

FROM HOUSING TO HEALTH: IMAGINING ANTIDISCRIMINATION PROVISIONS FOR MENTHOL CIGARETTE MARKETING

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Smoking has been decreasing steadily over the past several decades, but advertisers still target some populations for cigarette consumption. Currently, almost nine out of ten African American smokers smoke mentholated cigarettes compared to only one in four White Americans. This disparity in use came about through decades of targeted marketing efforts on the part of tobacco companies. Mentholated cigarettes are more addictive than unflavored cigarettes and lead to more lifelong smoking. Because menthol smokers have a harder time quitting, civil rights and public health advocates have long viewed the marketing practices of menthol cigarette makers as a racial injustice. This Note substantiates this notion by comparing racially targeted marketing of menthol to the racial targeting practices in the subprime mortgage market. In housing crisis-era cases centered on Fair Housing Act claims, courts found that targeting minorities to purchase predatory home loans was a civil rights violation. Drawing on reverse redlining jurisprudence under the Fair Housing Act and the Equal Credit Opportunity Act, this Note proposes a statutory provision that would prohibit racially targeted marketing of mentholated cigarettes.

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I. INTRODUCTION

The widespread decrease in smoking and tobacco use over the past fifty years has been one of the United States' greatest public health victories. Between the 1960's and now, the share of Americans who smoke has dropped from over forty percent to almost fifteen percent,¹ which has driven down tobacco-related disease. This massive reduction in smoking has preserved the lives of over 800,000 Americans who, through smoking, would have succumbed to lung cancer.² In honor of these gains, the Center for Disease Control counts tobacco regulation as a crowning public health achievement.³

While these public health strides have been remarkable, the gains in smoking reduction have been distributed unequally

¹ Brady Dennis, *Who Still Smokes in the United States—In Seven Simple Charts*, WASH. POST (Nov. 12, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/11/12/smoking-among-u-s-adults-has-fallen-to-historic-lows-these-7-charts-show-who-still-lights-up-the-most/?noredirect=on&utm_term=.0dde0a26d209 [<https://perma.cc/9BZ6-G5ZH>].

² *Nearly 800,000 Deaths Prevented Due to Declines in Smoking*, NAT'L INSTITUTES HEALTH (Mar. 14, 2012), <https://www.nih.gov/news-events/news-releases/nearly-800000-deaths-prevented-due-declines-smoking> [<https://perma.cc/GCN3-P9PU>].

³ *Ten Great Public Health Achievements—United States, 2001–2010*, CDC: MORBIDITY & MORTALITY WKLY. REP. (May 20, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6019a5.htm> [<https://perma.cc/XLU8-3JD3>].

across demographics. For example, low-income Americans and Native Americans have disproportionately high smoking rates.⁴ Smoking rates are the same between African Americans and Whites.⁵ Still, African Americans suffer from more tobacco-related disease⁶ and mortality.⁷

Smoking behavior and preferences are also different across demographics where smoking rates might be equal. In particular, African American smokers overwhelmingly smoke menthol cigarettes, which are tobacco cigarettes flavored with the compound menthol. Menthol cigarettes have survived the mass tort litigation against tobacco companies and federal tobacco regulation that troubled the tobacco industry more broadly. Currently, almost nine out of ten Black⁸ smokers prefer menthol.⁹ This difference in use is troubling and is in fact a driver of health disparities. Though menthol itself does not make cigarettes more toxic, the additive does make cigarettes easier to start smoking and harder to quit.¹⁰

The fact that more minorities smoke a more addictive product can be traced to racially targeted marketing campaigns

⁴ *Burden of Tobacco Use in the U.S.*, CDC, <https://www.cdc.gov/tobacco/campaign/tips/resources/data/cigarette-smoking-in-united-states.html> [<https://perma.cc/6GET-JSMH>] (last updated Feb. 25, 2019).

⁵ *Tobacco Use in Racial and Ethnic Populations*, AM. LUNG ASS'N, <http://www.lung.org/stop-smoking/smoking-facts/tobacco-use-racial-and-ethnic.html?referrer=https://www.google.com/> [<https://perma.cc/62F3-7CF5>] (last updated Feb. 20, 2019).

⁶ See Pebbles Fagan et al., *Eliminating Tobacco-Related Health Disparities: Directions for Future Research*, 94 AM. J. PUB. HEALTH 211 (2004) (discussing health disparities in tobacco-related diseases among groups in the United States).

⁷ See Jessica Y. Ho & Irma T. Elo, *The Contribution of Smoking to Black-White Differences in U.S. Mortality*, 50 DEMOGRAPHY 545 (2013) (examining the contribution of smoking-attributable deaths to mortality trends among African Americans).

⁸ This Note will use the terms “African American” and “Black” interchangeably. Though the author recognizes that these descriptors are not truly interchangeable, they will be used as such because the data and other research referenced do not distinguish between the two.

⁹ *African Americans and Tobacco Use*, CDC, <https://www.cdc.gov/tobacco/disparities/african-americans/index.htm> [<https://perma.cc/BS3T-F75Y>] (last updated Mar. 7, 2018).

¹⁰ See Nadine Kabbani, *Not so Cool? Menthol's Discovered Actions on the Nicotinic Receptor and Its Implications for Nicotine Addiction*, 4 FRONTIERS PHARMACOLOGY 95 (2013) (examining how menthol increases the addictiveness of cigarettes).

that began in the 1950's.¹¹ To this day, menthol cigarette makers inundate minority communities with advertisements while barely touching White markets. This targeting has created a disparate harm in public health, but current legal tools in tobacco regulation do not specifically address the civil rights injuries wrought by menthol cigarette makers' hyper-focus on African American populations and mentholated cigarettes' persistence in the tobacco market. This topic has been covered extensively in public health scholarship, where researchers express the intuition that tobacco companies' targeted advertising on the basis of race is unjust and exacerbates societal inequalities. This Note articulates those intuitions in legal terms by describing the harms of targeted marketing as civil rights injuries and by analogizing the marketing practices of menthol cigarette makers to the unlawful discriminatory behavior of lenders in the housing and credit sectors. While the practice of targeting certain goods at specific kinds of consumers is at the core of advertising, post-financial crisis cases about subprime lending show that racially targeted marketing can be harmful to minorities. This Note draws on law from subprime lending because it is one area where legislators and courts have established that *targeting* minorities for certain kinds of products is unlawful.

Part II of this Note will describe the racial disparity in menthol tobacco use, and parallel disparities in tobacco-related diseases, as a civil rights problem. It will also investigate the substantial history of menthol companies' targeting of African Americans. Part III will explore tools that have been used to regulate cigarettes, including tort litigation, legislation, agency regulation, and civil rights litigation. It will also explain how each of the tools fails to reach the discrimination problem in racially targeted marketing of menthol. Lastly, Part IV will explore how two consumer protection statutes—the Fair Housing Act and the Equal Credit Opportunity Act—have been interpreted to create liability for affirmative marketing of certain products based on race, especially in the aftermath of the subprime lending peak and the housing crisis. This Note will draw on those statutes to propose a federal statutory framework

¹¹ See Joshua Rising & Lori Alexander, *Marketing of Menthol Cigarettes and Consumer Perceptions*, 9 TOBACCO INDUCED DISEASES S2 (2011) (discussing the role that marketing plays in a consumer's perception of menthol).

that would create civil rights liabilities for racially targeted marketing of menthol tobacco products.

II. MENTHOL ADDITIVES' ROLE IN THE DISPARITIES IN TOBACCO USE AND TOBACCO-RELATED DISEASE

While the percentage of African American adults who smoke is about equal to the share of White Americans who smoke, African American smokers overwhelmingly prefer menthol cigarettes. Almost nine out of ten African Americans smoke menthol, whereas only twenty-five percent of Whites share that preference.¹² Menthol cigarettes themselves can be more harmful than non-mentholated cigarettes because they are more addictive, and African Americans overwhelmingly suffer the consequences from consuming a more addictive product.

A. Targeted Marketing

Journalists and academics have extensively covered the racially targeted marketing practices of menthol cigarette makers, and tobacco companies in general, over the past several decades. Starting in the 1940's, tobacco companies sought to develop an African American consumer base for their products, relying on political connections, cultural figures, African American media, and even civil rights leaders to generate support for—or at least temper hostility towards—cigarette smoking.¹³ In the majority of cases, the tobacco companies were trying to push mentholated cigarettes on minority groups.

It should be noted at the outset that there is no racially endemic preference for, or aversion to, mentholated cigarettes. That is, prior to menthol cigarette makers' pursuit of African American smokers, African Americans were not drawn to menthol to a significantly greater extent than White smokers.

¹² Stephanie Saul, *Black Lawmakers Seek Restrictions on Menthol Cigarettes*, N.Y. TIMES (July 1, 2008), <http://www.nytimes.com/2008/07/01/business/01menthol.html> [<https://perma.cc/G4B8-SMX3>].

¹³ See Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 NICOTINE & TOBACCO RES. S55 (2004) (examining the social factors that contribute to the disproportionate use of menthol cigarettes among African Americans).

Philip Morris commissioned a survey in 1953 to assess appetite for menthol cigarettes, finding that two percent of White Americans, and five percent of African Americans, preferred Kools, an existing menthol brand.¹⁴ Phillip Gardiner, a public health scholar, argues that tobacco companies magnified this small gap in consumer preference with decades of targeted advertising and relationship building, leading to the racial disparities in menthol cigarette consumption that we see today.¹⁵

Tobacco companies first tried to tap into minority markets by networking with African American community groups and civil rights organizations in the late 1950's and early 1960's. The tactic was to align the tobacco industry with the growing civil rights movement and argue that such alignment grew naturally from the industry's practice of employing African Americans (first as farm workers and then as salespeople) at a time when few other industries did the same.¹⁶ Executives at Philip Morris volunteered with and supported the National Association for the Advancement of Colored Peoples (NAACP), the National Urban League (NUL), and the United Negro College Fund (UNCF).¹⁷ With these relationships in place, tobacco companies were able to recruit salespeople from within the Black community and, in turn, strengthen their performance with Black smokers.¹⁸

Menthol cigarette makers in particular delicately inserted themselves into the civil rights dialogue in the 1960's as a way of capitalizing on the new cultural progression of Black identity that was distinct from White culture. An internal marketing analysis from R.J. Reynolds, the maker of Newport menthols, shows that the industry had the objective of making menthols the choice product for African Americans:

¹⁴ *Id.* at S59.

