The use of flavors in commercial tobacco products has been key to keeping smokers addicted to harmful products and recruiting new users. Menthol cigarettes remain a major share of all cigarettes smoked in the United States, and the epidemic in youth e-cigarette use has largely been driven by flavored vapor products. Federal tobacco control policy gaps and delays in rulemaking have created a need for local solutions. New York State and many of its local communities have been at the forefront of developing policies to reduce access to flavored tobacco products, and, when necessary, defending them in court. This brief will discuss common legal theories the tobacco industry uses to challenge flavored tobacco sales policies and the guidance courts have provided that can be used to craft legally defensible policies.

Federal, State, and Local Authority to Regulate Tobacco

Federal, state, and local governments have distinct yet sometimes overlapping authority to regulate tobacco products. At the federal level, the 2009 Family Smoking Prevention and Tobacco Control Act granted the U.S. Food & Drug Administration (FDA) the authority to regulate the manufacturing, marketing, and sale of all tobacco products through tobacco product standards; premarket approval of all new tobacco products; labeling requirements; and advertising...
restrictions (subject to review under the First Amendment).3 The Tobacco Control Act prohibited all flavored cigarettes except for menthol cigarettes and authorized the FDA to prohibit menthol cigarettes and other flavored tobacco products through its rulemaking process.4 The Tobacco Control Act also contains provisions that limit FDA authority. For example, the FDA can set tobacco product safety standards,5 but it cannot ban entire categories of tobacco products6 or drive nicotine yields of a tobacco product down to zero.7

At the state level, the Tobacco Control Act reserves for state and local governments the authority to enact or enforce any law or measure related to tobacco products that is more stringent than federal law, as long as it is not in an area reserved for federal action.8 Under the Tobacco Control Act, state and local governments are authorized to regulate the sale and distribution of tobacco products,9 the time, place, and manner of tobacco advertising and promotion,10 and the taxation of tobacco products.11

At the local level, the Home Rule Article (IX) of the New York State Constitution generally grants local government authority to pass laws relating to their “property, affairs or government,” so long as the laws are not inconsistent with the State Constitution or state law.12 The New York State Constitution empowers local governments to legislate the “health and well-being of persons or property therein.”13 State law also grants local boards of health, which are overseen by the New York State Department of Health, the authority to issue regulations “necessary and proper for the preservation of life and health.”14

Flavored Tobacco Regulation in New York

The current patchwork of regulation of flavored tobacco products in New York State demonstrates the interplay among federal, state, and local authority:

Flavored Cigarettes: In addition to enforcing the Tobacco Control Act’s prohibition on flavored cigarettes,15 the FDA has been engaged in a lengthy rulemaking process on banning menthol in cigarettes, but it has yet to finalize any regulations.16 Sales of menthol cigarettes also are permitted under New York State law. At the local level, in 2022 the Westchester County Board of
Legislators voted to prohibit sales of menthol cigarettes in the county, but the policy was vetoed by the County Executive and did not take effect.\textsuperscript{17}

**Flavored Vapor Products:** New York State law prohibits the sale of all flavored vapor and e-liquids, other than flavorless and tobacco-flavored.\textsuperscript{18} This policy is more stringent than a policy statement issued by the FDA that essentially prohibits flavored cartridge-based vapor products (other than flavorless, tobacco, or menthol-flavored products), but permits flavored vapor products that use other delivery systems, such as disposable vapor products and tank-style systems.\textsuperscript{19} At the local level, New York City, Yonkers, and Nassau County enacted policies limiting sales of certain flavored vapor products,\textsuperscript{20} but these policies have been superseded by the state law prohibiting sales of all flavored vapor products.\textsuperscript{21}

**Other Flavored Tobacco Products:** In 2022, the FDA began a rulemaking process to ban flavors in cigars, but it has not finalized any regulations.\textsuperscript{22} New York State law does not limit sales of other flavored tobacco products, except for limiting sales of gutka and bidis to tobacco shops.\textsuperscript{23} New York City was one of the first jurisdictions in the nation to regulate sales of certain flavored tobacco products.\textsuperscript{24} A provision of this policy – permitting only tobacco bars to sell cigars, little cigars, chewing tobacco, pipe tobacco, roll-your-own tobacco, snus, bidi, snuff, tobacco-containing shisha, or dissolvable tobacco products in flavors other than tobacco, menthol, mint, wintergreen or unflavored – is more stringent than federal and state law and remains in effect.\textsuperscript{25}

These policies illustrate the interplay among federal, state, and local authority to regulate sales of flavored tobacco products and the need for comprehensive policy solutions to limit sales of all flavored tobacco products.
Legal Arguments Used to Weaken and Delay State and Local Regulation of Flavored Tobacco Product Sales

The tobacco industry has aggressively used legal threats to deter state and local governments from taking action to limit sales of flavored tobacco products, and it has filed lawsuits to challenge policies and delay their implementation. This section describes common legal arguments used against state and local flavored tobacco product policies.

