

E-Racing Tobacco & Nicotine-Related Health Disparities

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ABSTRACT

In the past, tobacco companies used targeted advertising to integrate menthol cigarettes and addict the Black community, generating tobacco-related health disparities. As Juul has come under attack, they have utilized the tobacco playbook to protect itself and deflect criticism by donating to a historically Black medical school and recruiting leaders in the Black community. This helped to create a “Black shield” for menthol cigarettes, which are only now at risk of being regulated, and has the potential to do the same in the vape industry. If proactive steps are not undertaken, health tobacco-related health disparities will continue.

I. INTRODUCTION

Tobacco products continue to be the leading cause of preventable death in the United States, with over 400,000 deaths each year, and more than 16 million left with chronic diseases related to smoking.¹ Tremendous progress has been made since the height of tobacco’s popularity, including the passage of the Family Smoking Prevention and Tobacco Control Act (TCA).² The public is arguably more informed of the dangers of tobacco use—for cigarettes especially—than at any other point in this country’s history. Yet, progress in reducing tobacco use and nicotine addiction has not only stagnated, but perhaps regressed.

Tobacco companies profited most heavily from the broad use of cigarettes, and as cigarette users dwindled over time, so did a critical revenue stream. But past smokers hooked on cigarettes found the incredibly addictive products difficult to quit. Efforts to find effective smoking cessation devices produced limited success, with smokers using products such as nicotine patches and gum.³ From this landscape emerged a

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¹ *Tobacco-Related Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 28, 2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm.

² Pub. L. No. 111-31, § 904(a)(1), 123 Stat. 1776, 1790 (2009).

³ Gary C.K. Chan, Daniel Stjepanović, Carmen Lim, Tianze Sun, Aathavan Shanmuga Anandan, Jason P. Connor, Coral Gartner, Wayne D. Hall, Janni Leung, *A Systematic Review of Randomized Controlled Trials and Network Meta-Analysis of E-Cigarettes for Smoking Cessation* 119 ADDICTIVE BEHAVIORS 119–20 (2021).

new hope: the electronic cigarette (or e-cigarette). The advantage over prior products was evident: it gave the user the nicotine fix they craved and satisfied oral fixations, while producing less inhalable toxins found in combustible cigarettes.⁴

However, not all e-cigarettes are created equal. Juul emerged on the market and almost immediately found incredible success. One of the primary reasons was its high nicotine levels. Prior to Juul, most e-cigarettes provided nicotine in the 1%–2% range, with 3% typically being the highest option offered and advertised as intended for high-rate smokers, such as those consuming two packs a day.⁵ This made sense, given conventional cigarettes had a nicotine concentration of approximately 1.5%–2%.⁶ But Juul entered the market with 5% nicotine salt solutions, far outpacing the competition.⁷ In fact, Juul can be reasonably credited with inspiring new products that follow their pod-based model and, more importantly, beginning an arms race of high nicotine offerings.⁸

Given that nicotine is the highly addictive ingredient in cigarettes, Juul users face similar risk in addiction, though—in theory—reduced risk of detrimental health effects due to the e-cigarette being less harmful than traditional cigarettes. However, the evidence of Juul’s ability to help smokers quit is lacking and may actually work to increase addiction to smoking—albeit smoking of e-cigarettes.⁹ Moreover, the harm of a nicotine addiction cannot be overlooked. There are still potential dangers for e-cigarette users, whether they be adults, pregnant women, or youth whose brains are still developing.

All of this demonstrates that the fight to reduce the harms of smoking, whether they be traditional or electronic cigarettes, is not over. In fact, a new era of harm may have already begun with e-cigarettes, and Juul specifically, generating a new type of risk and creating a new generation of smoking addicts. This is critical to recognize not only for the public at large, but for communities of color in particular.¹⁰ These communities generally suffer disproportionately from health disparities, and

⁴ *Id.* at 120.

⁵ Robert K. Jackler & Divya Ramamurthi, *Nicotine Arms Race: Juul and the High-Nicotine Product Market*, 28 *TOBACCO CONTROL* 623, 623 (2019).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 624. Given the popularity and benchmark set by Juul, as well as the government scrutiny the company has faced for its marketing practices and impact on youth, this is the e-cigarette of focus for this Article. But many of the points made in this Article about Juul, such as capitalizing on alleged or perceived health benefits, could apply to other products on the market. This Article also is not meant to suggest Juul is the only product of public health concern, or that it cannot or has not provided some benefit to some users attempting to quit traditional combustible cigarettes.

⁹ Amber Famiglietti, Jessica Wang Memoli & Puja Gaur Khaitan, *Are Electronic Cigarettes and Vaping Effective Tools for Smoking Cessation? Limited Evidence on Surgical Outcomes: A Narrative Review*, 13 *J. THORACIC DISEASE* 384, 390 (2021).