¹⁵ *Id.*

¹⁶ See Chronology of Philip Morris Policy of Equal Opportunity and Involvement in the Black Community (Dec. 24, 1987) [hereinafter Philip Morris], <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=nxkg0089> [<https://perma.cc/QF4M-73S5>]; see also Diane S. Burrows, Younger Adult Strategies and Opportunities (Feb. 17, 1984), <http://legacy.library.ucsf.edu/tid/ene39d00> [<https://perma.cc/NC2Q-9FKR>].

¹⁷ V. B. Yerger & R. E. Malone, *African American Leadership Groups: Smoking with the Enemy*, 11 TOBACCO CONTROL 336, 337 (2002).

¹⁸ *Id.*

It was time for Blacks to build their own brand in the 1960s, the heyday of Martin Luther King and “Black pride.” The strategy for exploiting this phenomenon was simple: Kool apparently capitalized on this aspect of the 1960s by simply advertising to Blacks before its competitors did. Kool ads were in *Ebony* consistently from at least 1962 Kool became “cool” and, by the early 1970s, had a 56% share among younger adult Blacks—it was the Black Marlboro.¹⁹

Brown and Williamson, the makers of Kool, exploited multiple media avenues to reach African American consumers. In addition to advertising in *Ebony*, Brown and Williamson ran advertisements in African American newspapers and on radio and television stations with significant African American audiences.²⁰ By 1965, tobacco advertising in magazines was almost thoroughly racially segmented, with advertisements in *Ebony* featuring African American models and professional athletes and advertisements in *Life* featuring White models almost exclusively.²¹

The tobacco industry added another targeted marketing tactic to its portfolio starting in the 1970’s, which was marketing through music genres popular with African Americans. In 1975, Kool sponsored the Kool Jazz Festival as a way to reach its target audience when it felt that other media opportunities were insufficient.²² In the 1980’s, Brown and Williamson’s music sponsorship operations expanded into hip hop and nightclubs, where the company would distribute free samples of menthol cigarettes to inner city youth through disc jockeys and van drivers who could localize Brown and Williamson’s efforts and “defend Kool’s strong Black franchise.”²³ The menthol cigarette companies recognized that sponsoring music events was a

¹⁹ Stacey J. Anderson, *Marketing of Menthol Cigarettes and Consumer Perceptions: A Review of Tobacco Industry Documents*, 20 TOBACCO CONTROL ii20, ii22 (2011) (footnote omitted); Philip Morris, *supra* note 16.

²⁰ Navid Hafez & Pamela M. Ling, *Finding the Kool Mixx: How Brown & Williamson Used Music Marketing to Sell Cigarettes*, 15 TOBACCO CONTROL 359, 360 (2006).

²¹ Richard W. Pollay et al., *Separate, but Not Equal: Racial Segmentation in Cigarette Advertising*, 21 J. ADVERT. 45, 51 (1992).

²² Hafez & Ling, *supra* note 20, at 359.

²³ *Id.* at 361.

form of indirect advertising.²⁴ Menthol cigarette companies continued to focus on African Americans in standard advertising mediums during this time. Between 1984 and 1985, over sixty-five percent of the cigarette advertisements in publications with African American readership—such as *Ebony*, *Jet*, and *Essence*—were for mentholated cigarettes, compared to only about fifteen percent of cigarette advertisements in White or general interest magazines.²⁵

Menthol makers were implementing these culture-based marketing initiatives at a time when public awareness of the harms of smoking was growing. In the late 1980's, sellers of mentholated cigarettes were concerned that they were losing some customers to the "polarization" of the African American consumer base into an elite class and an "underclass." One company, R.J. Reynolds, decided to focus its marketing efforts on the "underclass," members of which would "simply have more pressing concerns than smoking issues"—that is, more pressing than their own health.²⁶

Tobacco companies led a parallel indirect advertising effort by deepening their relationships with community and advocacy groups that served lower-income African Americans. In the 1980's, R.J. Reynolds made extraordinary contributions to the NAACP's Special Contribution Fund in exchange for public support; by 1990, the company was placing its corporate logo on billboards advertising services provided by the National Urban League.²⁷ Tobacco companies had also formed connec-

²⁴ Tobacco companies advertised their menthol brands through music sponsorship well past the Master Settlement Agreement in 1998. In the early 2000's, Brown & Williamson ran the Kool Mixx campaign, in which the company linked itself to hip hop music and culture in an attempt to deepen its reach in the African American community and target African American youth. *See id.* The campaign included a music festival featuring artists such as the Roots and Erykah Badu, a D.J. competition, and free hip hop CDs. *See id.* In 2004, several states sued Brown & Williamson to enforce the Master Settlement Agreement's provisions banning youth marketing. *See id.* A New York state court issued a restraining order enjoining much of the campaign in 2004. *See id.*

²⁵ K. Michael Cummings et al., *Cigarette Advertising and Black-White Differences in Brand Preference*, 102 PUB. HEALTH REP. 698, 699 (1987).

²⁶ Anderson, *supra* note 19, at ii25.

²⁷ Yerger & Malone, *supra* note 17, at 337. For example, Brown & Williamson, the makers of Kool, entered into a "fair share agreement" with the NAACP, through which the tobacco company promised to generate revenue for minority-owned stores and rely on minority-owned advertising and marketing companies. *Id.* Brown & Williamson internal documents show what the

tions with politicians in the Congressional Black Caucus and state associations of Black legislators.²⁸ The tobacco industry influenced politicians to prevent the passage of laws unfavorable to the industry, leveraging their relationships with groups like the NAACP in policy debates.²⁹

Direct advertising continued alongside indirect marketing. Throughout the 1990's, minority neighborhoods were saturated with billboards advertising mentholated cigarettes.³⁰ By 1993, Brown and Williamson's own internal assessment found that "Blacks are three times as likely to smoke menthol and four times as likely to smoke full revenue menthol compared to non-Blacks."³¹ Between 1998 and 2002, readers of *Ebony* were nine times as likely to encounter a menthol advertisement as readers of *People*.³²

Mentholated cigarette makers have continued their racially targeted marketing practices into the present day in spite of serious obstacles. After the settlements from tobacco tort lawsuits (discussed in Part III) drastically curbed television and outdoor marketing, most tobacco marketing

company hoped to gain through the agreement: "Clearly, the sole reason for B&W's interest in the [B]lack and Hispanic communities is the actual and potential sales of B&W products within these communities and the profitability of these sales . . . this relatively small and often tightly knit [minority] community can work to B&W's marketing advantage, if exploited properly." *Id.*

²⁸ *Id.*

²⁹ Coordination between tobacco companies and minority-focused organizations was a formidable tool in defeating anti-tobacco policies. In the 1980's, when the federal government was considering an excise tax on cigarettes, tobacco companies relied on their partnerships with groups like the NAACP and vocally cast the tax proposal as a regressive tax on minorities. Again, internal documents reflected different concerns. A Philip Morris marketing memorandum emphasized that defeating the excise tax was a priority because the price increases on cigarettes through excise taxes would prevent young people from starting to smoke and forming a smoking habit. The company estimated that an excise tax would rob Philip Morris of the business of over 400,000 would-be smokers. Yerger & Malone, *supra* note 17, at 339–40.

³⁰ Diana P. Hackbarth et al., *Tobacco and Alcohol Billboards in 50 Chicago Neighborhoods: Market Segmentation to Sell Dangerous Products to the Poor*, 16 J. PUB. HEALTH POL'Y 213, 218 (1995).

³¹ Anderson, *supra* note 19, at ii25.

³² Rising & Alexander, *supra* note 11, at 4.

shifted to capture consumers at the point of sale.³³ Mentholated cigarette makers direct their targeting efforts hyper-locally, focusing on majority-minority and inner city neighborhoods. A 2011 study of tobacco advertising around California high schools found that as the proportion of Black students at a school increased by ten percentage points, the odds of encountering a Newport advertisement increased by fifty percent.³⁴ Similar results were found in a study that observed the location of point-of-sale menthol advertisements with respect to race.³⁵ Promotional discounts for mentholated cigarettes also tend to make the product much cheaper in minority and low-income neighborhoods.³⁶ Surveys of former smokers indicate that the exposure to point-of-sale tobacco marketing prompted impulse purchases of cigarettes and undercut quit attempts.³⁷ As recently as 2013, African American youth are three times more likely than children from other demographics to recognize advertisements for Newport.³⁸

³³ See Mohammad Siahpush et al., *Social Disparities in Exposure to Point-of-Sale Cigarette Marketing*, 13 INT'L J. ENVTL. RES. & PUB. HEALTH 1263, 1263 (2016) ("In 2013, tobacco companies spent \$8.9 billion on cigarette marketing. About 89% of this expenditure was made at the point of sale (POS) in the following three marketing areas: cigarette pack displays, advertisements, and promotional and price incentives for consumers." (footnote omitted)).

³⁴ Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RES. 116, 116 (2012).

³⁵ See Sarah Moreland-Russell, *Disparities and Menthol Marketing: Additional Evidence in Support of Point of Sale Policies*, 10 INT'L J. ENVTL. RES. & PUB. HEALTH 4571, 4579 (2013) ("[A] greater percent of retailers with menthol marketing near candy were located in census tracts with the highest percent of [B]lack children.").

