California State PTA Initiative Study Report

Title of Ballot Measure (as circulated): California Flavored Tobacco Products Ban Referendum (2022).

Committee Members: Brian Bonner, Carol Green, Beth Meyerhoff (chair), Amy Rickard, Vinita Verma.

1. Recommendation:

   The Flavored Tobacco Referendum Study Group submits the following motions as its recommendations:

   Motion 1. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA support passage of the referendum on Senate Bill 793 and authorize the California State PTA president to sign any ballot arguments to further implementation of Senate Bill 793.

   Motion 2. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA educate its constituent associations about the importance of passage of the referendum on Senate Bill 793 to the children and families of California and urge its constituent associations to work for passage of the referendum on Senate Bill 793.

   Motion 3. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA work with other agencies and/or organizations that also support Senate Bill 793 to ensure the passage of the referendum on Senate Bill 793.

2. What the Measure Proposes to Do

   This referendum, scheduled for the November 8, 2022, general election, will ask voters to either approve or reject the implementation of Senate Bill 793, Chapter 34, Statutes of 2020. SB 793 (Hill) prohibits a tobacco retailer, or any of the tobacco retailer’s agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale a flavored tobacco product or a tobacco product flavor enhancer.

   There is an exception to this prohibition for the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:

   a) The retailer has a valid license to sell tobacco products;
b) The retailer does not permit any person under 21 to be present or enter the premises at any time;
c) The retailer operates in accordance with all relevant state and local laws relating to the sale of tobacco products; and,
d) The retailer operates in accordance with all state and local laws relating to the consumption of tobacco products on the premises if consumption is allowed on the premises.

SB 793 allows local governments to adopt ordinances that impose a greater restriction on access to tobacco products than the provisions in the bill. SB 793 also provides that the greater restriction on the access of tobacco products will prevail in the case of inconsistency between the provisions of SB 793 and local standards.

California State PTA supported the passage of this bill in 2020.

A YES vote supports the implementation of SB 793’s prohibition on the sale of flavored tobacco products and a NO vote rejects the implementation of SB 793.

Federal Lawsuit
The tobacco companies also filed a federal lawsuit to set aside Senate Bill 793 in October, 2020, R.J. Reynolds Tobacco Company et al v. Xavier Becerra et al. The companies argued that the legislation violates the Constitution on both preemption and dormant Commerce Clause grounds. The plaintiffs contend that the law is “an overbroad reaction to legitimate public-health concerns about youth use of tobacco products…” The plaintiffs’ legal arguments are three-fold: the California ban is preempted by federal law both expressively and impliedly, and it also violates the dormant Commerce Clause.

On August 6, 2021, the court decided:

The U.S. District Court for the Southern District of California issued an order dismissing a lawsuit brought against the California Attorney General which sought to invalidate California Senate Bill 793 which was signed into law and would ban the sale of flavored tobacco products. The court concluded that the lawsuit is “not ripe for resolution” and therefore it lacked jurisdiction to consider the case. A case is “not ripe” if the issue is premature for review by a court and the claimed injury is too speculative.

In this case, which was brought by several tobacco manufacturers, a neighborhood retail association, and a vape retailer, the federal judge determined that since a voter referendum was certified and placed the question of whether Senate Bill 793 would go into effect on the November 2022 California general election ballot, there was no certainty that the law
would actually go into effect because the state’s voters will make that
determination when they go to the polls in November of 2022. That is, any
injury is contingent on the outcome of the referendum vote and, if the voters
reject Senate Bill 793, then there would not be any injury to the tobacco
industry.¹

The legislation is now the subject of a ballot referendum for voters on Nov. 8, 2022.

3. Fiscal Impact Summary

The California Fuels and Convenience Alliance (CFCA) estimates that the proposed ban
would cost the state $1.8 billion in tax revenue.² The tobacco companies argue that with fewer
tobacco products being sold, there is less revenue from tobacco taxes, and therefore, there is
less money for tobacco education to reduce use.³

In the first comprehensive analysis of the financial and health impacts of tobacco
in more than a decade, UC San Francisco researchers found that smoking
accounted for one in seven deaths in the state — more than from AIDS,
influenza, diabetes, or many other causes.