¹⁰ Much of this Article focuses on Black smokers and the Black community, but this is not because it is the only community that has been targeted or suffered from the corporate practices of tobacco companies. Rather, this is due to extensive evidence on the manner in which tobacco companies targeted the Black community specifically for increasing menthol sales. See generally KEITH WAILOO, *PUSHING COOL: BIG TOBACCO, RACIAL MARKETING, AND THE UNTOLD STORY OF THE MENTHOL CIGARETTE* (2021). Moreover, discussion of the Black community is used to represent the manner in which underserved communities of color are often subject to disproportionate harms while simultaneously overlooked for policies to address these disparities.

specifically from tobacco-related disparities, and have historically been targeted by tobacco companies.¹¹ Once more, this targeting continues with Juul as well.¹²

Targeting communities of color has a two-fold benefit for corporations seeking to protect profits. First, it increases direct revenue through greater sales to these communities. But a second benefit that garners far less attention is that the companies can use these communities as a shield from regulation.¹³ The debate and constant delay over deciding whether to ban menthol cigarettes, the last remaining flavor allowed after the TCA banned all others, demonstrates how Black smokers have been used as a shield from the menthol ban.¹⁴

Since a vast majority of Black smokers use menthol cigarettes, a ban on this flavor seemed like a significant and obvious step toward ameliorating some of these disparities.¹⁵ Yet, it has taken over a decade since the TCA was passed and banned all other cigarette flavors before a proposed rule banning menthol was issued.¹⁶ A significant justification for this delay was the fact that Black smokers prefer menthol cigarettes and, therefore, banning them would have a disproportionate impact on Black smokers which could result in increased policing of these communities.¹⁷

But lives were lost that could have been saved during this delay.¹⁸ With Juul now targeting communities of color and creating a new generation of addicted youth, we cannot afford another delayed reaction. Instead, we must recognize this new threat for what it is: Menthol 2.0. The parallels between the two are uncanny, right down to marketing strategies, and a recognition of the similarities—as opposed to simply the differences—will help to mitigate the new harm and potentially prevent what is likely to come next: Juul 2.0.

In Part I of this Article, the impact of menthols targeting people of color—the Black community in particular—will be explored and its connection to health disparities.¹⁹ Part II will examine Juul’s efforts to dominate the e-cigarette landscape, following a similar blueprint laid out by the tobacco company decades earlier.²⁰ In doing so, this section aims to highlight the deliberate attempt by Juul to exacerbate health disparities rather than alleviate them, as the company often claims. Finally, Part III will explain how delays to address Juul’s targeting of Black communities will result in a continuation of disproportionate impact of the newest threat from

¹¹ See *infra* Part I.

¹² See *infra* Part II.C.

¹³ See *infra* Part III.A.

¹⁴ *Id.*

¹⁵ See *infra* Part I.A.

¹⁶ 21 C.F.R. § 1162 (2022).

¹⁷ See *infra* Part III.A.

¹⁸ Though we may not be able to calculate the exact amount of damage by the delay, even by the Tobacco Products Scientific Advisory Committee’s own estimation from 2011 to 2020 menthol would cause 17,000 premature deaths and 2.3 million new smokers by 2020. Neal L. Benowitz & Jonathan M. Sarmet, *The Threat of Menthol Cigarettes to U.S. Public Health*, 364 *NEW ENG. J. MED.* 2179, 2181 (2011).

¹⁹ See *infra* Part I.

²⁰ See *infra* Part II.

smoking, while opening the door for future corporations to mimic the pattern that has already caused these communities so much harm.²¹

II. THE MENTHOL EFFECT

Certain demographic groups are more likely to suffer from tobacco-related illnesses, and the Black community has been impacted the hardest.²² The impact menthols have had on these disparities can hardly be overstated. Black smokers are more likely to smoke menthols than any other demographic, with approximately 85% of Black smokers use menthol cigarettes.²³ These rates are extremely high given the fact that menthols make up only about 36% of the market,²⁴ and are smoked by 30% of White smokers, and 48% of Hispanic smokers.²⁵ And for Black adults who smoke, 93% started using menthol cigarettes as compared to 44% of White smokers.²⁶

The differentiation between racial groups choosing menthols for their cigarettes is no mere coincidence.²⁷ To completely understand the large discrepancy in cigarette preference, the history of menthol cigarettes and how the Black community was specifically targeted for their advertising must be scrutinized. Examining this history also provides a fruitful demonstration on the power of targeted marketing, which should serve as a cautionary tale as we consider modern issues with tobacco and nicotine.

A. Menthol's Emergence

Menthol cigarettes were created in 1925, with the production and marketing of Spud cigarettes.²⁸ Early popularity came in 1933 when Kool mentholated cigarettes hit the market and became the most sought-out menthol product, which represented 2% of the tobacco market at the time.²⁹ From 1933 to 1956, menthols were generally identified as cigarettes that were to be used primarily when a smoker had a cough or a cold that prevented them from using a non-menthol brand.³⁰ Much of the early

²¹ See *infra* Part III.

²² Mandy Stahre, Kolawole S. Okuyemi, Anne M. Joseph & Steven S. Fu, *Racial/Ethnic Differences in Menthol Cigarette Smoking, Population Quit Ratios and Utilization of Evidence-Based Tobacco Cessation Treatments*, 105 ADDICTION 75, 75 (Supp. 2010).

²³ *Menthol Smoking and Related Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 27, 2022), https://www.cdc.gov/tobacco/basic_information/menthol/related-health-disparities.html.

²⁴ FED. TRADE COMM'N, CIGARETTE REPORT FOR 2018 28 tbl.7A (2019), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2018-smokeless-tobacco-report-2018/p114508cigarettereport2018.pdf>.