³⁶ See Suzan Burton et al., *Marketing Cigarettes When All Else Is Unavailable: Evidence of Discounting in Price-Sensitive Neighbourhoods*, 23 TOBACCO CONTROL e24 (2014) (examining cigarette price variations in the Australian market and its impact on smoking habits among certain groups).

³⁷ See generally Dale S. Mantey et al., *Exposure to Point-of-Sale Marketing of Cigarettes and E-Cigarettes as Predictors of Smoking Cessation Behaviors*, 21 NICOTINE & TOBACCO RES. 212 (2019).

³⁸ Amanda L. Dauphinee et al., *Racial Differences in Cigarette Brand Recognition and Impact on Youth Smoking*, 13 BMC PUB. HEALTH 170, 174 (2013).

B. Disparities in Use and Disease

There is some evidence that menthol cigarettes pose more negative consequences to smokers than non-mentholated cigarettes. These negative traits center around menthol cigarettes' addictiveness and menthol smokers' ability to quit smoking. First, menthol flavoring in cigarettes seems to encourage smoking *initiation*. Tobacco companies added menthol to cigarettes to mask the harshness of the smoke, and studies have confirmed that menthol cigarettes are easier to start smoking.³⁹ This is especially true in the context of youth smoking. In fact, tobacco companies were specifically aware that younger and less experienced smokers had a low tolerance for the irritation from nicotine and the taste of tobacco.⁴⁰ A tobacco company's own internal study from 1976 found that the cooling effect of menthol reduced the "nasal sting, tongue bite, and harshness" of tobacco.⁴¹ While overall youth smoking rates have been on a downward trajectory, youth smoking rates of menthol have risen by almost ten percent since 2008.⁴²

³⁹ See James Nonnemaker et al., *Initiation with Menthol Cigarettes and Youth Smoking Uptake*, 108 ADDICTION 171, 172 (2013) ("Youth who begin smoking menthol cigarettes are more likely than youth who begin smoking non-menthol cigarettes to progress to established smoking."); see also Geoffrey M. Curtin et al., *Measures of Initiation and Progression to Increased Smoking Among Current Menthol Compared to Non-Menthol Cigarette Smokers Based on Data from Four U.S. Government Surveys*, 70 REG. TOXICOLOGY & PHARMACOLOGY 446, 448 (2014). Though there is a statistically significant positive relationship between initiating smoking with menthol and forming a daily smoking habit, there is no national data regarding menthol cigarettes and progression to daily smoking or lifelong smoking. Curtin et al., *supra*.

⁴⁰ Valerie B. Yerger, *Menthol's Potential Effects on Nicotine Dependence: A Tobacco Industry Perspective*, 20 TOBACCO CONTROL ii29, ii30 (2011).

⁴¹ *Id.* at ii30.

⁴² Andrea C. Villanti et al., *Changes in the Prevalence and Correlates of Menthol Cigarette Use in the USA, 2004–2014*, 25 TOBACCO CONTROL ii14, ii16 (2016). While menthol smoking rates have always been higher among African American youth than rates in other racial groups, the percentage of African American youth smoking menthol decreased very slightly (by 1.4 percent) between 2008 and 2014. *Id.* As of 2014, almost eighty percent of African American youth and young adult smokers smoked mentholated cigarettes compared to only about fifty-six percent of Hispanic youth smokers and about forty-five percent of White youth smokers. *Id.*

Second, menthol flavoring makes the smoking experience more *addictive*. While the menthol compound itself is not an addictive substance, menthol augments the addictiveness of nicotine in tobacco. Because menthol tempers the harshness of cigarettes, smokers inhale more deeply and potentially absorb more nicotine.⁴³ Menthol has also been shown to inhibit the metabolism of nicotine, thereby increasing nicotine delivery.⁴⁴ New research suggests that menthol might even increase the number of nicotine receptors in the brain.⁴⁵ Menthol also complements the addictiveness of nicotine in cigarettes by offering an accompanying soothing sensation. Some researchers consider the effect menthol has on cold receptors to be another addictive property layered onto the nicotine.⁴⁶

Third, menthol additives seem to interfere with *cessation*—a smoker's ability to quit. One study found that minorities who smoked mentholated cigarettes had lower quit rates than minority smokers who smoked regular cigarettes.⁴⁷ At a broader level, researchers have found that youth who start smoking mentholated cigarettes are eighty percent more likely to be lifelong smokers than those who initiate smoking with non-mentholated cigarettes.⁴⁸ Smoking duration tends to be greater in the Black male population.⁴⁹

A preliminary report issued in 2013 by a Food and Drug Administration (FDA) scientific committee affirmed all three of these addiction-related consequences of menthol additives in a sweeping literature review. The committee reported that

⁴³ Jill M. Williams et al., *Higher Nicotine and Carbon Monoxide Levels in Menthol Cigarette Smokers with and Without Schizophrenia*, 9 NICOTINE & TOBACCO RES. 873, 874 (2007).

⁴⁴ See Kabbani, *supra* note 10, at 1; see also N.L. Benowitz, *Clinical Pharmacology of Nicotine: Implications for Understanding, Preventing, and Treating Tobacco Addiction*, 83 CLINICAL PHARMACOLOGY & THERAPEUTICS 531, 535 (2008).

⁴⁵ Matthew F. Thompson et al., *Menthol Enhances Nicotine-Induced Locomotor Sensitization and In Vivo Functional Connectivity in Adolescence*, 32 J. PSYCHOPHARMACOLOGY 332, 337–39 (2018).

⁴⁶ Pamela I. Clark & Phillip S. Gardiner, *Menthol Cigarettes: Moving Toward a Broader Definition of Harm*, 12 NICOTINE & TOBACCO RES. S85, S87 (2010).

⁴⁷ *Id.* at S90.

⁴⁸ Kabbani, *supra* note 10, at 1.

⁴⁹ Theodore R. Holford et al., *Comparison of Smoking History Patterns Among African American and White Cohorts in the United States Born 1890 to 1990*, 18 NICOTINE & TOBACCO RES. S16, S27 (2016).

“menthol in cigarettes is likely associated with increased initiation and progression to regular cigarette smoking,” “increased dependence,” and “reduced success in smoking cessation, especially among African American menthol smokers.”⁵⁰

One might think that if African Americans are less likely to be able to quit smoking because of mentholated cigarettes’ addictive properties and are more likely to smoke late into their lives, then smoking mentholated cigarettes *creates* more sickness and death in the African American population. However, most studies on the difference between mentholated and non-mentholated cigarettes have thus far not shown a difference in the additive’s impact on tobacco-related disease or mortality.⁵¹ For example, one study found that there was no significant difference in lung cancer rates between smokers of mentholated and non-mentholated cigarettes.⁵² Other research found that smokers of mentholated cigarettes faced no increased risks of cardiovascular disease.⁵³ However, it is not clear how much can be inferred from the absence of scientific findings linking smoking of mentholated cigarettes to tobacco-related disease.⁵⁴ There is, for example, evidence that the smoke of mentholated cigarettes contains up to twenty percent more fine particles than non-mentholated cigarettes.⁵⁵ Exposure to fine particles increases one’s risk of a heart attack, even at the low levels seen in outdoor air pollution.⁵⁶ Smokers of mentholated ciga-

⁵⁰ FDA, PRELIMINARY SCIENTIFIC EVALUATION OF THE POSSIBLE PUBLIC HEALTH EFFECTS OF MENTHOL VERSUS NONMENTHOL CIGARETTES 5–6 (2013), <https://www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAsses/UCM361598.pdf> [<https://perma.cc/V95N-Q5N4>].

⁵¹ Allison C. Hoffman, *The Health Effects of Menthol Cigarettes as Compared to Non-Menthol Cigarettes*, 9 TOBACCO INDUCED DISEASES S7, S12 (2011).

⁵² William J. Blot et al., *Lung Cancer Risk Among Smokers of Menthol Cigarettes*, 103 J. NAT’L CANCER INST. 810 (2011) (finding no increased risk of lung cancer from mentholated cigarettes alone).

⁵³ Heather M. Munro et al., *Menthol and Non-Menthol Cigarette Smoking: All-Cause, Cardiovascular Disease and Other Causes of Death Among Blacks and Whites*, 133 CIRCULATION 1861, 1864 (2016).

⁵⁴ Linda A. Alexander et al., *Why We Must Continue to Investigate Menthol’s Role in the African American Smoking Paradox*, 18 NICOTINE & TOBACCO RES. S91, S91 (2016).

⁵⁵ Youn O. Lee & Stanton A. Glantz, *Menthol: Putting the Pieces Together*, 20 TOBACCO CONTROL ii1, ii5 (2011).

⁵⁶ *Id.*

rettes can also face more exposure to the toxic effects of carbon monoxide than smokers of non-mentholated cigarettes.⁵⁷

The current lack of scientific evidence that mentholated cigarettes *produce* more tobacco-related disease does not mean that there is no material harm that stems from the tobacco industry's racial targeting. Tobacco-related health disparities exist *even where smoking rates are the same*. African American smokers live fewer years than White smokers, and more African American deaths are attributable to smoking.⁵⁸ The marketing practices of menthol cigarette makers have created a demand within the African American population, a medically vulnerable group that suffers a disproportionate burden of chronic disease.⁵⁹ In fact, African Americans face more tobacco-related disease and death even though they smoke at the same rate as White Americans. Academics refer to this higher disease and death burden from tobacco-related illnesses as the "African American smoking paradox."