Tobacco Control Act Preemption

The tobacco industry frequently argues that state and local flavored tobacco product policies are preempted by the Tobacco Control Act. In general, preemption occurs when a higher level of government restricts or altogether deprives a lower level of government the authority to regulate a particular issue. Preemption may be expressed or implied. Preemption is expressed when language in a federal statute explicitly bars state or local regulation of an issue. Implied preemption occurs when (1) there is a direct conflict between the federal law and the state or local law; or (2) Congress has so comprehensively legislated or “occupied the field” of a particular subject that the federal statute intended to leave no room for state or local governments to also legislate in that field.

The Tobacco Control Act contains three provisions that outline the scope of state, and local authority to regulate flavored tobacco products:

- **Preservation Clause**: Permits state and local regulation of sales, distribution, and promotion of tobacco products.

- **Preemption Clause**: Reserves authority to regulate “tobacco product standards, premarket review, adulteration, misbranding, registration, good manufacturing standards, or modified risk tobacco products” exclusively to the federal government.

- **Savings Clause**: Reiterates and bolsters the preservation clause by stating that state and local governments may regulate tobacco product sales, advertising, and promotions, even if such regulations touch on tobacco product standards.

In a case involving local regulation of flavored tobacco products, the Second Circuit Court of Appeals analyzed the three clauses together and found that the Tobacco Control Act’s “preservation clause expressly preserves localities’ traditional power to adopt any ‘measure relating to or prohibiting the sale’ of tobacco products” and localities are only limited by the specific prohibitions in the preemption clause. “Even then,” the court stated, “pursuant to the saving clause, local laws that would otherwise fall within the preemption clause are exempted if they constitute requirements relating to the sale” of tobacco products.
In litigation against local policies restricting sales of flavored tobacco products in New York City, Providence, RI, and Chicago, IL, the tobacco industry argued the policies would cause manufacturers to reduce production of flavored tobacco products and the policies therefore constituted manufacturing standards preempted by the Tobacco Control Act. In each case, the courts ruled that the ordinances were not manufacturing standards, because they did not regulate the flavor-creation process, but rather finished tobacco products. For example, in the New York City case, the court stated that a manufacturing standard subject to preemption “must be something more than an incentive or motivator . . . it must require manufacturers to alter the construction, components, ingredients, additives, constituents, and properties of their products.” A state or local sales regulation that does not interfere with the federal government’s authority to determine the ingredients or processes used to make tobacco products is not preempted.

In a lawsuit challenging a Los Angeles County policy prohibiting sales of all flavored tobacco products, the tobacco industry argued that the policy was preempted by the Tobacco Control Act because it impermissibly set a “product standard” for tobacco products. The Ninth Circuit Court of Appeals ruled that the Act did not expressly or impliedly preempt a local sales ban on flavored tobacco products. It interpreted the Tobacco Control Act’s preservation, preemption, and savings clauses to mean that “… Congress has allowed the federal government to set the standards regarding how a product would be manufactured and marketed, but has left states, localities, and tribal entities the ability to restrict or opt out of that market altogether.”

Smokeless tobacco companies also argued that the New York City ordinance restricting the sale of certain flavored tobacco products to tobacco bars was preempted by the Tobacco Control Act because it was a de facto ban of an entire tobacco product category. The Second Circuit disagreed with the challengers’ arguments, reasoning that (1) flavored tobacco is a “niche product” as opposed to a tobacco product category like cigarettes or smokeless tobacco, and (2) the Tobacco Control Act does not expressly extend the prohibition on banning tobacco product categories to state and local governments. The court upheld the ordi-
nance as a lawful sales restriction that “permits the limited sale of flavored tobacco products within New York City.” The court concluded, “given Congress’ explicit decision to preserve for the states a robust role in regulating, and even banning, sales of tobacco products, we adopt a broad reading of the saving clause and a limited view of the kinds of restrictions that would constitute a ban.”

