NEW YORK STATE & FLAVORED TOBACCO

Leveraging Local Policy Power

Flavors make commercial tobacco products,[1] including vapor products, more appealing to children and teens and make it harder for people to quit. For decades, the tobacco industry has added flavors to its products to enhance their appeal, especially among novice tobacco users.

Menthol in particular has a notorious history of being targeted to groups of lower socioeconomic status (low-SES) and racial and ethnic minorities.[2] Fortunately, evidence-based policy interventions at the local level can counter the powerful appeal of flavored tobacco. Local action can significantly advance New York State's objectives to prevent tobacco use in the first place and to reduce both tobacco use and tobacco-related health disparities. This brief summarizes recent evidence about flavored tobacco use, including tobacco companies' efforts to evade policies that target flavored tobacco products. It describes lessons learned from efforts to

enact flavored tobacco policies in New York State and elsewhere, and local policy options for communities in the state seeking to restrict sales of flavored tobacco products.

The Need for Local Policies

Federal rulemaking on commercial tobacco products typically takes years. For example, in 2009, federal law prohibited flavored cigarettes, except for menthol, and authorized the U.S. Food and Drug Administration (FDA) to regulate tobacco products and to study a potential ban

Photo: Lilit Amirkhanian

on menthol cigarettes.[3] Thirteen years later, the FDA issued a proposed rule to ban menthol cigarettes. The FDA could not even regulate cigars until 2016, and it proposed banning flavored cigars in 2022 at the same time it issued its proposed ban on menthol cigarettes. Even if final rules are issued in the near future, the likelihood of legal challenges and regulatory delays make it difficult to predict how many years may pass before the rules are fully implemented.[4]

The FDA could not regulate electronic cigarettes until 2016, and even then, it took few steps to regulate them over the next several years. In 2020, the FDA issued guidance to the tobacco industry that severely restricted cartridge-style or pod-based (e.g., JUUL) e-cigarette products in flavors other than menthol and tobacco.[5] The FDA's piecemeal approach to flavored vapor products is a cautionary tale for flavored tobacco product regulation. After the industry guidance was announced, major manufacturers of pod-based systems ceased production of pods in flavors other than tobacco and menthol. Use of flavored, disposable e-cigarette products then skyrocketed nationwide. A 2023 analysis of New York e-cigarette sales data

found that 87% of sales of flavored e-cigarettes prohibited under New York State law were for disposable products that were not regulated by the FDA's guidance.[6] These products facilitate youth tobacco use and pose a threat to the environment from improper disposal of toxic nicotine salts, plastic, metals, and vast numbers of one-time-use lithium-ion batteries, the scope of which is not yet known.[7]

The FDA took a step forward in 2022 by issuing proposed regulations to prohibit sales of menthol cigarettes[8] and flavored cigars.[9] Research has shown that restricting the sale of flavored tobacco products can lead to decreased use and increased quit attempts, which can in turn lead to saved lives.[10] Since the final rules are expected to impact such a large segment of the national tobacco market, the tobacco industry is likely to legally challenge the rules when they are issued.[11] To date, the FDA has yet to propose regulations to expand its flavored e-cigarette restriction to cover disposables and all other forms of flavored e-cigarettes.

Given the slow pace and uncertain prospects of federal regulations, local governments in New York can act now to help address the problem of flavored tobacco product sales in their communities through comprehensive local policies for flavored tobacco products.

Flavored Tobacco Drives Use and Addiction

Public health interventions have driven a tremendous decrease in cigarette smoking especially among youth over the past two decades. In 2022, 2.1% of New York high school students smoked cigarettes, compared to 27.1% in 2000.[12] In response, to offset their otherwise declining sales, tobacco companies have continued to target youth, people with lower incomes, and other groups by marketing flavored tobacco products.

Flavored Tobacco Products Legally for Sale in New York State

Many flavored tobacco products are still legal to sell in New York state due to a patchwork of local, state, and federal policies (Table 1). This policy environment exposes the public to predatory marketing and sales of flavored products and complicates enforcement. A 2022 survey of large health departments across the U.S. found that navigating tobacco sales policy loopholes and exemptions was a common barrier to policy enforcement.[13]

Table 1: State-Level Flavored Tobacco Product Regulation in New York

Product	Legal to Sell Under New York State Law
Menthol Cigarettes	Yes[14]
Flavored cigars, little cigars, chewing tobacco, pipe tobacco, roll-your-own tobacco, snus, bidi, snuff, tobacco-containing shisha, nicotine pouches, dissolvable tobacco	Yes
Gutka and Bidis	Yes, but only in tobacco shops[15]
Flavored Vapor Products	No, except for products that have received a pre-market tobacco product authorization from the FDA.[16] To date, the FDA has not authorized the sale of a flavored e-cigarette.
Cigarettes in Flavors Other than Menthol	No[17]