²⁵ *Menthol Smoking and Related Health Disparities*, *supra* note 23.

²⁶ *Id.*

²⁷ As Keith Wailoo references in the opening of his book, the myth that nobody understood why menthols were preferred by Black people was inaccurate. WAILOO, *supra* note 10, at 2.

²⁸ Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 NICOTINE & TOBACCO RSCH. S55, S57 (2004).

²⁹ *Id.* Brown & Williamson originally introduced Penguin in 1931, but it was replaced by Kool in 1933. *Id.*

³⁰ Charyn D. Sutton & Robert G. Robinson, *The Marketing of Menthol Cigarettes in the United States: Populations, Messages, and Channels*, 6 NICOTINE & TOBACCO RSCH. S83, S84 (2004). Kool

success of menthols can be attributed to these therapeutic claims and consumers looking for relief from “smoker’s throat,” with Kool leaning into the medicinal characteristic more than any other brand.³¹

Salem menthol cigarettes arrived in 1956 and increased the menthol market share from 2% to 5% within its first year.³² The success of Salem encouraged the creation of numerous other menthols during the 1950s and 1960s, including Newport in 1957, pushing the market share to 16% by 1963.³³ Part of the significant increase in market share generated by Salem was due to the marketing strategy the company used. Salem sought to advertise itself as a cigarette that should be used at all times, rather than marketing itself as a specialty cigarette as many menthols did originally.³⁴ Though, this response did not happen in a regulatory vacuum. It was in the 1950s that therapeutic claims became a focus of regulations aiming to prevent deception to consumers.³⁵

Despite these steady increases, it was not until menthols were targeted to the Black community that the market share surged to nearly 30% in 1978.³⁶ Prior to the increase in targeted advertising, the percentages of Black smokers using menthol cigarettes was essentially the same as the percentages in the general population.³⁷ With a segregated population that had their own cultural wants and needs, menthol cigarettes became leaders, along with malt liquors, fortified wines, and cheap whiskies, at marketing predominantly to poor and Black communities.³⁸

Kool increased its sales by utilizing television more than its competitors, which was thought to appeal more to the working and lower middle class because they read less.³⁹ In print, Kool selected a black baseball player from the New York Yankees, Elston Howard, to be the spokesman for Kool in magazines such as *Ebony*.⁴⁰ By 1962, there were twice as many cigarette ads in *Ebony* as there were in *Life*, and between 1963 and 1965, cigarette ads more than tripled in *Ebony*.⁴¹ This increase was significant since numerous studies at the time had shown that Black people were

advertising specifically focused on this notion, even suggesting healthful effects. Examples of slogans used include: “[k]eep a clear head with Kools. All the signs seems to point to a tough winter: cold, ice, chills and sniffles. Why not play it safe and smoke Kools?” and “[h]as a stuffed-up head killed your taste for smoking? Light a Kool. The mild menthol gives a cooling, soothing sensation . . . [and] leaves your nose and throat feeling clean and clear.” Gardiner, *supra* note 28, at S57.

³¹ WAILOO, *supra* note 10, at 43–45. Focusing on the Black community would also have been dangerous to profits at this time because “the era’s dominant characterization of Black life were overwhelmingly negative and profoundly stigmatized, and therefore not aligned with mass cultural ideals and aspirations in the view of advertisers.” *Id.* at 58.

³² Gardiner, *supra* note 28, at S57.

³³ *Id.* at S58.

³⁴ Sutton & Robinson, *supra* note 30, at S86. Newport also avoided attaching itself to health effects of their cigarettes. *Id.*

³⁵ WAILOO, *supra* note 10, at 65.

³⁶ Gardiner, *supra* note 28, at S58.

³⁷ Sutton & Robinson, *supra* note 30, at S85.

³⁸ Gardiner, *supra* note 28, at S58–S59.

³⁹ *Id.* at S59–S60.

⁴⁰ *Id.* at S60.

⁴¹ *Id.*

more likely to trust advertising directed at them than Whites.⁴² Perhaps just as important, readers of *Ebony* and other popular media in the Black community were less likely to have critiques of the tobacco companies given their reliance on the industry's advertising funds.⁴³

This unfortunate trust in advertising may also help to explain the devotion to menthol cigarettes when coupled with the fact that Kool continued to emphasize the health benefits of their menthol cigarettes into the 1950s.⁴⁴ While the health claims were not directed specifically at Black communities, Black smokers' propensity to place more trust in advertisements would have given these claims a stronger impact within this population. Surveys conducted in the 1960s show that Black people felt menthols were the best to smoke with a cold, easier on the throat, and better for one's health because they were less strong than regular cigarettes.⁴⁵

In addition to the health claims, the tobacco industry made sure their companies and their menthol brands were integrated into Black culture beginning in the 1960s. While racial tensions made it difficult for tobacco companies to outwardly court Black consumers in the 1950s, the Civil Rights era of the 1960s—along with the cancer scare that accompanied the Surgeon General's report in 1964—made it easier for some companies to pursue the urban Black smoker as a key area for growth.⁴⁶ For example, Kool utilized a word popular in the Black community thanks to the Cool Jazz movement, which was seen by many Black people as distinctly their own.⁴⁷ Over time, Kool began to feature darker-skinned models and increased their use of other slang terms associated with Black culture.⁴⁸

With a majority of Black people living in the South, where the tobacco industry is based, it was also to the tobacco companies' advantage to begin cementing a strong relationship with the Black community.⁴⁹ During a time of racial upheaval, and Black people seeking societal gains in their struggle with equality, employment alone was a significant contributor to strengthening a brand within the Black

⁴² See *id.* (describing how surveys from 1961, 1968, and 1979 showed that Blacks were more trusting of television and newspaper ads).