For example, all African Americans—not just those who smoke—are more likely to get lung cancer (Whites have an incidence rate of 64.4 in 100,000 for the disease, while 74.7 African Americans per every 100,000 get lung cancer).⁶⁰ Compounding this disparity is the fact that African Americans receive less effective medical treatment for their illnesses.⁶¹ In the context of lung cancer, African Americans who are diagnosed with the disease face shorter survival times than White lung cancer patients.⁶² African Americans already face discrimination in health care treatment, limited access to care, exposure to environmental harms, residential segregation, and higher

⁵⁷ See generally M.E. Jarvik et al, *Mentholated Cigarettes Decrease Puff Volume of Smoke and Increase Carbon Monoxide Absorption*, 56 *PHYSIOLOGY & BEHAV.* 563 (1994).

⁵⁸ Ho & Elo, *supra* note 7, at 2.

⁵⁹ Alexander et al., *supra* note 54 (including diseases like heart disease, stroke, hypertension, chronic obstructive pulmonary disease, and lung cancer).

⁶⁰ AM. LUNG ASS'N, *TOO MANY CASES, TOO MANY DEATHS: LUNG CANCER IN AFRICAN AMERICANS* (2010).

⁶¹ Elyse R. Park et al., *Disparities Between Blacks and Whites in Tobacco and Lung Cancer Treatment*, 16 *ONCOLOGIST* 1428, 1431 (2011).

⁶² Sarah Miller, *Lung Cancer and African Americans*, *CANCER PREVENTION & TREATMENT FUND*, <http://stopcancerfund.org/p-lung-cancer/lung-cancer-and-african-americans/> [https://perma.cc/X66N-VU9W].

poverty rates—conditions that predict disease.⁶³ Racially targeted marketing of mentholated cigarettes that seeks to make smoking more attractive to African Americans further exacerbates existing health disparities.

III. INADEQUACY OF EXISTING LEGAL TOOLS IN REGULATING MENTHOL MARKETING

While lawyers, lawmakers, and public policy officials have shown great interest in reducing smoking throughout the population and have undertaken efforts to rein in the ubiquitous and pervasive marketing of the tobacco industry, none of the major regulatory strategies since the mass tort litigation of the late 1990's touch the problem of the *racially disparate* marketing of menthol cigarettes.

A. The Master Settlement Agreement from State-Driven Tobacco Legislation

For as long as they could, tobacco companies publicly maintained that their products were neither dangerous nor addictive. Industry spokespeople adhered to these claims for decades in the face of mounting medical research that affirmed the addictive properties of nicotine and connected smoking to lung cancer. Leaked documents, delivered to a professor by a whistleblower in 1994, showed that the industry deliberately sold cigarettes for their addictive nicotine content.⁶⁴ States acted on this information and sued tobacco companies.⁶⁵ Specifically, they wanted to recoup the costs that state governments had expended in treating tobacco-related diseases. While the lawsuits focused on the health consequences of the product and the deception of consumers, they were vindicating *fiscal* injuries sustained by the state. By 1998, forty-six states had signed a Master Settlement Agreement (the “MSA”).

⁶³ Michael Marmot et al., *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, 372 LANCET 1661, 1661 (2008).

⁶⁴ *Tobacco Litigation Documents*, U.C.S.F. LIBR., <https://www.industrydocumentslibrary.ucsf.edu/tobacco/research-tools/litigation-documents/> [<https://perma.cc/J7CC-TGBY>].

⁶⁵ *Tobacco Control Litigation*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation> [<https://perma.cc/VU83-B7PP>].

In addition to requiring tobacco companies to pay states \$246 billion over twenty-five years,⁶⁶ the provisions of the MSA were mostly concerned with tobacco companies advertising to youth of all races. The MSA prohibits the industry from advertising on television, sponsoring athletic teams and leagues, and using cartoons in advertising.⁶⁷ The agreement exempts adult-only facilities from these advertising restrictions.

The settlement agreement adopts no race-based advertising restrictions, nor does it even acknowledge the practice of racially targeted marketing. As one law student described the MSA, “[i]n its monochromatic approach to marketing, education, and treatment . . . the settlement neglected to address the industry’s outstanding obligation to racial and ethnic minority communities.”⁶⁸ In fact, state attorneys general told the student author in interviews that they had neither discussed nor considered the unique and outsized public health harms minority communities sustained as a result of racialized marketing and higher tobacco use.⁶⁹ The author even suggested that by closing off advertising and growth opportunities in youth markets, the MSA may have indirectly exacerbated the problem of racially targeted marketing: “Closing other corridors for tobacco companies puts them under greater pressure to seek out customers belonging to minority communities.”⁷⁰

Some evidence bears out this claim. In the two years after the MSA was executed, Newport, a popular manufacturer of mentholated cigarettes, increased its advertising in youth magazines by thirteen percent (from \$5.3 million to \$6 million).⁷¹ In the six years after the MSA, mentholated brands went from spending thirteen percent of the industry’s total magazine

⁶⁶ *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013), <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go> [<https://perma.cc/YWT3-M7AH>].

⁶⁷ *Master Settlement Agreement*, PUB. HEALTH L. CTR., <http://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/Z2DZ-2YTQ>].

⁶⁸ Danny David, *Three Paths to Justice: New Approaches to Minority-Instituted Tobacco Litigation*, 15 HARV. BLACK LETTER L.J. 185, 210 (1999).

⁶⁹ *Id.*

⁷⁰ *Id.* at 210 n.142.

⁷¹ Charles King III & Michael Siegel, *The Master Settlement Agreement with the Tobacco Industry and Advertising in Magazines*, 345 NEW ENG. J. MED. 504, 507 (2001).

advertisement expenditures to seventy-seven percent.⁷² Public health researchers observed that in spite of the MSA's efforts to curb—even eliminate—youth smoking, tobacco companies consolidated their brand advertising to focus on flavored cigarettes, including menthol, which are popular with youth and young adults.⁷³ Eventually, widespread public backlash forced the industry to scale back its youth-targeted advertising operations.⁷⁴ As mentholated cigarette makers have injected more and more dollars into advertising, their share of the market has climbed.⁷⁵ This history suggests that the MSA not only failed to address the targeted marketing of menthol cigarettes specifically, but also that the settlement indirectly empowered menthol and other flavored cigarette brands.

The MSA's prohibitions on youth advertising and its funding for anti-smoking advertising⁷⁶ played some role in reducing the youth smoking rate—almost forty percent of American high school students smoked in the mid-nineties, but that number fell to fifteen percent by 2014.⁷⁷ However, the MSA left untouched the problem of race-based cigarette marketing, and so, twenty years later, one can still observe the disparities in menthol cigarette smoking across racial lines.

B. Congressional Inaction on Menthol

The next window of opportunity for comprehensive race-conscious tobacco regulation came when the FDA took jurisdiction over tobacco products in 2009. The Family Smoking

⁷² Hillel R. Alpert et al., *After the Master Settlement Agreement: Targeting and Exposure of Youth to Magazine Tobacco Advertising*, 27 HEALTH AFF. w503, w509 (2008).

⁷³ *Id.*

⁷⁴ W. Hamilton et al., *Cigarette Advertising in Magazines: The Tobacco Industry Response to the Master Settlement Agreement and to Public Pressure*, 11 TOBACCO CONTROL ii54, ii56 (2002).

⁷⁵ Anushree Sharma et al., *Trends in Market Share of Leading Cigarette Brands in the USA: National Survey on Drug Use and Health 2002–2013*, 6 BMJ OPEN e008813, e008814 (2016).

⁷⁶ See Melanie Wakefield et al., *Effects of Anti-Smoking Advertising on Youth Smoking: A Review*, 8 J. HEALTH COMM. 229, 239 (2003) (showing that anti-smoking advertising funded through the settlement had capacity to influence teen smoking behavior).

⁷⁷ *Adolescents and Tobacco: Trends*, HHS, <https://www.hhs.gov/ash/oah/adolescent-development/substance-use/tobacco/trends/index.html> [<https://perma.cc/B94F-2QPU>].

Prevention and Tobacco Control Act (the “FSPTCA”) was a landmark piece of legislation that established product restrictions and gave the FDA authority to set product standards and regulate marketing. In the FSPTCA, Congress banned all flavor additives, including clove and fruit flavors, but it did not ban menthol.⁷⁸

Congress’s omission of menthol from the flavor ban was a political compromise.⁷⁹ Lawmakers assumed that the FSPTCA’s viability hinged on backing from tobacco companies, who might have pulled support if the flavor ban extended to menthol. Furthermore, because of menthol cigarette companies’ longtime support for Black politicians and civic life in Black communities, there was discord amongst the Congressional Black Caucus about the inclusion of menthol in the flavor ban.⁸⁰

In addition to holding back on the menthol additive ban, Congress declined to adopt more incremental provisions on the racially targeted marketing of menthol cigarettes. To deal with menthol, Congress passed the buck to the FDA, instructing the agency to research race-based disparities in menthol and consider a menthol ban in the future.⁸¹

C. FDA Inertia on Menthol

While Congress excluded a menthol ban from the text of the FSPTCA, it did instruct the FDA to evaluate the public health risks of mentholated tobacco products shortly after the agency assumed regulatory authority over tobacco. Congress tasked the Tobacco Products Scientific Advisory Committee with reporting on the public health risks posed by the use of menthol cigarettes, identifying their impact on African Americans specifically.⁸² The menthol subsection of the statute required the Committee to issue its report and a recommendation within a year of the committee’s establishment.

⁷⁸ 21 U.S.C. § 387g(a)(1)(A) (2018).

⁷⁹ Stephanie Saul, *Blacks in Congress Split over Menthol Cigarettes*, N.Y. TIMES (July 25, 2008), <http://www.nytimes.com/2008/07/25/business/25menthol.html> [<https://perma.cc/2SJQ-63R4>].

⁸⁰ David, *supra* note 68, at 186.

⁸¹ Michael Freiberg, *The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products*, 64 CATH. U. L. REV. 949, 952 (2015) (citing 21 U.S.C. § 387g(e)(1) (2012)).