While the number of smokers in California declined from a decade ago, nearly 4
million people still smoke, including an estimated 146,000 adolescents, the
UCSF study found. ¹²³

¹ R.J. Reynolds Tobacco v. Becerra, Case No.: 20-CV-1990 JLS (WVG) (S.D. Cal. Apr. 16,
2021).
³ https://tobacco.ucsf.edu/big-tobacco-mounts-ad-blitz-against-calif-flavor-ban-sb-793-making-its-usual-failing-arguments

3
4. **PTA Authorities Pro and Con**

**California State PTA Mission Statement:**

OUR MISSION IS TO POSITIVELY IMPACT THE LIVES OF ALL CHILDREN AND FAMILIES

**California State PTA Advocacy Goals**

Promote physical and mental wellness beginning in early childhood.

**California State PTA Organizational Goals**

Represent, inform, and mobilize members and the public to advocate for the protection, education, health, safety, and well-being of all children and youth.

**California State PTA Legislative Planks**

8. To protect and improve the health of all families through the prevention, treatment, and control of the disease.

9. To extend and improve physical and mental health services and facilities, including rehabilitation.

11. To prevent, control, or eliminate hazards to the health, safety, and well-being of all children and youth.


5. **Resolutions:**

E-CIGARETTES/VAPING, FLAVORED TOBACCO PRODUCTS AND YOUTH HEALTH Adopted by the Statewide Annual Meeting Delegates June 2020

---

4 Smoking's $18.1 billion toll on California | University of California
RESOLVED, That California State PTA and its units, councils, and districts seek and support legislation, regulation, and/or other national, state, and local measures, to prohibit the use of electronic cigarettes and all flavored tobacco products on school grounds, in public places, and in other places where young people may be exposed to secondhand vaping; and be it further

RESOLVED, That California State PTA and its units, councils and districts seek and support legislation and regulations to protect the public, especially youth, against the health risks associated with the use of tobacco products by prohibiting the sale, marketing, and distribution of flavored tobacco products and e-cigarettes, including components, accessories, and tobacco product flavor enhancers; and be it further

6. What do Proponents and Opponents Say?

Supporters of Repealing the ban (NO vote)

California Coalition for Fairness: "We agree that youth should never have access to any tobacco products, but this can be achieved without imposing a total prohibition on products that millions of adults choose to use. This law goes too far and is unfair, particularly since lawmakers have exempted hookah, expensive cigars, and flavored pipe tobacco from the prohibition. Moreover, a prohibition will hurt small, local businesses and jobs as products are pushed from licensed, conscientious retailers to an underground market, leading to increased youth access, crime, and other social or criminal justice concerns for many California residents."

Supporters of Ban (yes)

Lindsey Freitas, advocacy director for Campaign for Tobacco-Free Kids: "We know Big Tobacco has hidden behind smoke and lies for years to hook generations of young people on deadly tobacco products, and this referendum is just one more tactic to continue the status quo."

Jim Knox, managing director of the American Cancer Society Cancer Action Network Inc.: "The tobacco industry has always shown it will go to any length to deceive the public about its deadly product. We are confident that if it gets on the ballot, that California voters will see through this despicable tobacco industry ploy to continue to lure kids into a lifetime of tobacco addiction."

State Sen. Gerald Hill (D-13): "California fought Big Tobacco and won. This shameless industry is a sore loser and it is relentless. It wants to keep killing
people with its candy-, fruit-, mint- and menthol-flavored poison. The adults who are hooked on nicotine aren’t enough for Big Tobacco; it wants our kids too."

