
Finished with Menthol: An Evidence-Based Policy Option That Will Save Lives

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I. Introduction

Smoking remains the number one preventable cause of death and disease in the United States, killing more than 480,000 people per year.¹ Despite steep decreases in current smoking prevalence in both adults and youth, cigarettes have become more lethal over time, causing more death and disease.² Without bold action, 5.6 million of youth today will die prematurely from smoking.³

A significant part of this problem is the continued sale of menthol cigarettes. The Family Smoking Prevention and Tobacco Control Act of 2009 banned all flavored cigarettes except for menthol cigarettes.⁴ Today, menthol cigarettes represent an increasing

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share of the cigarette market and prevalence rates show that menthol cigarettes loom as an obstacle in ending the tobacco epidemic.

This paper examines the impact of menthol cigarettes on public health and explores the legal authority of states and municipalities to protect the health of their residents by restricting the sale of menthol cigarettes.

II. Menthol in Cigarettes Harms Public Health

The Tobacco Control Act gave the U.S. Food and Drug Administration (FDA) broad authority to regulate tobacco products and established the Public Health Standard to guide this activity.⁵ Under this standard, when considering tobacco regulatory action, FDA must evaluate the evidence in terms of not just the impact on individual health, but also on the population as a whole, including those who do not use tobacco. Specifically, FDA must consider whether a product is more likely to increase or decrease initiation and whether a product is more likely to increase or decrease cessation.

The evidence is clear that menthol poses a threat to public health because menthol cigarettes increase the likelihood that youth and young adults will start smoking.⁶ Menthol also has a disproportionate impact on vulnerable populations including youth, African-Americans, Hispanics, the Lesbian, Gay, Bisexual and Transgender (LGBT) community, Asian-Americans, and women. This has been established by several reviews of the scientific literature by FDA, its Tobacco Products Scientific Advisory Committee (TPSAC), and Truth Initiative's Schroeder Institute. Some of the key findings from those reviews are below.⁷

a. Menthol in Cigarettes Increases Initiation

Menthol covers the harshness of tobacco and makes it easier to inhale.⁸ Indeed, we know from industry documents that the tobacco industry has known for decades that menthol cigarettes make a good starter product, that they appeal to African-Americans, and that they have manipulated the level of menthol in the product to attract youth and young adults.⁹ Today, menthol cigarettes are still very popular among young people, African Americans, and other minorities. A 2014 study showed that 50% of youth who had ever tried cigarettes, smoked a flavored cigarette the first time they tried smoking, and 59.8% of current youth smokers used menthol cigarettes.¹⁰ Additionally, youth and young adults use menthol cigarettes at higher rates than older adults.¹¹ Because most tobacco users start before age 18, and nearly all start before the age of 25, the high use of menthol among youth and young adults is concerning.

Moreover, even as non-menthol cigarette use among youth and young adults has decreased, menthol use rates have either remained constant or increased, occupying an increasing portion of the market.¹² One study found that among adolescents and adults over

rates than the national average.¹⁴ Among those African Americans who smoke, 84.6% use menthols.¹⁵ Other racial and ethnic groups also use menthol at high rates, including 38% of Asian Americans and 46.9% of Hispanics, compared to 28.9% of Caucasians.¹⁶

This is no accident. Industry has long targeted youth and young adults, as well as racial and ethnic minorities with menthol cigarette marketing and advertising and pricing strategies to make menthol cigarettes not only more appealing but more affordable. Study after study has shown that menthol cigarette advertisements are more prevalent in African-American and Hispanic publications, as well as more prevalent at the point of sale in neighborhoods with more African-American residents.¹⁷ At least one study found that menthol prices are lower in neighborhoods with higher proportions of African-American residents.¹⁸ Earlier this year, Reynolds American acquired Newport — the most popular menthol brand — and increased its targeting of young adults, based on the data showing that preference for menthol cigarettes has been rising among smokers, and smokers under 30 in particular.¹⁹

In sum, overwhelming evidence indicates that, in the words of the TPSAC report, “Removal of menthol cigarettes from the marketplace would benefit public health in the United States.”²⁰

Although FDA has the authority to prohibit menthol in tobacco products, the agency has yet to propose such a regulation. It is therefore up to states and communities to act. The most obvious question, then, is whether the Tobacco Control Act preempts a state or local prohibition on the sale of menthol cigarettes. Based on the plain language of the Act, as well as relevant case law, we conclude that it does not.

III. Legal Authority for States and Municipalities to Act

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The Tobacco Control Act contains requirements concerning the distribution, manufacturing, and marketing of tobacco products. The law also grants FDA the authority to regulate tobacco products, including the power to set standards for things like tar and nicotine levels in tobacco products, as appropriate to protect the public health.²¹ However, the Act also preserves some state authority over tobacco products.