⁸² 21 U.S.C. § 387g(e)(1).

In July of 2011, the Committee found that eliminating menthol cigarettes from the marketplace would improve public health, as its literature review had affirmed increased initiation and progression to regular smoking and decreased cessation in smokers of mentholated cigarettes.⁸³ In 2013, the agency issued an Advance Notice of Proposed Rulemaking (ANPRM), contemplating several new regulations on menthol in acknowledgement of the additive's danger to public health.⁸⁴ The ANPRM solicited comments on potential new limits or a ban on menthol flavoring in cigarettes and new limits on menthol in non-cigarette tobacco products.⁸⁵

The FDA has yet to issue a final rule on menthol related to its 2013 ANPRM. In August of 2017, eight Senate Democrats wrote a letter to FDA Commissioner Scott Gottlieb urging the agency to address its continued delay on the issue, a part of which is the targeted marketing of menthol towards African American consumers.⁸⁶ The lawmakers asked the agency to identify the steps it had taken since the ANPRM in 2013 to “address the risk of menthol,” the cause of delay in the final rulemaking, and a timeline for final regulations on menthol.⁸⁷

The FDA pulled two⁸⁸ menthol cigarettes from the market in September of 2015.⁸⁹ The FSPTCA allows the agency to ban the release and sale of—or withdraw from the market—new tobacco products that varied too much from previously approved cigarettes marketed in 2007.⁹⁰ The FDA found that the two menthol cigarette products were not substantially

⁸³ FDA, *supra* note 50, at 3 (“[R]emoval of menthol cigarettes from the marketplace would benefit public health in the United States.”).

⁸⁴ Menthol in Cigarettes, Tobacco Products, 78 Fed. Reg. 44484 (proposed July 24, 2013).

⁸⁵ *Id.*

⁸⁶ Letter from Edward J. Markey, Senator, to Scott Gottlieb, Comm’r, FDA (Aug. 27, 2017), <https://www.markey.senate.gov/imo/media/doc/letter%20to%20Dr.%20Gottlieb%20on%20menthol.pdf> [<https://perma.cc/LT86-ZS8V>].

⁸⁷ *Id.* at 2.

⁸⁸ These cigarettes were the Camel Crush Bold and the Pall Mall Deep Set Recessed Filter Menthol.

⁸⁹ See Press Release, FDA, FDA Issues Orders That Will Stop Further U.S. Sale and Distribution of Four R.J. Reynolds Tobacco Company Cigarette Products (Sept. 15, 2015), <https://wayback.archive-it.org/7993/20170406152122/https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm462407.htm> [<https://perma.cc/DW7Q-9494>].

⁹⁰ 21 U.S.C. § 387(j) (2018).

equivalent to their predicates, as the agency had previously represented, but rather “introduced new public health risks.” While the FDA prevented *new* tobacco products from exacerbating public health dangers, these orders did nothing to address the widespread and disparate use of menthol already out in the market.

At the start of the new presidential administration, the agency announced a new comprehensive regulatory plan with a less skeptical attitude towards menthol additives. Rather than focusing on the harm menthol introduces to cigarettes, the FDA planned to release new ANPRMs that would contemplate the utility of menthol in nicotine delivery products that are less harmful than cigarettes.⁹¹ However, in March 2018, the FDA issued an ANPRM seeking comments on product standards, restrictions, and distribution of flavored tobacco products in acknowledgement of flavor additives’ propensity to increase tobacco use in youth.⁹² Finally, in November 2018, Commissioner Scott Gottlieb released a statement that said that the agency will move forward and propose a rule to ban all menthol flavors in combustible cigarettes.⁹³ While the proposed ban on menthol would take menthol cigarettes off the market, it did not speak to the racial disparity issues that have developed over the course of decades. And in any case, Commissioner Scott Gottlieb abruptly announced his resignation on March 5, 2019.⁹⁴ It is unclear how much further the FDA’s tobacco control initiatives will move under new leadership.

⁹¹ See Press Release, FDA, FDA Announces Comprehensive Regulatory Plan to Shift Trajectory of Tobacco-Related Disease, Death (July 28, 2017), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm568923.htm> [<https://perma.cc/5HW7-2M94>].

⁹² Regulation of Flavors in Tobacco Products, 83 Fed. Reg. 12294 (proposed Mar. 21, 2018).

⁹³ Press Release, Scott Gottlieb, Comm’r, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on Proposed New Steps to Protect Youth by Preventing Access to Flavored Tobacco Products and Banning Menthol in Cigarettes (Nov. 15, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm> [<https://perma.cc/5W69-XR8X>].

⁹⁴ Sheila Kaplan & Jan Hoffman, *F.D.A. Commissioner Scott Gottlieb, Who Fought Teenage Vaping, Resigns*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/health/scott-gottlieb-resigns-fda.html> [<https://perma.cc/T9AW-UWFK>].

D. Past Civil Rights Lawsuits Have Been Unsuccessful

Prior to the Tobacco Control Act, minority plaintiffs had tried to raise civil rights claims against menthol tobacco makers for their targeted marketing of African Americans and the resultant disparities in tobacco-related death and disease. In *Brown v. Philip Morris*, Reverend Jesse Brown and “Black Smokers,” who were members of an advocacy group called the Uptown Coalition for Tobacco Control and Healing in Philadelphia, filed a lawsuit against menthol tobacco makers on behalf of all living African Americans.⁹⁵ The claims were pursuant to 42 U.S.C. §§ 1981, 1982, 1983, and 1985, which codify the Civil Rights Acts of 1866 and 1871.⁹⁶ Section 1981 intended to give all citizens in every state the same rights to make and enforce contracts, while § 1982 intended to afford all citizens the right to buy, sell, and lease property.⁹⁷ Section 1983 provides a private right of action to citizens who have sustained civil rights injuries from government action, and § 1985 also grants citizens the right to sue over deprivations of rights coordinated by the government.⁹⁸

The tobacco company defendants conceded to the racially targeted marketing the plaintiffs described in their complaint, and the plaintiffs offered some evidence that menthol cigarettes were more addictive.⁹⁹ Nonetheless, the district court granted the defendants’ motion to dismiss for failure to state a claim under the civil rights provisions.

The district court drew on a long line of precedent holding that discriminatory advertising claims were not cognizable under §§ 1981 and 1982, which only recognize discrimination that *impedes* the enforcement of contracts or the sale of real property or causes African Americans and Whites to be offered *different* products.¹⁰⁰ Here, of course, the problem was not that African Americans were excluded from a transaction, but that they were targeted for it. While previous plaintiffs had won some

⁹⁵ *Brown v. Philip Morris, Inc.*, No. 98-cv-005518, 1999 U.S. Dist. LEXIS 14495 (E.D. Pa. Sept. 22, 1999), *aff’d*, 250 F.3d 789 (3d Cir. 2001).

⁹⁶ *Id.*

⁹⁷ *Id.* at *18–19.

⁹⁸ *Id.* at *31–32, 42–43.

⁹⁹ *See id.* at *5 n.1 (alleging that mentholated cigarettes delivered more nicotine to the smoker than non-mentholated cigarettes and that menthol was a toxic substance with its own health harms).

¹⁰⁰ *Id.* at *20–26.

cases in which defective products were sold to African Americans deliberately, the district court found that there was no difference between the *menthol cigarette products* smoked by African Americans and Whites. The district court also dismissed plaintiffs' § 1983 claims for due process and equal protection violations because the tobacco companies had not undertaken their advertising practices under the color of state law.¹⁰¹

On appeal, the plaintiffs argued that the advertisements Philip Morris directed at African American communities contained misrepresentations about the safety of menthol cigarettes, that the marketing practices violated the "full and equal benefit" clause of § 1981, and importantly, that Philip Morris's practices were analogous to those of predatory home sellers in *Clark v. Universal Builders, Inc.*,¹⁰² who sold homes to African Americans at grossly inflated prices.¹⁰³ The Third Circuit rejected the analogy, because in *Clark*, "the defendants sold houses to Black purchasers on substantially different and more onerous terms than to others, effectively creating two separate, racially-segregated markets. . . . Black Smokers, however, point to no such disparities in the sale of mentholated tobacco products"¹⁰⁴

The majority felt that what the Black Smokers were really concerned with was advertising, and §§ 1981 and 1982 did not reach discriminatory advertising, even in the case of housing, a sphere in which Congress unambiguously wanted to purge discriminatory behavior.¹⁰⁵ To address such conduct, Congress had to pass separate statutes (like the Fair Housing Act) prohibiting steering and predatory transacting. This case came to the courts seven years before the financial crisis hit and the underbelly of racially predatory subprime lending unearthed itself. In Part III, this Note explains that in the post-crisis housing cases (mostly involving reverse redlining), courts' interpretation of discrimination in marketing is more in line

¹⁰¹ *Id.* at *31–32.

¹⁰² *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 333 (7th Cir. 1974).

¹⁰³ *See id.* at 328, 331. The premise of the *Clark* plaintiffs' claim was that the housing market in Chicago was completely segmented into White and Black. Plaintiffs advanced an exploitation theory in which home-sellers charged extraordinary prices to minorities who were locked into the "black" market.

¹⁰⁴ *Brown*, 250 F.3d at 799.

¹⁰⁵ *Id.* at 799–800.

with the housing analogy the Black Smokers unsuccessfully asserted.