⁴³ WAILOO, *supra* note 10, at 168. One example is *Ebony's* lack of coverage of Nat King Cole's cause of death, lung cancer, which may have proven extremely impactful coming the year after the Surgeon General's report linking smoking to cancer. *Id.* at 169. Instead of discussing the singer's heavy smoking, the issue featured four ads for menthol brands. *Id.* at 170.

⁴⁴ See Gardiner, *supra* note 28, at S60. ("Throat raw? Got a cold? Switch from Hots to Kools").

⁴⁵ *Id.* at S61.

⁴⁶ WAILOO, *supra* note 10, at 150–51. "It was precisely at this moment of peak fear and uncertainty—as the cancer findings threatened sales and the FTC cracked down on misleading claims—that Brown & Williamson was reaching across the contentious American color line with explicit Kool advertising in African American newspapers, shaping a new market." *Id.* at 158.

⁴⁷ Gardiner, *supra* note 28, at S62. This connection continued into the 1980s when Brown & Williamson launched the "Kool Jazz Festival." *Id.* Other tobacco companies also began to have their own music festivals around the same time period, which comprised of Black musical acts and promoted mainly menthol cigarettes. *Id.*

⁴⁸ See Sutton & Robinson, *supra* note 30, at S87 (giving examples of Black slang such as groovy, baby, and soul). Newport also used models with darker complexions and afro hairstyles in their ads. Gardiner, *supra* note 28, at S61.

⁴⁹ Gardiner, *supra* note 28, at S62.

community.⁵⁰ Black leaders even negotiated with tobacco companies in search of *more* Black faces in tobacco advertising, focusing on economic gains and political leverage instead of health disparities.⁵¹ The civil rights movement also demonstrated the economic power of the Black community through boycotts and protests.⁵² And with a large portion of Black youth taking part in the civil rights movement, tobacco companies gave money to Black community organizations and civil rights organizations, including generous contributions to the National Association for the Advancement of Colored People (NAACP), the National Urban League, and historically black colleges and universities (HBCUs).⁵³ Capturing Black youth was likely an important goal for tobacco companies due to their marketing research that suggested a strong brand loyalty among Black consumers.⁵⁴

The United States' inequities were a driving force behind opening the door for tobacco companies to exploit the Black community. Black leaders called on tobacco companies to hire Black workers, support Black causes, fund Black projects, and even urged *more* advertising in Black media.⁵⁵ Given the racial disparities suffered by the Black community, such as segregation and economic inequality, the push for increased funding opportunities was somewhat understandable. And once cigarette advertising was banned from television and radio, a new avenue of mutual benefit emerged: billboard advertising.⁵⁶ For two decades—from the 1970s until the Master Settlement Agreement (MSA) banned outdoor advertising in the 1990s—menthol billboards were a prominent feature of Black urban neighborhoods.⁵⁷ Along with advertising on public transit—a mechanism that allowed focused advertising to the predominantly Black users—billboards created an opportunity for more targeted advertising.⁵⁸ As federal funding in cities declined and White customers moved to the suburbs, cities—largely Black urban communities as a result of White flight—became reliant on tobacco companies for economic support.⁵⁹

The targeted advertising of menthols to the Black community extends even into the 1990s with failed attempts to launch Uptown cigarettes in 1990 and “X” in 1995.⁶⁰ Uptown cigarettes were created in an attempt to compete with Newport,

⁵⁰ WAILOO, *supra* note 10, at 149 (quoting Martin Luther King Jr., “If a firm persists in refusing to employ Negroes because of their race, Negroes will refuse to buy its products”). Marketing firms hired by tobacco companies emphasized the opportunity to use inequality to the benefit of the menthol cigarettes. *Id.* at 136. By framing the products as status symbols, tobacco companies could prey on the Black community’s “natural desire to achieve equality in every way possible.” *Id.*

⁵¹ *Id.* at 151.

⁵² *Id.* at 144–45 (“continuing civil rights boycotts and consumer challenges against segregated establishments would compel advertisers to take African American consumerism more seriously”).

⁵³ *Id.*

⁵⁴ *Id.* at 147.

⁵⁵ *Id.* at 176.

⁵⁶ *Id.* at 178.

⁵⁷ *Id.* at 178–79.

⁵⁸ *Id.* at 184, 210.

⁵⁹ *Id.* at 216. For example, reporters for the *Detroit Free Press* documented in 1989 that there were 154 cigarette billboards on Detroit’s urban roads, seventy-eight on the highways connecting the city to the suburbs, and seventeen in the suburbs. *Id.* at 226.

