Making a Move on Menthol:
Regulating Flavored Tobacco Products in Your Community

Nov. 13, 2014
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- Covering public health policy topics related to tobacco control
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The Tobacco Control Legal Consortium

The legal network supporting the tobacco control movement in the United States.
Global Tobacco Control: Lessons for the U.S.

Making a Move on Menthol: Regulating Flavored Tobacco Products in Your Community

Nov. 13, 2014
Presenters

- Moderator: Mike Freiberg, Tobacco Control Legal Consortium
- Delmonte Jefferson, National African American Tobacco Prevention Network
- Jessica Yamauchi, Hawaii Public Health Institute
- Kendall Stagg, Chicago Department of Health
Moderator:

Mike Freiberg
Staff Attorney
Tobacco Control Legal Consortium
Presenter:

Delmonte Jefferson

Executive Director
National African American Tobacco Prevention Network
Presenter:

Jessica Yamauchi

Executive Director
Hawaii Public Health Institute / Coalition for a Tobacco-Free Hawaii
Presenter:

Kendall Stagg, J.D.
Senior Advisor to the Commissioner
Chicago Department of Public Health
Timeline of FDA “Action” on Menthol

- **2009**: Congress adopts Family Smoking Prevention and Tobacco Control Act, exempts menthol from flavor ban

- **March 2011**: TPSAC report concludes that “removal of menthol cigarettes from the marketplace would benefit public health in the United States.”

- **July 23, 2013**: Second FDA report concludes that menthol use is associated with youth smoking initiation and greater addiction.

- **July 23, 2013**: FDA issues an Advance Notice of Proposed Rulemaking (ANPRM) to take public input on menthol in cigarettes.

- **November 2013**: Docket closes.
State and Local Authority

• **Preservation Clause** in Tobacco Control Act preserves authority of state and local governments to adopt tobacco control measures related to sale (including prohibition of sale), distribution, advertising, promotion, information reporting, taxation of tobacco products, and related policies.

• **Preemption Clause** prohibits state and local governments from adopting tobacco product standards, and a few related policies.

• **Savings Clause** reiterates that state and local governments can adopt regulations relating to sale, distribution, possession, information reporting, 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…
Local Flavor Regulations

“It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.”

*New York City Administrative Code § 17–715*

- “Tobacco product” does not include cigarettes
- Eight establishments meet definition of “tobacco bar.”
- “Flavored” excludes “the taste or aroma of tobacco, menthol, mint or wintergreen.”

“It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar.”

*Providence, Rhode Island, City Code § 14-309*

- “Tobacco Product” does not include cigarettes
- “Smoking bar” requires tobacco revenues > 50%
- “Flavored” excludes “the taste or aroma of tobacco, menthol, mint or wintergreen.”
Local Authority to Regulate Menthol
Banning Menthol
An Endgame Strategy to Tobacco Use

Delmonte Jefferson
What’s The Deal With Menthol?

• African American menthol use has skyrocketed in the last 50 years.

2006 - > 80%
1976 - 44%
1968 - 14%
1953 - 5%

What’s The Deal With Menthol?

- Priority populations have been disproportionally targeted with this menthol assault.

African Americans - 83%
Asians - 51%
Latinos - 47%
Whites - 30%

(Gardiner 2004)
What’s The Deal With Menthol?

- The assault on African American communities was/is systematic and intentional.
- African American Targeted Television Advertising
- Ebony and Jet Advertisements
- Community Philanthropy
- Kool Jazz Festivals
- Cigarette Sampling Vans
Focus vs. Non Focus Communities  (Wright, 2009)

- **Focus Communities: Inner-city, Colored and Poor**
  - Less expensive, more desirable promotions
    - Buy 1, Get X Free
    - Summer/ Holidays

- **Non-focus Communities: Upscale, suburban, rural and white**
  - More expensive, less desirable promotions
    - Buy 2, Get X Free
    - Buy 3, Get X Free

- **Menthol Cigarettes Cheaper**
  - Non-focus- 50 cents off/ pack ($5.00 off/ ctn)
  - Focus- $1.00-$1.50 off/ pack ($10.00-15.00 off/ ctn)
What’s The Deal With Menthol?

Menthol cigarettes are cheaper for African Americans

- For each 10% increase in the proportion of African American students:
  - Newport discount 1.5 times greater
  - The proportion of menthol advertising increased by 5.9%,
  - Newport promotion were 42% higher and
  - The cost of Newport was 12 cents lower.

