



October 26, 2021

Jodi Radke
Director, Rocky Mountain/Great Plains Region
Campaign for Tobacco-Free Kids
PO Box 784
Loveland, CO 80539

Dear Ms. Radke,

Thank you for this opportunity to share information on the status and risk of litigation challenges to policies restricting the sale of flavored tobacco products. As you know, the Public Health Law Center does not lobby, nor does it provide legal representation or advice. However, based on our experiences with regulation of commercial tobacco products throughout the country, we are able to provide you with our observations and educational information regarding your questions about flavored commercial tobacco product regulation. This information is for educational purposes only; we do not request that a policymaker take any specific action in regard to our comments, nor should our comments be considered a replacement for legal advice. If you require a legal opinion, we encourage you to consult with local legal counsel. That said, we hope that our comments and suggestions are helpful to you.

The recent wave of addiction to e-cigarettes among young people has drawn public attention to the significant health risk that flavored tobacco products pose to public health—particularly to young people. While flavored e-cigarettes have garnered significant media attention, the epidemic has also highlighted the insidious problem posed by menthol cigarettes and other flavored tobacco products (cheap, flavored cigars and smokeless tobacco) that remain on the market and continue to lure and addict young people. In fact, menthol cigarettes have been recognized by the FDA to be *more* damaging to public health than non-menthol cigarettes, particularly to African American, Latinx, and LGBTQ+ communities that have been historically targeted by the tobacco industry. Menthol is added to cigarettes to make them easier to inhale—and they have been shown to be harder to quit than non-menthol cigarettes.¹ The continued sale of menthol cigarettes has led to needless death and disease—borne disproportionately by these communities—that could have been prevented by local, state, and federal action. Unfortunately, mint and menthol remain

¹ See Public Health Law Center, Supplement to Citizen Petition: Prohibit Menthol as a Characterizing Flavoring of Cigarettes and Cigarette Smoke (2021).
<https://www.publichealthlawcenter.org/sites/default/files/resources/Supplement-to-Menthol-Citizen-Petition.pdf>

the most popular flavored products among youth, including those who use e-cigarettes.²

Local ordinances restricting the sale of *all* flavored tobacco products in their jurisdictions are an important step to protect public health moving forward. In the face of inaction on this issue by the federal government, it is even more important to ensure that local communities are protecting their constituents from the harms posed by secondhand smoke, tobacco product pollution, addiction, and all the other impacts of tobacco use, by preventing the sale of the most deadly and harmful products. In fact, both Massachusetts and California³ passed statewide sales restrictions last year, as did dozens of local jurisdictions across several states.⁴ These sales restrictions have covered most commercial tobacco products (including e-cigarettes) and all flavors.

To date, all tobacco industry lawsuits challenging comprehensive⁵ flavored tobacco products sales restrictions under federal law have been unsuccessful. There is always a risk of litigation with any public policy, and this analysis is provided to assist with weighing and balancing the potential risks with different policy approaches to restrict or prohibit the sale of flavored tobacco products. Exemptions in public health laws, such as flavor restriction or smoke free ordinances, can draw litigation challenges for treating one group of people or businesses differently than others. These legal challenges generally raise Constitutional issues, such as equal protection and due process claims. A court's consideration of these claims will often factor in the legislative purpose or determine whether the disparate treatment of different businesses was reasonably related to inherent differences in the business classification (i.e., what is different about the business being exempted).

- **Comprehensive prohibition on sale of flavored products is the strongest and most defensible policy**

From both a litigation risk and public health best practices perspective, the strongest policy is a comprehensive prohibition on the sale of all flavored tobacco products. The primary argument used by the industry in the cases filed to challenge laws prohibiting all sales of flavored products is that federal law preempts state or local

² USC News. Nov.5, 2019. "Teen vapers choose mint as their favorite e-cigarette flavor."

<https://news.usc.edu/162535/mint-e-cigarette-flavor-teen-vapers-usc-research/>;

Preidt, R. WebMD. Nov. 5, 2019. "1 in 4 High School Kids Vape, Mint Flavor Preferred."

<https://www.webmd.com/mental-health/addiction/news/20191105/1-in-4-high-school-kids-vape-mint-flavor-preferred#1>.

³ The California statute has been stayed pending the outcome of a tobacco industry-funded statewide ballot measure repeal campaign.

⁴ For a more robust overview of the national flavor policy landscape, see Public Health Law Center, [U.S. Sales Restrictions on Flavored Tobacco Products](#) (2021).

⁵ A comprehensive flavored tobacco sales restriction is one that prohibits the sale of all flavored tobacco products in all retailers in the jurisdiction.

regulation of flavored tobacco products. The industry claims that because sales restrictions pertain to the ingredients in tobacco products, they are “product standards” and are therefore preempted by federal law. Two recent cases filed by R.J. Reynolds in federal courts in Edina, Minnesota, and Los Angeles County, California, were dismissed by federal district court judges as meritless.⁶ These two decisions followed the reasoning in earlier cases in New York City; Providence, Rhode Island; and Chicago, in which the judges similarly concluded that these types of ordinances were *not* preempted by federal law.⁷

In 2020, the City of Arden Hills, Minnesota, was sued by a 21+ tobacco shop and gas station for its comprehensive flavored tobacco regulation. That litigation involved both federal preemption arguments, and a “kitchen sink” of state law claims. These include takings and equal protection arguments that these retailers were particularly harmed due to their retail model, which relies heavily on flavored tobacco sales. The 21+ tobacco shop argued that they should be exempt from the flavor restriction policy because they do not admit anyone under age 21. While the Arden Hills case was settled by the parties and the city temporarily delayed the implementation of the flavor restriction for the 21+ tobacco shop, the decision from the federal district court in the Edina case and other relevant case law should reassure communities that the Arden Hills litigation need not be a deterrent for considering a comprehensive flavored tobacco regulation to prohibit all sales. The fact that the tobacco industry continues to sue communities for enacting these sales restrictions is not an indication of the strength of the legal arguments but rather is in keeping with Big Tobacco’s long practice of using litigation as a tool of intimidation to chill public health policy change.

I hope this information is helpful to you. Please let me know if you have additional questions about this or other commercial tobacco control policies.

Sincerely,

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⁶ R.J. Reynolds has appealed both cases. Oral arguments have been completed and we await the decisions from the federal circuit courts.

⁷ Indeed, these types of cases have been repeatedly dismissed by every court to consider the issue. *See e.g. Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *Independents Gas & Serv. Stations Ass’n v. Chicago*, 112 F. Supp. 3d 749 (N.D. Ill., 2015); *CA Smoke & Vape Ass’n, Inc. v. Cty. of Los Angeles*, 2020 WL 4390384 (S.D. Cal. June 9, 2020); *R.J. Reynolds Tobacco Co. v. Cty. of Los Angeles*, 2020 WL 4390375 (C.D. Cal. July 13, 2020); *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *R.J. Reynolds Tobacco Co. v. City of Edina*, 2020 WL 5106853 (D. Minn. Aug. 31, 2020).