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## The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products

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## The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products

### Cover Page Footnote

Michael Freiberg, J.D., is a Staff Attorney with the Public Health Law Center in St. Paul, Minnesota. He has worked as an Adjunct Professor at the William Mitchell College of Law, teaching courses in Legislation and Public Health Law. He has served as a Minnesota State Representative since 2013. He received a B.A. from Georgetown University and a J.D. from the William Mitchell College of Law.

# THE MINTY TASTE OF DEATH: STATE AND LOCAL OPTIONS TO REGULATE MENTHOL IN TOBACCO PRODUCTS<sup>+</sup>

*Michael Freiberg<sup>++</sup>*

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Cigarette smoking is a public health problem of staggering proportions. According to a 2014 report of the U.S. Surgeon General, more than twenty million Americans have died because of smoking in the last fifty years; 2.5 million of those deaths were nonsmokers who were exposed to secondhand smoke.<sup>1</sup> Although the tobacco control movement has helped to reduce dramatically the death and disease attributable to smoking, smoking is still the leading cause of preventable death in the United States.<sup>2</sup> If persons under the age of eighteen were to continue to smoke at the current rate, 5.6 million children alive today would die prematurely from a smoking-related illness.<sup>3</sup> Further, the burden of tobacco use is not shared equally. Tobacco use hits certain

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1. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS 1 (2014), <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

2. *Id.* at 6, 11, 17.

3. *Id.* at 12.

populations particularly hard, with “disparities in tobacco use . . . across groups defined by race, ethnicity, educational level, and socioeconomic status.”<sup>4</sup>

The same 2014 report concluded that tobacco-related death and disease is “overwhelmingly caused by cigarettes and other combusted tobacco products,” and recommended the “rapid elimination of their use.”<sup>5</sup> Indeed, some have advocated for the elimination of cigarettes, or all combustible tobacco products, from the marketplace as part of a tobacco “end game” strategy.<sup>6</sup> To date, however, no jurisdiction has taken this dramatic step, potentially because of the challenging politics such a policy would implicate.<sup>7</sup>

Even in the absence of a prohibition on the sale of combustible tobacco products, it is possible that less comprehensive policy options would dramatically reduce cigarette-related death and disease. One such option relates to the elimination of a particularly detrimental combustible tobacco product: menthol cigarettes. Menthol is an organic additive used in cigarettes with analgesic cooling properties that reduce the harshness of tobacco smoke and the irritation of nicotine.<sup>8</sup> Marketed as a characterizing flavor in cigarettes, menthol makes it easier to start smoking and harder to quit smoking.<sup>9</sup> The disparities present in tobacco use generally are even more acute with menthol cigarette use as menthol-flavored cigarettes are targeted to and used disproportionately by groups with higher incidences of tobacco use, such as adolescents and minorities.<sup>10</sup>

Restricting the presence of menthol in cigarettes would benefit public health and reduce cigarette-related death and disease.<sup>11</sup> For example, a recent study showed that 38.9% of menthol smokers would quit in response to a prohibition on menthol cigarettes, including 44.5% of African American and 44% of female menthol smokers.<sup>12</sup>

To combat the problem of cigarette smoking and other forms of tobacco use, Congress enacted the Family Smoking Prevention and Tobacco Control Act

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4. *Id.* at 7.

5. *Id.*

6. *See, e.g.*, Robert N. Proctor, *Why Ban the Sale of Cigarettes? The Case for Abolition*, 22 TOBACCO CONTROL i27, i27 (2013).

7. *See* Mitchell Zeller et al., *The Strategic Dialogue on Tobacco Harm Reduction: A Vision and Blueprint for Action in the U.S.*, 18 TOBACCO CONTROL 324, 325–26 (2009).

8. TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMM., MENTHOL CIGARETTES AND PUBLIC HEALTH: REVIEW OF THE SCIENTIFIC EVIDENCE AND RECOMMENDATIONS 25 (2011), <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf> [hereinafter TPSAC REPORT].

9. *Id.* at 2, 149.

10. *Id.* at 41, 76, 92, 150.

11. *See id.* at 225 (making the “overall recommendation” that “removal of menthol cigarettes from the marketplace would benefit public health in the United States”).

12. Jennifer L. Pearson et al., *A Ban on Menthol Cigarettes: Impact on Public Opinion and Smokers’ Intention to Quit*, 102 AM. J. OF PUB. HEALTH e107, e111–12 (2012).

(FSPTCA) in 2009.<sup>13</sup> This Act gave the U.S. Food and Drug Administration (FDA) unprecedented authority to regulate tobacco products to achieve the complementary goals of increasing tobacco cessation and reducing tobacco initiation.<sup>14</sup> In the Act, Congress took an important step towards the goal of preventing youth smoking by prohibiting most cigarettes with flavorings,<sup>15</sup> recognizing the evidence that flavorings are a tool for tobacco companies to attract and addict younger generations of smokers.<sup>16</sup>

The FSPTCA's effectiveness was undercut, however, by Congress's decision to exempt from the ban of potentially the most damaging flavoring of all: menthol.<sup>17</sup> Menthol is consumed by nearly half of all youth smokers,<sup>18</sup> making it far and away more pervasive than any of the flavorings banned by Congress.<sup>19</sup> There is no scientific reason to distinguish it from other flavorings.<sup>20</sup> It is no

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13. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 123 Stat. 1776 (2009) (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.). The Act provided substantial oversight over tobacco products to the federal government, which would seem well suited to the task of limiting menthol. *See id.*

14. *See* 21 U.S.C. § 387f(d)(1) (2012); Nick Dantonio, *Vape Away: Why A Minimalist Regulatory Structure Is the Best Option for FDA E-Cigarette Regulation*, 48 U. RICH. L. REV. 1319, 1348 n.173 (2014) ("Congress has now taken the unprecedented step of granting FDA jurisdiction over [tobacco] products.") (quoting *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 78 (D.D.C. 2010) *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010)).

15. 21 U.S.C. § 387g(a)(1)(A) (2012).

16. Brian A. King et al., *Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students*, 54 J. OF ADOLESCENT HEALTH 40, 45 (2014).

17. Robert J. Baehr, *A New Wave of Paternalistic Tobacco Regulation*, 95 IOWA L. REV. 1663, 1686 (2010) ("[W]orse still is the deadliness of the exemption. While not much thorough research has been conducted outside of the tobacco industry, studies have demonstrated higher nicotine dependence and lower quit rates among smokers of menthol cigarettes."); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1234 n.80 (2014) (citing 21 U.S.C. § 387g (2012)) (banning "artificial" and "natural flavor" additives, except for menthol); *see also* Paul Smalera, *Cool, Refreshing Legislation for Philip Morris*, THE BIG MONEY (June 8, 2009), <http://www.thebigmoney.com/articles/judgments/2009/06/08/cool-refreshing-legislation-philip-morris> (identifying that in the United States, "[m]enthols account[] for a quarter of the roughly 370 billion cigarettes smoked domestically in 2006 and are more popular here than anywhere else in the world").

18. NATIONAL SURVEY ON DRUG USE AND HEALTH, USE OF MENTHOL CIGARETTES 2-3 (2009), <http://archive.samhsa.gov/data/2k9/134/134MentholCigarettes.htm>.

19. *See* Baehr, *supra* note 17, at 1686 ("Young smokers have a distinct preference for it, far outstripping their preferences for other tobacco flavors."); *see also* Mariano-Florentino Cuéllar, *Earmarking Earmarking*, 49 HARV. J. ON LEGIS. 249, 266 (2012) ("Public health advocates have roundly criticized the menthol exemption.") (referencing Stephanie Saul, *Opposition to Menthol Cigarettes Grows*, N.Y. TIMES, June 5, 2008, at C1 (noting opposition to menthol exemption by seven former Secretaries of Health and Human Services)).

20. *See* Robert L. Rabin, *Reexamining the Pathways to Reduction in Tobacco-Related Disease*, 15 THEORETICAL INQUIRIES L. 507, 532 n.106 (2014) ("While there is no scientific evidence of greater health risks associated with menthol, it is considered a gateway to youth smoking and an impediment to quitting."); *see also* Baehr, *supra* note 17, 1685-86 (noting the difficulty in "ignor[ing] anecdotal evidence that Congress drafted this menthol exception expressly

less attractive to youth than the flavorings prohibited by the Act<sup>21</sup> and, in fact, has additional drug-like properties that may impact addiction and cessation among youth and adults alike.<sup>22</sup>

Exempting menthol from the flavor ban was a purely political decision. A majority of African American smokers prefer menthol-flavored cigarettes,<sup>23</sup> and any measure regulating menthol was seen by Congress as politically charged.<sup>24</sup> Instead of acting, Congress chose to pass the perceived “hot potato” to the FDA, delegating to the federal agency the controversial decision as to whether menthol should continue to receive favorable treatment or should be treated consistently with other flavorings.<sup>25</sup> More than five years and two exhaustive studies later, the FDA continues to ponder this question.<sup>26</sup>

FDA inaction on tobacco control is not unique to menthol, and it does not seem likely that the agency will adopt any regulations on menthol in the near future.<sup>27</sup> Fortunately, in the absence of decisive federal tobacco regulation, state and local governments have stepped forward, regulating in creative ways with varying degrees of success.<sup>28</sup> Indeed, some state and local jurisdictions have already begun or are considering<sup>29</sup> regulating menthol tobacco products.<sup>30</sup>

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for Philip Morris,” and for Marlboro, whose “menthol brand constituted more than five percent of the total domestic cigarette market”).