In a 2022 ruling, the U.S. District Court for the Southern District of New York dismissed a complaint against the Town of Eastchester alleging, in part, that its policy prohibiting sales of all electronic nicotine delivery products (including flavored products) banned an entire category of tobacco products and was therefore preempted by the Tobacco Control Act. The court found that “complete sales bans” are not preempted because they fit within the scope of the Tobacco Control Act savings clause language that allows state and local regulation of “the sale of tobacco products to tobacco products by individuals of any age.” The court concluded that Eastchester’s policy “is, simply put, a requirement that tobacco retailers or licensees in the Town ‘not sell’ Electronic Nicotine Delivery Products” that is permissible under the grant of authority conferred to local governments by the Tobacco Control Act. This lower court case has limited precedential value but is an example of how lower courts have analyzed Tobacco Control Act preemption.

State Preemption

In New York State, tobacco control policies can be enacted through a legislative process or a regulatory process “necessary and proper for the preservation of life and health.” New York courts apply a four-factor analysis to state and local board of health rules to ensure they do not exceed the grant of authority delegated by the State Legislature:

1. Did the board of health improperly consider economic or social impacts when crafting the regulation? This is traditionally a legislative function, and boards of health are constrained to health considerations.

2. Has the legislature previously considered the subject of the board of health regulation, particularly where previous legislation was contentious and failed to become law?

3. Is the board of health addressing existing regulatory gaps or creating “its own comprehensive set of rules without benefit of legislative guidance”?

4. Was technical expertise in the field of health involved in developing the regulation that would warrant deference to an administrative agency?

For example, New York’s highest court struck down 1987 health regulations promulgated by the Public Health Council restricting smoking in public spaces, because the Council had exceeded its state-granted authority. The court ruled that the Council impermissibly considered economic
and social factors when developing public smoking restrictions and exceptions to the restrictions. The court noted that the New York State Legislature recently had struggled with and declined to pass a smoke-free law.56 Similarly, the New York Court of Appeals rejected a 2013 New York City health regulation capping the portion size of some sugary drinks.57 The court reasoned that when a “challenged regulation attempts to resolve difficult social problems in this manner[, t]hat task, policymaking, is reserved to the legislative branch.”58

In 2020, the Supreme Court of New York invalidated an emergency regulation promulgated by the New York State Public Health and Health Planning Council prohibiting the manufacture, possession, and sale of e-liquids with or without nicotine in flavors other than tobacco flavor, menthol flavor, or flavorless.59 The court found that the Council exceeded the scope of its authority because the emergency regulation embodied “the policy-based trade-off between the competing ends of limiting the attraction of vaping products to minors and allowing former or current combustible cigarette smokers the option to continue to consume tobacco- and menthol-flavored e-liquids.”60 The court also found that instead of being “an effort at filling in the blanks left by broad legislation,” the emergency regulation was “more an attempt to set a State policy strictly limiting the availability of vaping products in New York.”61 The court concluded that “[t]his action reserved constitutionally to the legislature and not to the executive branch (nor, for that matter, to the judiciary).”62 The court also examined the record of rulemaking and found it “devoid of any specialized expertise having been necessary in the crafting of the emergency regulation.”63 It concluded that “the emergency regulation is a statement of public policy and not the product of biomedical research. Accordingly, the deference for administrative action in highly technical areas is not available . . . here.”64 The state legislature subsequently prohibited sales of all flavored vapor products.65

These rulings indicate that in New York State, the legislative process may be a more feasible process than the regulatory process to enact new, comprehensive tobacco controls. Local boards of health that pursue flavored tobacco policies can minimize the likelihood of a successful legal challenge by carefully crafting flavored tobacco regulations in light of these four factors.

Commerce Clause

The Commerce Clause of Article I of the U.S. Constitution grants Congress the exclusive power to, “regulate commerce . . . among the several states.”66 Implied in this provision is what is
known as the “dormant Commerce Clause.” This clause prohibits a state from passing a law favoring people or products located within the state and has been used to challenge state and local health laws. For instance, tobacco companies argued that New York City’s ordinance restricting the sale of flavored tobacco products to specialty tobacco retailers violated the Commerce Clause. The plaintiffs relied on legislative findings of the Tobacco Control Act about how the sale and distribution of tobacco products substantially affected interstate commerce and argued that the sales restriction excessively burdened out-of-state tobacco manufacturers and distributors. The City’s ordinance was upheld without addressing the companies’ dormant Commerce Clause claim.