(Henriksen, et al., 2011)
## What’s The Deal With Menthol?

Storefront Cigarette Advertising Differs by Racial/Ethnic Community

<table>
<thead>
<tr>
<th></th>
<th>Brookline</th>
<th>Dorchester</th>
<th>p-value</th>
</tr>
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<tbody>
<tr>
<td>n</td>
<td>42</td>
<td>56</td>
<td></td>
</tr>
<tr>
<td>%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retailer w/ Ads</td>
<td>42.9</td>
<td>85.7</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Small Ads</td>
<td>56.8</td>
<td>20.1</td>
<td>&quot;</td>
</tr>
<tr>
<td>Large Ads</td>
<td>2.0</td>
<td>23.7</td>
<td>&quot;</td>
</tr>
<tr>
<td>Menthol Ads</td>
<td>17.9</td>
<td>53.9</td>
<td>&quot;</td>
</tr>
<tr>
<td>Average Price</td>
<td>$4.94</td>
<td>$4.55</td>
<td>&quot;</td>
</tr>
</tbody>
</table>

(Seidenberg, et al., 2010)
What’s The Deal With Menthol?

• Menthol is used to initiate youth and young adults to tobacco products.

Source: 2004 to 2008 SAMSHA National Survey on Drug Use and Health (NSDUH)
What’s The Deal With Menthol?

• A higher percentage of adolescent and young adult smokers smoke mentholated cigarettes than any other age group. (page 178 of the 2012 SGR)

• Mentholated flavoring increases the addictive potential of smoking among youth. (page 178 of the 2012 SGR)

• Menthol and other flavor additives including fruit and candy flavoring were used as marketing tools to attract young smokers. (page 600 of the 2012 SGR)

• Menthol cigarettes are more likely to be marketed in stores near schools with higher proportion of African American students. (page 543 of the report)

Source: “Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General” 2012
What’s The Deal With Menthol?

The Ultimate Candy Flavoring; Menthol Helps The Poison Go Down Easier

The whole smoking experience [with menthol]...thus becomes much more pleasant. Negatives are minimized (tobacco taste and harshness); positive attributes are superimposed (coolness and menthol taste).

British American Tobacco Company (1982)
What Are The Consequences?

Cancer Incidence Rates* by Race and Ethnicity, 2005-2009

- Men
- Women

- Hispanic: 333.2
- American Indian/Alaska Native: 418.7
- Asian American/Pacific Islander: 360.3
- African American: 286.2
- White: 327.5
- African American: 396.8
- White: 619.7
- White: 424.0
- White: 543.1

*Age-adjusted to the 2000 US standard population.
†Persons of Hispanic origin may be of any race.
What Are The Consequences?


*Per 100,000, age-adjusted to the 2000 US standard population.
†Persons of Hispanic origin may be of any race.
### Why Is Banning Menthol An End Game Strategy?

**All Tobacco Products Contain Menthol**

Menthol content of US tobacco products

<table>
<thead>
<tr>
<th>Product</th>
<th>Menthol (mg)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regular (non-menthol) cigarettes</td>
<td>0.003</td>
</tr>
<tr>
<td>Menthol cigarettes (weak effect)</td>
<td>0.1-0.2</td>
</tr>
<tr>
<td>Menthol cigarettes (strong effect)</td>
<td>0.25-0.45</td>
</tr>
<tr>
<td>Pipe tobacco</td>
<td>0.3</td>
</tr>
<tr>
<td>Chewing tobacco</td>
<td>0.05-0.1</td>
</tr>
</tbody>
</table>

Hopp, 1993
Why Is Banning Menthol An End Game Strategy?

TPSAC Estimates 2010-2050
Based on models conducted by Méndez, 2011

<table>
<thead>
<tr>
<th>Description</th>
<th>Cumulative Excess Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2020</td>
</tr>
<tr>
<td>General Population</td>
<td>17,182</td>
</tr>
<tr>
<td>African Americans</td>
<td>4,716</td>
</tr>
</tbody>
</table>
Why Is Banning Menthol An End Game Strategy?