Menthol

Menthol is a minty or wintergreen-flavored tobacco additive that imparts an anesthetizing effect, making smoke or vapor easier or smoother to deeply inhale, while masking the harsh taste of tobacco and other additives and chemicals. In 2021, menthol cigarettes were 37% of the U.S. cigarette market.[18] According to industry documents and analyses of menthol-flavored products, tobacco companies manipulate menthol levels to hook young users and keep established users smoking. According to the tobacco giant R.J. Reynolds, historically menthol cigarette brands used "a low menthol product strategy" to appeal to young smokers, but then discovered that "as smokers acclimate to menthol, their demand for menthol increases over time."[19] In response, tobacco companies produced different varieties of menthol cigarettes to suit older smokers' greater demand for menthol.[20]

Menthol cigarettes significantly implicate health equity. For years, tobacco companies have aggressively targeted youth, women, the LGBTQ+ community, and ethnic and racial populations with menthol cigarette marketing.[21] An estimated 30.5% of cigarettes consumed in New York State are menthol,[22] and, in 2018, 86% of Black and 72% of Hispanic smokers in New York State used menthol cigarettes.[23]

The FDA estimates that a national prohibition on sales of menthol cigarettes would lead to a 15% reduction in smoking within 40 years, and the prevention of 324,000 to 654,000 deaths over the course of 40 years.[24] Of these avoided deaths, 92,000 to 238,000 would be among Black people.[25] A 2023 economic analysis estimated that prohibiting the sale of menthol cigarettes in New York State alone would result in 5.6% (33,284) of menthol cigarette smokers quitting, prevent 7,800 premature smoking caused deaths, and result in fewer young people starting to smoke cigarettes in the first place.[26]

Menthol is also used in other tobacco products. For example, in 2021 half (50.7%) of smokeless tobacco products sold nationwide were menthol flavored.[27] Flavor blended e-cigarettes also commonly combine menthol, or other additives that cause a cooling sensation in the throat, with fruit and candy flavors. These products use names like Blue Razz Ice, White Gummi Ice, Blueberry Ice, Iced Cosmic, and Rainbow Ice.[28] A 2020 national survey of e-cigarette users 15 to 24 years old found that 74.8% had used a flavor blended product within the last 30 days.[29] The most popular products reported used product names associated with a cooling sensation or menthol. Iced Mango was used by 30.2% of the sample, followed by Banana Ice (26.2%), Lush Ice (23.8%), and Melon Ice (22.9%).[30]

Concept Flavors

In response to the growing number of restrictions on flavored tobacco products, the tobacco industry has begun to introduce so-called "concept-flavored" tobacco products.[31] Concept-flavored tobacco products use names that do not describe the way the product actually tastes – names such as Jazz, Diamond, Casino, Silver, and Unicorn Frappe.[32] As just one example, tobacco companies increased production and marketing of concept-flavored little cigars in response to local restrictions on flavored little cigars and the federal restriction on flavored cigarettes.[33] In 2020, more than half (53.3%) of cigars sold in convenience stores were flavored,[34] and 21.4% of those flavored cigars were concept-flavored; sweet/candy (30.6%) and fruit (29.5%) were the other leading categories.[35] Notably, sales of concept-flavored cigars in convenience stores increased by one-third (33%) from 2020 to 2021.[36] In 2022, health departments nationwide reported difficulty enforcing flavored tobacco polices against concept-flavored tobacco products.[37] While these product names are deliberately designed to conceal the content of these tobacco products from consumers and regulators, they do not change the fact that the products are flavored.[38]

Flavored E-Cigarettes

New York State teens and young adults use vapor products more than any other tobacco product, and although e-cigarette use in the state has been declining in recent years, its rate is still higher than the national average. In 2022, 18.7% of New York State high school-aged children reported vaping as compared to 14.1% nationally.[39] In 2021, 19.2% of young adults aged 18 to 24 vaped.[40] Tobacco products cannot be legally sold to anyone under 21 years of age in New York, and flavored e-cigarettes have been illegal to sell in New York State since 2020, but enforcement of these policies has been slow to commence, due to the COVID-19 pandemic and other challenges.

In 2021, 97% of New York State's high school-aged youth who vaped and 71% of adults who vaped used flavored products.[41] The majority of these flavored products tend to be disposable e-cigarettes.[42] The most common ways underage e-cigarette users in New York State (15 to 20 years old) obtained flavored e-cigarettes and e-liquids were to get them from another person (35.7%), buy them from a store (33%), or give someone else money to buy them (21.7%).[43] A 2023 civil complaint filed by the City of New York against various tobacco distributors and retailers in the city alleges that when undercover investigators asked about flavored vapor products, retail workers would simply hand over a list of flavored products for sale and then retrieve the products from an area out of sight.[44]

As noted in a 2023 analysis of New York State tobacco policy outcomes "[t]he COVID-19 pandemic, which led to significant closures and disruptions beginning in spring 2020, inevitably affected public health policy education and enforcement efforts."[45] Renewed focus on local enforcement of existing policies and passage of new local policies that may be even more comprehensive than state law can help reinvigorate tobacco control efforts in New York State.