21. See Baehr, *supra* note 17, at 1686.

22. TPSAC REPORT, *supra* note 8, at 24, 148–49.

23. *Id.* at 42.

24. See Rabin, *supra* note 20, at 532 n.106; Stephanie Saul, *Black Caucus Split on a Tobacco Issue*, N.Y. TIMES, July 25, 2008, at C1.

25. 21 U.S.C. § 387g(e)(1) (2012).

26. See *infra* Part I.

27. See generally Mark Gottlieb, *Overcautious FDA Has Lost Its Way*, 23 TOBACCO CONTROL 187 (2014).

28. See, e.g., N.Y.C. ADMIN. CODE § 17-706(a) (2010) (prohibiting the sale of tobacco to anyone under the age of twenty-one); *Nat'l Ass'n of Tobacco Outlets v. City of Providence*, 731 F.3d 71, 74–75 (1st Cir. 2013) (upholding a Providence, Rhode Island, ordinance restricting sale of flavored non-cigarette tobacco products and prohibiting tobacco coupon redemption against a challenge based on preemption by the Labeling Act); *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174, 180–82, 185–86 (2d Cir. 2012) (striking down a New York City ordinance requiring graphic warnings depicting dangers of smoking to be posted at point of sale on the grounds that it was preempted by the Labeling Act); Laurel E. Curry, *The Haverstraw Experience: The First Tobacco Product Display Ban in the United States*, 104 AM. J. OF PUB. HEALTH e9, e9, e11–e12 (2014) (describing how a Haverstraw, New York ordinance prohibiting the display of tobacco products was repealed in the face of a lawsuit by convenience store interests and big tobacco companies); Sean P. Murphy, *Westminster Drops Proposal to Ban Tobacco Sales*, BOS. GLOBE (Nov. 19, 2014), <http://www.bostonglobe.com/metro/2014/11/19/westminster-drops-proposal-ban-tobacco-sales/iUqa8BceSIIwO4rFtpqkUL/story.html> (recounting a proposed ordinance to ban all tobacco sales in Westminster, Massachusetts, withdrawn after public outcry).

29. See, e.g., H.B. 1522, 27th Leg. (Haw. 2014) (prohibiting, if enacted, the sale of menthol-flavored cigarettes).

30. See, e.g., CHL., ILL., MUNICIPAL CODE § 4-64-180(b) (2013) (enacted) (restricting the sale of tobacco products with any flavor, including menthol, near schools).

Consequently, state and local regulation of menthol-flavored tobacco products may well represent an important part of future tobacco control efforts.

Part I of this Article begins by illustrating why the use of menthol in tobacco products poses such a serious risk to public health. Part II then describes actions the federal government has taken—or, more accurately, failed to take—to regulate menthol. As a consequence of the relative dearth of federal action, and the leadership role state and local jurisdictions are undertaking, the bulk of this Article, in Part III, is dedicated to surveying state and local actions taken on menthol, describing additional actions state and local governments could take to address the problem, and investigating whether state and local governments actually have the authority to take these actions, concluding that they likely do. Finally, this Article concludes with an analysis of the policy merits of each option, and deduces from this analysis that the most effective way for a state or local government to address the public health problem of menthol tobacco products is through a sales restriction on the products.

### I. THE PROBLEM OF MENTHOL

Before describing why menthol tobacco products pose a risk to public health, it is important to define what constitutes a menthol tobacco product. Menthol is a compound used in many consumer and medicinal products that has cooling and analgesic properties.<sup>31</sup> Menthol is present in many cigarettes, even those not marketed specifically as menthol cigarettes.<sup>32</sup> Federal law has yet to establish a threshold, delineating an explicit concentration of menthol above which a nonmenthol cigarette becomes a menthol cigarette.<sup>33</sup> Similarly, the Tobacco Products Scientific Advisory Committee (TPSAC), authorized by Congress to study the impact of menthol in cigarettes on public health,<sup>34</sup> failed to adopt “a quantitative definition for a menthol cigarette, but instead relie[d] on the brand designation,” noting that “[t]hose cigarettes marketed as menthol have sufficient menthol content for menthol to become a ‘characterizing flavor.’”<sup>35</sup> This Article will use the terms “menthol cigarette” and “menthol tobacco product” consistent with the TPSAC definition. That is, a tobacco product will be considered menthol if it has a level of menthol sufficient to rise to the level of a characterizing flavor.

It is undisputed that menthol tobacco products pose a serious risk to public health, even beyond the risk already present in nonmenthol tobacco products. Two exhaustive studies have examined the existing data and publications on

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31. TPSAC REPORT, *supra* note 8, at 1.

32. *Id.* at 2.

33. See 21 U.S.C. § 387g(e)(1) (2012).

34. *Id.*

35. TPSAC REPORT, *supra* note 8, at 2.

menthol, and both concluded that the presence of menthol tobacco products in the marketplace poses a risk to public health.<sup>36</sup>

The first study, approved by the TPSAC in July 2011, concluded that the “[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States.”<sup>37</sup> Specifically, the TPSAC found that:

[Menthol’s] pharmacological actions reduce the harshness of smoke and the irritation from nicotine, and may increase the likelihood of nicotine addiction in adolescents and young adults who experiment with smoking. Furthermore, the distinct sensory characteristics of menthol may enhance the addictiveness of menthol cigarettes, which appears to be the case among youth. TPSAC has found that the availability of menthol cigarettes has an adverse impact on public health by increasing the numbers of smokers with resulting premature death and avoidable morbidity.<sup>38</sup>

The TPSAC also concluded that minority youth smoke menthol cigarettes at alarming and disproportionate rates, finding that “[m]ore than 80 percent of adolescent African American smokers and more than half of adolescent Hispanic smokers use menthol cigarettes.”<sup>39</sup> Use of menthol products is also prevalent among non-minority youth, unemployed persons, and individuals making less than \$10,000 per year.<sup>40</sup>

In July 2013, the FDA published its own exhaustive report on menthol entitled, “Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes.”<sup>41</sup> Although the report notes that “there is little evidence to suggest that menthol cigarettes are more or less toxic or contribute to more disease risk to the user than nonmenthol cigarettes,” it still reaches the conclusion that it is likely “that menthol cigarettes pose a public health risk above that seen with nonmenthol cigarettes” because menthol tobacco products are associated with an increased rate of smoking initiation by youth, possessing greater addiction potential than nonmenthol products, and making quit attempts less successful.<sup>42</sup>

Other studies have noted the same disparate use patterns of menthol. A National Survey on Drug Use and Health found that menthol cigarettes are used at disproportionately higher rates by racial and ethnic minority smokers, including African Americans (82.6%), Native Hawaiian or Pacific Islanders

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36. See *infra* text accompanying notes 37–42.

37. TPSAC REPORT, *supra* note 8, at 225.

38. *Id.*

39. *Id.* at 48.

40. *Id.*

41. U.S. FOOD & DRUG ADMIN., PRELIMINARY SCIENTIFIC EVALUATION OF THE POSSIBLE PUBLIC HEALTH EFFECTS OF MENTHOL VERSUS NONMENTHOL CIGARETTES 1 (2013), <http://www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf> [hereinafter FDA MENTHOL REPORT].

42. *Id.* at 6.



(53.2%), Hispanics or Latinos (32.3%), and Asian Americans (31.2%), in contrast to white smokers (23.8%).<sup>43</sup> Also, approximately seventy-one percent of all young LGBT smokers use menthol cigarettes,<sup>44</sup> and nearly half of all teen smokers use menthol tobacco products.<sup>45</sup> In addition, a convincing body of evidence has shown tobacco-related health disparities are exacerbated by targeted marketing strategies in minority areas,<sup>46</sup> a practice previously linked to menthol tobacco products.<sup>47</sup>

Considering the relative consensus among the scientific community that menthol tobacco products particularly pose a serious public health problem, one would expect the federal government to take prompt action on this crisis. Unfortunately, the federal government has remained relatively inactive, frustrating many of those in the public health community.

## II. FEDERAL INACTION ON MENTHOL

Any discussion of federal regulation of menthol tobacco products must begin with analyzing the FSPTCA.<sup>48</sup> This landmark legislation entrusted to, for the first time, the FDA the authority to adopt tobacco product standards aimed at improving public health.<sup>49</sup> The FDA, in determining whether a proposed tobacco product standard will improve public health, must consider three things: first, “the risks and benefits to the population as a whole”; second, “the increased or decreased likelihood that existing users will stop using such products”; and lastly, “the increased or decreased likelihood that [non-users of tobacco] will start using such products.”<sup>50</sup>

One other provision of the FSPTCA warrants brief mention. Section 105 of the Act required the FDA to “develop and publish an action plan to enforce restrictions . . . on promotion and advertising of *menthol* and other cigarettes to

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43. NATIONAL SURVEY ON DRUG USE AND HEALTH, *supra* note 18, at 5.

44. NATIONAL YOUTH ADVOCACY COALITION, COMING OUT ABOUT SMOKING: A REPORT FROM THE NATIONAL LGBTQ YOUNG ADULT TOBACCO PROJECT (2010), [http://lgbttobacco.org/files/Coming\\_Out\\_About\\_Smoking\\_NYAC.pdf](http://lgbttobacco.org/files/Coming_Out_About_Smoking_NYAC.pdf).