## TPSAC Estimates 2010-2050
Based on models conducted by Méndez, 2011

<table>
<thead>
<tr>
<th>Description</th>
<th>Cumulative Excess Smoking Initiation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2020</td>
</tr>
<tr>
<td>General Population</td>
<td>2,288,534</td>
</tr>
<tr>
<td>African Americans</td>
<td>461,273</td>
</tr>
</tbody>
</table>
National organizations, cities and local governments are well informed and mobilizing for action.

- NAATPN
- AATCLC
- Save Lives Ban Menthol Cigarettes
- Citizens Commission To Protect The Truth
- Delta Sigma Theta Sorority, Inc.
- Legacy
- City of Chicago, IL
- Bob Doyle – Menthol Mondays
- Tobacco Control Legal Consortium

Why Is Banning Menthol An End Game Strategy?

Save Lives: Ban Menthol Cigarettes
Mission: To ban the use of menthol in all tobacco products

COMMUNITY ACTION KIT

Contact: Rev. Jesse Brown
Number: 215.680.3790
Email: banmentholcigarettes@gmail.com
Facebook: Save Lives: Ban Menthol Cigarettes
Twitter: @BanMentholCigs
Why Is Banning Menthol An End Game Strategy?

Former Surgeon Generals and HHS Secretaries are champions of the movement to ban menthol.
Why Is Banning Menthol An End Game Strategy?

Emerging Tobacco Products May Contain Menthol
Menthol is a social justice issue

- Predatory marketing to vulnerable populations
- Dense advertising in focus communities
- Price discounts in focus communities
- Cigarette sampling vans
- Donations to African American elected officials
- Sponsorships of African American community events
Why Is Banning Menthol An End Game Strategy?

It’s Been Done Before, It Can Be Done Again!
The End

IT'S TIME ENERGIZE THE MOVEMENT

www.NAATPN.org
Overview of 2014 Legislative Bills in Hawaii relating to Menthol
Coalition for a Tobacco-Free Hawaii

Jessica Yamauchi
November 13, 2014
BACKGROUND:

- The Coalition for a Tobacco-Free Hawaii (Coalition) and the Hawaii State Department of Health worked collaboratively to pass a measure that would prohibit the sale of flavored tobacco products including menthol.
- This initiative had been started by REAL – a youth movement in Hawaii for over ten years that fought against industry influence. Unfortunately, the program folded at the end of 2013.
Bills Introduced

- SB 2222, Relating to Flavored Tobacco Products
- Companion Bill HB 1788
- Support from Keiki Caucus
Goal of the bill

• To prohibit the sale, offering for sale, or distribution of any flavored tobacco product, including menthol products and electronic smoking devices, within the State beginning on January 1, 2015
Main components of the bill

- Provided background - rationale
- Defined:
  - Characterizing flavor
  - Cigarette
  - Component part
  - Constituent
  - Electronic smoking device
  - Flavored tobacco product
  - Smoke constituent
  - Tobacco product
• SB 2222 was referred jointly to:
  ▫ Senate Commerce and Consumer Protection Committee
  ▫ Senate Judiciary and Labor Committee
  ▫ Ways and Means

• HB 1788 was referred to:
  ▫ House Health Committee
  ▫ House Judiciary Committee
  ▫ HB 1788 was never heard.
First Hearing on SB 2222 (CPN/JDL)

- Senate was filled with opposition from the e-cigarette industry.
- Menthol was not brought up at all
- Passed with amendment – deleting e-cigarettes from the bill.
Concern about menthol arose – industry led the legislators to believe that because menthol is in all cigarettes it would be difficult to ban menthol (all cigarettes). Committee deferred Decision Making
Met with WAM members

• Support for the bill focused on:
  ▫ Flavored tobacco products, including menthol, target youth
  ▫ Menthol is a flavor additive and is a “characterizing” flavor in cigarettes
  ▫ Bill refers to “characterizing” flavors that are on the package or labels and are usually detectable by the consumer through smell and taste.
  ▫ Flavors are additives and menthol is a flavor additive.
SB 2222

- Passed WAM, Passed the Senate with very little opposition
- Crossed to the House
SB 2222

- Referred jointly to House Consumer Protection and Commerce and Judiciary; then to Finance.
- CPC refused to hear the bill – eventually waived off
- Finance did not hear the bill (no hearing in the House was held)
We are making progress!

• 2014 was the **first** time the Hawaii State Legislature heard bills relating to prohibiting the sale of flavored tobacco products.

• We strongly encourage state and municipalities to pursue tobacco control policies addressing flavored tobacco products INCLUDING menthol.