Lessons Learned from Flavored Tobacco Regulation

In the absence of effective federal regulation, state and local governments are exercising their inherent authority to address the public health problem posed by flavored tobacco products. At the state level, Massachusetts and California have enacted comprehensive flavored tobacco sales restrictions.[46] And in 2020, New York State enacted a flavored vapor products law that

prohibits retailers from selling flavored e-cigarettes, e-liquids, or liquid nicotine, with the exception of products that are tobacco-flavored.[47]

In 2023, the Governor of New York State introduced comprehensive flavored tobacco legislation as part of her 2023-2024 budget proposal, but the policy was not included in the final budget.[48] Given the absence of a statewide ban on all flavored tobacco products, local governments in New York also are working to reduce access to flavored tobacco products as a way of protecting their residents. Local policies can build momentum towards a successful statewide policy by showing that sales restrictions can be successfully implemented at the local level, thus addressing concerns of resistant lawmakers. In both Massachusetts and California, dozens of localities passed bans on the sale of flavored tobacco products, paving the way for statewide laws. This section will summarize lessons learned from various efforts to restrict the sale of flavored tobacco products.

Community Education

Stakeholder engagement, community education, and a strong implementation plan are key in the adoption of effective local tobacco control policies. Communities can identify and engage with partners like parent groups, physicians, boards of health, law enforcement, religious groups, youth-serving organizations, and tobacco retailers to advance policies.[49] Community engagement also should place "priority populations . . . at the cent[er] of policy and campaign efforts to shape messaging, inform educational efforts and mitigate potential misunderstandings of a proposed policy."[50] Engaging with community members ensures that local policy campaigns align with local priorities.[51]

Partnering with tobacco retailers may seem counter-intuitive but has been highlighted as a lesson learned from prior flavored tobacco policy campaigns. Campaigns need to be prepared to respond to "coordinated retailer advocacy in opposition to proposed legislation due to concerns about lost sales, particularly for specialty shops."[52] Still, "retailers generally want to comply with a new policy, but need support to fully understand the intent, criteria and implications of flavo[]red tobacco legislation."[53] In New York State, tobacco retailers that comply with the state policy restricting sales of all flavored vapor products may find themselves at a competitive disadvantage compared to retailers that continue to sell flavored vapor products. A local flavored tobacco policy campaign could emphasize that effective local enforcement mechanisms are a step toward leveling the playing field for tobacco retailers in the community.

The Role of Law Enforcement

The majority of Black and Hispanic people in New York who smoke, use menthol cigarettes. The tobacco industry has a long history of targeting marginalized populations and manipulating public opinion, so it appears to be an ally to certain movements and causes, such as civil rights. For example, it has championed and funded opposition to flavored tobacco policies that restrict sales of menthol cigarettes by aligning itself with the anti-racism movement and supporting the narrative that these policies may have the unintended consequence of increased police encounters in communities of color.[54] The 2014 killing of Eric Garner in New York while being arrested for allegedly selling loose, untaxed cigarettes makes this concern especially salient in New York State.[55]

Local tobacco prevention and control efforts must address where and how public health laws contribute to systemic racism and discrimination. Public health leaders need to be aware of the manipulative role the tobacco industry can play in racial and health equity messaging regarding tobacco regulation. They also need to consider explicit policies they can take to reduce inequity in this area, such as working to eliminate the sale of flavored tobacco products like menthol cigarettes; restricting enforcement authority to public health and licensing officials; and focusing enforcement on tobacco retailers and wholesalers, rather than individuals such as retail clerks, who unlawfully sell, give, barter, distribute, or otherwise exchange tobacco products. A comprehensive list of values and recommendations for equitable tobacco control policy enforcement is available here.

Lessons Learned from Westchester

In 2022, the Westchester County Board of Legislators voted to prohibit sales of all flavored tobacco products, including menthol cigarettes.[56] In keeping with recommendations for equitable tobacco policy enforcement,[57] the policy only applied to retail establishments, not individuals, and enforcement was to be carried out exclusively by the County Department of Health.[58]

Despite legislative support, the Westchester County Executive vetoed the bill.[59] In his veto letter, the County Executive noted concerns about the role of law enforcement, stating: "There are questions of enforcement that cannot be dictated by the provisions of this bill alone."[60] The bill did not have sufficient legislative support to override a veto.

Dr. Hazel Dukes, President of the NAACP of New York State, criticized the County Executive's veto: "This law would have explicitly taken the authority away from police to enforce restrictions on Menthol sales, so any suggestion otherwise is both wrong and an excuse to preserve the tobacco industry's continued ability to profit off of the deaths of Black people."[61] The Westchester experience illustrates the tobacco industry's power and influence behind-the-scenes in funding and supporting people and groups who oppose tobacco regulation. These tobacco control opponents often disseminate disingenuous counter-narratives in the media, at public hearings, and in meetings with legislators. This experience also demonstrates how difficult it can be to effectively convey carefully crafted flavored tobacco policy language to the public and lawmakers.