The Third Circuit affirmed the district court's dismissal order in 2001.¹⁰⁶ But one of the three panel judges dissented, arguing that §§ 1981 and 1982 protect more than just the right to transact. The provisions protect the right of African Americans to transact with the same opportunities and options that White Americans enjoy. This, he argued, was why courts could find civil rights liability even where sellers did not refuse buyers, as happens in racial steering in the housing market. Racial steering is the practice of landlords or real estate agents pushing prospective residents into certain homes or neighborhoods based on their race. Normally, this meant discouraging African Americans from seeking housing alongside White residents by misrepresenting the condition of housing and neighborhoods or failing to show available housing.¹⁰⁷ Judge Milton Shadur, a judge in the Northern District of Illinois, wrote the following for the Third Circuit:

What must be understood instead is that both Section 1981 and Section 1982 are not at all limited by their terms to the outright deprivation of the Black community's right to contract. Instead each of those statutes mandates an equal playing field that is violated by conduct that imposes different and race-discriminatory conditions (however created) on the exercise of seemingly comparable contractual rights: Section 1981 guarantees to Black Smokers "the same right . . . to make . . . contracts . . . as is enjoyed by [W]hite citizens," while Section 1982 assures to Black Smokers "the same right . . . as is enjoyed by [W]hite citizens . . . to . . . purchase . . . personal property." And that is the gravamen of the Complaint—that by the tobacco companies' deliberate and successful targeting of Black Smokers to persuade them to purchase and smoke the concededly more dangerous menthol cigarettes and smokeless tobacco—conduct whose actionability is akin to the prohibition of actual "steering" under the Fair

¹⁰⁶ *Id.* at 800.

¹⁰⁷ George Galster, *Racial Steering in Urban Housing Markets: A Review of the Audit Evidence*, 18 REV. BLACK POL. ECON. 105, 105 (1990).

Housing Act—those companies have impaired that equality of rights.¹⁰⁸

The failure of the Black Smokers in *Brown* shows the inadequacy of existing civil rights law to address the harms that stem from racially targeted marketing and the market segmentation fostered by tobacco companies. A new statutory framework is needed, and it should draw on the protections afforded to consumers in the housing and mortgage markets.

IV. REGULATING TOBACCO MARKETING WITH AN ANTIDISCRIMINATION PROVISION

It can be challenging to articulate how targeted marketing practices create civil rights injuries for two reasons. First, targeted marketing is not only commonplace in the realm of advertising—it is almost the very essence of present-day marketing. Second, few of our current consumer protection laws sanction companies for trying to *increase* the probability of transactions with a certain demographic. Antidiscrimination laws that concern themselves with how products are marketed were enacted to prohibit companies or sellers from fencing minority consumers out or denying transactions.¹⁰⁹ Where laws create liability even when the transaction goes through, the offending conduct is often fraud or misrepresentation.¹¹⁰ These statutes are not antidiscrimination laws in nature.

However, the Fair Housing Act¹¹¹ (FHA) and the Equal Credit Opportunity Act¹¹² (ECOA) are two examples of civil rights statutes that create liability for targeting minority consumers for certain kinds of products. While Congress passed these statutes to expand minorities' access to credit and housing

¹⁰⁸ *Brown*, 250 F.3d at 807–08.

¹⁰⁹ *See, e.g.*, 42 U.S.C. § 3604 (2018) (contemplating discriminators making housing unavailable, denying housing, or refusing to rent or sell).

¹¹⁰ *See, e.g.*, 12 U.S.C. § 5531 (2018) (empowering the Consumer Finance Protection Bureau to bring civil actions against regulated entities for unfair, abusive, and deceptive practices); *see also* Donald M. Zupanec, Annotation, *Practices Forbidden by State Deceptive Trade Practices and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979 & Supp. 2000) (showing that every state has a consumer protection law that prohibits unfair and deceptive practices).

¹¹¹ 42 U.S.C. § 3601 et seq. (2018).

¹¹² 15 U.S.C. § 1691 et seq. (2018).

and to reduce residential segregation, cases from the 2000's—the years leading up to and immediately following the financial crisis—show that the statutes are responsive to the affirmative and racially targeted marketing of predatory and subprime loans.¹¹³ In other words, because of the protections for consumers in the FHA and ECOA, courts have been able to overcome the challenges to finding liability for the targeted marketing described above. For this reason, this Note relies on these consumer protection statutes to propose an antidiscrimination statute for tobacco products that could sanction the racially targeted marketing practices of mentholated cigarettes. This Note explores the FHA and ECOA precedent from subprime lending cases to demonstrate how courts advance an understanding of the harms of affirmative marketing that can be applied to tobacco regulation.

A. Liability for Targeted Marketing Under the Fair Housing Act

Congress passed the FHA in 1968 with the broad goal of eliminating residential segregation and promoting racial integration. The FHA would seek to accomplish this by banning outright exclusion of persons from housing because of their race or other protected characteristic and by creating liability in the private market when sellers or landlords tried to allocate housing based on race.¹¹⁴ Courts interpreted the FHA expansively, supporting that reading with the acknowledgement that Congress wished to end residential segregation in housing to combat the poor living conditions, concentrated violence, and physical isolation suffered by African Americans.¹¹⁵

The FHA contains several provisions that touch on racial preferences in advertising and marketing for housing. First, 42 U.S.C. § 3604(c) directly prohibits discriminatory advertising that communicates a preference based on any

¹¹³ See, e.g., *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887–88 (S.D. Ohio 2002) (finding that defendants' targeting of elderly women for high-cost home equity loans constituted violations of the FHA and ECOA).

¹¹⁴ Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 28 (2008).

¹¹⁵ *Id.* at 30, 31 (citing *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496–97 (S.D. Ohio 1976)).

protected characteristic. It makes it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”¹¹⁶

Advertising that targets certain racial groups can become a violation of other FHA provisions. Section 3604(a) makes it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” Courts have read this provision to prohibit racial “steering,” which occurs when real estate brokers try to influence buyers toward or away from certain neighborhoods or housing, even though steering is not a direct denial of a transaction.¹¹⁷ Ordinarily, liability for steering arises when brokers attempt to dissuade potential buyers from following through on a transaction because of their race. However, courts have found liability for steering in housing when real estate listing services selectively advertise housing to a particular race and therefore further entrench racial segregation.¹¹⁸ In other words, the FHA punishes the practice of attracting people to homes because of their race, not just discouraging them from purchasing certain homes.

Section 3604(b) makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” For this Note’s purposes, it will discuss cases that declare “reverse redlining,” or the singling out of minority homebuyers for subprime or predatory mortgages, to be a violation of § 3604(b).

¹¹⁶ 42 U.S.C. § 3604(c) (2018).

¹¹⁷ Neil C. Bruce, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L. REV. 758, 761 (1977).

¹¹⁸ In *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977), a violation of § 3604(a) was shown by evidence that a White couple who sought housing in an apartment complex that was only half White-occupied was steered to an all-White complex also owned by the defendant management company.

Subprime home loans were a niche market until they widely expanded in the 1990's.¹¹⁹ Among all mortgages, the percentage of subprime mortgages reached its peak in 2006.¹²⁰ A critical feature of subprime lending was banks' targeting of minority borrowers. Economic research confirms that between 2004 and 2007, African Americans were 105 percent more likely to borrow from a high-risk lender than White borrowers.¹²¹ One can consider the phenomenon of reverse redlining to be the combination of these two things: the rise of subprime and predatory lending¹²² and banks' active concentration of those home loan products in minority communities.

Hargraves v. Capital City Mortgage Corporation, litigated in 2001, was one of the first cases in which a court recognized reverse redlining as a violation of the FHA under § 3604(b).¹²³ The *Hargraves* plaintiffs argued that Capital City Mortgage targeted African Americans in the Washington, D.C. area for predatory loans that were designed to fail.¹²⁴ Denying Capital City Mortgage's motion for summary judgment on the FHA claims, the court wrote:

In order to show a claim based on reverse redlining, the plaintiffs must show that the defendants' lending practices and loan terms were "unfair" and "predatory," and that the defendants either intentionally targeted on the basis of race,

¹¹⁹ Stuart R. Berkowitz, *The Subprime Mortgage Mess—A Primer to Assist Investors: This Article Discusses the Subprime Mortgage Crisis from the Viewpoint of Investors and Suggests Legal Remedies*, 64 J. Mo. B. 122, 123 (2008).

¹²⁰ See generally Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUSING POL'Y DEBATE 328 (2013).

¹²¹ Patrick Bayer et al., *What Drives Racial and Ethnic Differences in High Cost Mortgages? The Role of High Risk Lenders* (Nat'l Bureau of Econ. Research, Working Paper No. 22004, 2016) (examining racial and ethnic differences in subprime lending in seven diverse metropolitan areas from 2004 to 2007).

¹²² While subprime lending does not necessarily involve predatory practices, there is significant overlap in subprime lending and predatory lending. See Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL'Y 121, 127–29 (2009).

¹²³ *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001).

¹²⁴ *Id.* at 20–21.

or that there is a disparate impact on the basis of race.¹²⁵

There are two notable features of this two-pronged test, whereby plaintiffs must show the product is predatory, and then show discrimination. Under the first prong, plaintiffs *need not* show that defendants sold a different kind of product to non-minority consumers in order to prove that the product is predatory. To require plaintiffs to come to court with proof that the defendants transacted with White customers differently would be to permit injustice “so long as it is visited exclusively on negroes.”¹²⁶ In reverse redlining cases, loans are deemed “predatory” or “unfair” based on their intrinsic characteristics or the practices that lenders and brokers use in the transaction. The *Hargraves* court recognized several characteristics that could make a mortgage predatory, including “exorbitant interest rates, lending based on the value of the asset securing the loan rather than a borrower’s ability to repay,” “churning” loans through multiple foreclosures on the same property,” “and loan servicing procedures in which excessive fees are charged.”¹²⁷ To the extent that many of these practices—like higher interest rates and excessive fees—function to lock the debtor into a longer relationship with the lender, ultimately increasing profits to the lender, the predatory nature of loans made through reverse redlining bears similarity to cigarettes. As described in Part II, youth who initiate smoking with menthol cigarettes are far more likely to become lifelong smokers than youth who start with non-mentholated cigarettes.¹²⁸ Several studies have shown that smokers of mentholated cigarettes are less successful at quitting than smokers of non-mentholated cigarettes.¹²⁹

Under the second prong, plaintiffs can demonstrate *intentional* discrimination by showing evidence of targeted advertising and marketing practices. Taken together, these two features of the *Hargraves* decision mean that *even if* defendants sell the same product to White consumers, plaintiffs have an

¹²⁵ *Id.* (quoting *Jackson v. City of Okaloosa*, 21 F.3d 1531, 1541 (11th Cir. 1994) (establishing the availability of disparate impact claims for violations of the FHA)).

