 2008
Grover Beach Population: 13,438	Sep 2005							May 2006
San Luis Obispo Population: 46,724	Aug 2003							Mar 2015
San Mateo County								
Brisbane Population: 4,722	Nov 2015**							Nov 2015
County of San Mateo Population: 65,470	Oct 2014**							Nov 2014
Daly City Population: 109,287	Sep 2015**				Sep 2015			Sep 2015
Pacifica Population: 38,124	Feb 2008							Feb 2008
Portola Valley Population: 4,707	Jun 2008**							Nov 2014
San Mateo Population: 103,426	Nov 2015**							Nov 2015

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
South San Francisco Population: 65,451	Mar 2008**							Jan 2014
Santa Barbara County								
Buellton Population: 5,129			Apr 2014* Reg					
Carpinteria Population: 13,943	Apr 2013	May 2013* Zoning						Apr 2013
County of Santa Barbara Population: 143,439	Nov 2010	Nov 2010						Jul 2015
Goleta Population: 31,760	May 2014	May 2014						May 2014
Santa Clara County								
Campbell Population: 42,726	Dec 2012							Dec 2012
County of Santa Clara Population: 87,764	Nov 2010	Nov 2010	Nov 2010		Nov 2010	Nov 2010		Jun 2014
Gilroy Population: 55,936	Nov 2014	Nov 2014						Nov 2014
Los Gatos Population: 31,314	May 2017	May 2017	May 2017		May 2017	May 2017		May 2017
Morgan Hill Population: 44,145	Apr 2014							Apr 2014
Mountain View Population: 79,278		Dec 2013**5 Zoning						
San Jose Population: 1,046,079	Dec 2010**							Dec 2010
Santa Clara Population: 123,983			Mar 2015* CUP					Mar 2015 ⁴
Saratoga Population: 30,569	Jun 2015	Oct 2009* CUP	Oct 2009* CUP					Jun 2015
Santa Cruz County								
Capitola Population: 10,162		Feb 2013* Reg						Apr 2015*
County of Santa Cruz Population: 136,193	Apr 2011	Oct 2016						Apr 2011
Santa Cruz Population: 65,070	Oct 2012	Apr 2014						Oct 2012
Scotts Valley Population: 12,163	Dec 2015	Apr 2014* ^{NG} Reg						Apr 2014
Watsonville Population: 53,015	Oct 2010							Mar 2013
Solano County								
Fairfield Population: 114,157		Dec 2013* CUP						
Vallejo Population: 118,280		Dec 2009* CUP						

Community	Tobacco Re-tailer License	Sales Near Youth-Populated Areas	Reducing Retailers by Location	Reducing Retailers by Population or Number	Pharmacies	Flavor Restrictions	Minimum Pack Size for Cigars	Electronic Cigarettes
Sonoma County								
County of Sonoma Population: 151,371	Apr 2016	Apr 2016		Apr 2016	Apr 2016			Apr 2016
Healdsburg Population: 11,800	Jun 2014				Oct 2014			Nov 2014
Rohnert Park Population: 42,067		Apr 2009* CUP						
Sonoma Population: 10,989	Jun 2015		Feb 2015 ⁶	Jun 2015		Jun 2015	Jun 2015	Jun 2015
Windsor Population: 27,371		Nov 2009* CUP						
Stanislaus County								
Riverbank Population: 24,610	Jul 2010	Jul 2010 ^{NG}						
Ventura County								
Oxnard Population: 207,772	Feb 2012							Feb 2012
Yolo County								
County of Yolo Population: 30,122	May 2006					Oct 2016		May 2006
Davis Population: 68,740	Aug 2007							Aug 2007
Winters Population: 7,255	Jan 2016							Jan 2016
Woodland Population: 59,616	Apr 2015							Jun 2015

* The policy is not a part of the community's tobacco retailer license (TRL).

** Community has a TRL, however TRL does not meet requirements to be considered 'strong'

^{NG} Applies to new and existing retailers (no grandfathering exemptions for existing retailers)

¹ Includes restriction on new licenses near schools and prohibits sale of e-cigs and flavored tobacco products near schools

² Restricts sale of flavored tobacco products near schools

³ License applies to e-cigarette retailers and vapor bars

⁴ The policy regulates electronic cigarettes, but does not define them as a tobacco product

⁵ Significant tobacco retailers proposing locations within 1000 feet of schools, playgrounds, and public recreational facilities will be examined for suitability and alternative locations

⁶ Prohibits new retailers that aren't on pre-existing list of allowed locations from obtaining licenses

Sources: Population figures are from the State of California, Department of Finance, E-1 Population Estimates for Cities, Counties and the State with Annual Percent Change – January 1, 2016. All County populations are based on the unincorporated areas



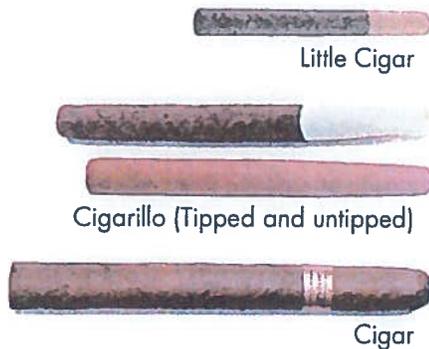
Fact Sheet

Overview: In the United States (U.S.), consumption of flavored tobacco products such as cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions (used in electronic smoking devices) have increased in recent years [1]. These products come in a variety of flavors including chocolate, berry, cherry, apple, wintergreen, and peach [2] and are sold in colorful packaging, which make them especially appealing to young people. There is growing concern that flavored tobacco products help users develop habits that can lead to long term nicotine addiction [3].

Types of Flavored Products

Cigars

There are three types of cigars sold in the U.S.: little cigars, which are the same size and shape as cigarettes; cigarillos, which are a slimmer version of large cigars and usually do not have a filter; and large cigars, which are larger and weigh more than little cigars and cigarillos [4].

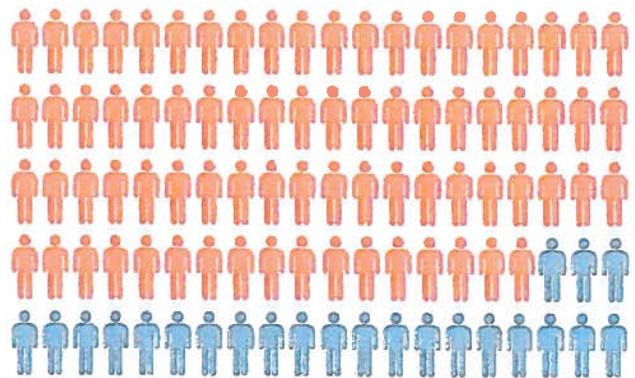


Cigars are the second most common form of tobacco used by youth [5]. Many of the brands that are popular among youth come in flavors such as apple, chocolate, grape, and peach [6], while other less traditional flavors are branded with appealing names like "Fruit Squirts," "Waikiki Watermelon," "Tutti Frutti," "Blue Water Punch," "Oatmeal Cookie," and "Alien Blood" [7].

A recent study found that more than 87 percent of adolescents who used cigarillos in the past 30 days used flavored cigarillos [8].

Regular cigar smoking is associated with increased risk for lung, larynx, oral cavity, and esophagus cancer [9]. Heavy cigar use and deep inhalation has also been linked to elevated risk of heart disease and chronic obstructive pulmonary disease [10].

Cigars contain higher levels of nitrosamines—which are compounds that cause cancer—more tar, and higher concentrations of toxins than cigarettes [11].



87% of adolescents who used cigarillos in the past 30 days used flavored cigarillos.

Smokeless Tobacco

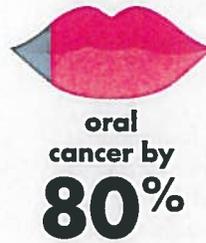


Smokeless tobacco products include chewing tobacco, dip, snuff, and snus and come in flavors such as mint, wintergreen, berry, cherry, and apple [12].

These products contain at least 28 carcinogens [13] and have been shown to cause gum disease and cancers of the mouth, lip, tongue, cheek, throat, stomach, pancreas, kidney, and bladder [14].

Smokeless tobacco products increase the risk of developing oral cancer by 80 percent, and esophageal and pancreatic cancer by 60 percent [15].

Smokeless tobacco products increase the risk of developing

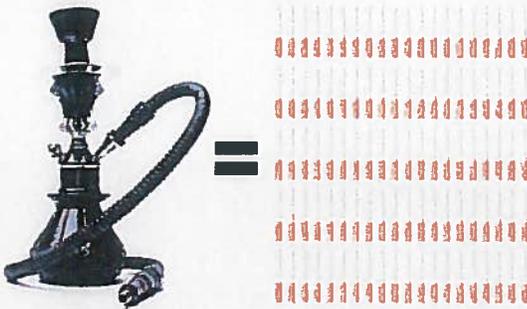


Shisha or Hookah Tobacco

Shisha is also known as hookah, water pipe, narghile, or goza tobacco and is available in an array of fruit, alcoholic beverage, and herbal flavors [12].

Hookah smoking has been associated with lung cancer, respiratory illness, and periodontal disease [9].

Many young adults falsely believe that hookah smoking is safer than cigarette smoking [16]. However, smoking hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes [17].



Smoking hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes

One hookah session delivers approximately 125 times the smoke, 25 times the tar, 2.5 times the nicotine and 10 times the carbon monoxide as a single cigarette [18].

A 2014 study found that teens who use hookah are two-to-three times more likely to start smoking cigarettes or to become current smokers than teens who have not tried hookah [19].

Liquid Nicotine Solution

Liquid nicotine solution, also called "e-juice" or "e-liquid," is used in electronic smoking devices such as e-cigarettes.

There are more than 7,000 e-liquid flavors [20] including cotton candy, gummy bear, and chocolate mint, as well as flavors named after brand name candy and cereal products such as Wrigley's Big Red Gum and Quaker Oats' Cap'n Crunch [21].



E-liquids, when heated, form an aerosol that emits toxic chemicals known to cause cancer, birth defects, and other reproductive harm [22].

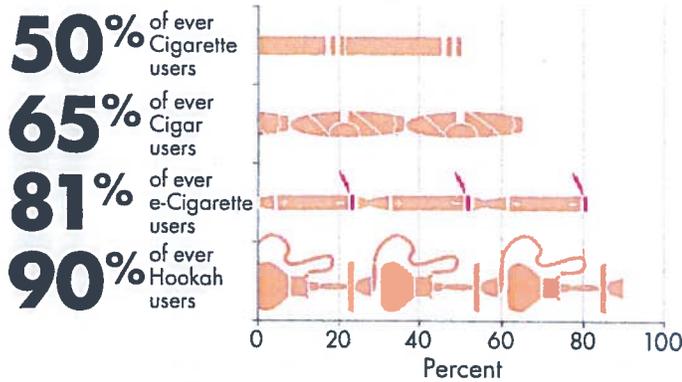
E-liquid solutions contain varying concentrations of nicotine, ranging from no nicotine to 100 mg per milliliter (a milliliter is approximately a fifth of a teaspoon). The lethal dose of nicotine is estimated to be 60 mg or less for an adult and 10 mg for a child. The toxicity of a 60 mg dose of liquid nicotine is similar to or even higher than that of cyanide [23].

Using Flavored Tobacco Products

Recent declines in the prevalence of cigarette smoking among youth have coincided with an increased use of e-cigarettes and hookah tobacco [24]. In the U.S., cigarettes are prohibited from containing flavors other than menthol; however, other tobacco products such as e-cigarettes and hookah tobacco are exempt from this regulation.

A 2015 study of adolescents ages 12 to 17 found that among those who self-reported ever experimenting with tobacco, the majority started with a flavored product. It also found that most current youth tobacco users reported use of flavored products [25].

Teens report that their tobacco use typically started with a flavored tobacco product. One study reported that almost 90 percent of ever hookah users, 81 percent of ever e-cigarette users, 65 percent of ever users of any cigar type, and 50 percent of ever cigarette smokers said the first tobacco product they used was flavored [25].



said the first tobacco product they used was flavored

A study conducted by the Centers for Disease Control and Prevention (CDC) found that more than two out of every five middle and high school students who smoke reported either using flavored little cigars or flavored cigarettes [26].