![Make Tobacco History](image)
Contact info:

Jessica Yamauchi
jessica@tobaccofreehawaii.org
(808) 591-6508
To view the complete bill:
www.capitol.hawaii.gov
Making a Move on *Menthol*: Regulating Flavored Tobacco Products in Your Community

Kendall Stagg, JD
Chief of Policy | Senior Advisor
Chicago Department of Public Health

November 11, 2014

#HealthyChicago
Tobacco control is one of the top priorities of Healthy Chicago — and for good reason.

“Ensuring that our children don’t start smoking is a key priority for the City of Chicago.”

—Mayor Rahm Emanuel

In the past year, Chicago...

- Passed a life-saving tax measure: **Highest priced cigarettes in the country**
- Adopted the nation’s only law — at any level of government — that **regulates menthol cigarettes as a flavored tobacco product**
- Was the first of the 20 largest U.S. city to propose legislation **to include e-cigarettes in their clean indoor air law**
- Passed **comprehensive regulations on sales and distribution of eCigs, too**, including flavored eCigs

Click on links above for additional information
Smoke Free Parks

580 parks
90 gardens
90 museum campuses
9 lakefront harbors
9 ice skating rinks

More than 24 miles of lakefront property, including 17 historic lagoons

NOT IN OUR PARKS
Free as a bird? Not so much. Chicago Park District votes to ban smoking in city’s parks, harbors page 3
Institutional Policies, too!

6 Chicago Housing Authority properties
8 Hospitals
Roosevelt University, Robert Morris University, the University of Illinois at Chicago, Rush, and Moody, and 7 Chicago City College locations
Mayor Emanuel Takes Swift Action to Protect Kids...

- Children aged 12 – 17 smoke menthol more than any other age group.
- Less than 48 hours after the FDA’s report was released, Mayor took swift action.

Mayor Emanuel Recognized for Visionary Leadership...
A Special Town Hall Meeting:
Reducing Menthol Use Among Chicago’s Youth
Thursday, September 19th 6:30 – 8:00PM
Austin Town Hall Park Field House
5610 W. Lake Street

In Collaboration with Representative LaShawn Ford

Refreshments generously provided by American Lung Association of Illinois

Last week, Chicago Mayor Rahm Emanuel took an unprecedented step to protect thousands of Chicago residents from the dangers of tobacco. Mayor Emanuel requested the Chicago Board of Health and the Chicago Department of Public Health (CDPH) to undertake a series of initiatives aimed at curtailing the use of menthol cigarettes by youth in Chicago.

The National African American Tobacco Prevention Network (NAATPN) commends Mayor Emanuel's leadership on this issue, and we will provide full support to the Mayor as he works to loosen the death grip menthol flavored cigarettes have on thousands in Chicago. Nowhere is menthol's grip felt more than in African American communities.

The Network for LGBT Health Equity

Nancy Brown
Chief Executive Officer

The Honorable Rahm Emanuel
Mayor of Chicago
121 N. LaSalle Street
Chicago City Hall, 4th Floor
Chicago, IL 60602

Dear Mayor Emanuel:

On behalf of the American Heart Association, I would like to congratulate you for putting health first by calling for policy solutions to curb consumption of menthol-flavored cigarettes among Chicago's youth.

#NoMoreMenthol
A CALL TO ACTION
AND A GUIDE FOR LOCAL ACTION...

Healthy Chicago
Transforming the Health of Our City
Curbing the use of menthol-flavored cigarettes and other flavored tobacco products among youth: Policy recommendations and other strategies for local action.
Chicago Board of Health
Mayoral Report, November 2013

- We all know it takes a long time to get things done in Washington, D.C.
- When action is delayed at the state and Federal levels, citizens expect their local government to act.
- Local governments have always led the way on tobacco control.

Flavored tobacco products simply do not belong near schools...

Tobacco retail outlets near schools have been found to contain more cigarette advertising than outlets farther from schools.

This is especially true of schools located in minority communities.
We win on social justice arguments!

“It is socially unjust to allow the flavored cigarettes that are targeted aggressively to minority communities to remain unregulated years after all other flavored cigarettes were removed from the market.”
— Commissioner Bechara Choucair

Public Education Campaigns Should Reinforce Need for Change...