45. CASACOLUMBIA, TIME TO BAN MENTHOL 6–7 (2014), <http://www.casacolumbia.org/addiction-research/reports/time-to-ban-menthol-report-2014>.

46. Sarah Moreland-Russell et al., *Disparities and Menthol Marketing: Additional Evidence in Support of Point of Sale Policies*, 10 INT. J. ENVIRON. RES. PUB. HEALTH 4571, 4572, 4580 (2013).

47. See, e.g., Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 WAKE FOREST L. REV. 97, 123–24 (2002) (noting that a “cigarette company was forced to withdraw its menthol cigarette, ‘Uptown,’ because the product was deliberately targeted at African-American consumers”); CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO COMPANY MARKETING TO AFRICAN AMERICANS 1, 3–4 (2015), <http://www.tobaccofreekids.org/research/factsheets/pdf/0208.pdf>.

48. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 123 Stat. 1776 (2009) (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C.).

49. 21 U.S.C. § 387g(a)(3)(A) (2012).

50. *Id.* § 387g(a)(3)(B)(i) (2012).

youth.”<sup>51</sup> The FDA solicited public comment and issued an “Enforcement Action Plan for Promotion and Advertising Restrictions” in October 2010.<sup>52</sup> The Action Plan includes provisions related to market surveillance of menthol cigarettes, but contained no restrictions on menthol that did not already apply to all cigarettes.<sup>53</sup>

Although the FSPTCA provided the FDA wide discretion in adopting tobacco product standards, some requirements were created directly by Congress. For example, in recognition of the appeal flavorings (such as candy, fruit, and alcohol) have for children and young adults,<sup>54</sup> the FSPTCA prohibited any cigarette from containing a characterizing flavor.<sup>55</sup> Importantly, the prohibition exempted tobacco and menthol flavors, and did not apply to non-cigarette tobacco products.<sup>56</sup>

The political compromise exempting menthol generally was not well received.<sup>57</sup> The New York Times wrote:

With menthol brands making up about 28 percent of the \$70 billion American cigarette market, the exemption was seen as a necessary compromise to win broad backing for the legislation. But menthol has become a politically charged subject in Washington because an estimated 75 percent of black smokers choose mentholated brands.<sup>58</sup>

The African American Tobacco Prevention Network, arguing that the exemption was discriminatory, claimed that the menthol exemption “sends a message that African American youngsters are valued less than white youngsters.”<sup>59</sup> In contrast, others argued, albeit weakly, that making such arguments was equivalent to playing a “race card.”<sup>60</sup> In a disturbing twist, the Lorillard Tobacco Company, the largest producer of menthol cigarettes,<sup>61</sup> cynically tried to co-opt African American history in support of continued menthol exemption, arguing that “the history of African Americans in this country has been one of fighting against paternalistic limitations and for

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51. 21 U.S.C. § 387f-1(a)(1) (2012) (emphasis added).

52. U.S. FOOD & DRUG ADMIN., ENFORCEMENT ACTION PLAN FOR PROMOTION AND ADVERTISING RESTRICTIONS 1–5 (2010), <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM227882.pdf>.

53. *Id.* at 11–14.

54. *See, e.g.*, King et al., *supra* note 16, at 44–45.

55. 21 U.S.C. § 387g(a)(1)(A) (2012).

56. *Id.*

57. *See, e.g.*, Saul, *supra* note 24; Cuéllar, *supra* note 19, at 266.

58. Saul, *supra* note 24.

59. Andrew Cheyne et al., *The Debate on Regulating Menthol Cigarettes: Closing a Dangerous Loophole vs Freedom of Choice*, 104 AM. J. PUB. HEALTH e54, e57 (2014).

60. *Id.*

61. *See* Andrew Zajac, *Lorillard Wins Ruling on Tobacco Panel Conflicts*, BLOOMBERG (July 22, 2014, 3:42 PM), <http://www.bloomberg.com/news/articles/2014-07-21/lorillard-wins-ruling-on-tobacco-panel-conflicts>.

freedoms.”<sup>62</sup> Some, including the NAACP Legal Defense and Education Fund, have countered this inane argument by correctly mentioning that addiction to a substance, such as nicotine, countervails freedom.<sup>63</sup>

Acknowledging the public health problems left unaddressed by the menthol exemption, the FSPTCA directed the Tobacco Products Scientific Advisory Committee (TPSAC) to study “the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities.”<sup>64</sup> In July 2011, the TPSAC reached the conclusion that the removal of menthol cigarettes from the marketplace would benefit public health.<sup>65</sup>

Rather than act promptly, the FDA instead announced that it would conduct “a preliminary independent scientific evaluation of existing data and research on menthol cigarettes.”<sup>66</sup> Although this may seem like a typical example of the intractable inertia of federal bureaucracies, the FDA’s decision to conduct an additional review on menthol irrespective of the TPSAC report was more likely a canny decision to mitigate a potential adverse ruling following a lawsuit filed by two of the largest tobacco companies against the FDA disputing the TPSAC’s determinations. Some even suggest that the FDA commissioned the second report on menthol to “ensure that the evidence base for action was not clouded by the potential impact” of this lawsuit.<sup>67</sup>

This lawsuit, challenging the composition of the TPSAC and arguing that some of the committee members had conflicts of interest, commenced in February 2011.<sup>68</sup> In July 2014, the U.S. District Court for the District of Columbia agreed with the tobacco companies’ allegation, concluding that the TPSAC’s “findings and recommendations, including reports such as the Menthol Report, are, at a minimum, suspect, and, at worst, untrustworthy.”<sup>69</sup>

Unfortunately, the FDA delayed the release of its independent menthol report and continued to dawdle on the topic of menthol. Although the peer review for the independent report was completed in early 2012, the report was not issued until July 2013,<sup>70</sup> leading some to speculate that the delay was “to ensure that there would not be a proposed menthol rule issued before the 2012 Presidential election.”<sup>71</sup>

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62. Cheyne et al., *supra* note 59, at e58.

63. *Id.* at e57.

64. 21 U.S.C. § 387g(e)(1) (2012).

65. TPSAC REPORT, *supra* note 8, at 225.

66. U.S. FOOD & DRUG ADMIN., *Tobacco Products: Menthol Cigarettes*, <http://www.fda.gov/TobaccoProducts/PublicHealthScienceResearch/Menthol/default.htm> (last visited July 14, 2015).

67. Gottlieb, *supra* note 27, at 187.

68. *Lorillard, Inc. v. U.S. Food & Drug Admin.*, 56 F. Supp. 3d 37, 39 (D.D.C. 2014).

69. *Id.* at 56.

70. *Id.*

71. *Id.*

The independent report reached conclusions similar to those of the TPSAC report, finding that menthol is associated with youth smoking initiation, greater addiction, and poses a public health risk surpassing that of nonmenthol cigarettes.<sup>72</sup> Again, rather than taking prompt action, the FDA issued a nonbinding advanced notice of proposed rulemaking and took public comments.<sup>73</sup> The comment period closed in November 2013, and despite calls on the agency to ban menthol, the FDA has been silent on the topic of menthol since then.<sup>74</sup>

Not only is the congressional menthol exemption detrimental to the public welfare, but its inherent inconsistency with respect to the restriction of other cigarette flavorings, such as clove cigarettes, has also led to potential financial repercussions resulting from international disputes.<sup>75</sup> After the FSPTCA flavor ban prohibited the importation of clove cigarettes, Indonesia—the largest exporter of clove cigarettes—successfully argued before the World Trade Organization (WTO) that the flavor ban was discriminatory because it applied to clove cigarettes while exempting menthol.<sup>76</sup> A WTO panel sided with Indonesia, although the United States and Indonesia subsequently settled the dispute.<sup>77</sup>

Given that the FDA appears to have little appetite for meaningful action regarding the regulation of menthol, it may be up to other levels of government to address this problem. Fortunately, some state and local jurisdictions have adopted or introduced policy interventions addressing menthol.<sup>78</sup>

### III. STATE AND LOCAL OPTIONS

State and local governments are often viewed as a “laboratory” for innovative policy,<sup>79</sup> and certainly seem like the natural governmental entities capable of tackling such a serious public health problem in the face of federal foot-

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72. FDA MENTHOL REPORT, *supra* note 41, at 6.

73. Press Release, U.S. Food & Drug Admin., FDA Invites Public Input on Menthol in Cigarettes (July 23, 2013), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm361966.htm>.

74. See Letter from Twenty-Seven Attorneys General to Division of Dockets Management Food and Drug Administration (Nov. 8, 2013), <http://ago.vermont.gov/assets/files/Consumer/Tobacco/Menthol%20Letter.pdf>.

75. Vicki Needham, *US, Indonesia Settle Fight Over Clove Cigarettes*, THE HILL (Oct. 3, 2014), <http://thehill.com/policy/finance/219755-us-indonesia-settle-clove-cigarette-dispute>.

76. *Id.* (noting that the reviewing WTO Panel found that clove and menthol cigarettes are “like products” under controlling trade agreements “based in part on its factual findings that both types of cigarettes are flavoured and appeal to youth”).

77. *Id.*

78. See, e.g., CHI., ILL., MUNICIPAL CODE § 4-64-180(b)(2013) (enacted) (restricting the sale of tobacco products with any flavor, including menthol, near schools); H.B. 1522, 27th Leg. (Haw. 2014) (prohibiting, if enacted, the sale of menthol flavored cigarettes).

79. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

dragging.<sup>80</sup> The tobacco control movement—a movement dedicated to the curtailment of tobacco products through the employment of public policy tactics founded in compelling empirical data<sup>81</sup>—can find several advantages in employing public policy options at the state or local level given the potentially lesser influence of political lobbying at these levels, compared with the federal level.<sup>82</sup>

The tobacco control movement has relied on several different policy options to address the general problem of tobacco-related death and disease.<sup>83</sup> These policies include sales prohibitions and restrictions, tax policies, other price-related policies, age-of-sale regulations, disclosure requirements, and marketing restrictions. Each of these options raises complicated legal issues as well as policy arguments for and against them, which this section evaluates. The question becomes, however, whether these policy options could be used to address the specific tobacco control problem of menthol.

### A. Sales Prohibition

Federal law prohibits the presence of characterizing flavors in cigarettes, yet excludes menthol and non-cigarette tobacco products from this prohibition.<sup>84</sup> The most straightforward approach to addressing the problem of menthol would be to simply label it as a characterizing flavor in tobacco products, thereby removing it from the marketplace—an approach utilized in other countries, such as Brazil.<sup>85</sup> Unfortunately, state and local governments cannot simply extend this prohibition to menthol tobacco products. In adopting this section of the

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80. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905) (affirming authority of the legislature “to care for the public health and the public safety when endangered by epidemics of disease”).

81. Randolph Kline et. al., *Beyond Advertising Controls*, 39 LOY. L.A. L. REV. 603, 603–04 (2006).

82. Leslie Zellers & Ian McLaughlin, *State and Local Policy as a Tool to Complement and Supplement the FDA Law*, 2 HASTINGS SCI. & TECH. L.J. 117–19 (2010).

83. See, e.g., FOREWORD, FRAMEWORK CONVENTION ON TOBACCO CONTROL, WORLD HEALTH ORG. v–vi (May 21, 2003), [http://www.who.int/fctc/text\\_download/en/](http://www.who.int/fctc/text_download/en/) (listing policy options, including, but not limited to, price and tax measures, education and public awareness, and sales to minors); see also THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 1, at 788–800 (discussing anti-smoking policies such as taxation, smoke-free and tobacco-free legislation, regulations on youth access, advertising bans and restrictions, and tobacco product litigation).

84. 21 U.S.C. § 387g(a)(1)(A) (2012).

85. TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING MENTHOL TOBACCO PRODUCTS, 2 (March 23, 2012), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-reg-menthol-tips-tools-2015.pdf>. The European Union intends to adopt similar measures in 2016. *Id.*; Wiktor Sarzy, *Poland to Challenge EU Ban on Menthol Cigarettes*, BUS. INSIDER (July 21, 2014), <http://www.businessinsider.com/r-poland-to-challenge-eu-ban-on-menthol-cigarettes-2014-21>; *contra Alberta Exempting Menthol Cigarettes Under Flavoured Tobacco Ban*, CBC NEWS (Nov. 13, 2014), <http://www.cbc.ca/news/canada/edmonton/alberta-exempting-menthol-cigarettes-under-flavoured-tobacco-ban-1.2834374>.

FSPTCA, Congress considered the flavor restriction to be a “tobacco product standard,” a regulation left in the exclusive domain of the federal government.<sup>86</sup>

Although Congress preempted state and local adoption of tobacco *product standards*, it granted state and local governments’ wide authority to regulate the *sale and distribution* of tobacco products.<sup>87</sup> Thus, a state or local government could consider prohibiting the *sale of* menthol tobacco products. In fact, one government has considered doing this. In the Hawaii legislature, bills were proposed that would have prohibited the sale of tobacco products containing any characterizing flavor, including menthol, with no exemptions for specific retailers.<sup>88</sup> However, these bills were not enacted into law. Accordingly, legal analysis is required to predict whether a court would have upheld such a regulation on menthol had the bill been passed into law.

The answer to this question requires a detailed discussion of the FSPTCA’s three complementary provisions that affect local authority to regulate tobacco products. A preservation clause grants state, local, and tribal governments the authority to adopt a range of tobacco control regulations that are more stringent than federal law.<sup>89</sup> A provision within the preservation clause preserves the right of state and local governments to adopt regulations “relating to *or prohibiting* the sale [or] distribution . . . of tobacco products.”<sup>90</sup> And, as mentioned previously, a preemption clause removes the ability of state and local governments to adopt “tobacco product standards.”<sup>91</sup> However, the savings clause reiterates that the preemption clause “does not apply to requirements relating to the sale [or] distribution” of “tobacco products.”<sup>92</sup> Notably, the savings clause excludes the word “prohibiting” that appears in the preservation clause.

These provisions of the FSPTCA have not been widely litigated. To the extent they have, however, court decisions have generally favored the authority of state and local governments. The most relevant litigation involves ordinances from New York City<sup>93</sup> and Providence, Rhode Island,<sup>94</sup> both of which restricted the sale of non-cigarette tobacco products containing characterizing flavors—with

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86. 21 U.S.C. § 387p(a)(2)(A) (2012); 21 U.S.C. § 387g(a)(1)(A) (2012) (including ban on flavored tobacco products under “tobacco product standards”).

87. 21 U.S.C. § 387p(a)(2)(B) (2012).

88. H.B. 1522, 27th Leg. (Haw. 2014) (prohibiting, if enacted, menthol cigarettes), S.B. 2222, 27th Leg. (Haw. 2014) (prohibiting, if enacted, all flavored tobacco products).

89. 21 U.S.C. § 387p(a)(1) (2012).

90. *Id.* (emphasis added).

91. *Id.* § 387p(a)(2)(A).

92. *Id.* § 387p(a)(2)(B).

93. *See* U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 431–32 (2d Cir. 2013).

94. *See* Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71, 74 (1st Cir. 2013).

the exception of menthol, mint, and wintergreen flavors.<sup>95</sup> Both ordinances also contained limited exemptions for certain retailers. For example, Providence exempted “smoking bars,”<sup>96</sup> while New York City exempted “tobacco bars,” of which there were only eight and none sold flavored smokeless tobacco.<sup>97</sup>

In both cases, tobacco manufacturers and retailers argued that the ordinances were tobacco product standards masquerading as sales restrictions.<sup>98</sup> In both cases, federal district and circuit courts disagreed. The First Circuit, emphasizing the exemption for smoking bars—which rendered the ordinance “not a blanket prohibition”—held that the Providence ordinance fell within the FSPTCA’s savings clause as a regulation relating to the sale of tobacco products.<sup>99</sup> The Second Circuit held that the New York City ordinance was not preempted as a tobacco product standard, but was an acceptable sales regulation, explaining that a product standard is a regulation that would “require manufacturers to alter the construction, components, ingredients, additives, constituents, and properties of their products.”<sup>100</sup> The court reasoned that the New York City ordinance was not a product standard because the city was concerned only with “whether final tobacco products are ultimately characterized by—or marketed as having—a flavor.”<sup>101</sup>

While the Second Circuit’s primary holding was that the New York City ordinance did not rise to the level of a product standard, the court stated that even if the New York City ordinance were a tobacco product standard, it would fall within the FSPTCA’s savings clause as a requirement related to the sale of tobacco products.<sup>102</sup> The court adopted a broad reading of the savings clause, noting that Congress decided to “preserve for the states a robust role in regulating, *and even banning*, sales of tobacco products.”<sup>103</sup> The court felt that the ordinance was limited in scope because it regulated “a niche product,” that is, flavored non-cigarette tobacco products, and “not a broad category of products such as cigarettes or smokeless tobacco.”<sup>104</sup> As further proof of the ordinance’s limited scope, the Second Circuit noted the exemption for tobacco bars.<sup>105</sup>

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95. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 431–32; *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 74 n.2, 76 n.5.

96. *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 74.

97. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 431–32.

98. *Id.* at 434; *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 82.

99. *Nat’l Ass’n of Tobacco Outlets*, 731 F.3d at 82.

100. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 434 (citing 21 U.S.C. § 387g(a)(4)(B) (2012)) (internal quotations omitted).

101. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 435.

102. *Id.*

103. *Id.* at 436 (emphasis added).

104. *Id.* at 436 n.3.

105. *Id.* at 432.

Although a state or local government could not adopt a requirement prohibiting the *manufacturing* of a tobacco product with a menthol flavoring, these cases suggest that a state or local prohibition on the *sale* of menthol tobacco products might survive judicial scrutiny. Still, some factors do suggest that courts might look less favorably on a state or local prohibition on the sale of menthol tobacco products than they did on the New York City or Providence ordinances.