A 2014 CDC survey of U.S. youth found that 70 percent of U.S. middle and high school tobacco users have used at least one flavored tobacco product in the past 30 days [1].



Two out of every five middle and high school students who smoke reported either using flavored little cigars or flavored cigarettes

This survey also found that 18 percent of all high school students in the U.S. reported using at least one flavored tobacco product in the last 30 days [1]. Among current middle and high school tobacco users, more than 63 percent had used a flavored e-cigarette, more than 60 percent had used flavored hookah tobacco, and more than 63 percent had used a flavored cigar in the past 30 days [1].

Findings from the 2015 nationwide Monitoring the Future study found that about 40 percent of all students in 8th, 10th, and 12th grades who used vaporizers, such as e-cigarettes, said that they used them because the flavors tasted good, compared to the 10 percent that used them in an attempt to quit smoking combustible cigarettes [27].

Flavored Tobacco Products are Heavily Marketed to Young People [28] with Sweet Flavors and Colorful Packaging

Flavored tobacco products are very enticing to children and even share the same names, packaging, and logos as popular candy brands like Jolly Rancher, Kool-Aid, and Life Savers [29] and gaming systems like Wii and Gameboy.

Many of the flavoring chemicals used to flavor "cherry," "grape," "apple," "peach," and "berry" tobacco products are the same ones used to flavor Jolly Rancher candies, Life Savers, Zotz candy, and Kool-Aid drink mix [29].

Tobacco companies market their products to young people through the use of youthful models, celebrities, sex appeal, and peer oriented slogans [30].

Young people are much more likely to use candy-and fruit-flavored tobacco products than adults [31].

Bright packaging and product placement at the register, near candy, and often at children's eye-level, make tobacco flavored products very visible to kids [32].



Flavors Make it More Enticing to Smoke Tobacco and More Difficult to Quit

Flavorings help mask the naturally harsh taste of tobacco, making flavored tobacco products more appealing to youth and easier for youth to initiate and sustain tobacco use [31].

Studies show that individuals who begin smoking at a younger age are more likely to develop a more severe addiction to nicotine than those who start later [6].

Both the U.S. Food and Drug Administration (FDA) and the Surgeon General have warned that flavored tobacco products help new users establish habits that can lead to long-term addiction [3, 6].

Not only do flavors make it easier for new users to begin smoking, but the presence of flavors like menthol in tobacco products also make it more difficult for tobacco users to quit [33].

Flavors in tobacco products:

make it more appealing for new users to buy and smoke

mask the harsh taste of tobacco

help users establish habits that can lead to long-term addiction



Flavored Tobacco Products are Cheaper and Sold in Smaller Packages than Cigarettes

“

The tobacco industry has promoted little cigars, which are comparable to cigarettes with regard to shape, size, and packaging, as a lower cost alternative to cigarettes [34].

”

While cigarettes must be sold in packs of 20, other tobacco products, like little cigars, can be purchased in quantities of one or two at a time, often for less than a dollar [32].

Price discounting has become the tobacco industry's leading method of attracting users and accounts for the largest percentage of marketing expenditures [35].

Price discounts disproportionately affect vulnerable populations including young people, racial/ethnic minorities, and persons with low incomes, as these groups are more likely to purchase tobacco products through a discount [36, 6].



Little Cigar



Cigarette

Many Young Adults Falsely Believe that Flavored Tobacco Products are Safer than Non-Flavored Tobacco Products

Flavored tobacco products are not only just as harmful as combustible or smokeless tobacco products, but they are also just as addictive [3].

A recent study found that people younger than 25 years of age were more likely to say that hookahs and e-cigarettes were safer than cigarettes [37].

Many studies indicate that cigar smokers misperceive cigars as being less addictive, more “natural,” and less harmful than cigarettes [38]. The misperception among young people that other tobacco products are less harmful than cigarettes, as well as the fact that these products are less harsh to smoke and taste good, may contribute to the increase in the use of other tobacco products by youth.

A 2015 study found that only 19 percent of 8th graders believe that there is a great risk of people harming themselves with regular e-cigarette use, compared to 63 percent of 8th graders who think that there is a great risk of people harming themselves by smoking one or more packs of cigarettes a day [27].

Other tobacco products than cigarettes (OTP’s) such as little cigars, cigarillos, and hookah, like all tobacco products, contain the addictive chemical nicotine which makes them very hard to quit [39] and increases the risk of developing serious health problems including lung cancer, heart disease, and emphysema [40].

Flavoring Chemicals in E-Cigarettes Have Been Linked to Severe Respiratory Disease

Certain chemicals used to flavor liquid nicotine, such as diacetyl, 2,3-pentanedione, and acetoin, are present in many e-liquids at levels which are unsafe for inhalation [41].

Diacetyl, 2,3-pentanedione, and acetoin are used in the manufacture of food and e-liquid flavors such as butter, caramel, butterscotch, piña colada, and strawberry [7].

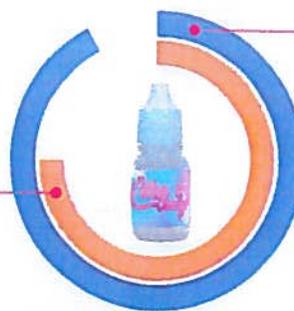
Diacetyl, when inhaled, is associated with the development of the severe lung condition bronchiolitis obliterans, also known as “popcorn lung,” which causes an irreversible loss of pulmonary function and damage to cell lining and airways [42].



2,3-pentanedione, a chemically similar substitute to diacetyl, caused proliferation of fibrosis connective lung tissue and airway fibrosis in an inhalation study performed on rats [43].

A 2015 study by the Harvard School of Public Health detected

diacetyl in **75%** of flavored e-cigarette liquids and refill liquids tested



at least one of the three flavoring chemicals (diacetyl, 2,3-pentanedione, or acetoin) in **92%** of the tested e-cigarettes and liquids [7]

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Menthol and Cigarettes



What is Menthol and How is it Used?

- Menthol is a naturally occurring compound derived from mint plants and is also synthetically produced. [1] Because of its cool, minty candy-like flavor and fresh odor, it is used as an additive in many products including tobacco, lip balm, cough medication, mouthwash, toothpaste, chewing gum, and candy, as well as in beauty products and perfumes. [2]
- Menthol's anesthetizing effect makes the smoke "smooth" and easier to inhale while masking the harshness of tobacco, making menthol cigarettes more appealing to young and beginner smokers. [1]
- Menthol allows smokers to inhale more deeply and for harmful particles to settle deeper inside the lungs. [2] By reducing airway pain and irritation, continuous menthol smoking can mask the early warning symptoms of smoking-induced respiratory problems. [3]
- Menthol decreases the metabolism of nicotine and increases the amount of the addictive substance in the blood, making cigarettes even more dangerous and difficult to quit. [4]
- Many menthol-only smokers underestimate the dangers of menthol in cigarettes and believe that menthol cigarettes are less harmful than regular cigarettes as compared to non-menthol-only smokers. [5]
- Menthol cigarettes are not safer than regular cigarettes. Menthol cigarettes only mask the harshness of tobacco smoke, making it easier for new smokers to start and more challenging to quit. [6]
- Menthol smokers show greater signs of nicotine dependence and have higher rates of quit attempts, [7] but are less likely to successfully quit smoking than other smokers. [8]
- Menthol cigarettes are not safer than regular cigarettes. Menthol cigarettes have been shown to increase youth initiation, inhibit cessation, and promote relapse. [9] Scientific studies have shown that because of its sensory effects and flavor, menthol may enhance the addictiveness of cigarettes. [10]
- Menthol cigarettes account for approximately 25 percent of all cigarette sales in the U.S. [11] Moreover, more than 90 percent of all tobacco cigarettes contain menthol, regardless of being marketed as a mentholated cigarette. [12]

Menthol smokers

show greater signs of nicotine dependence

have higher rates of quit attempts

but are less likely to successfully quit smoking than other smokers



[7, 8]

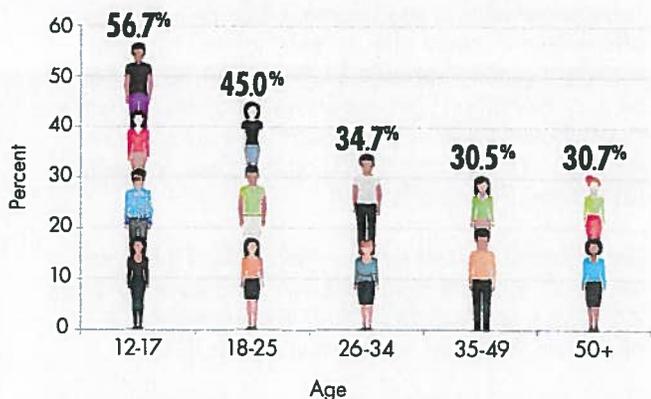


90%

of all tobacco cigarettes contain some menthol, regardless of being marketed as a mentholated cigarette [12]

Who Smokes Menthol Cigarettes?

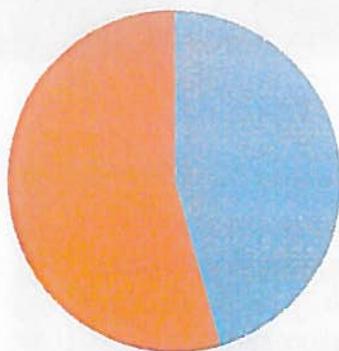
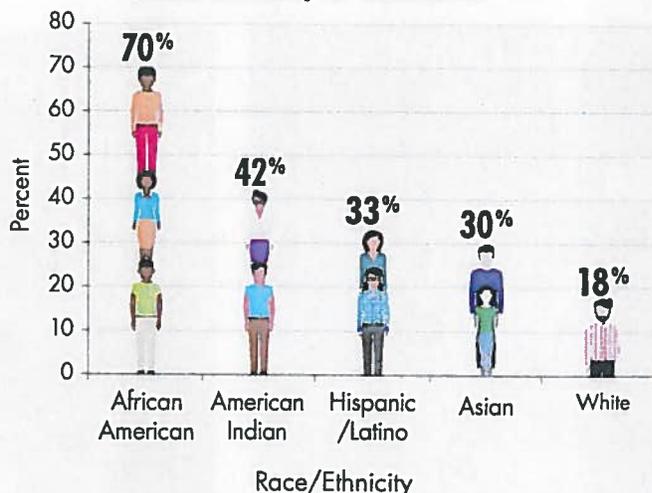
Menthol Cigarette Smoker Use by Age ^[13]



- Nearly half of all lesbian, gay and bisexual adult cigarette smokers in California smoke menthol cigarettes while only 28 percent of straight smokers smoke menthol cigarettes. [16]
- Generally, menthol smokers tend to be female, younger, members of ethnic minorities, have only a high school education, and buy packs rather than cartons. [17]
- Menthol cigarettes are used disproportionately in communities of color. In California, 70 percent of African American, 42 percent of American Indian, 33 percent of Hispanic/Latino, and 30 percent of Asian, adult cigarette smokers smoke menthol cigarettes compared to only 18 percent of white adult cigarette smokers. [16]

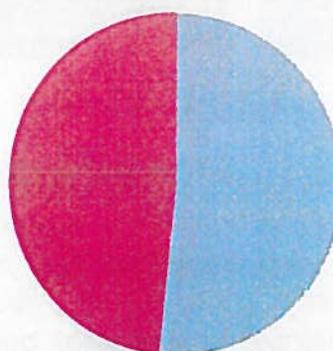
- A national 2013 study found that, among cigarette smokers, menthol cigarette use was more common among 12-17 year olds (56.7 percent) and 18-25 year olds (45 percent) than among older persons (30.5-34.7 percent). [13]
- Approximately 19 million Americans smoke menthol cigarettes, including 1.1 million adolescents. [14]
- More than 50 percent of menthol cigarette smokers are female (52.2 percent) and nearly 30 percent of all menthol smokers are African American (29.4 percent). [15]
- Although the use of cigarettes is declining in the United States (U.S.), sales of menthol cigarettes have steadily increased in recent years, especially among young people and new smokers. [14]

Menthol Cigarette Smoker Use by Race/Ethnicity in California ^[16]