Defining Products

The tobacco industry continues to develop new products specifically designed to evade flavored tobacco policies. These products include concept-flavored products, flavor blends that combine menthol with fruit and candy flavors, and, most recently, nonmenthol or so-called "sensation" products that use an additive other than menthol to provide a cooling sensation. A comprehensive definition of flavored tobacco products covers all tobacco products and the full range of tastes and sensations, other than tobacco, imparted by those products. It also covers flavored components and parts designed to be used in conjunction with tobacco products (these are sometimes referred to as "flavor enhancers").

The following is an example of a comprehensive definition of flavored tobacco products that can be used in a local flavored tobacco policy:

> "FLAVORED TOBACCO PRODUCT" means any tobacco product that imparts: (1) a taste or smell, other than the taste or smell of tobacco, distinguishable by an ordinary consumer either prior to or during the consumption of such tobacco product, including but not limited to the taste or smell of fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, menthol, herb, or spice; or (2) a cooling or numbing sensation distinguishable by an ordinary consumer either prior to or during the consumption of such tobacco product.[62]

Properly defining flavored tobacco products is directly linked with effective policy implementation by retailers and regulators. In a study of best practices for flavored tobacco policies, a public health official noted: "Look at the places which have exceptions. Those laws are much harder to enforce, because the rule is complex. If you just say, 'we're not allowing the sale of flavored tobacco products, period,' it's also easier for the retailers because they don't have to get into these questions."[63]

The New York Governor's 2024 budget proposal would have expanded New York's law, which currently bans flavored vapor products, except tobacco flavor, to prohibit the sale of all flavored tobacco products statewide.[64] The legislation would have removed loopholes that retailers continue to use to keep flavored tobacco products on the market.[65] It also explicitly defined sensation products as flavored tobacco products.[66] These policies were not enacted but provide a useful roadmap on how local governments in New York can craft laws that avoid potential loopholes.[67]

Flavored Tobacco and Cannabis are Different Products

> Some tobacco retailers have argued that flavored tobacco sales restrictions are too narrowly defined because they do not include flavored cannabis products.[68] This claim is a red herring: not only are tobacco and cannabis different products with tobacco far more researched and causing substantially more documented harms than cannabis, but the adoption of one policy (flavored cannabis regulation) does not need to occur before the adoption of the other (flavored tobacco products regulation).

Flavor Bans Do Not Significantly Harm Retailers

Another claim raised consistently in opposition to flavored tobacco sales restrictions is that they will have a major negative economic impact on convenience stores and other retailers that sell these products. Data from states, including Massachusetts, that have enacted flavor bans do not bear this out.[69] For instance, a 2023 study found no impact of flavored tobacco sales restrictions on the number of convenience stores or store employees in New York.[70] To the contrary, the study found that since New York's flavored vapor products policy was enacted in 2020, the number of convenience stores in the state increased for six straight quarters, and by the fourth quarter of 2021, New York had the highest number of convenience stores over the entire time period (2018 to 2021) in the six states examined by the study.[71] The study also found that since the policy was enacted, there has been a "massive increase" in the number of New York convenience store employees.[72]

Identifying Products

Product identification is key to effective policy enforcement. Flavored tobacco policies are strongest when they specify how retailers and regulators can identify flavored tobacco products. Public health officials and retailers can identify flavored products by using a simple smell test (without combusting them); reviewing product packaging, marketing claims, and consumer reviews; requiring manufacturers to certify in writing that products are not flavored; or comparing products against a list of prohibited flavored products.[73]

Policies should also create a presumption that a product is flavored when a tobacco company markets a product in a way that explicitly states or implicitly suggests that it is flavored. This language is important for enforcement because it puts the burden on the manufacturer to prove that a product is not flavored if there is a statement or claim to the contrary (such as a description of a flavor on a manufacturer's website or in a manufacturer's advertising materials). For example, New York State's law restricting sales of flavored vapor products contains the following presumption:

> *A vapor product . . . shall be presumed to be flavored if a product's retailer, manufacturer, or a manufacturer's agent or employee has made a statement or claim directed to consumers or the public, whether expressed or implied, that such product or device has a distinguishable taste or aroma other than the taste or aroma of tobacco.*[74]

In 2023, the New York's Governor proposed amending this presumption to provide that: tobacco product packaging is a form of communication to consumers and the public; tastes and aromas other than tobacco need only be distinguishable by an ordinary consumer; and tastes and aromas include sensations.[75] Although these amendments were not adopted into law, they provide a sensible roadmap for localities considering passing a similar ordinance.

In 2022, California enacted a comprehensive prohibition on sales of all flavored tobacco products. The policy contains a rebuttable presumption that a tobacco product is flavored when a manufacturer:

> *has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor [other than tobacco], including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor [other than tobacco].*[76]

In anticipation of the policy, R.J. Reynolds began distributing advertisements for new products that it claimed were not flavored, but that offered experiences like a "tropical oasis" or a cooling sensation when smoked. These products are labeled as "non-menthol" but use packaging and marketing consumers associate with menthol cigarettes.