⁶⁰ Gardiner, *supra* note 28, at S63.

which at the time held over 80% of the younger Black smoking market.⁶¹ This effort was a part of R.J. Reynolds' internal Black Initiative Program, which was later renamed the Menthol Initiative Program.⁶² Uptown cigarettes were packaged upside down, because of the belief that Black smokers opened cigarettes from the bottom to keep filters fresh.⁶³ Uptown cigarettes also came in packs of ten and twenty to offer a lower priced alternative with the goal of increasing the opportunity to connect with populations that were low income and those not attending college.⁶⁴ The next step was to advertise in Black print media and utilize a heavy outdoor presence that would be supported by nightclub events, mobile video vans distributing samples, and additional retail incentives.⁶⁵

Unfortunately for R.J. Reynolds, their decision to advertise the upcoming release of the Uptown cigarette as one designed specifically for Black smokers in the *Philadelphia Daily News*, the city's Black newspaper, backfired.⁶⁶ The announcement of the launch created enormous public backlash, led by the Uptown Coalition, which resulted in the company canceling the test marketing campaign and eventually all future plans for the Uptown cigarette.⁶⁷ However, the Menthol Initiative Program, created to target Black smokers, continued its mission of grabbing a larger share of the Black smoker market.⁶⁸ For example, R.J. Reynolds did not announce their reformulation of Salem cigarettes in 1990, when the menthol levels were lowered to appeal to the younger Black community, so the public would not be aware that decisions were being made specifically to attract more young Black smokers.⁶⁹ Additionally, their focused advertising continued. A comparison of R.J. Reynolds advertisements in *Jet*, *Ebony*, and *Essence*, magazines targeted to Black readers, with those found in *People Weekly*, a magazine primarily read by Whites, during 1999–2000, show that the former contained 97.3% mentholated brands while the latter contained 0% of menthol ads.⁷⁰

Similarly, "X" was a brand that an independent Boston firm attempted to market in 1995 by capitalizing on the film *Malcolm X*, which was popular at the time.⁷¹ The film had reintroduced the civil rights figure to the young Black community and this new familiarity was intended to be taken advantage of through cigarette packaging

⁶¹ Edith D. Balbach, Rebecca J. Gasior & Elizabeth M. Barbeau, *R.J. Reynolds' Targeting of African Americans: 1988–2000*, 93 AM. J. PUB. HEALTH 822, 823 (2003).

⁶² *Id.* Documents show that while there was a consistent use of the word menthol, in one report initially titled "Black Initiative Monthly Marketing report," the term "Black" was crossed out by hand and "Menthol" was written in its place. *Id.* at 824.

⁶³ *Id.* at 823–24.

⁶⁴ *Id.*

⁶⁵ *Id.* at 824.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Jennifer M. Kreslake, Geoffrey Ferris Wayne, Hillel R. Alpert, Howard K. Koh & Gregory N. Connolly, *Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults*, 98 AM. J. PUB. HEALTH 1685, 1686 (2008).

⁷⁰ Balbach, Gasior & Barbeau, *supra* note 61, at 825. This difference is actually larger than the one found in 1989–1990, when it was 100% to 31.6%. *Id.*

⁷¹ Gardiner, *supra* note 28, at 63.

that included red, black, and green colors.⁷² Yet, this plan was also met with community resistance resulting in the project being abandoned.⁷³

While the use of menthols grew during the 1960s and 1970s among Whites as well, it was not nearly at the same rate as found in the Black community.⁷⁴ And it is now abundantly clear that this was not by accident. Rather, menthol cigarettes were pushed onto Black communities by tobacco companies looking for larger market shares, and the result is that after half a century of inundation, these are now the preferred cigarettes of Black smokers.

B. Mentholated Health Disparities

It is established that Black smokers use menthols to a significantly higher degree than other smokers, especially their White counterparts. It is also clear that tobacco companies specifically targeted Black communities with their menthol advertising and marketing. We also know that Black people have significantly higher rates of incidence and mortality for lung cancer and other smoking-related diseases despite smoking fewer cigarettes per day than Whites.⁷⁵ This alone may be sufficient to demonstrate that menthol cigarettes are more harmful than non-menthol options and have contributed directly to these health disparities. But a better understanding of the mechanisms of menthol cigarettes help to demonstrate their likely connection to these disparities.

Physiologically, menthol has cooling effects, relieves pain, acts as a local anesthetic, and has respiratory effects.⁷⁶ The effects can differ depending on the amount of menthol the cigarette contains.⁷⁷ Even low amounts of menthol can mask the taste of tobacco and reduce uncomfortable sensations at the back of the throat.⁷⁸ Unlike the burning or scratching irritation that is commonly found with tobacco, increased menthol consists of cooling qualities, which a high nicotine and menthol blend can give to both the mouth and throat.⁷⁹ This balanced cooling impression is found in major competitive menthol brands because it is preferred over the unbalanced cooling of just the mouth or throat, which is found with a combination of menthol and only a moderate level of nicotine.⁸⁰ Therefore, there is an incentive to increase the nicotine content in menthol cigarettes to ensure the characteristics that make the product so popular for individuals who do not enjoy the sensations from non-menthol cigarettes. And increased nicotine means increased risk of addiction.

⁷² See *id.* (describing these colors as the African American liberation colors).

⁷³ *Id.*

⁷⁴ *Id.* at S64.

⁷⁵ Pamela I. Clark, Phillip S. Gardiner, Mirjana V. Djordjevic, Scott J. Leischow & Robert G. Robinson, *Menthol Cigarettes: Setting the Research Agenda*, 6 NICOTINE & TOBACCO RSCH. S5, S6 (2004).