54.5%
of high school

and

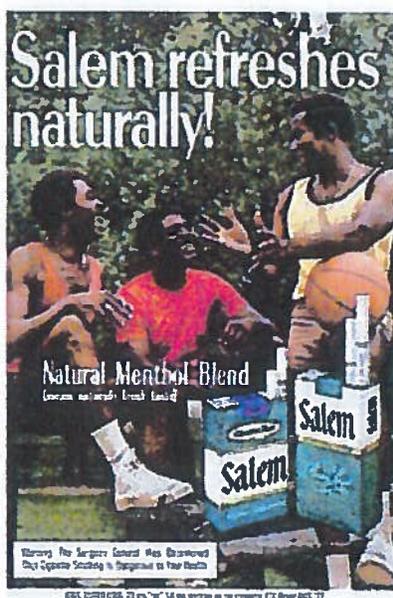
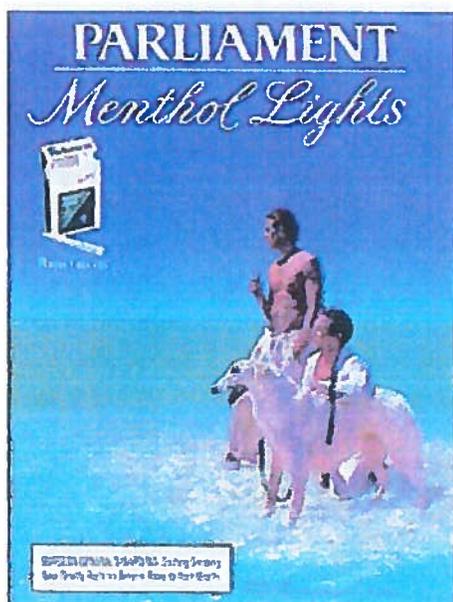


48.4%
of middle school

current tobacco users smoked menthol cigarettes in the U.S. ^[18]

Predatory Marketing Tactics Target Young, Female, and Minority Populations

- Menthol cigarettes were originally developed for and promoted to women. In order to appeal to women, menthol cigarette advertisements often contain images of romantic couples, flowers, and springtime. [20]
- Cigarette packaging design and color are carefully chosen by the tobacco industry to create specific associations. An example of this is the green packages for mentholated cigarettes which suggest coolness and freshness. [19]
- Tobacco retailers in low income, urban communities having high menthol sales are more likely to place larger exterior tobacco advertisements and have more menthol advertisements on their store fronts. [1]
- Tobacco retailers in low income, urban communities offer higher discount rates on mentholated cigarette brands, including between \$1.00 and \$1.50 off per pack or buy one (1) get one (1) free promotions, while more affluent white neighborhoods see discounts on menthols of only about \$0.50 off per pack or buy two (2) get one (1) free offers. [9]
- Camel brand smokers and menthol smokers (Newport and KOOL), who are more often young adults and African Americans, are much more likely to use promotional offers than those who smoke other brands. [21]
- Young adults and African Americans are also less likely to switch from menthol to non-menthol cigarettes regardless of higher product price. [22]

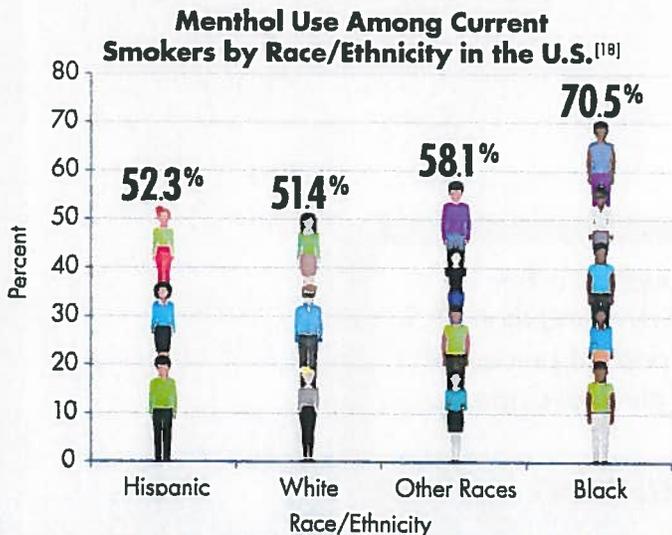


“Menthol brands like Newport have specifically targeted adolescents and young adults with their marketing messages^[20], through “youthful imagery, messages promoting an appealing sensory experience, and peer group acceptance.”^[6]

Why Mentholated Tobacco Products Matter to the Health of the African American Community

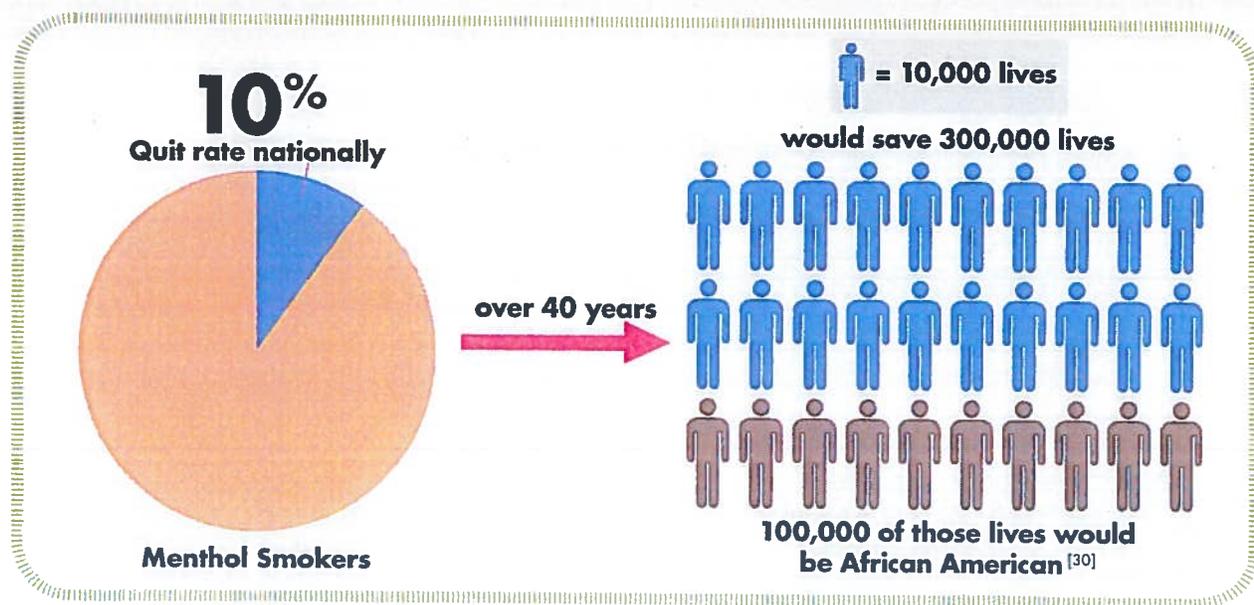
According to the Food and Drug Administration's Tobacco Products Scientific Advisory Committee, by 2020 the African American population will have suffered more than 4,700 excess deaths due to menthol in cigarettes, and more than 460,000 more African Americans will have started smoking due to the impact of menthol. [23]

- African Americans have been one of the main target groups of menthol cigarette advertising. [24] Tobacco industry documents reveal aggressive menthol tobacco product marketing in urban, low-income, African American neighborhoods through marketing; such as advertising more desirable menthol promotions; dedicating a greater store display space for menthol products; and allowing more menthol interior and exterior signage in stores. [25]
- Historically, African Americans have been exposed to hundreds of tobacco advertisements and the tobacco industry has placed proportionately more menthol cigarette advertisements in African American magazines than in mainstream magazines. [26] Many of these targeted advertisements incorporate elements of African American culture, music, and messages related to racial identity and urban nightlife. [32]
- Today, menthol cigarettes are the overwhelming favorite tobacco product among African Americans. A 2015 CDC report found that among current cigarette smokers in the U.S., 70.5 percent of African Americans reported menthol cigarette use; about 20 percentage points higher than whites and Hispanics. [18]
- The tobacco industry has been highly influential in the African American community for decades, providing funding and other resources to community leaders and emphasizing publicly its support for civil rights causes and groups, while ignoring the negative health effects of its products on those it claims to support. Tobacco industry support for African American communities is estimated to be as high as \$25 million per year. [27]
- For decades, the tobacco industry has donated generous amounts of money to members of the Congressional Black Caucus Foundation, the National Urban League, the National Association for the Advancement of Colored people and the United Negro College Fund. [28]
- Many African American organizations opposing the ban on menthol in tobacco products continue to receive money from the tobacco industry. In 2014, Lorillard Tobacco donated campaign cash to half of all African American members of Congress, making African American lawmakers (all but one of whom are Democrats) 19 times as likely as their Democratic peers to get a donation. [29]



ACCORDING TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION, smoking-related illnesses kill more Black Americans than AIDS, car crashes, murders and drug and alcohol abuse combined.

Menthol and Cessation



- A leading model of smoking in the U.S. predicts that a 10 percent quit rate nationally among menthol smokers would save thousands of lives, preventing more than 4,000 smoking-attributable deaths in the first ten years, and that more than 300,000 lives would be saved in over 40 years. Approximately 100,000 of those lives saved would be African American. [30]
- Another model predicts that if menthol were prohibited, between 2010 and 2020, over 2.2 million people would not start smoking. By 2050, the number of people who would not start smoking would reach 9 million. [6]
- Among African American smokers, menthol cigarette smoking is negatively associated with successful smoking cessation. [31]
- Quitting menthol cigarettes is particularly difficult, because menthol smokers have to get over their dependence on nicotine as well as positive associations with menthol itself such as the minty taste, cooling sensation, and sensory excitation. [9]
- Youth who initiate smoking with menthol cigarettes are more likely to become regular, addicted smokers and are more likely to show higher measures of dependence than youth who initiate with non-menthol cigarettes. [32]
- Menthol smokers in the U.S. who report consuming 6-10 cigarettes per day show greater signs of nicotine dependence (i.e., shorter time to first cigarette in the day) than comparable non-menthol smokers. [33]
- Menthol smokers in general and African American smokers in particular, have a difficult time quitting despite smoking significantly fewer cigarettes per day compared to non-menthol smokers. [26], [34] Compared to non-menthol African American light smokers, menthol smokers are younger and have less confidence to quit smoking. [35]

“More than half of Americans support a ban on menthol [36], and a national study found that 44.5 percent of African Americans and 44 percent of females would quit smoking if menthol cigarettes were prohibited. [23]”