First, in finding that the New York City ordinance was a sales regulation within the FSPTCA's savings clause, the Second Circuit considered it relevant that the ordinance regulated merely a "niche product."<sup>106</sup> Because one-third of U.S. smokers smoke menthol cigarettes,<sup>107</sup> it would be more challenging to categorize them as a niche product. However, it might not be impossible. The Second Circuit distinguished "niche product[s]," like flavored non-cigarette tobacco products, from "a broad category of products such as cigarettes or smokeless tobacco," thereby creating a spectrum of niche-ness.<sup>108</sup> On this spectrum, menthol cigarettes would fall somewhere between flavored non-cigarette tobacco products and all cigarettes. Considering two-thirds of smokers do not smoke menthol cigarettes, menthol is likely closer to the former.<sup>109</sup>

Second, a sales prohibition can be distinguished from the New York City and Providence ordinances, and would require a court to consider questions that neither the First nor Second Circuits directly addressed. Most obviously, the New York City and Providence ordinances exempt tobacco bars and smoking bars respectively,<sup>110</sup> while a sales prohibition would have no such exemption. Both circuits discussed the exemptions.<sup>111</sup> However, they did not reach the question of whether such an exemption is necessary in order for the ordinance to fall within the savings clause. There is some merit to this argument because the savings clause uses different language than the preservation clause. The preservation clause discusses measures "relating to *or prohibiting* the sale . . . of tobacco products,"<sup>112</sup> while the savings clause merely references regulations "relating to the sale . . . of[] tobacco products."<sup>113</sup> However, this does not mean that a state or local sales prohibition would necessarily be preempted. When used with "to," "relate" simply means "to have connection, relation, or

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106. *Id.* at 436.

107. TPSAC REPORT, *supra* note 8, at 41.

108. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 436.

109. *See* TPSAC REPORT, *supra* note 8, at 41.

110. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 431; Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71, 74 (1st Cir. 2013).

111. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 436 n.3; *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 82; *see also* Order at 2, *Indep. Gas & Serv. Stations Ass'n v. City of Chicago*, No. 14 C 7536 (N.D. Ill. Nov. 12, 2014) ("If Chicago were to ban the sale of menthol-flavored tobacco products outright, [plaintiff gas stations] might have a colorable argument that the city was imposing a requirement that ran afoul of the Act's preemption term.").

112. 21 U.S.C. § 387p(a)(1) (2012) (emphasis added).

113. *Id.* § 387p(a)(2).



reference.”<sup>114</sup> A sales prohibition would certainly be connected or related to the sale of tobacco products. Still, it would likely be up to a court to determine the significance, if any, with respect to the absence of the word “prohibiting” from the savings clause.

Finally, the FSPTCA contains several provisions that are specific to menthol cigarettes that appear to support the argument that it is the federal government, not state and local governments, that should be regulating these products. First, as noted previously, the FSPTCA charged TPSAC with studying menthol cigarettes.<sup>115</sup> However, Congress included a rule of construction that the obligation charged to the TPSAC did not limit the FDA’s “authority to take action under this section or other sections of this chapter applicable to menthol.”<sup>116</sup> Arguably, this language suggests that Congress did not intend for menthol cigarettes to be treated any differently than other tobacco products under other sections of the FSPTCA. Moreover, legislative history suggests that the TPSAC charge was motivated by concern that a nationwide menthol ban would lead to a black market in menthol cigarettes, and a sudden demand for cessation services that quitlines could not absorb.<sup>117</sup> A state or local sales prohibition would not raise those concerns to the same extent.

Additionally, the FSPTCA singles out cigarettes in ways that may raise concerns regarding a state or local regulation of menthol cigarettes. Most notably, as previously discussed, the law prohibits cigarettes from containing a characterizing flavor, with the exception of tobacco and menthol flavors.<sup>118</sup> This provision contains a rule of construction similar to the provision charging TPSAC with studying menthol, stating that the FDA retains authority to adopt regulations related “to menthol or any artificial or natural flavor, herb, or spice not specified in this subparagraph.”<sup>119</sup> Again, this arguably suggests that Congress did not intend for the regulation of menthol tobacco products to be treated differently at the state and local level than other tobacco products pursuant to other sections of the FSPTCA. Additional provisions of the FSPTCA regulate cigarettes,<sup>120</sup> but none suggest that state and local authority should be diminished beyond what is in the preemption clause.

These legal authorities suggest that a court may very well uphold a state or local prohibition on the sale of menthol tobacco products, and such a prohibition could be modeled off of the New York City and Providence ordinances that

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114. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1472 (4th ed. (2000)).

115. 21 U.S.C. § 387g(e)(1) (2012).

116. *Id.* § 387g(e)(3).

117. H.R. Rep. No. 111-58, pt. 1, at 38 (2009).

118. 21 U.S.C. § 387g(a)(1)(A) (2012).

119. *Id.*

120. *See, e.g., Id.* § 387g(d)(3)(A) (prohibiting the FDA from banning all cigarettes); 15 U.S.C. § 1333(d) (2012) (requiring the FDA to promulgate regulations requiring the placement of graphic warnings depicting adverse health effects of smoking on cigarette packaging).

restrict the sale of flavored non-cigarette tobacco products.<sup>121</sup> However, some changes should be considered. First, the exemption for menthol, mint, and wintergreen flavors should be eliminated. Although smokeless tobacco products with a menthol flavoring do not appear to be as widely used as menthol cigarettes, there does not appear to be a sound public health basis for exempting these flavorings. It has been conclusively demonstrated that menthol as a flavoring appeals to youth;<sup>122</sup> mint and wintergreen flavorings are presumably no less appealing. Second, to constitute a true sales prohibition, no retailer should be exempt from an ordinance the way tobacco bars and smoking bars were exempted in New York City and Providence, respectively. Finally, the ordinance should have a provision including menthol cigarettes within the sales prohibition. This provision would be the most controversial because of the number of menthol smokers, but, for the same reason, it would make the most substantive improvement in public health. In order to decrease the risk of preemptive conflict with the FSPTCA's prohibition on flavored cigarettes, this prohibition ought to be a separate section from the provisions related to non-cigarette tobacco products and should make it explicitly clear that, in the case of cigarettes, the ordinance is regulating menthol. This provision could also include a "sunset clause," stating that the provision would cease to be in effect if and when the FDA added menthol to the list of prohibited flavors for cigarettes. Finally, the ordinance should include a severability clause so that it remains in effect if any part of it gets struck down.

Still, would such an ordinance be sound from a policy standpoint, and would it be practical? Several arguments support a menthol sales ban. First, it is a logical extension of the FSPTCA's prohibition on flavored cigarettes.<sup>123</sup> It would effectuate the conclusions of the TPSAC and FDA reports that removing menthol from the marketplace would benefit public health.<sup>124</sup> It would remove a common starter product, making it less likely that youth would begin smoking.<sup>125</sup> It would also help with smoking cessation among menthol smokers,<sup>126</sup> which could help reduce tobacco-related disparities among classified diversity groups. Moreover, because such a policy would not have any exemptions, it would presumably be more effective in reaching these objectives compared to policies that exempted certain retailers or tobacco products.

Some arguments, however, cut the other way. Legislative history shows that Congress exempted menthol cigarettes from the flavor ban because it was concerned about a potential black market for menthol cigarettes and a dramatic

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121. N.Y.C. ADMIN. CODE § 17-715 (2014); CODE OF ORDINANCES OF THE CITY OF PROVIDENCE § 14-309 (2012), <https://www.providenceri.com/efile/2036>.

122. FDA MENTHOL REPORT, *supra* note 41, at 3.

123. 21 U.S.C. § 387g(a)(1)(A).

124. TPSAC REPORT, *supra* note 8, at 225; FDA MENTHOL REPORT, *supra* note 41, at 6.

125. FDA MENTHOL REPORT, *supra* note 41, at 5.

126. Pearson, *supra* note 12, at e111.

increase in the need for cessation services.<sup>127</sup> The threat of a black market is often used by the tobacco industry to argue against any meaningful tobacco control measure and is likely a red herring.<sup>128</sup> The need for increased cessation services is a more serious concern, but it can certainly be addressed within the existing tobacco cessation infrastructure. Standard tobacco control measures, such as tobacco tax increases<sup>129</sup> or smoke-free laws,<sup>130</sup> invariably lead to an increase in cessation attempts, but do not seem to overwhelm the system. Indeed, residents of every U.S. state have access to a tobacco quitline.<sup>131</sup>

Political challenges and the risk of litigation present more serious impediments to adopting a state or local menthol sales prohibition. As the congressional experience shows,<sup>132</sup> it would be politically challenging to adopt a state or local menthol sales prohibition. The tobacco industry has proven adept at using arguments related to tobacco smuggling, racial bias, and personal liberty to thwart effective menthol regulations.<sup>133</sup> These arguments are generally specious,<sup>134</sup> but can be effective with policymakers.<sup>135</sup>

Further, as noted earlier, the First and Second Circuits relied in part on the presence of exemptions for smoking bars and tobacco bars, respectively, in finding that the cities' ordinances fell within the FSPTCA's savings clause.<sup>136</sup> It is by no means certain that a court would not uphold an ordinance without

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127. H.R. Rep. No. 111-58, pt. 1, at 38 (2009).

128. See David E. Rosenbaum, *Smoking Foes Battle the Industry's Specter of Smuggling*, N.Y. TIMES, May 5, 1998, at A28 ("Senator John H. Chafee, Republican of Rhode Island, . . . characterizes the black-market argument as a 'red herring.'"); Letter from twenty-seven Attorneys General, *supra* note 74, at 3 ("The specter of a black market is often raised to oppose regulation or taxes, but the threat of the emergence of a black market in menthol cigarettes should not be permitted to override the protection of public health. Although contraband cigarettes are a serious problem, there are numerous law enforcement tools that can be used to combat production or importation of unlawful tobacco products."); see also BENJAMIN C. ALAMAR ET AL., CIGARETTE SMUGGLING IN CALIFORNIA: FACT AND FICTION, CTR. FOR TOBACCO CONTROL RESEARCH & EDUC. 19-20 (2003), <http://www.escholarship.org/uc/item/4fv0b2sz#page-1> (finding that tax increases on cigarettes increase smuggling only marginally).