⁷⁶ Geoffrey Ferris Wayne & Gregory N. Connolly, *Application, Function, and Effects of Menthol in Cigarettes: A Survey of Tobacco Industry Documents*, 6 NICOTINE & TOBACCO RESEARCH S43, S43 (2004).

⁷⁷ Kreslake et al., *supra* note 69, at 1686.

⁷⁸ *Id.*

⁷⁹ Wayne & Connolly, *supra* note 76, at 47–48.

⁸⁰ *Id.* at S48 (taking information from a 1984 Philip Morris study).

The menthol not only provides a cooling sensation, but by acting as a local anesthetic it can reduce the intensity of tobacco pain-sensitive sensations.⁸¹ This reduces the perception of irritation by the smoker⁸² but does not actually reduce the irritation that is in fact occurring in the body. The difference between what is perceived and what is actually taking place may be due to a drug effect impeding impulse transmission in nerves or acting as a counterirritant that dilutes the tobacco sensations causing the loss of the ability to recognize local pain sensation.⁸³ Regardless of the reason, the presence of menthol appears to reduce the smoker's ability to perceive the actual irritation that is taking place in their body, which likely reaffirms the misbelief that menthols are safer than non-mentholated cigarettes.

The disconnect between what is perceived and what is taking place plays a critical role in the respiratory system. Menthol allows the smoker to feel that they are breathing freely, creating a "perceived openness of the nasal airway in the absence of actual changes in nasal resistance."⁸⁴ This respiratory perception affects the smoker's inhalation patterns, allowing them to inhale more deeply.⁸⁵ This is especially problematic given the reduction in irritation that menthol creates. While menthol might not be addictive itself, the fact that it masks discomfort of inhaling smoke enough to allow delivery of an effective dose of nicotine can contribute to increased tobacco addiction, especially among new smokers.⁸⁶ Thus, because many smokers believe menthol cigarettes provide a less harmful alternative, a switch to menthols could actually increase the risk of harm by allowing more steady and frequent smoking due to the cooling sensation it creates.⁸⁷

This lesson is critical to keep in mind when considering how to reduce the harmful effects of tobacco and nicotine moving forward. We must maintain focus not simply on what is included in the product, but also on the consumer's perception of the product. Regardless of how harmful menthols or e-cigarettes are, a user's behavior is more heavily influenced by how harmful they believe the product to be. This is essential for e-cigarettes, which advertise themselves as less harmful than combustible cigarettes and tend to insinuate safety. As a result, while combustible cigarettes may be more harmful than e-cigarettes, the lack of awareness of the harms that can come from e-cigarette usage can still create a significant risk. This is especially true for those populations that may be targeted by e-cigarette companies, such as youth, the poor, undereducated, and communities of color.

⁸¹ *Id.* (quoting Roper & Wilkins, *Cigarette Study*, 1978).

⁸² *Id.* at S48.

⁸³ *Id.*

⁸⁴ *Id.* at S49 (quoting an R.J. Reynolds review).

⁸⁵ Deeper inhalation has been shown to increase health risks. *See, e.g.,* Jie-Min Lee, Sheng-Hung Chen & Chi-Jung Hsieh, *Does Perceived Safety of Light Cigarettes Encourage Smokers to Smoke More or to Inhale More Deeply?*, 53 INT'L J. PUB. HEALTH 236, 243 (2008) ("inhaling cigarette smoke more deeply can significantly increase risk of adenocarcinoma").

⁸⁶ Kreslake et al., *supra* note 69, at 1689.

⁸⁷ WAILOO, *supra* note 10, at 111.

III. MENTHOL 2.0⁸⁸

“Just like that, the start-up that had vowed to strike a dagger through the heart of Big Tobacco suddenly was Big Tobacco.”⁸⁹

A. Risks of Vaping

It is important that risk from e-cigarettes not be conflated with the risks of combustible cigarettes. To be sure, e-cigarettes are a safer product.⁹⁰ Though, safer than combustible cigarettes—a product that will kill the consumer if used as intended—is quite a low threshold to surpass. To label e-cigarettes simply as a harm reduction tool for smokers is misleading. Harm reduction tools and policies aim to reduce the harm for those already at risk of harm due to current use. Harm reduction is not intended to encourage or entice new users. Yet, it appears e-cigarettes have done just that. Perhaps more troubling, there is evidence e-cigarettes have brought in users who would have been unlikely to use any other tobacco product, as well as acting as a gateway product to combustible cigarettes. E-cigarette use by youth has been shown to be an independent risk factor for future cigarette initiation and current smoking among adolescents.⁹¹ In fact, according to one study, e-cigarette users were five times more likely to become regular cigarette smokers.⁹²

While e-cigarettes may be safer than combustible cigarettes, it would be inaccurate to consider them safe or without health risks. Besides the potential gateway to using combustible cigarettes and other tobacco products, e-cigarettes and the addictive nicotine they contain come with their own potential for harm. For the underdeveloped brain of the youth, nicotine addiction alone is concerning, and the younger someone is when exposed to nicotine, the more likely they are to develop an addiction.⁹³ Failed attempts to quit e-cigarettes and cigarettes by adolescents was higher in 2020 than the prevalence of unsuccessful cigarette quit attempts in the