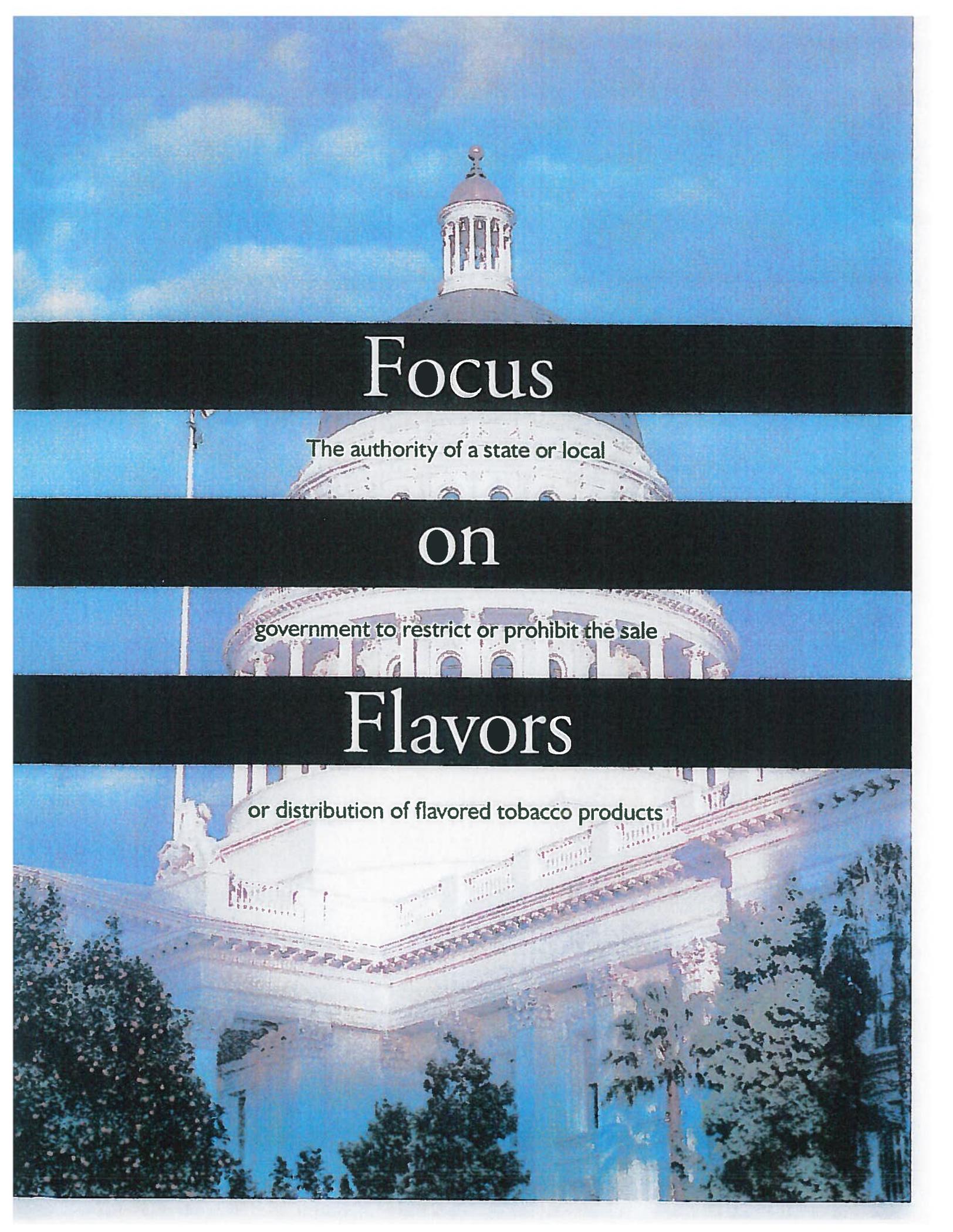
Food and Drug Administration Regulation of Menthol Tobacco Products

- In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) granting the FDA with regulatory authority over tobacco products. [37]
- Effective September 22, 2009, the FSPTCA banned artificial or natural flavorings, as well as herbs or spices, which produce characterizing flavors in cigarettes. This included flavors such as strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, and coffee. Menthol, however, was exempt from the ban. [38]
- The FDA has the ability to prohibit menthol as an ingredient in cigarettes and other tobacco products. Tobacco Products Scientific Advisory Committee (TPSAC) was established and charged with developing a report assessing the impact of the use of menthol in cigarettes on public health and proposing recommendations to the FDA on whether menthol should be regulated or not. [37]
- The TPSAC report and recommendations were submitted to the FDA on March 23, 2011. The TPSAC report found that the availability of menthol cigarettes has an adverse impact on public health in the U.S. and recommended removal of menthol cigarettes from the marketplace. [37]
- On April 12, 2013, 20 leading national organizations and advocates filed a formal Citizen Petition urging the FDA to prohibit menthol as a characterizing flavoring in cigarettes. More than 1,000 public comments were submitted to the FDA. [37]
- In July of 2013, the FDA released a preliminary scientific review that found that menthol made it easier to start smoking and allowed for a faster progression to regular use of cigarette smoking; it also found that menthol made it harder to quit smoking, especially among African American menthol smokers. The FDA solicited public comment on the "potential regulation" of menthol cigarettes. [39]
- In July of 2014, a Federal District Court Judge, Justice Richard Leon, issued a decision requiring the FDA to appoint new members to the TPSAC and to prohibit the agency from using the 2013 scientific review prepared by the TPSAC. The judge ruled that the new TPSAC members must be unbiased and impartial, following a 2011 lawsuit by Lorillard Tobacco Company and R.J. Reynolds Tobacco Company against the FDA. The lawsuit sought a court order to require the FDA to reconstitute the TPSAC's membership, alleging that three TPSAC members had conflicts of interest because of their ongoing work as expert witnesses against tobacco companies in tobacco litigation and due to their consulting fees paid by pharmaceutical companies in connection with certain smoking cessation products. The FDA was ordered to reconstitute the advisory panel's membership and refrain from using the prior advisory panel's report on menthol cigarettes. [39]
- In September of 2014, the U.S. Department of Justice filed an appeals motion on behalf of the FDA in response to Circuit Court Justice Leon's ruling in favor of the Tobacco Industry. [40]
- In January 2016, a panel for the U.S. Court of Appeals for the District of Columbia Circuit overturned the lower Federal District Court ruling, holding that Lorillard and R.J Reynolds Tobacco Companies lacked standing to bring the case to the courts. The court found that the injuries alleged by the plaintiffs were "too remote and uncertain...insufficiently imminent" and that the inclusion of the three members of the TPSAC committee with an alleged conflict of interest "by no means rendered the risk of eventual adverse FDA action substantially probable or imminent." [41]
- The FDA has still not made a recommendation on whether to ban or limit menthol cigarettes. [39]



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Focus

The authority of a state or local

on

government to restrict or prohibit the sale

Flavors

or distribution of flavored tobacco products

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Focus on Flavors

May a state or local government restrict or prohibit the sale or distribution of flavored tobacco products?

A. Overview

A state or local government may restrict or prohibit the sale and or distribution of flavored tobacco products. State and local governments hold “police power” under the federal constitution, which means they have power to protect the health, safety and welfare of their citizens.¹ The Family Smoking Prevention and Tobacco Control Act (FSPTCA), a federal statute, expressly preserves state and local power to enact measures relating to the sale or distribution of tobacco products, even if those measures are more restrictive than federal law. Nationally, a number of local governments have enacted measures that restrict or prohibit the sale of flavored tobacco products. Three of those ordinances have, to date, been challenged in federal court, and all have been upheld.² However, courts have not ruled on all the possible variants of regulation of flavored tobacco products.

The regulatory power of a state or locality in this area is broad, but not unlimited: it must be based on police power, such as for the purpose of reducing youth smoking initiation,³ it must be limited to a restriction of sales, distribution, or use of tobacco products within the jurisdiction; it may not regulate how products are manufactured or the ingredients they may contain; and it may not restrict the movement of products through the jurisdiction in commerce. Also, if the measure restricts speech, it may be vulnerable to challenge under the First Amendment.

Existing state and local measures that regulate flavored tobacco products define the regulated product by reference to its characterizing flavor.⁴ This

“A state or locality may regulate the sale or distribution of tobacco products with any or all characterizing flavors”

¹ See, e.g., *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 610 (1926).

² *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, 708 F.3d 428 (2nd Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *Independents Gas & Serv. Stations Ass'n, Inc. v. City of Chicago*, No. 14 C 7536, 2015 WL 4038743 (N.D. Ill., June 29, 2015). These decisions are not binding in California because they are in different states and circuits, but they are persuasive authority.

³ California's interest in preventing the sale of tobacco products to minors dates back to at least 1891. See Cal. Penal § 308, Stats. 1891, c. 70, p. 64, § 1.

⁴ The term “characterizing flavors” is not defined in the federal statute. It is used here to refer to products that have a taste or aroma that can be distinguished from the taste or aroma of tobacco during consumption of the product, or that are marketed as having such a characteristic.

is not a prescription for how a product must be made, but a description of the character of the product experienced by the consumer. This distinction is important because states and localities lack power to set manufacturing standards. A state or locality may regulate the sale or distribution of tobacco products with any or all characterizing flavors. Or a state or locality may except some flavors (such as menthol), as long as the inclusion or exception of the flavored product is based on police power (such as the protection of public health).

A state or locality may exercise this power over the full range of tobacco products, including cigarettes, cigarillos, and electronic cigarettes.⁵ In 2009, in the FSPTCA, Congress gave the Food and Drug Administration (FDA) power to regulate only cigarettes, smokeless tobacco, and roll your-own (RYO) tobacco products. However, Congress also authorized the FDA to deem additional products to be within the FDA's regulatory power, and in 2014, the FDA issued a proposed rule to do just that. As of March 2016, those deeming regulations are not final. It is anticipated that the FDA will soon extend its regulatory authority over additional products, including electronic cigarettes, pipe tobacco, cigarillos, and cigars. Until that happens the FSPTCA presents no bar to state or local regulation of those products. Therefore, this paper proceeds on the assumption that a state or local government may regulate, for instance, cigarettes and electronic cigarettes, in exactly the same way.⁶

It is beyond the scope of this paper to consider the many policy and enforcement issues that might arise in the event a state or local government chooses to use its police power to regulate the sale or distribution of flavored tobacco products. Rather, this paper examines the legal authority for state or local action in this area. It first focuses on the ways in which states and localities may act, as distinct from areas in which only the federal government may act. This requires a discussion of the legal doctrine of federal preemption. This paper then examines the key provisions of the FSPTCA and returns to consider certain preemption issues in greater depth. Thereafter, it summarizes the three cases where courts have reviewed local ordinances regulating flavored tobacco products. The paper concludes with a discussion of other legal challenges that could be mounted against a state or local measure, as well as some miscellaneous issues arising from the definitions and scope of such measures.

⁵ The term "electronic cigarettes" is used broadly to include all types of electronic devices and their components that deliver aerosolized or vaporized nicotine, tobacco or flavors.

⁶ To be clear, in the event that the deeming regulations are not finalized, are invalidated by courts, or do not include all of the products identified above, the FSPTCA will not restrict the power of state or local governments to regulate the non-deemed products.

B. Federal preemption - briefly

Preemption refers to a legal doctrine that determines when a federal law displaces a state or local law (federal preemption) or when a state law displaces a local law (state preemption). For purposes of this paper, only federal preemption is likely to be relevant. Federal preemption is derived from the Supremacy Clause, which invalidates state or local measures that interfere with or are inconsistent with federal law. See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

There are various types of federal preemption, of which two are likely to be raised in opposition to a state or local flavored product measure. One is express preemption, asking whether the preemption clause expressly states that the state or locality is prohibited from taking certain action. The other is conflict preemption, asking whether the state or local measure conflicts with federal law. See *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt Dist.*, 498 F.3d 1031, 1039-40 (9th Cir. 2007). Thus, a court reviewing a state or local measure to regulate flavored tobacco products will both examine the FSPTCA's preemption scheme and consider whether the state or local measure is inconsistent with the FSPTCA or with FDA regulations. See *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) ("Congress may indicate preemptive intent through a statute's express language or through its structure and purpose.")

At this point an analysis of preemption becomes less certain. Under the prevailing view, when a state or local measure is based on traditional police power, the reviewing court will start its analysis with a presumption against preemption. In other words, it will presume that the state or local government may properly enact measures that are stricter than federal law. This is in recognition that what is at issue is federal supremacy power versus state or local police power, both of which derive from the federal constitution. Thus, a state or local measure regulating sales or distribution of flavored tobacco products will not be displaced "unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). If "the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group*, 555 U.S. at 77 (internal citation omitted). Similarly, if the federal statute contains a preemption clause and it does not specify that a certain area of regulation is preempted, that indicates a local or state measure regulating that area is not preempted. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.")

“Preemption refers to a legal doctrine that determines when a federal law displaces a state or local law (federal preemption) or when a state law displaces a local law (state preemption)”

However, not all current Supreme Court Justices agree with these principles. Some specifically reject the presumption against preemption when applied in express preemption cases, the use of legislative history to determine congressional intent regarding preemption, and the view that in express preemption cases there cannot also be preemption based on a conflict between federal and state law in an area not specifically referenced in the express preemption clause. See *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt Dist.*, 541 U.S. 246, 256 (2004); *Altria Group*, 555 U.S. at 95, 99-102 (Thomas, J. dissenting); *Cipollone v. Liggett*, 505 U.S. at 548 (Scalia, J. dissenting). Therefore, in an abundance of caution, the analysis that follows relies neither on the presumption against preemption nor on the legislative history of the FSPTCA, and it applies the "ordinary principles of statutory construction." *Altria Group*, 555 U.S. at 101 (Thomas, J. dissenting).

With these principles in mind, this paper examines the FSPTCA's preemption scheme.