129. See Jie-Min Lee, *Effect of a Large Increase in Cigarette Tax on Cigarette Consumption: An Empirical Analysis of Cross-Sectional Survey Data*, 122 PUB. HEALTH 1061, 1066 (2008).

130. U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 16 (2000) (finding that support for "clean indoor air restrictions" is "high" because smoke-free "environments have been shown to decrease daily tobacco consumption and to increase smoking cessation among smokers").

131. See NORTH AMERICAN QUITLINE CONSORTIUM, WHAT IS A QUITLINE, <http://www.naquitline.org/?page=whatisquitline> (last visited July 15, 2015).

132. See, e.g., Saul, *supra* note 24.

133. See generally Cheyne et al., *supra* note 59, at e56-e58.

134. See generally ALAMAR ET AL., *supra* note 128.

135. See Cheyne et al., *supra* note 59, at e56 (quoting U.S. Representative John Dingell defending the menthol exemption and explaining that "[i]n a perfect world, we'd ban all cigarettes . . . [b]ut the hard fact is that there are a lot of jobs depending on this").

136. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71, 82 (1st Cir. 2013); U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 436 (2d Cir. 2013).

such an exemption, but it is not guaranteed. For that reason, a state or local sales restriction (*i.e.*, not a prohibition) on menthol tobacco products will now be evaluated.

### B. Sales Restrictions

The most meaningful state or local menthol policy taken to date is a sales restriction enacted in Chicago. In late 2013, the city council adopted an ordinance prohibiting the sale of any tobacco product containing any characterizing flavor—including menthol—by tobacco retailers located within five hundred feet of any school property line.<sup>137</sup> At the time the ordinance was considered, 351 out of 2,986 tobacco retailers—or about 11.7%—were located within 500 feet of a school zone.<sup>138</sup> The ordinance exempted “retail tobacco stores” that derive at least eighty percent of sales from tobacco and related products.<sup>139</sup> Less than five percent of retail stores within the City of Chicago met the definition of “retail tobacco stores.”<sup>140</sup>

Determining whether the Chicago sales restriction ordinance would be preempted as an invalid tobacco product standard requires legal analysis similar to that applied to a sales prohibition ordinance. A sales restriction, compared to a sales prohibition, would seem to be an even clearer example of a restriction that “relat[es] to the sale [of] tobacco products”<sup>141</sup> permitted under the FSPTCA’s savings clause because it exempts both “retail tobacco stores” and retailers located more than five hundred feet from a school.<sup>142</sup> Indeed, an association of gas stations recently challenged the Chicago ordinance in federal district court,<sup>143</sup> and preliminary decisions in this litigation suggest that the city was acting within its authority.<sup>144</sup> Therefore, it appears likely that a court would uphold the ordinance.

One can imagine a broader sales restriction that still falls short of a prohibition. For example, rather than limiting the scope of the ordinance to within five hundred feet of schools, it could apply citywide or statewide, while still including narrow exemptions for certain retailers. To ensure that the

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137. CHI., ILL., MUNICIPAL CODE § 4-64-180(b)(2013) (enacted).

138. Melissa Buenger, *Licensed Tobacco Retailers Within 500 Feet of Public and Private Schools by Chicago Ward* (2013) (on file with author).

139. CHI., ILL., MUNICIPAL CODE §§ 4-64-180(b), 7-32-010 (2013) (enacted).

140. Complaint at 5, *Indep. Gas & Serv. Stations Ass’n, Inc. v. City of Chicago*, No. 14CV7536, 2015 WL 4038743 (N.D. Ill. Oct. 22, 2014). The city of Berkeley, California, has considered a similar ordinance. Ivy Kim, *Berkeley City Council Explores Restriction of Flavored Tobacco Sales Near Schools*, THE DAILY CALIFORNIAN (March 10, 2014), <http://www.dailycal.org/2014/03/10/berkeley-city-council-explores-restriction-flavored-tobacco-sales-near-schools/>.

141. 21 U.S.C. § 387p(a)(2)(B) (2012).

142. CHI., ILL., MUNICIPAL CODE § 4-64-180(b) (2013) (enacted).

143. *See generally* Complaint, *Indep. Gas & Serv. Stations Ass’n, Inc. v. City of Chicago*, No. 14CV7536, 2015 WL 4038743 (N.D. Ill. Sept. 27, 2014).

144. Order at 2, *Indep. Gas & Serv. Stations Ass’n v. City of Chicago*, No. 14CV7536, 2015 WL 4038743 (N.D. Ill. Nov. 12, 2014).

ordinance has a maximum public health benefit, any such exemption should be drafted as narrowly as possible. Consequently, exemptions could be modeled after the “tobacco bar” exemption in the New York City ordinance because only eight retailers met the definition.<sup>145</sup> The exemption for “retail tobacco stores” in the Chicago ordinance also seems to be a potential model because less than five percent of retail stores in Chicago meet this definition.<sup>146</sup> Other laws define tobacco retailers in ways that might also make useful models.<sup>147</sup>

Presumably, by limiting the ordinance’s scope to within five hundred feet of schools, Chicago intended to address the appeal of flavored tobacco, especially menthol, to youth. This is certainly a laudable goal, and the ordinance could be an effective way of addressing this problem. However, menthol has also been shown to make it more difficult for adult smokers to quit,<sup>148</sup> a problem left unaddressed by the geographically restricted Chicago ordinance. Given that “88.25 percent of Chicago retailers can continue to sell menthol tobacco products,” it appears that these products will still be readily available to adult smokers.<sup>149</sup> For that reason, a more comprehensive restriction would seem to be desirable from a public health standpoint.

A statewide or citywide sales restriction with a limited exemption for adult tobacco retailers would seem to be a stronger ordinance because it would advance the complementary goals of preventing youth tobacco initiation while encouraging adult cessation. While an exemption for adult tobacco retailers would undercut the latter goal somewhat, if the exemption is drawn narrowly enough, it would still help advance the goal by removing a tempting product—*i.e.*, menthol cigarettes—from locations adult smokers would frequent for reasons unrelated to a tobacco habit, such as gas stations.

### C. Tax Policy

Raising taxes on tobacco products has long been recognized as an effective method to help encourage cessation and limit tobacco initiation by youth who are especially price sensitive.<sup>150</sup> It is certainly possible that a tax increase on

145. U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 432 (2d Cir. 2013).

146. See Complaint at 5, *Indep. Gas & Serv. Stations Ass’n, Inc. v. City of Chicago*, No. 14CV7536, 2015 WL 4038743 (N.D. Ill. Oct. 22, 2014).

147. See, e.g., 21 C.F.R. § 1140.16(c)(2)(ii) (2014) (exempting vending machines and self-service displays that are monitored by the retailer from a requirement that tobacco sales be conducted in face-to-face exchanges with retailers); Minn. Stat. § 144.4167, subd. 4 (2008) (defining “tobacco products shop[s]” as a “retail establishment . . . that derives more than 90 percent of its gross revenue from the sale of” tobacco and various tobacco products).

148. FDA MENTHOL REPORT, *supra* note 41, at 6.

149. TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING MENTHOL TOBACCO PRODUCTS 3 (2015), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-reg-menthol-tips-tools-2015.pdf>.

150. See Jidong Huan & Frank J. Chaloupka, IV, *The Impact of the 2009 Federal Tobacco Excise Tax Increase on Youth Tobacco Use* 24–29 (Nat’l Bureau of Econ. Research, Working Paper No. 18026, 2012), <http://www.nber.org/papers/w18026.pdf>.

menthol tobacco products beyond the level applied to nonmenthol products would constitute an impetus to quit the smoking of mentholated products and potentially tobacco use altogether, and an additional deterrent to the initiation of mentholated tobacco use.

There is a precedent for imposing price disparities among different tobacco products. Certainly, the retail prices of different categories of tobacco products are not consistent. This is in large part due to differential tax rates for products like cigarettes that typically see higher tax rates than products, such as cigars and smokeless tobacco, which typically have comparatively lower prices.<sup>151</sup>

Some have recommended taxing tobacco products according to toxicity,<sup>152</sup> a recommendation that is analogous to raising taxes on menthol tobacco products. While the evidence does not suggest that menthol tobacco products cause more direct physical harm to an individual than nonmenthol products, evidence does suggest that menthol products increase the likelihood of tobacco initiation and hinder cessation.<sup>153</sup> Since both of these problems increase health care costs on society and individual tobacco users, there is some logic to enacting a similar method of leveling taxes.

The most powerful argument against a higher tax rate for menthol tobacco products is that it would be regressive.<sup>154</sup> Given that use rates for menthol tobacco products are inversely related to an individual's socioeconomic status,<sup>155</sup> a higher tax on menthol tobacco products would be felt most acutely by addicted persons who are least able to absorb the cost, a reality acknowledged during the Chicago ordinance campaign.<sup>156</sup> Before recommending a sales restriction on all flavored tobacco products, the Chicago Board of Health considered several different policy options to address the problem of menthol.<sup>157</sup> The Board opposed a higher tax on menthol tobacco products because it believed

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151. See CAMPAIGN FOR TOBACCO FREE KIDS, THE BEST WAY TO TAX SMOKELESS TOBACCO 1 (2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0282.pdf>.