7. Discussion/Analysis

The primary arguments against the ban are:

A. The law is unfair as it exempts products that wealthier consumers purchase.
B. The law is racist as it includes a ban on menthol flavoring which nearly 85% of Black smokers smoke while not banning hookah.
C. SB 793 could lead to over-policing in communities of color.
D. The law will hurt small businesses and push products to the underground market.

Analysis of arguments against the ban:

A. Is the law unfair as SB 793 exempts expensive tobacco products - hookah, expensive cigars, and flavored pipe tobacco?

Opponents of the ban argued that the exemptions benefited those who could afford to purchase more expensive tobacco products.

According to the California Coalition for Fairness, “SB 793 criminalizes the sale of menthol cigarettes preferred by people of color and creates special exemptions for products preferred by the wealthy - allowing the sale of expensive flavored cigars and pipe tobacco, in addition to hookah, to remain legal.”

The amendments adding several exceptions to SB 793 - hookah,6 expensive cigars, and flavored pipe tobacco - were deemed to not target children according to the testimony of legislators. According to Assemblyman Jim Wood, “Senator Jerry Hill’s worthy and hard-fought legislation to ban flavored tobacco products, passed the Assembly Health Committee today with amendments to exempt premium cigars and pipe tobacco, products that do not target children.”

---


---

One of the products exempted from SB 793 (hookah) is exempted only if certain conditions are met, one of which limits access to children by requiring people to be over 21.⁸

(Move to support section?) Although hookah, expensive cigars and flavored pipe tobacco are exempted from the ban, their exception remains problematic as “Research shows that flavored products – no matter what the tobacco product – appeal to youth and young adults.” There is no safe form of tobacco.

Other data:

More than half (58.3%) of current youth cigar smokers—550,000 youth—use flavored cigars. Among current youth users of flavored cigars, the most popular flavor was fruit (61.5%), followed by candy/dessert/other sweets (34.0%) and mint (30.4%).⁹

Youth and young adults prefer brands that come in a variety of flavors, and that preference declines significantly with age – in one study, 95% of 12-17 year old cigar smokers reported a usual brand that makes flavored cigars compared with 63% of cigar smokers aged 35 and older.

The exemptions were added in by the Senate.

B. Is SB 793 racist?

Opponents of the ban state that the law prohibits menthol products that are popular among Black smokers while exempting hookah which is popular among Middle Eastern cultures.

---

⁸ From SB 793:
   a) The retailer has a valid license to sell tobacco products;
   b) The retailer does not permit any person under 21 to be present or enter the premises at any time;
   c) The retailer operates in accordance with all relevant state and local laws relating to the sale of tobacco products; and,
   d) The retailer operates in accordance with all state and local laws relating to the consumption of tobacco products on the premises if consumption is allowed on the premises.

⁹ Campaign for Tobacco-Free Kids, October 13, 2021, p.4.
From The Observer: Law Enforcement Action Partnership (LEAP) and the National Organization of Black Law Enforcement (NOBLE) agree that the bill has a racist element to it. They say the bill demonstrates clear discrimination and preferential treatment between two tobacco products preferred by two different cultural groups. “We will not and cannot stand for more policies that resemble another Black tax yet find a way to make concessions and amendments for certain groups,” Rev. Tulloss said. “Hookah is exempted, yet menthol cigarettes are not. The Speaker can make this bill fair and that’s all we’re asking.”

Research shows that out of all Black smokers, nearly 85% smoke menthol cigarettes, compared to 30% of White smokers. 7 in 10 African American youth smokers smoke menthol cigarettes.

Centers for Disease Control and Prevention state that tobacco use is a major contributor to the three leading causes of death among Black people — heart disease, cancer, and stroke. According to the U.S. Food and Drug Administration, 85% of all Black smokers smoke menthol cigarettes, with studies showing that menthol makes it easier to start tobacco use and harder to quit.

The high use of menthol use by Black smokers is not unintentional as “in majority Black neighborhoods, menthol cigarettes have been both heavily marketed and heavily discounted, two tactics designed to increase accessibility.”