C. The operative federal statute: the Family Smoking Prevention and Tobacco Control Act (FSPTCA)

Congress gave the FDA authority to regulate "tobacco products" when it passed the FSPTCA in June 2009, and defined these products as cigarettes, cigarette tobacco, RYO tobacco, smokeless tobacco and any other tobacco products that the Secretary of Health and Human Services deems are subject to this authority by regulation.⁷ See 21 U.S.C. § 387a(b). Under the FSPTCA, the FDA may establish tobacco product standards and regulate ingredients, additives, nicotine levels, testing, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, and modified risk tobacco products.⁸ All of these can be categorized, broadly, as "product standards." "Product standards" are an area of exclusive FDA power.

⁷ As discussed above, because Congress gave the FDA authority to deem other products to be tobacco products and the FDA's deeming rule appears to be close to final, this paper assumes that the FDA's authority extends to "new" products, including electronic cigarettes, cigars, cigarillos, and pipe tobacco.

⁸ 21 U.S.C. § 387g gives the FDA power to regulate product standards; § 387h gives power to notice and recall defective products; § 387i requires manufacturers and importers to maintain and provide records to the FDA; § 387j sets forth requirements for new products and for pre-market review of products that are claimed to be substantially equivalent; § 387k sets forth requirements for products that claim to have a modified risk; § 387o requires the FDA to establish regulations regarding testing of ingredients and disclosure of such information; and § 387q concerns establishment of a scientific products advisory committee, which is required to have representatives of tobacco manufacturing and farming (but not retail or distribution).

C.1 The FSPTCA has a calibrated, hierarchical preemption structure

The FSPTCA's preemption scheme is hierarchical. The "preservation clause" comes first and is the broadest – it preserves the authority of federal agencies other than the FDA, the states, the political subdivisions of states (i.e., local governments created by the states), and the governments of Indian tribes. 21 U.S.C. § 387p(a)(1). Through the preservation clause Congress carved out an area for the FDA, but preserved all other powers for other entities – such as states, localities, tribes, and other federal agencies. Following the preservation clause is the "preemption clause" which describes the carve-out. *Id.* at § 387p(a)(2)(A). The preemption clause forbids only states and political subdivisions of states from acting in the preempted (or carved-out) areas, whereas actions by other federal agencies and tribes are not preempted. For the purposes of this paper, the most important preempted area is "product standards." The final part of the FSPTCA preemption scheme is the "savings clause." *Id.* at § 387p(a)(2)(B). Like the preemption clause it applies only to states and political subdivisions of states. The reason why the savings clause is relevant only to state and local governments is because by its own terms it references only the preemption clause – which concerns only state and local governments. It contains no provision to save the preserved powers of federal agencies other than the FDA or of tribes because none of their powers were preempted. Similarly, the savings clause saves only the state and local powers that could have been preempted. The savings clause ensures that the preserved powers of state and local governments are not preempted solely because they relate to a particular area, such as product standards, where direct state or local authority is prohibited.

C.2 The preemption clause

Congress placed the power to regulate "product standards" under FDA control using a preemption clause.⁹ This clause limits the powers of states and localities. It provides that "[n]o State or political subdivision of a State may establish . . . with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the [FSPTCA] relating to tobacco product standards, premarket review, adulteration, misbranding,

“Through the preservation clause Congress carved out an area for the FDA, but preserved all other powers for other entities – such as states, localities, tribes, and other federal agencies”

⁹ The full text of the preemption clause, 21 U.S.C. § 387p(a)(2)(A), is as follows:

(2) Preemption of certain State and local requirements

(A) In general

No State or political subdivision 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, labeling, registration, good manufacturing standards, or modified risk tobacco products.

“Congress explicitly preserves the authority of a state or local government to regulate or prohibit the sale or distribution of tobacco products”

labeling, registration, good manufacturing standards, or modified risk tobacco products.” 21 U.S.C. § 387p(a)(2)(A). In other words, states and localities may not regulate product standards, even under their police powers, because any such regulation would likely be different from or in addition to federal law. This preemption clause underlies the argument presented to several courts, that local sales regulations are veiled, improper, product standards regulations.

C.3 The preservation clause

The argument that state or local sales and distribution regulations are impermissible product standards in disguise fails because Congress expressly preserved certain powers for state and local governments: Congress allowed state and local governments to adopt certain measures that are in addition to, or more stringent than, federal law. These powers are identified in the preservation clause.¹⁰ This clause provides that, except for the areas identified as preempted in the preemption clause, “nothing” in the FSPTCA “shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact . . . and enforce any law . . . or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under” the FSPTCA. 21 U.S.C. § 387p(a)(1). In other words, in those areas preserved for state or local regulation, the FSPTCA is a floor, not a ceiling, and “nothing” in the FSPTCA can take away from stricter state or local regulation.

The preservation clause continues, providing that this “includ[es] a law . . . or other measure 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.” 21 U.S.C. § 387p(a)(1). Congress explicitly preserves the authority of a state or local government to regulate or prohibit the sale or distribution of tobacco products. This express recognition of state and local power is what makes permissible a state or local restriction or prohibition on the sale or distribution of flavored tobacco products.

¹⁰ The full text of the preservation clause, 21 U.S.C. § 387p(a)(1), is as follows:

(1) Preservation

Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure 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. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.

The clause also preserves the power of a state or locality to regulate or prohibit the possession or use of tobacco products. See 21 U.S.C. § 387p(a)(1). A state or locality may do this for individuals of any age – this is not merely a grant of authority to set a higher minimum purchase age or to ban possession of tobacco products by minors. *Id.* A state or locality may also regulate advertising and promotions.¹¹ *Id.* Finally, the preservation clause states that no provision of the FSPTCA “shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.” *Id.* In short, states and localities have power to regulate or prohibit the sale or distribution of tobacco products.

C.4 The savings clause

State and local power is not only set forth in the preservation clause, but also in the savings clause.¹² The savings clause reiterates that, notwithstanding the preemption clause, the powers of states and localities are preserved. It states that, regardless of the preemption clause, states may impose “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.” 21 U.S.C. § 387p(a)(2)(B). Thus, the bar on state and local regulation of product standards under the preemption clause does not impair a state or local sales or distribution measure even if that measure relates in some way to a product standard. Put another way, a state or locality may adopt a measure that relates to a product standard as long as the measure is only a regulation of the sale or distribution of products – such as a restriction on the sale of flavored tobacco products within the jurisdiction.

C.5.a The power of state and local governments to prohibit survives the preemption clause even though it is not expressly included in the savings clause

Challengers to local flavored product restrictions have argued that, in the savings clause, Congress saved the power of local and state governments only to “restrict,” but not to “prohibit,” sales of tobacco products. See *U.S. Smokeless Tobacco v. New York*, 708 F.3d at 435; *Nat’l Ass’n of Tobacco Outlets*

“A state or locality may adopt a measure that relates to a product standard as long as the measure is only a regulation of the sale or distribution of products – such as a restriction on the sale of flavored tobacco products within the jurisdiction”

¹¹ See, e.g., the City of Providence, RI, ordinance prohibiting retailers from redeeming coupons, approved in *Nat’l Ass’n of Tobacco Outlets v. Providence*, 731 F.3d at 74, 76-81.

¹² The full text of the savings clause, 21 U.S.C. § 387p(a)(2)(B), is as follows:
(B) Exception
Subparagraph (A) 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. Information disclosed to a State under subparagraph (A) that is exempt from disclosure under section 552(b)(4) of Title 5 shall be treated as a trade secret and confidential information by the State.

“Because the preemption clause does not use the word ‘prohibiting,’ the power to prohibit was not preempted and thus need not be saved”

v. Providence, 731 F.3d at 82; *Independents Gas & Serv. Stations v. Chicago*, 2015 WL 4038743 at *3. The argument is as follows: in the preservation clause Congress explicitly preserved power to “prohibit” when it gave a state or locality power to pass measures both “relating to” or “prohibiting” sales. However, Congress narrowed that power in the preemption clause and in the savings clause when it clarified which powers survived preemption, it did not include the word “prohibit.” Thus, goes the argument, the power to “prohibit” was not “saved” for state or local governments. The three courts that considered this argument appear not to have been persuaded by it, but did not squarely resolve the issue because none of the operative ordinances were complete prohibitions and each court relied on that fact to pass on the issue. (*Id.*) It is therefore useful to consider at greater length whether the power to prohibit survives preemption.

The simplest counter to such an argument is that “relating to” is broader than, and encompasses, prohibition. Therefore, because the power to “prohibit” was originally granted, and the power to regulate in ways that “relate” was saved, then the power to “prohibit” was also saved. More conclusively, the presence of the words “relating to” and the absence of the word “prohibiting” in the savings clause are explained by the fact that the savings clause simply mirrors the language in the preceding preemption clause: the savings clause merely states what is saved from preemption. Because the preemption clause does not use the word “prohibiting,” the power to prohibit was not preempted and thus need not be saved.¹³

C.5.b The Fire Safety Act is an example that the power to prohibit in areas that relate to product standards survives the preemption clause

The interplay of the preservation, preemption and savings clauses is also illustrated by the assignment of power to regulate cigarette fire safety standards. This example is illuminating because, like characterizing flavors, fire safety standards implicate both the state’s police power and the FDA’s power to set product standards. The FSPTCA assigns this fire safety power as follows: The preservation clause explicitly preserves state authority to enact “measures relating to fire safety standards for tobacco products.” 21 U.S.C. § 387p(a)(1)(A). The preemption clause then prohibits state or local governments from enacting differing or additional measures relating to product standards. *Id.* at § 387p(a)(2). However, California’s Cigarette Fire

¹³ The hierarchy of the preemption scheme is also illustrated by the fact that the preservation clause preserves the authority of federal agencies other than the FDA, the states, political subdivisions of states, and governments of Indian tribes; whereas the preemption clause prohibits only states and political subdivisions of states from acting in the preempted areas, leaving other federal agencies and tribal governments unaffected; thus the savings clause contains no provision for saving the powers of other federal agencies or tribes because none of their powers were preempted. Similarly, because the power to prohibit was never preempted, it need not be saved.

Safety and Firefighter Protection Act (Fire Safety Act) requires cigarette manufacturers to submit laboratory test results regarding ignition propensity to the State Fire Marshal. See Cal. Health & Safety §§ 14950-60. California's statute sets forth detailed product standards. *Id.* at § 14952. The statute therefore appears to be preempted: it imposes different and additional requirements "relating to" product standards. 21 U.S.C. § 387p(a)(2)(A). However, the savings clause states that the preemption clause does not apply to requirements "relating to fire safety standards for tobacco products." *Id.* at § 387p(a)(2)(B). Thus it saves this power for states even though the state measure is "relating to" a product standard. *Id.* The Fire Safety Act therefore exemplifies how state and local power to regulate sales or distribution of flavored tobacco products is saved, even if that measure relates in some way to product standards.

Moreover, the Fire Safety Act is a sales and distribution *prohibition*, not merely a restriction. Cal. Health & Safety § 14951(a) ("A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance . . ."). This demonstrates that the power to prohibit is retained despite arguments (above) to the contrary.

No court has been asked to address the issue of whether California's Fire Safety Act is preempted by the FSPTCA, either as an impermissible prohibition under the savings clause or as an impermissible product standard under the preemption clause of the FSPTCA. However, the fact that all states have enacted fire safety laws very similar to California's illustrates that states have broad authority, using police power, to restrict or prohibit sales and distribution of tobacco products even when the regulation relates to product standards. This power is guaranteed under the preservation clause and, even though the restriction or prohibition relates in some way to product standards, because of the savings clause it is not preempted.¹⁴

“The Fire Safety Act therefore exemplifies how state and local power to regulate sales or distribution of flavored tobacco products is saved, even if that measure relates in some way to product standards”

¹⁴ Several other provisions in the FSPTCA provide additional examples that Congress intended states and localities to possess certain regulatory powers even if exercising those powers related to product standards. For instance, the Fire Safety Act requires that an approved mark be placed on the pack. See Cal. Health & Safety § 14954. This implicates the labeling power that is reserved for the FDA under the preemption clause and which is not explicitly saved for the state in the savings clause. This shows the limits of federal preemption in an area where the state exercises its power to regulate sales or distribution. Similarly, regarding the federal Freedom of Information Act, the savings clause instructs that “[i]nformation disclosed to a State [regarding product standards] that is exempt from disclosure under [the Freedom of Information Act] shall be treated as a trade secret and confidential information by the State.” 21 U.S.C. § 387p(a)(2)(B). This indicates that Congress contemplated that states might require reporting of information that relates to product standards – otherwise it would have been unnecessary to require that states treat such information as confidential. Also, the FSPTCA includes a provision stating that nothing in the FSPTCA shall be construed to modify or affect state product liability law. 21 U.S.C. § 387p(b). Even though product liability litigation may have a powerful impact on product standards, Congress made it clear that state product liability law is preserved. All of these examples show that the thrust of the savings clause was not to expand federal power beyond the parameters of the preemption clause, but the opposite – to clarify that state and local power to regulate sales and distribution is not preempted even when such measures implicate product standards.