In 2020, the tobacco industry sought an injunction to delay implementation of a California state law prohibiting the sale of most flavored tobacco products including all flavored vapor products and menthol cigarettes. Plaintiffs argued that the law: 

…violates the dormant Commerce Clause because it dictates how out-of-state manufacturers must manufacture their products. By banning characterizing flavors in most tobacco products, California has attempted to dictate how out-of-state manufacturers produce their tobacco products. The law thus directly regulates interstate commerce and exceeds the inherent limits of the Commerce Clause.

No court has yet to rule on the merits of this argument. However, a flavored tobacco sales policy that does not discriminate between in-state and out-of-state entities and simply limits the sale of certain products would be unlikely to violate the dormant Commerce Clause.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires states to similarly treat persons who are similarly situated as a way of preventing government discrimination based upon distinctions irrelevant to a legitimate government purpose. The U.S. Supreme Court has consistently extended this protection to corporations.

Tobacco retailers have filed equal protection claims against local laws that restrict tobacco product sales by a subset of retailers. In 2010, the Walgreens pharmacy chain challenged a San Francisco ordinance prohibiting tobacco sales by certain pharmacy retailers in order to reduce the adverse health consequences of tobacco use and dependence and eliminate the contradictory messaging posed by a health-based entity selling and marketing a deadly, addictive product. The ordinance allowed tobacco sales by supermarkets and “big box” stores containing a licensed pharmacy. Walgreens argued the ordinance violated the corporation’s right to Equal Protection under the law by treating similar businesses differently. The California Court of Appeals agreed with Walgreens, finding that San Francisco failed to meet
its legal burden of showing a “rational basis” for the differential treatment of pharmacy retailers in connection to the government’s goal of reducing tobacco use. San Francisco subsequently amended its ordinance to cover all stores with a pharmacy, including the “big box” stores. The amended ordinance was not challenged in court and remains in place.

In contrast, a tobacco control policy that distinguished between venues open to all ages and adult-only venues was upheld. The convenience store chain and tobacco retailer Cumberland Farms sued six Massachusetts towns that had enacted regulations restricting the sale of flavored tobacco products to adult-only smoke shops and adult-only smoking bars. Cumberland Farms sought a preliminary injunction to delay implementation of these local policies, in part, on the grounds that the policies violated the Equal Protection clause of the Massachusetts Declaration of Rights. Although this case was decided under state law, the court’s analysis is instructive. In a 2019 opinion, the Massachusetts Superior Court found no Equal Protection violation, because convenience stores and adult-only tobacco shops and smoking bars are not “similarly situated.” The court reasoned that:

…those who enter smoke shops and smoking bars have a preexisting interest in tobacco products, because that is the only product sold there. Convenience stores, on the other hand, absent the regulations, could serve as a recruitment venue for youths not already interested in buying flavored tobacco products—that is, youths on site to purchase age-appropriate goods but who are exposed in the process to flavored tobacco product advertising. In these circumstances, it is by no means a disparate treatment of the similarly situated to subject youth-serving convenience stores to regulations not applied to adult-serving tobacco venues.

In light of these Equal Protection rulings, flavored tobacco policies that distinguish between tobacco retailers should clearly articulate the difference between the retailers selected for regulation and the public health rationale for the policy.
Free Speech

The First Amendment to the U.S. Constitution restricts government from enacting laws “abridging freedom of speech.”85 Speech applies to many forms of expression and can include “commercial speech” such as advertising commercial products.86 Thus, corporations also enjoy some First Amendment protection.

The tobacco industry has argued that a restriction on the sale of flavored tobacco products implicates speech when the regulation relies on tobacco company statements about the product’s flavor as evidence that the product satisfies the definition of “flavored.” Tobacco companies and retailers made this legal argument in a 2012 challenge to a Providence, RI, ordinance restricting the sale of flavored tobacco products to adult-only specialty tobacco businesses. The federal trial court in Rhode Island upheld the flavored tobacco ordinance because it restricted economic activity—the sale of flavored tobacco products—rather than commercial speech.87 The court noted that “[p]laintiffs are free to describe their products as having or producing a characterizing flavor; they are, however, precluded from selling flavored tobacco products in Providence (with the exception of tobacco bars).”88 The First Circuit Court of Appeals concurred and upheld the ordinance.89

While these decisions highlight courts’ deference to state and local authority to regulate flavored tobacco sales, it may be problematic under the First Amendment for state and local governments to directly regulate words, images, and other indications of product flavoring. It is important to carefully craft flavored tobacco policies to restrict only product sales, and not the advertising, promotion, or marketing of flavored tobacco products.