BURNED by Menthol campaign generated
More than 22 million media impressions

“Take Pride” generated more than 12.5 million impressions
Record Number of Smokers Seeking Cessation Support…

- 24,496 calls in 2013
- 10,000 more calls than 2012
- More than two thirds of calls from minority communities
- More than half were uninsured

Chicago Tobacco Quitline Calls

<table>
<thead>
<tr>
<th>Year</th>
<th>July-Dec</th>
<th>Jan-June</th>
<th>July-Dec</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td></td>
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</tbody>
</table>

Provided by the Illinois Department of Public Health, Illinois Tobacco Quitline.
YOUTH SMOKING IS DOWN… WAY DOWN!

Percent of Students Who Smoke, Chicago

Year

Percent

2003

16.8

2005

15.9

2007

13.9

2009

13.6

2011

13.6

2013

10.7

Legend:

- Percent of students who smoke, Chicago

Note:

The graph shows a decreasing trend in the percent of students who smoke from 2003 to 2013. The percent dropped from 16.8% in 2003 to 10.7% in 2013.
Two separate lawsuits filed by tobacco retailers.

Claims asserted include:

- Equal Protection (No rational basis)
- Due Process
- Unconstitutionally vague
- Preempted by Tobacco Control Act of 2009
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEPENDENTS GAS & SERVICE STATIONS ASSOCIATION, INC., Plaintiff,

v.

CITY OF CHICAGO, Defendant.

CASE NO. 14 C 7536

ORDER

For the reasons stated below, the Court denies plaintiff's motion for a temporary restraining order (dkt. no. 8). The case remains set for a status hearing on today's date to set a schedule for further proceedings.

STATEMENT

The plaintiff in this case, a trade association called the Independents Gas & Service Stations Association, Inc. (IGSSA), has sued the City of Chicago seeking to enjoin enforcement of a city ordinance that prohibits the sale of flavored tobacco products, including menthol cigarettes, within 500 feet of any school. IGSSA challenges the ordinance on multiple grounds. It has moved for entry of a temporary restraining order barring enforcement of the ordinance, asserting only one ground: the ordinance is preempted by federal law. IGSSA contends that the federal Family Smoking Prevention and Tobacco Control Act, which establishes product standards for cigarettes, expressly authorizes menthol as an additive in cigarettes and preempts state and local laws that are different from or in addition to the Act's product standards.
Independents Gas & Service Stations Associations, Inc. v. City of Chicago | Case No: 14 C 7536

If Chicago were to ban the sale of menthol-flavored tobacco products outright, [plaintiffs] might have a colorable argument that the city was imposing a requirement that ran afoul of the Act's preemption term. But Chicago has not imposed an outright ban; it has simply regulated where flavored tobacco products may be sold. The ordinance falls squarely within the exception to preemption established by the federal Act. See U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 433, 435-36 (2d Cir. 2013) (rejecting preemption challenge to New York City ordinance governing sale of flavored tobacco products); see also Nat'l Ass'n of Tobacco Outlets, Inc. v. City Providence, 731 F.3d 71, 82-83 (1st Cir. 2013) (rejecting preemption challenge to Providence ordinance prohibiting most retail sales of flavored tobacco products other than cigarettes).
...with respect to [a Due Process] claim, the plaintiffs face the problem that a substantive Due Process claim, or a “takings” claim, requires the provision of a property right by the state; a right to sell a heavily regulated product, however, is not such a property right ... Nor does the plaintiffs’ procedural due process claim seem likely to prevail...The plaintiffs’ Equal Protection challenge also appears quite weak; the Ordinance does not target a suspect class and its ostensible objective—to reduce the use of tobacco by minors by limiting its availability in areas where there tend to be large concentrations of minors, namely around schools—is not irrational ... And finally, the plaintiffs argument that federal law preempts the Ordinance appears to fly in the face of the express language of the preemption provision in the applicable federal statute (the Family Smoking Prevention and Tobacco Control Act, or “FSPTCA”), which explicitly states that its preemption provision “does not apply to requirements relating to the sale ... of, tobacco products ...” 21 U.S.C. § 387p(a)(2)(B) (emphasis added).
Kendall Stagg, JD
Chief of Policy | Senior Advisor
Chicago Department of Public Health

Kendall.Stagg@cityofchicago.org

@KendallStagg

#HealthyChicago
HEALTHY CHICAGO
CHICAGO DEPARTMENT OF PUBLIC HEALTH

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