¹²⁶ *Id.* at 20 (quoting *Contract Buyers League v. F&F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969)).

¹²⁷ *Id.* at 18, 20–21.

¹²⁸ Kabbani, *supra* note 10, at 1.

¹²⁹ Clark & Gardiner, *supra* note 46, at S88.

antidiscrimination claim so long as they can show they were influenced by racially targeted advertising to purchase a predatory product.¹³⁰ The *Hargraves* plaintiffs supplied evidence to substantiate both intentional discrimination claims and disparate impact claims. The court took note of certain facts the plaintiffs offered to show targeting:

As evidence of intent, or targeting, plaintiffs point to the defendants' solicitation of brokers who operate predominantly in the [B]lack community, their distribution of flyers and advertisements in [B]lack communities, the decision to place their offices in [B]lack communities, and the fact that a picture of Nash standing next to former Mayor Marion Barry, Reverend Jesse Jackson, and former District of Columbia Councilmember Arrington Dixon hung just inside Capital City's office entrance (plaintiffs allege that this was an attempt to convey a message to African-Americans that Nash could be trusted).¹³¹

Other courts adjudicating reverse redlining cases followed *Hargraves*'s consideration of advertising with respect to interrogating the discriminatory intent of sellers. For example, in *Steed v. EverHome Mortgage*, the Eleventh Circuit decided to follow the *Hargraves* test because no other circuit court had recognized a reverse redlining claim under the FHA. In upholding the lower court's grant of defendant-mortgagee's motion for summary judgment, the Eleventh Circuit noted the total absence of any evidence of racially targeted advertising, which the *Hargraves* court found persuasive.¹³² The Commonwealth

¹³⁰ Another line of cases applies a slightly different test to identify racial discrimination in reverse redlining. In *Matthews v. New Century*, the court held that a plaintiff must make out a prima facie case by showing that (1) she is a member of a protected class, (2) that she applied for and was qualified for a loan, (3) that she was given the loan on grossly unfavorable terms, and (4) that the lender continues to provide loans to other applicants with similar qualifications but on significantly more favorable terms, or that the lender intentionally targeted her for an unfair loan. 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002). As is true in FHA reverse redlining claims, plaintiffs can show intentional targeting through advertising in lieu of demonstrating that nonminority borrowers received more favorable mortgages.

¹³¹ *Hargraves*, 140 F. Supp. 2d at 21–22.

¹³² *Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 369 (11th Cir. 2009).

Court of Pennsylvania also relied on the *Hargraves* test in *McGlawn v. Pennsylvania Human Relations Commission* to establish reverse redlining in the absence of state court precedent on the issue.¹³³ In *McGlawn*, where a mortgage broker was seeking judicial review of a state agency determination that he violated the state's human rights law by singling out African American borrowers for predatory loans, evidence of marketing practices persuaded the court that the broker intentionally discriminated against minorities. The broker "engaged in an aggressive marketing plan targeting African Americans" in which he advertised extensively in print sources and on radio and television channels that were "oriented toward African American audiences and readers."¹³⁴ One commentator described the broker's practices as building a "cultural affinity with the [B]lack borrowers it targeted."¹³⁵

If these predatory lending marketing tactics look familiar, it is because they are strikingly similar to the approaches that menthol cigarette makers took to target their product at African American consumers. Tobacco companies first began the process by taking out advertisements in magazines and newspapers, and on radio and television shows, with predominantly African American audiences.¹³⁶ Then, tobacco executives began courting civil rights leaders and community organizations, whom they relied upon to earn African Americans' trust.¹³⁷ Menthol cigarette makers also tried to align their product with Black cultural identity by sponsoring jazz—and later hip hop—music festivals.¹³⁸ And just as subprime lenders did, menthol tobacco companies racially target based on geography: menthol cigarette retail promotions and discounts overwhelmingly cluster in African American neighborhoods.¹³⁹ Yet, only predatory lenders face civil rights liability for affirmatively marketing their products to a protected minority.

¹³³ *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757, 767 (Pa. Commw. Ct. 2006).

¹³⁴ *Id.* at 764, 772.

¹³⁵ Carol N. Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907, 942 (2010).

¹³⁶ Hafez & Ling, *supra* note 20, at 359 (describing the history of Brown & Williamson's "Kool Mixx" campaign for the menthol brand "Kool").

¹³⁷ Anderson, *supra* note 19, at ii20.

¹³⁸ Hafez & Ling, *supra* note 20, at 359.

¹³⁹ Rising & Alexander, *supra* note 11, at S2.

B. Liability for Targeted Marketing Under the ECOA

Reverse redlining is also actionable under the ECOA, 15 U.S.C. § 1691(a)(1), which makes it unlawful for creditors to “discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race.” In cases where plaintiffs allege that they were *rejected* for loans or credit products because of their race, plaintiffs must show that they qualified for the credit product, and that the lender preferred borrowers of a non-protected race, to make out a *prima facie* case.¹⁴⁰ However, in cases involving reverse redlining where minority borrowers have been singled out for predatory loans, courts have approached the interrogation of discrimination in a very similar way to the FHA cases. Just like in cases under the FHA, a plaintiff need not show that he or she was denied a transaction based on race in order to have a discrimination claim under the ECOA. For example, in *Hargraves*, where plaintiffs also brought an ECOA claim, the court held that the plaintiffs stated a claim for discrimination even though they were not denied loans.¹⁴¹ The court found that the same predatory lending practices that made out the FHA claim could violate the ECOA.

Courts have also applied the logic of reverse redlining claims under the FHA to the ECOA. In lieu of showing that lenders prefer White borrowers or offer better credit products to non-minority consumers, ECOA plaintiffs bringing claims for reverse redlining can make out a *prima facie* case for intentional discrimination by showing that the defendant *targeted* racial minorities for a predatory credit product.¹⁴²

¹⁴⁰ See 2 CAROL V. CLARK, PADRICK’S RESPA, TILA, HOEPA, AND ECOA IN REAL ESTATE TRANSACTIONS: WITH FORMS § 3:32 (2018–2019 ed. 2018).

¹⁴¹ *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 23 (D.D.C. 2000), *on reconsideration in part*, 147 F. Supp. 2d 1 (D.D.C. 2001).

¹⁴² “Courts have thus softened the requirements for establishing a *prima facie* case when reverse-redlining forms the substance of the discrimination claim, and have allowed such plaintiffs to show that they (i) were members of a protected class; (ii) applied for and were qualified for the housing or the loan; (iii) received grossly unfavorable terms; and (iv) were intentionally targeted or intentionally discriminated against.” *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 575 (E.D.N.Y. 2010) (citing *Barkley v. Olympia Mortg. Co.*, 2007 WL 2437810, at *13–15 (Aug. 22, 2017); *Matthews*

Plaintiffs can establish discriminatory targeting by showing that defendants advertise or market inferior credit products to customers based on race. In *M & T Mortgage Corporation v. White*, plaintiffs sued a development corporation for selling and financing homes that were uninhabitable, contrary to representations in the sale contracts. The court indicated that the defendant's use of African American agents who made it their "personal mission" to increase minority homeownership could be discriminatory targeting.¹⁴³ The court stated that plaintiffs could also support their claim of intentional targeting based on race by showing that the defendant advertised in predominantly minority neighborhoods.¹⁴⁴

C. Amending the Tobacco Control Act to Add an Antidiscrimination Provision

For the reasons articulated above, one can readily draw analogies between the affirmative marketing of predatory loans in reverse redlining and the racially targeted marketing of menthol cigarettes at African Americans. Both products—predatory loans and mentholated cigarettes—are suboptimal versions of their originals, prime mortgages and non-mentholated cigarettes. Predatory home loans are more likely to go into default and cost the consumer more than what her credit-worthiness warrants; mentholated cigarettes are more addictive and harder to quit than non-mentholated cigarettes and likely lead to longer lifelong smoking.¹⁴⁵ Both of these products are aggressively targeted at African Americans through the media they consume and the neighborhoods they live in.

v. New Century Mortg. Corp., 185 F. Supp. 2d 874, 887–88 (S.D. Ohio 2002); *Hargraves*, 140 F. Supp. 2d at 23.).

¹⁴³ The court denied summary judgment motions from both parties and stated that the question of intentional targeting was to be left for the jury. *Id.* at 576.

¹⁴⁴ *Id.*

¹⁴⁵ Addiction is often used as a metaphor to describe debtors' relationship to creditors who trap them into a cycle of borrowing in order to keep up with exorbitant interest and fees. For example, consumer protection advocates analogize payday loans to drugs when cash-poor borrowers get stuck rolling over loans. See Bob Sullivan, "Like a Drug": Payday Loan Users Hooked on Quick-Cash Cycle, NBC NEWS (May 11, 2013), <https://www.nbcnews.com/feature/in-plain-sight/drug-payday-loan-users-hooked-quick-cash-cycle-v18088751> [<https://perma.cc/D7LJ-8C3B>].