Newport Non-Menthol Green

Once R.J. Reynolds released these products, the California Attorney General reviewed the packaging and promotional materials for four of its new products (Newport Non-Menthol Green, Newport EXP, Camel Crisp Non-Menthol Green, and Camel Crush Non-Menthol Oasis) and determined that the products were "presumptively flavored" and therefore prohibited by California's flavored tobacco law.[77] R.J. Reynolds and several other plaintiffs filed a complaint against the Attorney General challenging this determination. The complaint argues that the products are not flavored because the cigarettes contain a tasteless and odorless chemical called "WS-3" that produces the cooling sensation. According to R.J. Reynolds, WS-3 is not a flavor because it imparts a cooling sensation by activating a person's thermoreceptors rather than taste or smell receptors.[78] The case is ongoing.

The following is an example of a presumption that can be used in a local ordinance that restricts the sale of both flavored and sensation-imparting products

> PRESUMPTIVE FLAVORED TOBACCO PRODUCT. Any communication by, or on behalf of, the manufacturer or retailer of a tobacco product that indicates that the product imparts: a taste or smell other than the taste or smell of tobacco; or a cooling or numbing sensation, constitutes presumptive evidence of a violation of this section. Presumptive evidence may include but is not limited to the use of terms such as "cool," "chill," "ice," "fresh," "arctic," or "frost" to describe the product.[79]

Local Policy Options

Local flavored tobacco policies are important to reduce access to flavored tobacco products in the community and to build momentum and political will to adopt comprehensive policies at the state level.[80] Local governments in New York can use their inherent police power to address flavored tobacco sales through enhanced enforcement of existing policies, comprehensive flavored tobacco ordinances, and tobacco retailer licensing. The phrase police power should not be confused with law enforcement by police departments. Rather, it encompasses a broad governmental responsibility to protect the people who inhabit a jurisdiction.

Enhanced Enforcement of Adolescent Tobacco Use Prevention Act (ATUPA)

In New York State, the practice of selling tobacco to people under 21 years of age undermines state and federal policies restricting sales of flavored tobacco products. Local governments can have an impact on underage tobacco sales through enhanced enforcement of underage

sales policies. For example, even though Westchester County did not enact a local flavored tobacco policy, the local policy effort did result in an allocation of $3 million for tobacco control enforcement and education in the community.[81] The Westchester County Department of Health has held trainings and informational meetings for tobacco retailers about youth access to flavored tobacco and vapor products.[82] In the summer of 2023, the Department began enhanced inspections and educational visits to tobacco retailers and announced plans to visit tobacco retailers several times a year for compliance checks.[83]

Comprehensive Flavored Tobacco Ordinances

Comprehensive tobacco policies are needed because tobacco companies invariably exploit loopholes to undermine incomplete policies, to maximize sales, and to maintain addiction to their products. An optimal local ordinance would prohibit sales of all categories of flavored tobacco products, paraphernalia and component parts intended to add flavor to tobacco products, and would not exempt any category of retailer (e.g., smoke shops). A local policy could also close the current loophole in New York State law for flavored vapor products with pre-market tobacco product authorization from the FDA. This is a concern even though the FDA has yet to authorize any flavored vapor products. According to the American Cancer Society of New York, this loophole "has created ambiguity around which flavored products remain legal under the law for retailers and health inspectors."[84] A comprehensive flavored tobacco policy for localities in New York State is available here.

Enforcement Through Tobacco Retailer Licensing

Requiring stores to obtain a local license to sell tobacco products—whether flavored or unflavored—allows a community to efficiently identify and survey these stores and to enforce all retail tobacco control laws, including a restriction on the sale of flavored tobacco products. A tobacco retailer licensing clause that requires all holders of a license to comply with applicable local, state, and federal laws would allow local governments to enforce policies and encourage adherence to state and federal policies. The potential to lose a local license creates a strong incentive for retailers to comply with tobacco controls. Tobacco retail license fees can be assessed to cover the costs of administering the license and enforcing applicable flavored tobacco product sales regulations. A comprehensive tobacco retailer licensing model ordinance for localities in New York State is available here.

Conclusion

More than a decade has passed since the FDA was authorized to regulate flavored tobacco products. Since that time, an entire generation of children has been exposed to flavored tobacco products that did not exist when their parents were born. The tobacco industry has relentlessly sought to block life-saving tobacco control policies, spending exorbitant sums to reformulate and re-package flavored tobacco products to circumvent policies designed to restrict their availability. Local governments can act now to adopt comprehensive flavored tobacco policies, such as expanded flavored tobacco sales restrictions that include menthol-flavored tobacco products. Such policies can streamline enforcement by closing state and federal loopholes, help ensure equitable enforcement of tobacco control policies, prevent tobacco initiation, and reduce disproportionate health risks to youth, members of the LGBTQ+ community, and racial and ethnic populations in New York State.

Contact us for assistance!

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 contrast, 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.

2 Public Health Law Center, *The Tobacco Industry & the Black Community: The Targeting of African Americans* (2021), https://www.publichealthlawcenter.org/sites/default/files/resources/Tobacco-Industry-Targeting.pdf.

3 Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 3(2), 9, 123 Stat. 1776, 1776 (codified at 21 U.S.C. § 387 and 15 U.S.C. § 1334).