“The FSPTCA does not limit the power of a state or locality to ban or restrict the sale or distribution of particular products, such as flavored products”

C.6 Tobacco product characterizing flavor restrictions in the FSPTCA

The FSPTCA contains two provisions regarding flavors. One is a ban on cigarettes with characterizing flavors other than menthol or tobacco. 21 U.S.C. § 387g(a)(1)(A). This is not a ban on sales or distribution, but a complete prohibition: “a cigarette . . . shall not contain . . . [a] flavor . . . [other than tobacco or menthol].” *Id.* The second is a grant of authority to the FDA to regulate or prohibit menthol cigarettes in the future, but to do so only after conducting research into the impact of menthol-flavored cigarettes on public health.¹⁵ *Id.* at § 387g(e). Congress did not prohibit flavored smokeless or RYO tobacco products, but it gave the FDA authority to prohibit such products, and, through the deeming process, to prohibit other flavored tobacco products as well. *Id.* at § 387g(a)(3) & (4). Altogether, these provisions show that Congress banned certain flavored products and gave the FDA authority to regulate or ban other flavored products through its power to set product standards. This is distinct from the power preserved for states and localities, which is the power to regulate sales and distribution (and expressly excludes the power to regulate product standards.) *Id.* at § 387p(a)(2)(A). Thus, there is no inconsistency between the FSPTCA and the power of states or localities to enact measures regarding sales or distribution of flavored tobacco products.

C.7 Tobacco product category restrictions in the FSPTCA

The FDA’s powers in the area of product regulation are not unlimited. “Because of the importance of a decision” the FDA is prohibited 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 products” or “requiring the reduction of nicotine yields of a tobacco product to zero.” 21 U.S.C. § 387g(d)(3). The FSPTCA does not, however, limit the power of a state or locality to ban or restrict the sale or distribution of particular products, such as flavored products. In fact, while early versions of the bill reserved the power to ban or restrict the sale or distribution of products to the FDA, the enacted statute denied this exclusive power to the FDA and gave it to states, localities, other federal agencies, and tribes. See *U.S. Smokeless Tobacco v. New York*, 708 F.3d at 433, n.1. This reversal during the legislative process indicates congressional intent that states and localities hold power to regulate the sale or distribution of entire categories of products.

¹⁵ The California Attorney General and 26 other state and territorial Attorneys General are on record as supporting a prohibition on menthol flavored cigarettes. See Comment from State Attorneys General to FDA re: Menthol in Cigarettes, FDA-2013-N-0521, Nov. 8, 2013.

C.8 The FDA's power to regulate sales and distribution of tobacco products

Finally, it is instructive to consider that the FSPTCA gives authority not only to states and localities, but also to the FDA, to regulate sales and distribution of tobacco products. See 21 U.S.C. § 387f(d)(1) (authorizing FDA to restrict sale and distribution of a tobacco product, including restrictions on advertising and promotion, to protect public health). However, unlike the regulation of product standards that Congress assigned exclusively to the FDA in the preemption clause and in detail in other provisions of the FSPTCA, there is nothing in section 387f or in the preemption clause that limits the power to regulate sales and distribution to the FDA. Rather, the preservation and savings clauses assign such power to states and localities.¹⁶ In other words, the fact that the FSPTCA gives the FDA power to regulate sales and distribution does not imply that that power is not also possessed by state and local governments.

C.9 Authority of tribal governments to restrict or prohibit sale or distribution of flavored tobacco products

The power of tribal governments (and of federal agencies other than the FDA) to enact measures that are stricter than federal law, specifically including sales or distribution measures, is set forth in the preservation clause just as it is for state and local governments.¹⁷ However, unlike state and local governments, the preemption clause in no way limits those powers of tribal governments. See 21 U.S.C. § 387p(a)(1) (containing no reference to tribal governments or other federal agencies). In other words, a tribe's power to enact a measure restricting or prohibiting the sale or distribution of flavored tobacco products on its reservation is not expressly preempted. However, if a tribe enacted a product standard that was inconsistent with a product standard set by the

“The power of tribal governments (and of federal agencies other than the FDA) to enact measures that are stricter than federal law, specifically including sales or distribution measures, is set forth in the preservation clause just as it is for state and local governments”

¹⁶ Similarly, the FSPTCA forbids the FDA from prohibiting the sale of tobacco products in a specific category of retail outlets or from raising the minimum purchase age above 18 years. 21 U.S.C. § 387f(d)(3)(A). But the Act neither bars state or local governments from doing so nor expressly assigns those powers to state or local governments. Illustrating the fact that these powers are not preempted, despite not being expressly assigned to state or local governments, many localities and states have successfully raised the minimum age above 18 years and/or prohibited sale of tobacco products in certain retail outlets such as pharmacies. See, e.g., TOBACCO EIGHTEEN TWENTY-ONE <http://tobacco21.org/> (last visited Jan. 27, 2016).

¹⁷ The relevant portions of this clause, 21 U.S.C. § 387p(a)(1), are as follows:
... nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of ... the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure 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, ... or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any ... tribal ... taxation of tobacco products.

FDA, the tribal measure could be challenged as inconsistent with federal law (i.e., conflict preemption.) This suggests that a tribe would be better advised to regulate sales or distribution rather than enact product manufacturing standards.

D. Preemption – in greater detail

Challengers to the New York City, Providence, and Chicago flavored tobacco product ordinances based their preemption arguments on two recent U.S. Supreme Court cases. In both cases the Supreme Court held that the state or local measure was preempted and also did not apply the traditional presumption against preemption even though the state or local measure was based on the exercise of police power. However, review of these two cases reveals that they do not support preemption of state or local flavored product measures under the FSPTCA.

***D.1 National Meat Association v. Harris,* - U.S. -, 132 S.Ct. 965, 181 L.Ed.2d 950 (2012)**

The first case that may be cited as authority for preemption of a state or local measure restricting sale or distribution of flavored tobacco products is *National Meat Association v. Harris*, - U.S. -, 132 S.Ct. 965 (2012). The Federal Meat Inspection Act (FMIA) regulates operations at slaughterhouses. A preemption clause prohibits states from imposing additional or different requirements regarding those operations or facilities. 21 U.S.C. § 678. The federal statute and regulations specify how nonambulatory animals are to be processed. 9 C.F.R. § 309. A California statute prohibited slaughterhouses from purchasing, selling, or processing nonambulatory animals. Cal. Penal § 599f(a) & (b). A trade association challenged the state statute. California and others argued that the state statute was not preempted because it did not regulate the slaughtering process, only the kinds of animals that may be slaughtered and the sale of such meat. The Supreme Court disagreed, stating that California had imposed different operational requirements: "Where under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another." *Nat'l Meat Ass'n*, 132 S.Ct. at 970. The state statute was therefore preempted.

The reasoning, preemption scheme, and facts in *National Meat Association*, however, are quite different from those pertaining to a flavored tobacco product sales restriction under the FSPTCA. The preempted state statute regarding nonambulatory animals regulated facilities (slaughterhouses) and operations (how non-ambulatory animals were to be processed at those

facilities). Cal. Penal § 599f(c) (“No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.”) It did so even though the FMIA specifically stated that non-federal regulation of facilities and operations was preempted. 21 U.S.C. § 678. Unlike the FSPTCA, the FMIA contains no savings clause that permits limited non-federal regulation of facilities or operations. See *id.* Rather, the FMIA savings clause provides for non-federal regulation only over matters “other” than the facilities and operations regulated by the FMIA. *Id.* In other words, the FMIA savings clause is markedly different from the FSPTCA savings clause (that expressly permits non-federal regulation of sales and distribution even if it relates to the preempted area of product standards). See *Nat’l Ass’n of Tobacco Outlets v. Providence*, 731 F.3d at 82.

California contended that its sales ban operated only as an “incentive” for slaughterhouses to make certain operational choices. *Nat’l Meat Ass’n*, 132 S.Ct. at 972. The Supreme Court disagreed, stating that “the sales ban instead functions as a command to slaughterhouses to structure their operations in the exact way the [state statute] mandates.” *Id.* at 972-73. However, for the reasons explained above, a state or local restriction on the sale of flavored tobacco products would be at most an incentive to manufacturers to produce non-flavored products. It would not contain an operational command similar to the instruction as to how nonambulatory animals must be handled in a production facility so as to avoid a criminal sanction.

California also argued that there was no conflict between state and federal law because its statute only designated which animals were to be removed from the slaughtering process altogether, whereas the federal law only regulated the animals that were going to be turned into meat. *Nat’l Meat Ass’n*, 132 S.Ct. at 973. “We think not,” concluded the Supreme Court. *Id.* The Court pointed out that federal regulations regulated not only which animals may be turned into meat, but also which ones may not be. *Id.* The requirements of the state statute, therefore, did not fall outside the scope of the federal act but overlapped, and, being different, were preempted. *Id.* at 974. In contrast, a non-federal measure restricting sale of flavored tobacco products would regulate in an area that the FSPTCA expressly preserved and saved for state or local government action.¹⁸

¹⁸ Interestingly, in dicta the *National Meat Association* Court distinguished cases that upheld the power of a state to ban slaughtering horses for human consumption: “A ban on butchering horses for human consumption works at a remove from the sites and activities that the FMIA most directly governs. When such a ban is in effect, no horses will be delivered to, inspected at, or handled by a slaughterhouse, because no horses will be ordered for purchase in the first instance.” 132 S.Ct. at 974. This illustrates that a prohibition of a category of product does not amount to operational interference. Thus, a state or local measure that specifies an upper threshold of intensity of rum-flavored cigarillos to avoid a sales prohibition might be open to challenge (as similar to a restriction on processing of nonambulatory pigs), whereas a measure banning the sale of all flavored cigarillos is a prohibition of a category and not an operational command (similar to a prohibition on slaughter of any horse for human consumption.) This suggests that *National Meat Association* stands for the proposition that a state or local government would be on stronger ground when it regulates without exception, than when it permits an exception that is based on a product standard.

“In contrast, a non-federal measure restricting sale of flavored tobacco products would regulate in an area that the FSPTCA expressly preserved and saved for state or local government action”

In sum, not only are the preemption schemes of the FSPTCA and FMIA distinct, but so is a state or local restriction on the sale of flavored tobacco products likely to be very different from the state statute held to be preempted by *National Meat Association*. The reasoning and outcome of *National Meat Association* is therefore not a guide for how a court might review a state or local measure restricting the sale of flavored tobacco products.

D.2 Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246 (2004)

The other case that may be cited as authority for preemption of a state or local measure restricting sale or distribution of flavored tobacco products is *Engine Manufacturers Association v. South Coast Air Quality Management District* 541 U.S. 246 (2004). However, like *National Meat Association*, it can readily be distinguished because the preemption scheme is so different from that under the FSPTCA.

The Clean Air Act contains an express preemption clause that prohibits the enactment of state or local standards relating to vehicle emissions controls. 42 U.S.C. § 7543(a). An Air Quality Management District adopted Fleet Rules that applied to many types of vehicles in the greater Los Angeles basin. The Fleet Rules limited the types of vehicles that fleet operators could purchase or lease. *Engine Mfrs. Ass'n*, 541 U.S. at 249. The district court and 9th Circuit concluded that the Fleet Rules were not preempted because they only regulated the purchase of vehicles and did not compel manufacturers to meet an emissions "standard." *Id.* at 250. The Supreme Court disagreed, explaining that a local regulation of vehicle purchases was in effect a regulation of the underlying federal manufacturing standards. *Id.*

On its face, this decision appears to doom a local or state measure restricting the sale or distribution of flavored tobacco products. However, unlike the FSPTCA which in both the preservation and savings clauses carved out sales and distribution restrictions as proper areas for state or local regulation, the Clean Air Act did not carve out purchase regulations for state or local action. Rather, it did the opposite: the Clean Air Act included vehicle purchase provisions within the area of federally-approved action, as a way to meet federal clean air standards. 42 U.S.C. §§ 7581–7590; see also *Engine Mfrs. Ass'n*, 541 U.S. at 254-55. The status of non federal regulation of product purchases under the Clean Air Act and of non-federal regulation of product sales under the FSPTCA is therefore dissimilar. *Engine Manufacturers Association* does not support the view that state or local measures regulating the sale or distribution of flavored tobacco products are preempted under the FSPTCA.