To address how authority to regulate tobacco products is divided and shared between federal and state governments, the Tobacco Control Act contains a specific section on preemption, which is divided into

25, as non-menthol cigarette use decreased, menthol cigarette use remained constant from 2004-2014. Among young adults age 18-25 menthol cigarette use actually increased.¹³

b. Menthol Disproportionately Impacts Vulnerable Populations

Menthol cigarettes not only contribute to initiation, they are used disproportionately by youth and minority groups. In addition to the alarming youth use of menthol, women smoke menthols at higher rates than men, and LGBT smokers smoke menthols at higher

three provisions. First, the preservation clause explicitly preserves state and local authority for certain laws that are stronger than provisions in the Tobacco Control Act. Examples include laws and regulations regarding tobacco sales, use and possession. Second, the preemption provision bars most state and local requirements “relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.” Third, the saving clause reiterates that states and local entities can enact laws and regulations regarding the same issues listed in the preservation clause.²²

The tobacco industry has argued that a state or local law prohibiting the sale of flavored tobacco products is preempted by the Tobacco Control Act because: (1) such a law constitutes a “tobacco product standard,” authority expressly reserved to FDA; and (2) because FDA is prohibited from banning certain classes of tobacco products, state and local governments are also thus prohibited from doing so through a sales regulation. The plain language of the Act and recent case law indicate these arguments will fail against well-crafted sales restrictions.

1. Tobacco Product Standards

Two recent court decisions upholding local laws restricting the sale of flavored tobacco products dealt with the industry’s argument that a state or local law prohibiting sales of flavored tobacco constitutes a “tobacco product standard” and illustrate how courts have viewed that argument thus far. New York City and Providence each passed an ordinance prohibiting the sale of any flavored non-cigarette tobacco product, with narrow exceptions. The industry sued both cities, and in both cases the ordinances were upheld. In the New York City case, the Second Circuit Court of Appeals found that because the ordinance regulates the sale of a finished product, it was not a tobacco product standard and therefore not preempted.²³ In Rhode Island, the First Circuit Court of Appeals held that the ordinance limiting the sale of flavored tobacco products was a sales restriction not a product standard, and was therefore not preempted.²⁴

These decisions support the argument that a state or local law prohibiting the sale of flavored tobacco products is not a “tobacco product standard” preempted by the Tobacco Control Act. Rather, such a law regulates the sale of a particular *type* of tobacco product rather than manner in which the product is manufactured. While the New York and Providence decisions are not binding outside of their federal circuits, they may serve as persuasive authority to other courts ruling on related issues.

2. Eliminating Certain Tobacco Products

A second argument the industry will likely raise to challenge a menthol sales restriction is that the Tobacco Control Act provision prohibiting FDA from eliminating the sale of classes of products also applies to state and local governments. The Act limits FDA’s power by explicitly prohibiting FDA from “banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own tobacco products.” Furthermore, one of the Tobacco Control Act’s stated purposes is “to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure that they are not sold or accessible to underage purchasers.”²⁵

Of course, prohibiting or restricting the sale of one kind of cigarette — menthol, in this case — is not the same as banning an entire class of products. But in any case, the Act’s provision on this point does not apply to states or cities. In *U.S. Smokeless Tobacco*, the New York City case discussed above, the court found that the Tobacco Control Act’s prohibition barring an FDA ban against entire categories of tobacco products “nowhere extend[ed] that provision to state and local governments.” The court noted instead that the preservation clause of the Tobacco Control Act “...expressly *preserves* localities’ traditional power to adopt any ‘measure relating to or prohibiting the sale’ of tobacco products.”²⁶

Based on this ruling and the plain language of the Act, while FDA cannot ban a class of tobacco products, that limitation probably would not prevent a state or local government from prohibiting the sale of menthol cigarettes.

IV. Conclusion

The industry strategy has worked. More than half of youth smokers smoke menthol cigarettes, and minority smokers smoke menthol cigarettes disproportionately. Much of this is due to industry marketing and advertising, as well as industry manipulation of the product. Menthol cigarettes are increasingly buoying smoking rates.

The evidence for banning menthol cigarettes is overwhelming. Ideally, FDA would issue a product standard to eliminate them. However, since FDA has taken no action, states and municipalities can fill the void and move to protect their residents by instituting menthol sales restrictions. Eliminating menthol has the potential to save hundreds of thousands of lives over time — nearly a third of them African American lives.²⁷ We must take bold action now to eliminate menthol and move closer to ending the tobacco epidemic.

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