4 *See, e.g.*, Public Health Law Center, *FDA Menthol Timeline*, https://www.publichealthlawcenter.org/resources/fda-menthol-timeline.

5 Ctr. for Tobacco Products, U.S. Food & Drug Admin., Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised): Guidance for Industry (2020), https://www.fda.gov/media/133880/download.

6 CDC Found., Monitoring U.S. E-Cigarette Sales: State Trends (2023), https://www.cdcfoundation.org/State-E-Cigarette-Sales-DataBrief-Mar2023?inline.

7 Public Health Law Center, *Disposing of E-Cigarette Waste: Options for New York State* (2023), https://www.publichealthlawcenter.org/sites/default/files/resources/E-Cigarette-Waste-FAQ.pdf.

8 *View Rule*, Off. of Info. & Reg. Aff., Off. of Mgmt. & Budget (Spring 2023), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=0910-AI60 (rulemaking status of the FDA's tobacco product standard for menthol in cigarettes).

9 *Id.*

10 *See, e.g.,* Michael Chaiton et al., *Association of Ontario's Ban on Menthol Cigarettes with Smoking Behavior 1 Month After Implementation*, 178 JAMA Internal Med. 710 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5876835/#:~:text=Although%20a%20substantial%20decrease%20in,smoking%20shortly%20after%20ban%20implementation.

11 *See FDA Menthol Timeline*, *supra* note 4.

12 Bureau of Tobacco Control, N.Y. State Dep't of Health, *Youth Tobacco Use Continues to Decline Across All Product Types in 2022, One in Five Youth Still Use Tobacco* (2023), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume15/n1_youth_tobacco_use.pdf.

13 ASPiRE Ctr., Tobacco Retail Policy Trends in 2022: Insights from the Field (2023), https://aspirecenter.org/wp-content/uploads/2023/05/TobaccoRetailPolicyTrends_2022-1.pdf.

14 21 U.S.C. § 387g(a)(1)(A).

15 N.Y. Pub. Health Law § 1399-mm (gutka); N. Y. Pub. Health Law § 1399-ll*2 (bidis).

16 N.Y. Pub. Health Law § 1399-mm-1.

17 21 U.S.C. § 387g(a)(1)(A).

18 Fed. Trade Comm'n, Cigarette Report for 2021 30 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p114508cigarettereport2021.pdf.

19 Jennifer M. Kreslake et al., *Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults*, 98 Am. J. of Pub. Health 1685 (2008).

20 *Id.*

21 Public Health Law Center, *The Tobacco Industry & the Black Community: The Targeting of African Americans* (2021), https://www.publichealthlawcenter.org/sites/default/files/resources/Tobacco-Industry-Targeting.pdf.

22 Frank J. Chaloupka, *Public Health Benefits of a Ban on the Sale of Menthol Cigarettes in New York* (2023), https://tobacconomics.org/files/research/832/ny-flavor-ban-ph-benefits-final-2-21-23.pdf.

23 Bureau of Tobacco Control, N.Y. State Dep't of Health, *Prevalence of Menthol Cigarette Use Among Adult Smokers by Race/Ethnicity* (2021), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume14/n1_menthol_cigarette_use.pdf.

24 Press Release, U.S. Food & Drug Admin., *FDA Proposes Rules Prohibiting Menthol Cigarettes and Flavored Cigars to Prevent Youth Initiation, Significantly Reduce Tobacco-Related Disease and Death* (Apr. 28, 2022), https://www.fda.gov/news-events/press-announcements/fda-proposes-rules-prohibiting-menthol-cigarettes-and-flavored-cigars-prevent-youth-initiation.

25 *Id.*

26 *See* Chaloupka, *supra* note 22.

27 Fed. Trade Comm'n, Smokeless Tobacco Report for 2021 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p114508smokelesstobaccoreport2021.pdf (90.5% of smokeless tobacco sold in 2021 was moist snuff).

28 Rosedalekb Vape, *Top 10 Disposable Vapes (Updated 2023),* https://rosedalekb.com/best-disposable-vape.

29 Jennifer M. Kreslake et al., *Perceived Sensory Characteristics of Blended and Ambiguous "Concept" Flavors Among Adolescent and Young Adult E-cigarette Users*, 25 Nicotine & Tobacco Res. 524 (2023); Truth Initiative, *Young E-cigarette Users Report Widespread Use of Flavor Blends and "Concept" Flavors Like Iced Mango, Blue Dream, and OMG* (Jan. 27, 2023), https://truthinitiative.org/research-resources/emerging-tobacco-products/young-e-cigarette-users-report-widespread-use-flavor.

30 *Id. See* Truth Initiative*, supra* note 32.

31 Public Health Law Center, *U.S. Sales Restrictions on Flavored Tobacco Products* (May 2023), https://www.publichealthlawcenter.org/sites/default/files/resources/US-sales-restrictions-flavored-tobacco-products.pdf.

32 *See* Rosedalekb Vape, *supra* note 27; Catherine C. Osborn et al., *Dissonance in Young Adult Cigarillo Users' Categorization of Concept Flavored and Unflavored Products*, Int'l J. of Envtl. Res. & Pub. Health 7219 (2022).