Assemblywoman Shirley Weber (D-San Diego), the chairwoman of the California Legislative Black Caucus, said it is racist for the tobacco industry to claim the bill discriminates against Black people by prohibiting the sale of menthol cigarettes in the state.

“I am insulted that the tobacco industry would make an effort to make us believe that mentholated cigarettes are part of African American culture and...”

---


13 https://apnews.com/sponsored/?prx_f=HSEGAOsVHA8CAPA&prx_ro=s&ntv_fr#_fn1

that this is a discriminatory piece of legislation against Black people,” Weber said during the floor debate.”

Supporters of the ban note that the tobacco industry has targeted the Black community for menthol marketing which increases the damage to Black people.

According to the National NAACP’s statement in favor of the ban, “For decades, the tobacco industry has been targeting African Americans and have contributed to the skyrocketing rates of heart disease, stroke and cancer across our community. The tobacco industry is on a narrow quest for profit, and they have been killing us along the way.”

The California/Hawaii State Conference of the NAACP also recently resolved to support the campaign and efforts to uphold California Senate Bill 793, and identified the need for “the protection of children and communities of color from Big Tobacco's predatory marketing of candy and menthol flavored nicotine-containing products.”

C. Could SB 793 lead to over-policing and enforcement in communities of color?

Opponents of the ban expressed concern that enforcement of the ban in communities of color could increase confrontations between Black youth and law enforcement.

The law ends the sale of tobacco products, not the use. The responsibility is on the tobacco retailers, not on individuals. The bill language states that the purchase, use, or possession of flavored or mentholated tobacco products would not be criminalized.

Smoking banned in certain areas - can be disproportionately enforced.

D. The law will hurt small businesses and push products to the underground market.

There are nearly 12,000 convenience stores who rely heavily on tobacco sales, generating nearly 33% of their revenue from the sale of tobacco products.

---


16 *Flavor Ban Would Hurt Convenience Stores.* [https://capitolweekly.net/flavored-tobacco/](https://capitolweekly.net/flavored-tobacco/)
The ban on flavored tobacco products could “spell the end for many small businesses” particularly when almost 50% of the cigarettes consumed were acquired from an illegal source, such as tax avoidance or evasion.\textsuperscript{17} Since July 2020, the business labor market has continued to weaken with firms reducing employment.

**The primary arguments in favor of the ban are:**

**A.** Tobacco use remains the leading cause of preventable death and disease in the United States and in California.\textsuperscript{18} Youth e-cigarette users cited appealing flavors as the primary reason for use.\textsuperscript{19} The rate of high school student current e-cigarette users has more than doubled in the last two years and middle school student use has tripled since 2017.\textsuperscript{20}

**B.** With the reduced harshness of the initial vaping experience and the appealing flavors, young people may feel that this is a superior product, but greater nicotine concentrations, negative health impacts, and the risk of young people becoming addicted make this a poor choice. Nicotine, flavorings, metals, chemicals, and known carcinogens are directly delivered to the user’s lungs. Furthermore, the flavorings are intended to appeal to young people.

**C.** Nicotine is highly addictive, especially in the developing brains of adolescents.


\textsuperscript{18} [https://www.lung.org/research/sotc/state-grades/highlights/california](https://www.lung.org/research/sotc/state-grades/highlights/california)


9. Motions

The Flavored Tobacco Referendum Study Group submits the following motions as its recommendations:

Motion 1. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA support passage of the referendum on Senate Bill 793 and authorize the California State PTA president to sign any ballot arguments to further implementation of Senate Bill 793.

Motion 2. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA educate its constituent associations about the importance of the passage of the referendum on Senate Bill 793 to the children and families of California and urge its constituent associations to work for passage of the referendum on Senate Bill 793.

Motion 3. The Flavored Tobacco Referendum Study Group recommends and I move that California State PTA work with other agencies and/or organizations that also support Senate Bill 793 to ensure the passage of the referendum on Senate Bill 793.