⁸⁸ With increasing negative attention and regulation, as well as recognition that their product killed the consumer preventing future profits, the tobacco companies themselves spent significant time, money, and resources looking for Cigarettes 2.0, even working with vaporizing prototypes and products. LAUREN ETTER, *THE DEVIL’S PLAYBOOK: BIG TOBACCO, JUUL, AND THE ADDICTION OF A NEW GENERATION* 41–44 (2021). FDA wanted to use this as evidence that tobacco companies were actually drug companies producing nicotine-delivery devices. *Id.* at 45. This, along with poor sales and lack of consumer appeal, led to these projects being abandoned to reduce the waste of money and resources. *Id.* Moreover, it is worth mentioning that Juul, the part of the focus of this Article, did indeed become partly owned by Altria, Philip Morris’s parent company, after a \$12.8 billion sale for 35% of the company. *Id.* at 289.

⁸⁹ Shortly into the company’s existence and after selling part of its ownership to a tobacco company, Juul was run by a tobacco executive. *Id.* at 350.

⁹⁰ Gideon St. Helen & David L. Eaton, *Public Health Consequences of E-Cigarette Use*, 178 *JAMA INTERNAL MED.* 984, 984 (2018).

⁹¹ Samir Soneji, Jessica L. Barrington-Trimis, Thomas A. Wills, Adam M. Leventhal, Jennifer B. Unger, Laura A. Gibson, JaeWon Yang, Brian A. Primack, Judy A. Andrews, Richard A. Miech, Tory R. Spindle, Danielle M. Dick, Thomas Eissenberg, Robert C. Hornik, Rui Dang & James D. Sargent, *Association Between Initial Use of E-Cigarettes and Subsequent Cigarette Smoking Among Adolescents and Young Adults: A Systematic Review and Meta-Analysis*, 171 *JAMA PEDIATRICS* 788, 791 (2017).

⁹² Olatokunbo Osibogun, Zoran Bursac & Wasim Maziak, *E-Cigarette Use and Regular Cigarette Smoking Among Youth: Population Assessment of Tobacco and Health Study (2013–2016)*, 58 *AM. J. PREVENTIVE MED.* 657, 661 (2020).

⁹³ Mitch Zeller, *Youth E-Cigarette Use and the Food and Drug Administration’s Multifaceted Approach*, 110 *AM. J. PUB. HEALTH* 772, 773 (2020).

thirteen years prior, demonstrating e-cigarettes' contribution to nicotine addiction for youth.⁹⁴ Thus, e-cigarettes are creating a new population of nicotine addicts.

Nicotine can have significant impacts on neuronal development. Nicotine exposure is associated with priming the brain for other addictive substances, deficits in learning and attention, reduced impulse control, and mood disorders.⁹⁵ There are also risks of nicotine withdrawals.⁹⁶ Health risks from e-cigarettes can also spread throughout the body, with vapor exposure increasing vascular, cerebral, and pulmonary oxidative stress.⁹⁷ In terms of mental health, nicotine withdrawal can result in irritability, restlessness, anxiety, depression, difficulty sleeping, and problems concentrating.⁹⁸ And as with smoking in general, a cycle can be created where e-cigarettes are used to relieve the stress and anxiety that they help to generate.

B. The Juul Generation

As cigarette usage plummeted over time after the MSA and the TCA, there was hope we were getting closer to a generation no longer impacted by the negative consequences of smoking. Smoking in adults declined from 20.9% in 2005 to 12.5% in 2020.⁹⁹ The popularity of cigarettes dropped precipitously among youth, with high school smoking rates dropping from 28% in 2000 to 7.6% in 2017.¹⁰⁰ What the e-cigarette movement has done is created a trojan horse, bringing addiction to a new generation under the guise of a healthier, safer alternative that can mitigate negative health consequences for adult smokers.

This may not be surprising given that as combustible cigarettes were becoming increasingly regulated after the passage of the TCA, e-cigarettes had essentially no legal limitations early on.¹⁰¹ While combustible cigarette usage declined, e-cigarettes became increasingly popular among youth. In 2018, nearly 20% of high school students—over 3 million across the country—were using e-cigarettes, an increase of

⁹⁴ Richard Miech, Adam M. Leventhal, Patrick M. O'Malley, Lloyd D. Johnston & Jessica L. Barrington-Trimis, *Failed Attempts to Quit Combustible Cigarettes and E-Cigarettes Among US Adolescents*, 327 JAMA 1179, 1180 (2022).

⁹⁵ Vivek H. Murthy, *E-Cigarette Use Among Youth and Young Adults: A Major Public Health Concern*, 171 JAMA PEDIATRICS 209, 209 (2017).

⁹⁶ ETTER, *supra* note 88, at 346.

⁹⁷ Marin Kuntic, Matthias Oelze, Sebastian Steven, Swenja Kröller-Schön, Paul Stamm, Sanela Kalinovic, Katie Frenis, Ksenija Vujacic-Mirski, Maria Teresa Bayo Jimenez, Miroslava Kvandova, Konstantina Filippou, Ahmad Al Zuabi, Vivienne Brückl, Omar Hahad, Steffen Daub, Franco Varveri, Tommaso Gori, Regina Huesmann, Thorsten Hoffmann, Frank P. Schmidt, John F. Keaney, Andreas Daiber & Thomas Münzel, *Short-Term E-Cigarette Vapour Exposure Causes Vascular Oxidative Stress and Dysfunction: Evidence for a Close Connection to Brain Damage and a Key Role of the Phagocytic NADPH Oxidase (NOX-2)*, 41 EUROPEAN HEART J. 2472, 2481 (2020).