33 Melody Kingsley et al., *Impact of Flavoured Tobacco Restriction Policies on Flavoured Product Availability in Massachusetts*, 29 Tobacco Control 175 (2020); Todd Rogers et al., *Changes in Cigar Sales Following Implementation of a Local Policy Restricting Sales of Flavoured Non-Cigarette Tobacco Products*, 29 Tobacco Control 412 (2020).

34 Cristine D. Delnevo et al., *Cigar Sales in Convenience Stores in the US, 2009-2020*, 326 J. Am. Med. Ass'n 2429 (2021).

35 *Id.*

36 *Id.* (just 2.2% of cigars sold in convenience stores in 2009 were concept-flavored).

37 *See* ASPiRE Ctr., *supra* note 13.

38 *See e.g., Memo. of Dec. & Or. on Pl.'s Mot. for Judm. on the Pldg. After Remand*, 1-2 (Sept. 26, 2018), https://mahb.org/wp-content/uploads/2018/10/Motion-for-Judgment-on-the-pleadings-denied-10.1.18.pdf (ruling that a local board of health properly determined that "Jazz" cigars were a flavored tobacco product).

39 Betty Brown et al., *From Policy to Practice: Changes in New York Statewide Tobacco Policies and Tobacco-related Outcomes* (2023), https://www.health.ny.gov/prevention/tobacco_control/reports/docs/2023-05_policy_to_practice.pdf; Fatma Romeh M. Ali et al*., E-cigarette Unit Sales by Product and Flavor Type, and Top-Selling Brands, United States, 2020–2022*, 72 Morbidity & Mortality Wkly. Rep. 672 (June 23, 2023).

40 *Id.*

41 *See* Betty Brown et al., *supra* note 39.

42 CDC Found., Monitoring U.S. E-Cigarette Sales: State Trends (2023), https://www.cdcfoundation.org/State-E-Cigarette-Sales-DataBrief-Mar2023?inline.

43 *See* Betty Brown et al., *supra* note 39.

44 Complaint, City of New York v. Magellan Technology, Inc., No. 23-CV-05880 (S.D.N.Y. 2023), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2023/Vape-Complaint.pdf.

45 *See* Betty Brown et al., *supra* note 39.

46 Campaign for Tobacco Free Kids, *States & Localities That Have Restricted the sale of Flavored Tobacco Products* (last updated July 27, 2023), https://assets.tobaccofreekids.org/factsheets/0398.pdf.

47 *See* N.Y. Public Health Law §1399-MM-1 (2020), https://www.nysenate.gov/legislation/laws/PBH/1399-MM-1.

48 N.Y. State Division of the Budget, FY 2024 New York State Executive Budget: Health and Mental Hygiene Article VII Legislation (2023), https://www.budget.ny.gov/pubs/archive/fy24/ex/artvii/hmh-bill.pdf.

49 Katherine Peck et al., *Identifying Best Practices in Adoption, Implementation and Enforcement of Flavoured Tobacco Product Restrictions and Bans: Lessons from Experts*, 21 Tobacco Control 32 (2022); Public Health Law Center, *Flavored Tobacco Sales Restrictions in Massachusetts: An Interview with Cheryl Sbarra*, (Mar. 16, 2023), https://www.publichealthlawcenter.org/webinar/flavored-tobacco-sales-restrictions-massachusetts-interview-cheryl-sbarra

50 *See* Katherine Peck et al., *supra* note 49.

51 S. Roussos et al., *Fighting Flavored Tobacco: A Best Practice Guide for Developing Local Policy Campaigns to Restrict the Sale of Flavored Tobacco Products in California* (2018), https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/Community/ToolKitsandManuals/CDPH-Flavored-Tobacco-Toolkit-Final.pdf. *See also Flavored Tobacco Sales Restrictions in Massachusetts*, *supra* note 53 ("The education piece is the most important piece to do. . . . "[My] biggest suggestion would be to do a lot of educating...of parents, physicians, boards of health, community organizations...you need that education piece." -- Cheryl Sbarra, JD, Massachusetts Association of Health Boards).

52 *See* Katherine Peck et al., *supra* note 49.

53 *Id.*

54 *See, e.g.*, *The Tobacco Industry and the Black Community, supra* note 21.

55 Ashely Southall, *N.Y.P.D. Fires Officer in 2014 Chokehold Case*, N.Y. Times, Aug. 20, 2019, at A1.

56 Westchester Cty. Bd. of Legislators, Local Law Prohibiting the Sale or Distribution of Flavored Tobacco Products (Nov. 28, 2022), https://westchestercountyny.legistar.com/LegislationDetail.aspx?ID=5814849&GUID=DA118BF6-17BA-4097-BAC2-F0D7AF43B34D&Options=ID%7cText%7c&Search=flavored.

57 *Tobacco Control Enforcement for Racial Equity: Decriminalizing Commercial Tobacco Addressing Systemic Racism in the Enforcement of Commercial Tobacco Control* (2021), https://www.fightcancer.org/policy-resources/decriminalizing-commercial-tobacco-addressing-systemic-racism-enforcement.