Due Process

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees procedural safeguards before the government may deprive a person or a business of liberty or property interests.90 This is known as procedural due process. Specifically, procedural due process requires that affected persons or businesses are provided sufficient information about a law and that they have an opportunity to protect their liberty or property interest before a court.91

For example, tobacco retailers challenged language in Providence, RI’s flavored tobacco sales ordinance as unconstitutionally vague. Plaintiffs claimed that the terms “tastes,” “aromas,” and “concepts” within the ordinance’s definition of “characterizing flavor” were not specific enough, thereby encompassing an unclear, “non-exhaustive list” of flavored tobacco products subject to the restriction.92 The court rejected this argument, noting that the language was closely modeled after a provision of the Tobacco Control Act, which included some specific examples of flavors.93 The court concluded that the language was not unconstitutionally vague simply
because the definition included a “non-exhaustive list” of examples.94

Cumberland Farms also challenged how the Town of Yarmouth, Massachusetts, enforced its flavored tobacco sales regulation. The challenge arose after a Yarmouth Health Department inspector found the retailer selling flavored tobacco products in violation of Yarmouth’s regulation.95 The retailer argued that the Town failed to independently and sufficiently inspect and determine the product was flavored, and would therefore not be permitted for sale.96 Instead, the Town relied on a list developed by a third party (Massachusetts Association of Health Boards (“MAHB”)) to make its determination.97 A 2020 decision by the Appeals Court of Massachusetts rejected this argument, noting that the MAHB list was only one piece of evidence used by Yarmouth in making its flavored product determination.98 The record showed “substantial evidence” that Yarmouth also relied on the perceptions and testimony of its inspectors and members at the Department of Health, testimony of other expert witnesses, and examination of third-party advertisements from online tobacco retailers.99 The court did, however, overturn a $250 fine imposed on the retailer after a finding that Yarmouth did not follow the procedures set out in its ordinance when levying the fine.100

Although, for the most part, the procedural due process challenges were rejected in these cases, they signal the need for caution as state and local governments craft and enforce flavored tobacco ordinances. Including legislative findings in the policy of the benefits of using such processes (such as cost and consistency); identifying a clear evidentiary process to determine when a product is “flavored,” and articulating an appeal process for policy violations can help guard against a procedural due process challenge.

Regulatory Takings

The Takings Clause of the Fifth Amendment of the U.S. Constitution protects a person’s private property from being taken by the government for public use without “just compensation” (generally assessed as fair market value).101 The New York State Constitution also contains a “takings clause.”102 A flavored tobacco product restriction may be challenged as a regulatory taking when the government regulation denies the owner of “all economically viable use” of property or as a partial regulatory taking.103 When analyzing a partial regulatory taking, courts consider three factors: (1) the economic impact of the regulation; (2) the impact of the regulation on the owners’ investment-backed expectations; and (3) the character of the action, such as whether it is a physical invasion of property or “public program . . . to promote the common good.”104 To date, tobacco control challenges in this vein have arisen in the context of clean indoor air laws that restricted smoking inside businesses such as restaurants and bars, and a state law requiring public reporting of tobacco product ingredients.105
Tobacco retailers could argue that a policy prohibiting sales of flavored tobacco products constitutes a regulatory taking. However, under such a policy, the business owner can continue to sell unrestricted products, and thus is conceivably able to maintain economically viable uses of the business. In addition, business owners could not reasonably claim their investment-backed expectations would be drastically affected by a sales restriction given that the tobacco products and tobacco outlets are subject to regulatory oversight. Finally, if the flavored regulation were crafted to benefit public health, it would promote the common good. Thus, a challenge to a flavored tobacco sales policy based on a full or partial regulatory takings argument is unlikely to prevail.

Conclusion

While tobacco companies and their allies rely on litigation as a strategy for deterring legally sound policy interventions, local governments have a rich record of success in defending their thoughtful policies. Prohibiting the sale of flavored tobacco products will advance New York State’s objectives of preventing initiation of tobacco use, reducing overall tobacco use, promoting cessation, and narrowing the widening disparities in tobacco use.