152. See, e.g., Zeller et al., *supra* note 7, at 329–30.

153. FDA MENTHOL REPORT, *supra* note 41, at 5–6.

154. See KAREN RICHARDSON, SMOKING, LOW INCOME AND HEALTH INEQUALITIES: THEMATIC DISCUSSION DOCUMENT 12 (May 2001), [http://www.ash.org.uk/files/documents/ASH\\_86.pdf](http://www.ash.org.uk/files/documents/ASH_86.pdf).

155. See TPSAC REPORT, *supra* note 8, at 48.

156. See Whet Moser, *The Good and Bad of Sin Taxes' Impact on Chicago's Poor*, CHI. (Nov. 7, 2013), <http://www.chicagomag.com/city-life/November-2013/Chicagos-Sin-Taxes-Could-Have-More-Impact-on-the-PoorBut-Could-Benefit-Them-More-As-Well/>.

157. See generally CHICAGO BD. OF HEALTH, 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 (2013), [https://www.cityofchicago.org/content/dam/city/depts/cdph/CDPH/MentholReport%20\\_Jan212014.pdf](https://www.cityofchicago.org/content/dam/city/depts/cdph/CDPH/MentholReport%20_Jan212014.pdf) (discussing policies aimed at reducing access to and use of menthol cigarettes such as limiting venues where menthol products can be sold, limiting promotional offers, expanding cessation services, etc.)

such a tax would “place a disproportionate burden on minority communities that have already been the target of predatory marketing.”<sup>158</sup>

Even in the absence of arguments that a tax increase on menthol tobacco products would be regressive, taxes are a perennially controversial policy option. In the context of a jurisdiction with a large proportion of minority communities, this is a valid concern. However, considering taxation is well within the purview of state and local governments, and the FSPTCA’s preemption clause specifically states that the law does not “limit or otherwise affect any State, tribal, or local taxation of tobacco products,”<sup>159</sup> coupled with the historically effective impact increased taxation has upon smoking rates,<sup>160</sup> a tax policy targeting menthol tobacco products remains a viable policy option especially in communities where youth tobacco initiation is a larger concern, such as a college town. Still, it is worth examining whether other policy options dealing with price could achieve some of the same goals.

#### *D. Other Price-Related Policies*

State and local jurisdictions have adopted several tobacco control regulations, outside direct taxation, that affect the price of tobacco products. As one example, the city of Providence, Rhode Island, adopted an ordinance that prohibits retailers from accepting any coupons that reduce the price of tobacco products in conjunction with restricting the sale of flavored non-cigarette tobacco products.<sup>161</sup> Second, some jurisdictions simply set a minimum price for various tobacco products.<sup>162</sup> Finally, some jurisdictions address price by setting a minimum pack size for various tobacco products.<sup>163</sup>

The legality of these non-tax price regulations is not as clear cut as tax laws because the preservation clause of the FSPTCA preserves state and local

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158. *Id.* at 6.

159. 21 U.S.C. § 387p(a)(1) (2012).

160. *See, e.g.*, RAISING THE EXCISE TAX ON CIGARETTES: EFFECTS ON HEALTH AND THE FEDERAL BUDGET 8–9 (June 2012), [https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CEEQFjAF&url=http%3A%2F%2Fwww.cbo.gov%2Fsites%2Fdefault%2Ffiles%2F06-13-Smoking\\_Reduction.pdf&ei=dnudVbu4DYSbyAT-npf4CA&usq=AFQjCNEljx6uJlBoTCeM0SvfvuuFyBF0tw&sig2=UiFTDvZoYJx\\_8iFS017m8Q&bvm=bv.96952980,d.aWw](https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CEEQFjAF&url=http%3A%2F%2Fwww.cbo.gov%2Fsites%2Fdefault%2Ffiles%2F06-13-Smoking_Reduction.pdf&ei=dnudVbu4DYSbyAT-npf4CA&usq=AFQjCNEljx6uJlBoTCeM0SvfvuuFyBF0tw&sig2=UiFTDvZoYJx_8iFS017m8Q&bvm=bv.96952980,d.aWw); CANADIAN CANCER SOC’Y, SURVEYING THE DAMAGE: CUT-RATE TOBACCO PRODUCTS AND PUBLIC HEALTH IN THE 1900S 24–25 (Oct. 1999), <http://www.nsr-adnf.ca/DOCUMENTS/PDFs/oct99taxrep.pdf>.

161. *See Nat’l Ass’n of Tobacco Outlets v. City of Providence*, 731 F.3d 71, 74 n.1 (1st Cir. 2013).

162. *See id.* at 81 (internal quotations omitted) (noting that “as of 2009, 25 states had minimum price laws for cigarettes”); *see also* Minn. Stat. § 325D.33, subd. 1 (2014) (prohibiting the sale of cigarettes at less than cost to the retailer or wholesaler for the purpose of injuring a competitor).

163. *See, e.g.*, 21 C.F.R. § 1140.16(b) (prohibiting the sale of cigarettes in quantities less than twenty); ST. PAUL, MINN., CODE § 324.07(a) (2013) (prohibiting sales of cigarettes outside of their original packaging); GARDENA, CAL., CODE § 5.52.090(F)(1) (2015) (prohibiting the sale of cigars in quantities less than five).

taxation authority,<sup>164</sup> but contains no reference to price regulations outside of the tax realm. Accordingly, a legal analysis is required before attempting to apply these non-tax price policy options to menthol tobacco products. Because menthol cigarettes are a larger public health burden than non-cigarette tobacco products with a menthol flavoring, it would be critical that any regulation of menthol apply to menthol *cigarettes*.<sup>165</sup> This Article examines a coupon regulation first. Because coupons could be considered advertisements, it must be determined whether the Federal Cigarette Labeling and Advertising Act (FCLAA)<sup>166</sup> would pose a bar to state or local action.

The FCLAA preempts the ability of state and local governments to adopt any “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any” properly labeled cigarettes.<sup>167</sup> However, in a provision adopted as part of the FSPTCA, the FCLAA goes on to permit state or local “regulations, based on smoking and health . . . imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”<sup>168</sup>

In upholding Providence’s ordinance restricting tobacco product coupon redemption, the First Circuit found that the ordinance did not regulate the content of an advertisement; rather, the ordinance merely regulated the “manner” in which cigarettes were promoted, a practice consistent with the FCLAA.<sup>169</sup> While this decision is not universally dispositive, it does strongly suggest that a state or local prohibition on the redemption of coupons for menthol tobacco products would also be upheld.

The second non-tax policy option, a minimum price law for menthol tobacco products, is a restriction that likely stands on stronger legal footing than coupon redemption restrictions. In upholding Providence’s coupon ordinance, the First Circuit noted that twenty-five states have minimum price laws for cigarettes, which support the notion that these laws would not be preempted by the FCLAA.<sup>170</sup> Although a minimum price law for menthol tobacco products would likely be upheld, the fact that twenty-five states have such a law in place for cigarettes generally means that a minimum price law targeted at menthol products specifically would not make a huge difference in addressing the problem of menthol unless the minimum price of menthol cigarettes exceeded

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164. 21 U.S.C. § 387p(a)(1).

165. See Richard J. O’Connor, *Non-Cigarette Tobacco Products: What Have We Learned and Where Are We Headed?*, 21 TOBACCO CONTROL 180, 184 (2012).

166. 15 U.S.C. § 1334 (2012).

167. *Id.* § 1334(b).

168. *Id.* § 1334(c).

169. Nat’l Ass’n of Tobacco Outlets v. City of Providence, 731 F.3d 71, 81 (1st Cir. 2013). Arguably, this reasoning is incorrect because coupons relate to the manner of sale and not the manner of speech.

170. *Id.*



the minimum price of nonmenthol cigarettes.<sup>171</sup> Consequently, because the minimum price of menthol cigarettes would already be set in these states, the law would only be targeting products that do not pose as serious of a public health problem, *i.e.*, non-cigarette tobacco products with a menthol flavoring.

The third non-tax policy option, a minimum pack size, requires a similar analysis to the previous policy option. In addition to the many state and local laws related to pack size already in place—and do not appear to have been challenged<sup>172</sup>—a federal regulation limits the pack size of all cigarettes to no more than twenty.<sup>173</sup> Unfortunately, a comparable federal restriction for non-cigarette tobacco products does not exist.<sup>174</sup> Any minimum pack size regulation of menthol tobacco products, therefore, would apply only to non-cigarette tobacco products. This would limit the utility of this approach in the context of menthol.

It seems that, while all three of these options are on reasonably solid legal footing, the strongest option from a policy standpoint would be a state or local prohibition of coupon redemption and multi-pack discounts. Tobacco manufacturers use coupons and other discounting techniques extensively to lower the price of their products, making them more widely available.<sup>175</sup> This certainly has an adverse impact on public health in the context of a product like menthol, which is used more heavily by those of a lower socioeconomic status. However, this could also suggest that such a policy would have a regressive effect, similar to the arguments against policies that would tax menthol tobacco products at a higher rate.

#### *E. Age-of-Sale Regulations*

A straightforward approach that could address the problem of menthol in tobacco products is to raise the minimum age at which the products can be purchased. Currently, federal law sets the minimum age to purchase tobacco products at eighteen.<sup>176</sup> Several states, cities, and counties, however, have raised the minimum purchase age higher than that set by the federal government. Alabama, Alaska, New Jersey, and Utah have minimum purchase ages of nineteen.<sup>177</sup> Evanston, Illinois, and New York City have a minimum purchase

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171. See generally TOBACCO CONTROL LEGAL CONSORTIUM, CIGARETTE MINIMUM PRICE LAW (2011), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-cigminimum-pricelaws-2011.pdf> (discussing policy benefits of increased cigarette prices).