58 *See* Westchester, Local Law Prohibiting the Sale or Distribution of Flavored Tobacco Products, *supra* note 56.

59 Letter from George Latimer, Cty. Exec., Westchester Cty., N.Y. to Members of the Westchester County Board of Legislators, Westchester County, N.Y. (Dec. 12, 2022), https://westchestercountyny.legistar.com/View.ashx?M=F&ID=11518644&GUID=9CF7E52A-BD3F-4850-A593-97B266421C8C

60 *Id.*

61 Rick Pezzullo, *Latimer Criticized for Vetoing Bill Prohibiting Sale of Flavored Tobacco Products*, Hudson Independent, December 23, 2022, https://thehudsonindependent.com/latimer-criticized-for-vetoing-bill-prohibiting-sale-of-flavored-tobacco-products.

62 Public Health Law Center, *Big Tobacco Creates New "Sensation" with Same Old Playbook*, (Apr. 7, 2023), https://www.publichealthlawcenter.org/commentary/230407/4/7/2023-big-tobacco-creates-new-sensation-same-old-playbook.

63 *See* Katherine Peck et al., *supra* note 49.

64 N.Y. State Division of the Budget, FY 2024 New York State Executive Budget: Health and Mental Hygiene Article VII Legislation (2023), https://www.budget.ny.gov/pubs/archive/fy24/ex/artvii/hmh-bill.pdf.

65 *Id.*

66 *Id.*

67 *See also* N.Y. State Division of the Budget, FY 2024 New York State Executive Budget: Health and Mental Hygiene Article VII Legislation; Memorandum in Support (2023), https://www.budget.ny.gov/pubs/archive/fy24/ex/artvii/hmh-memo.pdf (providing rationale for proposed policy changes).

68 For example, in response to the New York Governor's budget proposal to prohibit sales of all flavored tobacco products, a representative from the N.Y. Association of Convenience Stores argued that "[b]laming flavored tobacco as a vehicle for underage smoking while promoting flavored cannabis is bizarre and contradictory, and will only impact the lives of retail employees who will see their jobs eliminated." Carl Campanile, *NY's Kathy Hochul Accused of Double Standard for Banning Flavored Cigs Not Cannabis*, N.Y. Post, Jan. 22, 2023, https://nypost.com/2023/01/22/nys-kathy-hochul-accused-of-double-standard-for-banning-flavored-cigs-not-cannabis.

69 John A. Tauras & Frank J. Chaloupka, *The Economic Effects of Cigarette Sales and Flavor Bans on Tobacco Retail Businesses* 17 Tobacconomics (June 7, 2023) (finding projected negative economic impact of Massachusetts flavored tobacco ban to be "exaggerated"), https://tobacconomics.org/files/research/865/final-report-cigarette-sales-flavor-bans-and-business-05.23.23-md.pdf.

70 *Id.*

71 *Id.* (the study analyzed data from Connecticut, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont).

72 *Id.* at 19.

73 Public Health Law Center, *Flavored Tobacco Sales Prohibitions: Enforcement Options* (2022), https://www.publichealthlawcenter.org/sites/default/files/resources/Flavored-Tobacco-Sales-Prohibitons-Enforcement-Options.pdf.

74 N.Y. Pub. Health Law § 1399-mm-1.

75 N.Y. State Division of the Budget, FY 2024 New York State Executive Budget: Health and Mental Hygiene Article VII Legislation (2023), https://www.budget.ny.gov/pubs/archive/fy24/ex/artvii/hmh-bill.pdf.

76 Cal. Health & Safety Code § 104559.5(b)(2).

77 Letter from Rob Bonta, Att'y Gen., State of California, to Jonathan Reed, CEO & Chief Commercial Officer, R.J. Reynolds Tobacco Co. (April 25, 2023), https://www.publichealthlawcenter.org/sites/default/files/case/RJR-Bonta-Notices-of-Determination.pdf.

78 R.J. Reynolds Tobacco Co. v. Rob Bonta, No. 23CECG01734 (Super. Ct. Fresno County 2023), https://www.publichealthlawcenter.org/sites/default/files/case/RJR-v-CA-Complaint-Flavor%20Ban.pdf.

79 *See Big Tobacco Creates New "Sensation" with Same Old Playbook*, *supra* note 62.

80 *See* ASPiRE Ctr., *supra* note 13.

81 Press Release, Off. of the Cty. Exec., Westchester Cty. (June 15, 2023), https://www.westchestergov.com/home/all-press-releases/9863-following-county-executive-george-latimer-s-plan-for-increased-enforcement-department-of-health-hosts-training-for-merchants-to-curb-youth-tobacco-sales.

82 *Id.*

83 *Id.*

84 *Coalition Delivers Letter to Governor Hochul in Support of Tobacco Proposals*, Cancer Action Network, American Cancer Society (Jan. 30, 2023), https://www.fightcancer.org/news/coalition-delivers-letter-governor-hochul-support-tobacco-proposals.