Contact us for assistance!

If you’re working on New York State commercial tobacco control issues and need assistance, contact the Public Health Law Center at (651) 290-7506 or publichealthlawcenter@mitchellhamline.edu.

This brief was prepared by the Public Health Law Center, a nonprofit organization that provides information and legal technical assistance on issues related to public health, and was made possible through a contract with the New York State Department of Health. The Center does not provide legal representation or advice. The information in this document should not be considered legal advice.

Endnotes

1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit http://www.keepitsacred.itcmi.org. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.


12. N.Y. Const. art IX, § 2(c).

13. N.Y. Const. art IX, § 2(c)(10).


27  Id. at 75.
28  Id.
32  U.S. Smokeless Tobacco Mfg. Co. LLC, 708 F.3d 428, 433 (2013) (highlighting that state and local governments are only limited by the specific prohibitions of the preemption clause).
33  Id.
37  Id. at 434.
38  Id.
39  R.J. Reynolds Tobacco Co. v. County of Los Angeles, 29 F.4th 542 (9th Cir 2022).
40  Id. at 555.
41  21 U.S.C.S. § 387g(d)(3) (2018) (prohibits the FDA 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”).
42  U.S. Smokeless Tobacco Mfg. Co. LLC v. N.Y.C., 708 F.3d at 436.
43  Id. at 433.
44  Id at 435-436.
45  Id. at 436.
47  Id. at *10.
48  Id. (quoting R.J. Reynolds Tobacco Co. v. County of Los Angeles, 29 F.4th 542, 558 (9th Cir. 2022))
49  N.Y. PUB. HEALTH LAW § 308(d).
51  Id. at 1355.
52  Id. at 1356.
53  Id.
54  Id.
Legal Theories Used to Challenge Flavored Tobacco Sales Policies

55 Id. at 1351. Note: the Public Health Council is now the New York State Public Health and Health Planning Council.

56 Id. at 1356


58 Id. at 697.


60 Id.

61 Id.

62 Id.

63 Id.

64 Id.

65 N.Y. PUB. HEALTH LAW § 1399-MM-1.

66 U.S. CONST. art. 1, § 8, cl. 3.


72 Id.


74 Compare GoodCat, LLC v. Cook, 202 F. Supp. 3d 896 (S.D. Ind 2016) (granting a preliminary injunction to stop enforcement of an Indiana licensing law for e-liquid manufacturers brought under the dormant Commerce Clause, because “only one local firm could provide the state-mandated service for commercial access to Indiana’s market for e-liquids, the firm’s capacity favored local commerce at the expense of interstate commerce, and the burden on interstate commerce exceeded any purported benefits” of the regulation.)


76 Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, n. 9 (1985) (“[I]t is well established that a corporation is a ‘person’ within the meaning of the Fourteenth Amendment.”); see also Southern Ry. v. Greene, 216 U.S. 400, 412- 413 (1910) (explaining “there is no doubt that a private corporation is included” in protections afforded by the Equal Protection Clause).


78 Id. at 502.

79 Id. at 501.

80 Id.

Id.

Id. at *12-13.

Id. at 13.

U.S. CONST. AMEND. I.


Id.

Natl. Assn. of Tobacco Outlets, Inc. v. Providence, 731 F.3d 71 (1st Cir. 2013); see also Eastchester Tobacco & Vape Inc. v. Town of Eastchester, No. 21 CV 6996, 2022 U.S. Dist. LEXIS 136467 *11 (S.D.N.Y. Aug. 1, 2022) (holding that a local law prohibiting the sale of e-cigarettes did not implicate the First Amendment because the law did law “not attempt to regulate commercial speech by, for example, prohibiting plaintiffs from advertising accurate information about lawfully sold products.”)

U.S. CONST. AMEND. XIV.


Id. at 40-41

Id.


Id.

Id.

Id. at *18.

Id. at *15.

Id. at *20-21.

U.S. CONST. AMEND. V; U.S. CONST. AMEND. XIV (applying the Bill of Rights to states).


E.g., Philip Morris v Harshbarger, 159 F3d 670 (1st Cir 1998) (affirming a lower court judgment that plaintiff was likely to succeed in its claim that a Massachusetts state law requiring public disclosure of tobacco product ingredients could be found to be a regulatory taking that impacted plaintiffs’ investment-backed expectations of nondisclosure of ingredient information that was considered a trade secret).