172. See *supra* note 163 and accompanying text.

173. 21 C.F.R. § 1140.16(b) (2014).

174. Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS HEALTH L. 407, 428 (2012).

175. B.R. Loomis et al., *Point of Purchase Cigarette Promotions Before and After the Master Settlement Agreement: Exploring Retail Scanner Data*, 15 TOBACCO CONTROL 140, 140 (2006).

176. 21 C.F.R. § 1140.14(a).

177. See ALA. CODE § 28-11-2(4) (2014); ALASKA STAT. ANN. § 11.76.100(a)(1) (West 2014); N.J. STAT. ANN. § 2C:33-13.1(a) (West 2010); UTAH CODE ANN. § 76-10-104(1) (West 2014).

age of twenty-one.<sup>178</sup> Suffolk County, New York, and Hawaii County have an age limit of twenty-one.<sup>179</sup> None of these laws has been overturned, and it seems fairly clear that the FSPTCA—which allows for state and local regulation of the “use of tobacco products by individuals *of any age*”—preserves the authority of state and local governments to raise the purchase age beyond the federal age of eighteen.<sup>180</sup>

If raising the age to purchase *all* tobacco products is not politically feasible in a jurisdiction, a strong argument remains to raise the age to purchase menthol tobacco products, or tobacco products with any flavoring, for that matter. Like other characterizing flavors, menthol is a common starter product for young adult and minor smokers.<sup>181</sup> Removing the ability of young adults between the ages of eighteen and twenty to purchase these products legally could have a positive effect in reducing tobacco initiation.

#### F. Disclosure Requirements

In addition to allowing state and local governments to increase the age to purchase tobacco products, the FSPTCA also allows state and local governments to adopt tobacco control laws related to “information reporting to the State.”<sup>182</sup> While some state information reporting laws in the tobacco field relate to the ingredients of tobacco products,<sup>183</sup> they could also conceivably relate to tobacco marketing.<sup>184</sup> Some state laws even go as far as requiring tobacco manufacturers to disclose their promotional activities.<sup>185</sup>

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178. See Derrick Blakley, *Evanston Becomes First Illinois City To Raise Cigarette-Buying Age To 21*, CBS CHI. (Nov. 7, 2014, 6:13 PM), <http://chicago.cbslocal.com/2014/11/07/evanston-becomes-first-illinois-city-to-raise-cigarette-buying-age-to-21/>; *NYC Gets Tough on Tobacco, Raises Purchase Age To 21*, CNN (Nov. 19, 2013), <http://www.cnn.com/2013/11/19/us/new-york-city-tobacco-age-law/>.

179. Ashley Edwards & James Ford, *Suffolk County Raises Tobacco Purchase Age To 21 With Support From Many Veteran Smokers*, PIX11 (Apr. 14, 2014, 7:48 PM), <http://pix11.com/2014/04/14/suffolk-county-raises-tobacco-purchase-age-to-21/>; *Tobacco Age Limit in Hawaii County Rises To 21 Next Week*, KHON-2 (June 25, 2014, 4:07 PM), <http://khon2.com/2014/06/25/tobacco-age-limit-in-hawaii-county-rises-to-21-next-week/>.

180. 21 U.S.C. § 387p(a)(1) (2012) (emphasis added).

181. FDA MENTHOL REPORT, *supra* note 41, at 6.

182. 21 U.S.C. § 387p(a)(1).

183. See, e.g., MASS. GEN. LAWS ANN. ch. 94, § 307B (West 2014) (requiring manufacturers to provide to the department of public health the nicotine yield of their tobacco and “the identity of any added constituent other than tobacco”).

184. See generally TOBACCO CONTROL LEGAL CONSORTIUM, SUNSHINE LAWS: REQUIRING REPORTING OF TOBACCO INDUSTRY PRICE DISCOUNTING AND PROMOTIONAL ALLOWANCE PAYMENTS TO RETAILERS AND WHOLESALERS (2012), [http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-sunshinelaws-tobaccocontrol-2012\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-sunshinelaws-tobaccocontrol-2012_0.pdf) (providing guidance “for state and local policymakers . . . who are considering requiring disclosure or reporting” of tobacco marketing practices).

185. See, e.g., N.J. ADMIN. CODE § 18:6-4.2 (2004) (requiring advance written notification of “any manufacturer’s promotional sales plan, including a description of the plan in detail and the dates and period of time during which the plan is to be operative”).

A state or local law requiring tobacco manufacturers to disclose amounts spent on the marketing of menthol tobacco products broken down by geographic area, e.g. a ZIP code, could provide the public health community with valuable information. Evidence has shown that tobacco manufacturers disproportionately promote menthol tobacco products in predominantly low income and minority areas.<sup>186</sup> If a law were to require the production of data showing these documented marketing disparities, that data could be used to identify improper advertisement practices, which could provide an impetus for a more substantive policy addressing menthol, such as a sales restriction.

### G. Marketing Restrictions

Modified by the FSPTCA, the FCLAA permits state and local regulations “on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes,” even when those regulations are based on smoking or health.<sup>187</sup> Accordingly, any regulation in this area must adhere to the U.S. Supreme Court’s First Amendment jurisprudence. To be sure, this jurisprudence sets a high bar for tobacco marketing regulations,<sup>188</sup> but it may not be an insurmountable bar. For example, the First Circuit upheld the Providence restriction on coupon redemption as an acceptable regulation of “the ‘manner’ of promotion.”<sup>189</sup>

One can imagine many time, place, and manner restrictions tailored to restrict menthol, particularly inhibiting the appeal of menthol as a factor in youth tobacco initiation. A “time” restriction could prohibit the marketing of menthol tobacco products outdoors or in any place minors can enter before a curfew. A “place” restriction could prohibit the marketing of menthol tobacco products outdoors or in a minor accessible facility located within one thousand feet of a school. Finally, a “manner” restriction could restrict the use of video advertisements for menthol tobacco products in retail stores that can be entered by minors.

To be sure, each of these policy options would likely face powerful opposition from tobacco manufacturers and retailers. The small city of Haverstraw, New York, for example, adopted a display ban but rescinded the ordinance when faced with a lawsuit.<sup>190</sup> Upon the eventual occurrence of litigation, marketing

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186. See Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH 116, 116 (2012) (finding that tobacco industry records demonstrate a greater focus on marketing menthol cigarettes in predominantly low-income and minority neighborhoods).

187. 15 U.S.C. § 1334(c) (2012).

188. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (striking down, on First Amendment grounds, a Massachusetts height restriction on indoor smokeless tobacco advertisements).

189. *Nat’l Ass’n of Tobacco Outlets v. City of Providence*, 731 F.3d 71, 81 (1st Cir. 2013).

190. Laurel E. Curry et al., *The Haverstraw Experience: The First Tobacco Product Display Ban in the United States*, 104 AM. J. OF PUB. HEALTH e9, e9, e11–12 (2014).

restriction laws would likely be challenged under the U.S. Supreme Court's *Central Hudson* test,<sup>191</sup> a test that the Court has used to strike down previous restrictions on the marketing of tobacco products.<sup>192</sup> However, such a regulation could be upheld if the ordinance was drafted narrowly, for example, including an exemption for adult-only facilities. In addition, a marketing surveillance campaign should be implemented in any jurisdiction considering such a law, considering the appeal of menthol tobacco products to impressionable minors and young adults. Such a law could have a powerful effect on reducing youth initiation and would be consistent with internationally-recommended policies on tobacco marketing.<sup>193</sup>

#### IV. CONCLUSION

Historically, state and local governments have had a wide variety of policy levers available to address the public health problem of tobacco. Although state and local governments are beginning to address the specific problem of menthol, many of these same policy options could be used nationwide to address the serious public health problem posed by menthol tobacco products.<sup>194</sup> The policy option that would likely have the most immediate and greatest positive effect on public health would be a prohibition or restriction on the sale of all flavored tobacco products, including menthol cigarettes. Short of that, more modest options such as raising the age to purchase menthol tobacco products or requiring tobacco manufacturers to disclose the amount spent on marketing menthol tobacco products could also have a positive impact on public health and yield useful information.

To be sure, any of these options would require a large amount of groundwork in terms of coalition building, data collection, and advocacy. They would also likely face daunting legal challenges from tobacco manufacturers and retailers. However, in light of the federal government's continued failure to take meaningful action to address this problem, time and resources spent working on and defending such a policy would be well spent.

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191. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). The test requires the Court to inquire "whether the expression is protected by the First Amendment" and "whether the asserted government interest is substantial." *Id.* If both of these questions "yield positive answers," then the Court considers "whether the regulation directly advances the governmental interest asserted, and . . . is not more extensive than is necessary to serve that interest." *Id.*

192. *Lorillard Tobacco Co.*, 533 U.S. at 567.

193. See FRAMEWORK CONVENTION ON TOBACCO CONTROL, *supra* note 83, at 11 (calling on member nations to "undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship" if consistent with that nation's constitution).

194. See *supra* Part III (discussing state and local sales restrictions, taxation schemes, age restrictions, and other policy solutions).