E. Litigation arising from local measures regulating sale of flavored tobacco products

An increasing number of local governments,¹⁹ and one state,²⁰ have passed measures that, in one way or another, restrict sales of flavored tobacco products. Three of these measures have been challenged and all were upheld. Although none of these legal decisions bind a court evaluating a measure in California, they provide a clear guide for how a court might review a state or local measure enacted in California. A discussion of these three decisions follows:

E.1 The New York City ordinance and litigation

In October 2009, soon after passage of the FSPTCA, New York City adopted an ordinance that prohibited the sale of all flavored tobacco products, except in tobacco bars,²¹ and it did not prohibit the sale of products with menthol, mint, wintergreen or tobacco flavors. N.Y. City Admin. Code § 17-715.

U.S. Smokeless Tobacco Company ("USST") immediately sought an injunction against enforcement of the ordinance, arguing it was preempted by the FSPTCA. USST makes and distributes flavored smokeless tobacco products like chew, dip and snuff, so it was impacted by the ordinance. The U.S. District Court for the Southern District of New York denied USST's preliminary injunction motion. *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, No. 09 CIV. 10511 CM, 2011 WL 5569431 (S.D.N.Y., Nov. 15, 2011). In 2011, it granted summary judgment in favor of the City. *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of New York*, 703 F.Supp.2d 329 (S.D.N.Y. 2010). In 2013, the Second Circuit affirmed, agreeing that the ordinance was not preempted. *U.S. Smokeless Tobacco v. New York*, 708 F.3d 428.

USST argued that Congress, when it passed the FSPTCA, recognized the paradox between the harm caused by tobacco and the fact that many citizens smoke, and also that there is no national consensus to ban tobacco products altogether. *U.S. Smokeless Tobacco v. New York*, 708 F.3d at 433. Therefore, USST argued, Congress banned flavored cigarettes (other than tobacco and

¹⁹ Including, in California, Santa Clara County, and the Cities of Berkeley, El Cerrito, Hayward, and Sonoma. Sonoma's ordinance excepts menthol but the other ordinances prohibit all flavors.

²⁰ Maine, which has since 2009 prohibited cigars with flavors other than tobacco. 22 Me. Rev. Stat. Health & Welfare § 1650-D.

²¹ The ordinance defined a tobacco bar as a bar that, in 2001, generated 10% or more of its annual gross income from the on-site sale of tobacco products and rental of humidors. N.Y. City Admin. Code § 17-502(jj).

menthol flavors), yet forbade the FDA from banning cigarettes altogether. *Id.*, citing 21 U.S.C. § 387g(a) and (d)(3). USST argued that Congress did not intend for localities to upset that balance by prohibiting a flavored tobacco product altogether. *Id.* The court, however, disagreed, concluding that even though the FSPTCA denies that power to the FDA, it “nowhere extends that prohibition to state and local governments.” *Id.* Further, the court observed that while earlier versions of the legislation did reserve the power to prohibit exclusively to the federal government, the version that was actually enacted “does not forbid such bans by state and local governments.” *Id.* at 433, n.1.

The court also addressed USST’s express preemption argument, concluding that the preservation clause,

expressly preserves localities’ traditional power to adopt any ‘measure relating to or prohibiting the sale’ of tobacco products. § 387p(a)(2)(B). That authority is limited only to the extent that a state or local regulation contravenes one of the specific prohibitions of the preemption clause. *Id.* The only prohibition relevant here forbids local governments to impose ‘any requirement . . . relating to tobacco product standards.’

708 F.3d at 433 (emphasis in original).

Turning to those product standards, the court held that the statute “reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects . . .” 708 F.3d at 434. USST contended that the ordinance was artfully crafted to evade preemption by appearing to be a sales regulation, but was in effect a product standard. *Id.* The court was not persuaded because to accept USST’s contention would make the preservation clause superfluous: why would Congress give localities power to prohibit the sale of a product in one clause only to take it away in the next? The court therefore adopted “a narrower reading of the preemption clause that also gives effect to the preservation clause.” *Id.* Because the ordinance does “not clearly infringe” on the FDA’s authority to regulate the manufacturing of the products, it is not preempted. *Id.*

The court drew a distinction between the manufacturing process and the characteristics of a finished consumer product, observing that the local ordinance permissibly regulated the sale of a finished product that had certain characteristics, whereas the FDA’s exclusive authority applied to regulating the manufacturing process of that product. 708 F.3d at 434-35. “[T]he City does not care what goes into the tobacco or how the flavor is produced, but only whether final tobacco products are ultimately characterized by – or marketed as having – a flavor.” *Id.*

The court also reasoned that even if the ordinance did indirectly set a product standard within the terms of the preemption clause, it would still not be preempted because it fell within the savings clause. The savings clause allows state and local governments to set “requirements relating to the sale” of tobacco products. 708 F.3d at 435. USST argued that although the savings clause allows for “requirements,” it does not mention and therefore does not permit a complete “prohibition.” *Id.* The court decided it did not need to resolve that issue because the New York ordinance was not actually a prohibition: sales were permitted in tobacco bars. *Id.* at 435-36. It was uncontested that USST products were not actually sold in any of the eight tobacco bars in the City, but that was a result of a commercial choice rather than the statute on review, and there was also no evidence as to whether flavored products, other than smokeless tobacco, were sold at tobacco bars. *Id.* at 432, 436 n.3. Thus, the court did not resolve whether the savings clause encompassed an ordinance that was a complete prohibition.²²

Finally, the court assessed the overall purposes of the FSPTCA, to consider whether its interpretation of the ordinance and its conclusion that the ordinance was not preempted, comported with the overall objectives of Congress. Noting the shared goals of the FSPTCA and the ordinance – reducing tobacco use especially by young people – it concluded that the ordinance was not preempted. 708 F.3d at 436.

The *City of New York* case stands for the capacity of a local government to restrict the sale of tobacco products (other than cigarettes) that have flavors (other than menthol), and to do so even if the practical effect of the measure is to make the products commercially unavailable in the jurisdiction.

E.2 The City of Providence ordinance and litigation

In 2012 Providence, Rhode Island, adopted two ordinances regulating the sale of tobacco products. A price ordinance prohibited retailers from redeeming coupons that discounted tobacco products; the price ordinance is not relevant to this paper. A flavor ordinance prohibited all retailers, other than tobacco bars, from selling flavored tobacco products, but it exempted cigarettes and exempted the flavors of menthol, mint, wintergreen and tobacco. Providence, R.I., Code of Ordinances § 14-309. In other words, the flavor ordinance was very similar to the New York City ordinance discussed above. The legislative purpose was to reduce use of tobacco by youth. *Nat’l Ass’n of Tobacco Outlets v. Providence*, 731 F.3d at 75. In February 2012, the National Association of Tobacco Outlets, Inc. (NATO) and various manufacturers filed suit. The parties moved for summary judgment. The district court denied

“The *City of New York* case stands for the capacity of a local government to restrict the sale of tobacco products (other than cigarettes) that have flavors (other than menthol), and to do so even if the practical effect of the measure is to make the products commercially unavailable in the jurisdiction”

²² The court also described the ordinance as regulating a “niche product, not a broad category of products such as cigarettes.” *Id.* at 436. This suggests that the court might have looked less favorably on a broader regulation that, for instance, prohibited sale of all cigarettes.

“The *City of Providence* case stands for the proposition that a local government may restrict the sale of tobacco products other than cigarettes that have flavors other than menthol, even if by doing so it has an operational effect on product standards”

NATO's motion and granted the City's motion, and in 2013 the First Circuit affirmed. *Id.* at 74.

Plaintiffs argued that the ordinance was a product standard in disguise, and thus preempted. 731 F.3d at 82. Plaintiffs also argued that the ordinance was not encompassed within the savings clause because it was effectively a prohibition and the savings clause did not save local regulations that prohibited sales. *Id.* The court disagreed, noting that the ordinance “is not a blanket prohibition because it allows the sale of flavored tobacco products in smoking bars.” *Id.* Thus, like the Second Circuit in the *City of New York* case, the First Circuit did not resolve the issue of whether a regulation prohibiting sales was within the scope of the savings clause.

The First Circuit disagreed with the Second Circuit only on the issue of whether a sales restriction that functions as a command to manufacturers to operate in accord with a local standard is necessarily preempted. *Id.* at 83, n.11. The First Circuit concluded that “[g]iven Congress’ decision to exempt sales regulations from preemption, whether those regulations have an impact on manufacturing is irrelevant.” *Id.* Thus, in the view of the First Circuit, the nature or scale of the impact of a state or local measure on product standards – whether it is an incentive, motive or command – has no bearing on its validity, as long as it is a regulation only of sales or distribution.²³

The *City of Providence* case stands for the proposition that a local government may restrict the sale of tobacco products other than cigarettes that have flavors other than menthol, even if by doing so it has an operational effect on product standards.

E.3 The City of Chicago ordinance and litigation

In 2013 Chicago adopted an ordinance that went significantly further than the New York and Providence ordinances. It regulated selling or dealing in any tobacco products, including cigarettes, with a characterizing flavor, including menthol. Chicago, Ill. Code § 4-64-098. Such sales and dealing were prohibited at retail locations within 500 feet of a school, but permitted elsewhere and also permitted regardless of location at tobacconists that derived over 80% of gross revenue from sale of tobacco products. *Id.* The purpose of the restriction was to reduce smoking by adults and youth. Chicago, Ill. Ordinance 02013-9185 (Dec. 11, 2013). In 2014, an association of gas stations and small businesses in Chicago, and a convenience store that sold flavored tobacco products, filed suit in federal court. In 2015, the court granted the City's motion to dismiss the suit. *Independents Gas & Serv. Stations v. Chicago*, 2015 WL 4038743. The parties did not appeal.

²³ Plaintiffs raised other challenges to the flavored products ordinance based on the state constitution, but those contentions also failed. *Id.* at 83-85.

The district court accepted the reasoning and conclusions, without exception, of the Second Circuit in the *City of New York* case. See *Independents Gas & Serv. Stations v. Chicago*, 2015 WL 4038743 at *3-4. The court reasoned that by its plain terms the ordinance operated as a sales regulation and therefore fell squarely within the savings clause. *Id.* at *3. The Plaintiffs argued, as did the Plaintiffs in the First and Second Circuit cases, that while the preservation clause applied to measures that either related to or prohibited the sale of tobacco products, the savings clause only applied to measures that related to the sale of tobacco products. *Id.* at *3. Thus, they concluded, because the ordinance prohibited sales in certain areas and the power to prohibit was not saved, the ordinance was preempted. *Id.* The court found this argument “unpersuasive,” pointing out that the ordinance was not actually a prohibition because it allowed the sale of flavored products both beyond the 500 foot zone and in tobacconists. *Id.*

The Plaintiffs also argued that the ordinance was “a manufacturing regulation disguised as a sales regulation because it will cause manufacturers to reduce production of flavored tobacco product.” *Id.* at *3. The court held that “to run afoul of the preemption clause, the ordinance must function as a command to tobacco manufacturers” rather than only an “incentive or motivator.” *Id.* (internal quotations omitted). Concluding that the “ordinance regulates flavored tobacco products without regard for how they are manufactured . . . it is not a command to implement particular manufacturing standards and . . . is exempt from the FSPTCA’s preemption clause.” *Id.* at *4.²⁴

The *City of Chicago* case stands for the proposition that a local government may restrict the sale of all tobacco products, including cigarettes, that have any characterizing flavor other than tobacco, and may severely restrict sales within certain areas.

F. Other issues arising from regulation of flavored tobacco products

Federal preemption is the most likely, but not the only, legal argument that could be mounted against state or local measures regulating sales of flavored tobacco products.