Hargraves and its progeny under the FHA and the ECOA instruct that racially targeted marketing *can* be injurious when the underlying product is harmful. And, because there are civil rights statutes that take on the goal of ending residential segregation, those injuries are legally actionable and can be described in civil rights terms. Congress passed the FHA and the ECOA because it recognized that many inequalities spun out of one's inability to choose her home because of her race.¹⁴⁶ Just as establishing a home free from the obstacles of racial discrimination in the housing market is critical to living freely and fully as a citizen, it is essential that minorities be able to maintain bodily health without the discriminatory influences of companies that make and market products that kill when used as intended. Health disparities result from myriad factors, including society's tolerance of a particular demographic's exposure to unhealthy agents. This Note considers companies' targeted promotion of smoking in the African American community an injustice, and one that contrasts starkly with the zealous and enduring nationwide campaign to reduce smoking rates. While racial justice movements have long included health-related policies in their platforms,¹⁴⁷ and other health-related legislation takes care to prohibit racial discrimination, no laws yet address the civil rights injuries that stem from the targeted marketing of mentholated cigarettes.

Congress should amend the Tobacco Control Act to include an antidiscrimination provision modeled after the provisions in the FHA and the ECOA that would create liability

¹⁴⁶ See *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496 (S.D. Ohio 1976) ("In this case, a realistic examination of the concerns that led to the adoption of this legislation proves a better guide to congressional intent than the dusty volumes of Sutherland on Statutory Interpretation. Primary among these concerns were the rioting and civil disturbances that had rocked the central cores of many of the nation's major cities the previous summer. These disturbances had not only focused attention on the discontent of the people trapped in the nation's ghettos, but had also brought many to the realization that the underlying illness, of which the riots of 1967 were symptomatic, had to be treated if a worse catastrophe was to be forestalled. This, indeed, was the conclusion of the National Advisory Commission on Civil Disorders appointed by President Johnson in July, 1967. Its final report was released in March, 1968, during the debate on the Civil Rights Act, and its findings were a matter of general concern to Congress.").

¹⁴⁷ Vann R. Newkirk II, *The Fight for Health Care Has Always Been About Civil Rights*, ATLANTIC (June 27, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-fight-for-health-care-is-really-all-about-civil-rights/531855/> [https://perma.cc/V8ZC-UDCM].

for the targeted marketing of menthol cigarettes. The provision should prohibit the kinds of practices that menthol cigarette makers have used in the past, such as targeting African Americans in specific magazines or on the radio, as well as the tactics the industry currently uses, which are mostly focused on marketing at the point of sale in majority-minority neighborhoods. For example, the statute could make it unlawful “for any manufacturer of mentholated cigarettes to discriminate against any consumer, with respect to any aspect of a transaction to purchase mentholated cigarettes, on the basis of race.”¹⁴⁸

This antidiscrimination provision should be enforceable in private actions brought by citizens, just as the antidiscrimination provisions in the FHA and the ECOA allow. Individuals or classes of individuals should be able to establish viable claims by providing evidence that they were targeted by advertisements, discounts, or marketing schemes focused in their neighborhoods. The FHA offers private individuals actual and punitive damages if they prevail on their discrimination claims; the amendment to the Tobacco Control Act should provide the same money damages.

There are benefits to this statutory solution beyond just potentially decreasing the consumption of menthol cigarettes within minority groups, which a product or additive ban could do. First, African Americans suffer a dignitary harm when society accepts that companies target them for tobacco consumption, especially because there is broad societal and governmental opposition to smoking because of its health risks. Our current regulatory regime for tobacco is geared to prevent *some* people from smoking, but not all; it is more concerned with the longevity of the White and the wealthy than the health of minorities. Universal regulations, like product bans,

¹⁴⁸ While this Note explores a statutory remedy for the racially targeted marketing of menthol cigarettes, borrowing from the FHA, it might also be possible to relitigate the §§ 1981–82 discrimination claims first raised in the Black Smokers case. The court in *Hargraves* deemed reverse redlining a cognizable injury under the FHA, but also under § 1982. However, the cases from the subprime lending era are less certain on the applicability of § 1982 to factual situations involving reverse redlining. See *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000) (“Although sections 1981 and 1982 are narrower, they may be construed to prohibit some or all of the practices of which the plaintiffs produce evidence here” (citation omitted)).

do not offer a remedy for the indignity African Americans suffer, because they touch every consumer in the same way.

A second benefit of the statutory provision this Note proposes for *marketing* is that it does not face the same obstacles as *product* regulation. Regulations of the actual tobacco product face vehement and formidable opposition from the tobacco industry, as evidenced by the failure to include menthol in the 2009 statutory ban and the FDA's inertia on the matter. Providing a civil rights private right of action is a way to influence tobacco consumption and sales without regulating the product specifically. Industry opposition to such a provision would be harder to defend. While tobacco companies' arguments against including menthol in the 2009 ban centered on racial paternalism and freedom of choice to smoke, an antidiscrimination provision would offer aggrieved litigants the chance to bring a lawsuit against marketing practices *if they chose*. Finally, the statutory provision could close the gap in health equality by indirectly regulating a behavioral health determinant. Discouraging the disparate use of mentholated cigarettes by prohibiting discrimination in advertising would be more efficient, in terms of effort and funds, than promoting and administering smoking cessation programs or more localized interventions.

However, support for such an antidiscrimination regime in tobacco regulation would have to overcome some obstacles. First, there is the slippery slope counterargument. Many harmful or suboptimal products are aggressively marketed to low-income and minority populations. Fast food and junk food, for example, are much more prevalent in minority neighborhoods and they drive up obesity rates. How far should the regulation of products in the name of health equity go? Should such advertising prohibitions apply to *every* product that contributes to a racial health disparity? The key to addressing this concern is the fact that there is no safe level of smoking. Unlike makers of beauty products or music, menthol companies are singling out a specific population on which to foist a habit that is the number one cause of preventable death in the country.¹⁴⁹ Lawmakers have before decided to regulate marketing with respect to race when it comes to extremely important parts of a person's wellbeing, such as housing, employment recruiting, and credit access. And while many other products—like fast

¹⁴⁹ *Smoking & Tobacco Use: Fast Facts*, CDC, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm [<https://perma.cc/XPJ5-5MU6>] (last updated Feb. 6, 2019).

and junk food, soda, and alcohol—might contribute to health disparities, safe levels of consumption still exist. The same cannot be said for cigarettes.

A second concern with this Note's proposal might be its interference with the exercise of liberty. Cigarettes are legal, and the decision to smoke or not smoke—or to smoke a specific kind of cigarette—is theoretically up to the adult consumer. Would a provision that aims to end racially discriminatory marketing simply be taking choices away from autonomous adults? This Note argues that this is not the case. If anything, the status quo of targeting minorities for mentholated cigarettes, which are more addictive and lead to more lifelong smoking, prevents consumers from choosing a product across the *full* range of options. African Americans are currently overexposed to the inferior product. Similar arguments were made about predatory subprime loans in the FHA and the ECOA cases: because of targeted marketing and promotion of subprime loans, African American borrowers simply did not know about better credit products.¹⁵⁰ Furthermore, there are already limitations on choice for other tobacco flavors, which Congress simply banned in the 2009 Tobacco Control Act.

A third obstacle might sound in criticism of the FHA's impotence in the face of entrenched residential segregation: if such a lauded statute could secure only modest gains in equality between races,¹⁵¹ while the problem of residential isolation for minorities persists, why would a similar model work for the marketing of cigarettes? The answer is in the difference between the housing market, which is dispersed and includes many sellers, and the tobacco market, which includes only a handful of menthol cigarette makers in the United States. It would be much easier to police the advertising of tobacco products to targeted markets than it would be to enforce the FHA's antidiscrimination provisions in each housing-related transaction.

¹⁵⁰ “[B]rokers—and some lenders—frequently targeted minority neighborhoods because they assumed residents would respond favorably to their pitches for these high-cost loan products. This is because borrowers with few financial options, or those unaware of other options, were more likely to take out higher-rate loans through subprime originators working in their neighborhoods.” Fisher, *supra* note 122, at 148 (footnote omitted).

¹⁵¹ Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Soc. F. 571, 571, 581 (2015).

The fourth obstacle is the First Amendment's protection of commercial speech. In fact, tobacco companies have previously sued the FDA over product labeling and advertising regulations.¹⁵² However, courts have upheld many of the FDA's labeling and marketing provisions to protect youth from smoking initiation, such as the ban on sponsoring athletic or music events. Commercial speech does not have an unlimited runway; the government can regulate this speech when it has a substantial interest and the regulation achieves that substantial interest.¹⁵³ Furthermore, this Note's proposal does not actually proscribe specific content in advertising—it just demands that advertising not be discriminatory. In the employment context, for instance, where discrimination is illegal, employers do not have a First Amendment right to advertise jobs to specific genders.¹⁵⁴

V. CONCLUSION

Menthol cigarettes persist in spite of massive overhauls in the regulatory scheme over tobacco more generally, brought on by widespread tort litigation, congressional legislation, and FDA control. Its continuance is responsible for the massive health disparities between White Americans and African Americans, the latter of whom suffer earlier deaths and more tobacco-related disease. Past strategies, including tort litigation, civil rights lawsuits, and FDA rulemaking, have proven ineffective at both curbing menthol use and stopping tobacco companies from targeting advertisements for their products at African Americans and other minorities.

A new regime is needed, and it can be based off of the same ideas that undergird consumer protection statutes. Statutes like the Equal Credit Opportunity Act and the Fair Housing Act accept that there are some “products”—in credit, in particular—that are subpar or more harmful to a consumer,

¹⁵² *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 521 (W.D. Ky. 2010), *aff'd in part, rev'd in part sub nom. Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

¹⁵³ Ross D. Petty et. al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 382 (2003).

¹⁵⁴ *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 392 (1973); *see also Hailes v. United Airlines*, 464 F.2d 1006 (5th Cir. 1972).

and they prevent directing consumers to those products on the basis of race. An analogous statutory regime for tobacco would finally target the core civil rights issue in this realm, which is the targeted marketing that produces health inequities.