F.1 Equal protection challenges

Legislation that contains an exemption for a particular type of retailer could be challenged by other similarly-situated retailers as arbitrary and

²⁴ The court also rejected arguments based on vagueness, retroactivity, and vested rights. (*Id.* at *4-6.)

²⁵ Note that the exemption for tobacco bars in New York City was not challenged because the lawsuit was filed by a manufacturer and not by a tobacconist.

“The *City of Chicago* case stands for the proposition that a local government may restrict the sale of all tobacco products, including cigarettes, that have any characterizing flavor other than tobacco, and may severely restrict sales within certain areas”

capricious, in violation of the constitutional guarantee of equal protection. For instance, in 2008, the City of San Francisco banned tobacco product sales in pharmacies, but exempted supermarkets and 'big box' stores that had pharmacies. Walgreen successfully challenged the ordinance on the ground that the City violated equal protection by not exempting Walgreen stores that, like supermarkets, also sold general merchandise. See *Walgreen Co. v. City and Cnty of San Francisco*, 185 Cal. App. 4th 424, 443–44 (2010). However, if the exception is based on protection of public health or there is no exception at all, the measure is more likely to satisfy rational basis review and be upheld. See *Safeway Inc. v. City and Cnty of San Francisco*, 797 F. Supp. 2d 964, 973 (N.D. Cal. 2011) (upholding San Francisco's amended pharmacy ordinance that contained no exception). It is important to be clear that an equal protection challenge does not go to the power of a state or local government to act, but only whether it may except certain businesses from its action. Thus, a tobacco bar might raise an equal protection challenge against a flavored product sales ordinance that excepts hookah bars but not tobacco bars.²⁵

F.2 Vested interest and retroactivity challenges

A retailer or manufacturer could argue that it has a constitutionally protected right to sell flavored tobacco products. The fact, however, that current law or a license may permit an entity to sell a product does not mean that the right has vested and cannot be removed. Courts have not recognized a constitutional right to sell specific tobacco products. Further, California law recognizes that even if a right has vested it must yield to the state's police power, unless a specific business is arbitrarily singled out. See *O'Hagen v. Bd. of Zoning Adjustment*, 19 Cal. App. 3d 151, 159; see also *Safeway v. San Francisco*, 797 F. Supp. 2d at 970-71. Again, this is not a challenge to the state or local government's power to act in general, but its power to regulate a specific entity. This points to the importance of basing any exemptions on well supported grounds.

Related to this argument, a retailer or manufacturer could argue that a law violates due process because it applies retroactively. The standard for impermissible retroactivity, however, is whether the new law "attaches new legal consequences to events completed before its enactment," not just that it unsettles existing expectations. *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994); see also *Independents Gas & Serv. Stations v. Chicago*, 2015 WL 4038743 at *4-6. In other words, a law that takes away the retail tobacco license from a store that sells flavored tobacco products might be vulnerable

²⁵ Note that the exemption for tobacco bars in New York City was not challenged because the lawsuit was filed by a manufacturer and not by a tobacconist.

to challenge, but one that permits the store to continue to do business and to renew its license while prohibiting only its sale of flavored products, attaches no new legal consequence other than the limited one supported by police power.²⁶

F.3 First Amendment challenges

It could be argued that a regulation of flavored tobacco products implicates the speech rights of a retailer or manufacturer if the measure provides that a claim that a product has a certain flavor constitutes presumptive evidence that the product is in fact a flavored product.²⁷ However, if a measure regulates only sales of a product, not speech, then the First Amendment is not implicated: as long as only sale is prohibited, the retailer and manufacturer are free to say whatever they want about the product. Because First Amendment rights are not implicated, the state or locality need show only that the law has a rational basis, and the protection of public health satisfies this test. Indeed, even if speech rights were implicated, a state or locality could argue that the protection of public health was a compelling interest.²⁸

It could also be argued that a prohibition on the “offer” for sale of flavored tobacco products implicates the First Amendment because an “offer” is a form of commercial speech. However, if the law prohibits the sale of the products, then an offer to sell them would be an offer to engage in unlawful conduct. Such an offer does not receive First Amendment protection. *United States v. Williams*, 553 U.S. 285, 297 (2008).

F.4 Vagueness

Legislation is often challenged on grounds of vagueness.²⁹ Prevention is the best cure, i.e., a well-drafted law. For instance, if an ordinance prohibits sales from stores located within 1,000 feet of a school, it might be prudent to

²⁶ A retroactivity argument based on the Ex Post Facto Clause would likely fail unless the ordinance includes criminal penalties.

²⁷ For instance, a measure providing that: “A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such product, that such product has or produces a characterizing flavor shall constitute presumptive evidence that the product is a flavored tobacco product.”

²⁸ Such arguments were raised, analyzed at length, and rejected in *National Association of Tobacco Outlets v. Providence*, 2012 WL 6128707 at *4-9. However, because of the possibility that the inclusion of this evidentiary presumption could lead to litigation and delay in enforcement, state or local governments may choose to avoid including such a presumption. In that case, a state or local government could introduce evidence of, for instance, a pack of cigarettes with the word “menthol” printed on it in green letters, and then argue that this labeling tended to show that the cigarettes had a characterizing flavor of menthol and/or was offered for sale and purchased with that expectation. But there would be no legal presumption favoring that argument.

²⁹ An ordinance is unconstitutionally vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” or “if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

“If a measure regulates only sales of a product, not speech, then the First Amendment is not implicated: as long as only sale is prohibited, the retailer and manufacturer are free to say whatever they want about the product”

“It is unlikely that a state preemption challenge could be brought against a local ordinance restricting sale of flavored tobacco products because no state law limits the authority of local governments to regulate the distribution or sale of flavored tobacco products within their boundaries”

specify whether this distance is measured from the exterior boundary of the school or from a central point, whether it includes charter and/or private schools, and that enforcement of the ordinance will begin only after all retailers have received notice. Similarly, prudence counsels that a law specify whether it prohibits only the sale of a product, or also distribution, offer for sale and/or possession for sale.

F.5 State preemption

It is unlikely that a state preemption challenge could be brought against a local ordinance restricting sale of flavored tobacco products because no state law limits the authority of local governments to regulate the distribution or sale of flavored tobacco products within their boundaries. See Cal. Health & Safety § 118950(e); Cal. Bus. & Prof. §§ 22960(c), 22961(b), 22962(e), and § 22971.3.

G. Definitions and scope of state or local measures

It is beyond the scope of this paper to consider the pros and cons of regulating the sale of flavored tobacco products, or what the proper scope of a state or local measure should be. However, the following general points are offered.

The measure should define what constitutes a “flavored tobacco product.” This is typically done by reference to a “characterizing flavor.”³⁰ The term “characterizing flavor” also needs definition, in particular as to whether or not it includes menthol flavor.³¹ The first local restrictions on flavored products excluded menthol, but it appears that this was a result of policy rather than legal considerations. As explained earlier, although the FSPTCA imposes limits on the FDA’s power to regulate products with menthol flavor, it does not place those limits on the powers of state or local governments to enact sales or distribution restrictions.

Some of the existing ordinances give examples of prohibited flavors, such as candy or alcohol flavors. This is not necessary, but may serve to emphasize that the government is specifically seeking to reduce youth smoking and initiation by restricting sale of products with flavors with youth appeal. The greater the extent to which the restriction is defined by the characteristics of the consumer product, the more impervious it will be against a challenge that it is a disguised product standard. Thus, some existing ordinances include a

³⁰ For instance, a “flavored tobacco product” means any tobacco product or component thereof that imparts a characterizing flavor.

³¹ For instance, the term “characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product. This type of definition, which is based on the character of the product as experienced by a consumer, sets the regulation apart from one based on a product standard.

clause that “no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.” Such language may tend to demonstrate that the sales regulation is entirely distinct from a product standard.³² Some measures also include an evidentiary rule that any statement characterizing the flavor of the product, made by the manufacturer or its agent, amounts to a presumption that it is a flavored tobacco product.

It is also advisable to identify clearly what constitutes a regulated product. For instance, does it include electronic nicotine delivery devices and/or components, such as flavored e-liquids? Does it include electronic aerosol or vapor delivery devices that do not contain nicotine or tobacco and are not marketed as tobacco products or nicotine delivery devices?³³

Finally, the legislative body should make findings, state the purpose of the measure, and explain how the measure is intended to achieve that purpose.³⁴ This purpose, presumably, will be within the entity’s police power to safeguard public health, welfare, and safety. It would therefore be consistent with the statutory directive from Congress to the FDA to act so as to protect the public health. See, e.g., 21 U.S.C. § 387g(a). Consistency between the purposes of federal, state, and local statutory measures will tend to protect state and local measures from federal preemption.

H. Other areas of state and local authority

This paper focuses on the power preserved under the FSPTCA for state and local governments to regulate sales and distribution of tobacco products. However, the FSPTCA also preserves state and local power to enact other measures. For instance, local restrictions and prohibitions on the use and possession of flavored tobacco products are not preempted, but they might be difficult to enforce. For instance, if a citizen returns from another state with a prohibited product in his or her possession, what effective enforcement mechanism would a city or state possess? If enforcement was attempted, would it be an efficient means to achieve the purpose of the

³² Legislators should also be aware that the characterizing flavor of “tobacco” is itself an elaborate construct. See Robert N. Proctor, *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* 31-45, 494-505, 2011. The leaves of a tobacco plant are a far cry from the product found rolled within a tobacco-flavored cigarette tube. Tobacco is cured in ways that change its pH to make it inhalable and sweeter, and sugars and flavoring agents are added to create what is then characterized as “tobacco” flavor. *Id.*

³³ This would regulate electronic devices that impart only a flavor, or that provide flavor to marijuana or other substances.

³⁴ Legislators should make these findings and state these purposes in an explicit fashion, rather than rely on them being inferred from legislative history or testimony. As discussed above, some judges are skeptical about the value of legislative history in statutory analysis.

“It is also advisable to identify clearly what constitutes a regulated product. For instance, does it include electronic nicotine delivery devices and/or components, such as flavored e-liquids? Does it include electronic aerosol or vapor delivery devices that do not contain nicotine or tobacco and are not marketed as tobacco products or nicotine delivery devices?”

“There does not, appear to be a legal barrier to a state or local government enacting a complete sales prohibition on the sale of menthol cigarettes, flavored tobacco products, and/or flavored electronic cigarettes”

measure, which might be to reduce youth access to flavored products? A ban on possession might also prompt challenges under the Commerce Clause. How would a truck transporting prohibited products through the jurisdiction be distinguished from one delivering products for sale within the jurisdiction? The FSPTCA also gives states and localities power to restrict advertising. Such regulations would be likely to raise expensive and time-consuming First Amendment challenges. A pragmatic view might be that if a retailer cannot sell an item within the jurisdiction then the retailer is unlikely to devote resources to advertising it or offering coupons, thus making unnecessary a restriction on marketing or promotion. It is beyond the scope of this paper to consider the many policy and enforcement issues that might be implicated by state or local measures that go beyond limiting the sale and/or distribution of menthol cigarettes, flavored tobacco products, and flavored electronic smoking devices or the cartridges and liquids sold separately for these devices.

I. Conclusions

State and local governments have police power to act to protect public health. This includes enacting measures to regulate tobacco products. Under the FSPTCA, state and local power to enact sales and/or distribution measures is expressly preserved and saved from preemption. This is the case even if the measures are more stringent than under federal law and even if the measures relate to a product standard. (State and local governments have no power to regulate product standards themselves.) The power includes the power to regulate all types of tobacco products, including cigarettes, and all characterizing flavors, including menthol. A state or local measure may contain exceptions. Several existing measures contain exceptions for certain products (e.g., menthol cigarettes), for certain retailers (e.g., tobacco bars), or for certain areas (e.g., zones around schools). Three such ordinances have, to date, been challenged in courts, and all have been upheld by federal courts in New York, Rhode Island, and Illinois. All of these ordinances contain limited exceptions of various kinds. Thus, no court, to date, has been required to consider the validity of a complete prohibition of sales and distribution of all types of tobacco products that have any characterizing flavor other than tobacco. There does not, however, appear to be a legal barrier to a state or local government enacting a complete sales prohibition on the sale of menthol cigarettes, flavored tobacco products, and/or flavored electronic cigarettes.