⁹⁸ *Quick Facts on the Risks of E-Cigarettes for Kids, Teens, and Young Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 23, 2022), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html.

⁹⁹ *Current Cigarette Smoking Among Adults in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 17, 2022), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

¹⁰⁰ Press Release, Matthew L. Meyers, President, Campaign for Tobacco-Free Kids, New U.S. Survey Shows Youth Cigarette Smoking is at Record Lows, but E-Cigarettes and Cigars Threaten Progress (June 7, 2018), https://www.tobaccofreekids.org/press-releases/2018_06_07_nyts.

¹⁰¹ ETTER, *supra* note 88, at 88.

nearly 80% from the prior year.¹⁰² With the e-cigarette popularity, tobacco use among high schoolers had grown to 34% in 2021.¹⁰³ Over 1.3 million middle school students were using tobacco products, a rate of 11.3%.¹⁰⁴ While e-cigarettes created the hope of a harm reduction tool for current smokers, the increase in youth use created a new generation of smokers and nicotine addicts.

The most prominent among the e-cigarettes available on the market has been Juul. The Juul e-cigarette is of particular interest because of its meteoric rise in popularity. Over the span of one year, Juul was able to increase its sales by 783%.¹⁰⁵ Juul represents over 75% of the e-cigarette market.¹⁰⁶ And Juul achieved a \$10 billion valuation faster than any other company, reaching the mark four times faster than Facebook.¹⁰⁷

Juul's prominence in the e-cigarette market is undoubtedly a credit to its design and marketing, though the flavors and emphasis on its safety likely helped as well.¹⁰⁸ Again, even if e-cigarettes may be a safer alternative to combustible cigarettes to those who already smoke, the overemphasis on product safety was misleading and helped to increase youth uptake.¹⁰⁹ For example, approximately two-thirds of users fifteen to twenty-four years old were unaware that Juul contains nicotine.¹¹⁰ The marketing of Juul certainly played a role in this misunderstanding.

One of the primary similarities between Juul and menthols is this initial marketing focused on health benefits—though, in this case, Juul's health benefit was to help reduce cigarette consumption as opposed to helping with colds and throat irritation. While Juul made sure to never specifically advertise their product as a smoking cessation device—because it never received Food and Drug Administration (FDA) approval as one—it still found indirect ways to market itself as a safer option that was healthier than cigarettes.¹¹¹ For example, the “switch” terminology was quite prevalent as a marketing campaign.¹¹² Advertisements even mentioned the specific

¹⁰² *Id.* at 275.

¹⁰³ Andrea S. Gentzke, Teresa W. Wang, Monica Cornelius, Eunice Park-Lee, Chunfeng Ren, Michael D. Sawdey, Karen A. Cullen, Caitlin Loretan, Ahmed Jamal & David M. Homa, *Tobacco Product Use and Associated Factors Among Middle and High School Students—National Youth Tobacco Survey, United States, 2021*, 71 MORBIDITY & MORTALITY WEEKLY REPORT, Mar. 11, 2022, at 6.

¹⁰⁴ *Id.*

¹⁰⁵ Robert K. Jackler, Cindy Chau, Brook D. Getachew, Mackenzie M. Whitcomb, Jeffrey Lee-Heidenreich, Alexander M. Bhatt, Sophia H.S. Kim-O'Sullivan, Zachary A. Hoffman, Laurie M. Jackler & Divya Ramamurthi, *Juul Advertising Over its First Three Years on the Market*, STAN. RSCH. INTO IMPACT TOBACCO ADVERT., Jan. 31, 2019, at 2.

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.*

¹⁰⁸ In 2021, 85.8% of high school students and 79.2% of middle school students who used e-cigarettes in the past thirty days reported using a flavored version. *Youth and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2022), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates. See also notes 112–17 and accompanying text.

¹⁰⁹ *Examining Juul's Role in the Youth Nicotine Epidemic: Part I Hearing Before the H. S. Comm. on Economic and Consumer Policy*, 116th Cong. 14 (2019) [hereinafter *Examining Juul's Role Part I*].

¹¹⁰ *Quick Facts on the Risks of E-Cigarettes for Kids, Teens, and Young Adults*, *supra* note 98, at 3.

¹¹¹ Jackler et al., *supra* note 105, at 27.

¹¹² *Id.* at 15.

goal of switching from cigarettes, whether it be “help a smoker switch to Juul” or “help mom switch to Juul.”¹¹³ Meanwhile, the company’s website and social media accounts offered testimonials of former smokers detailing how Juul helped them transition from cigarettes.¹¹⁴

While Juul may be safer than cigarettes, the direct comparisons served to obscure any health risk that came with using the product, and likely played a role in users not understanding that the product contained the same addictive ingredient as cigarettes—nicotine. Juul’s emphasis, unsurprisingly, focuses on the reduced harm from combustible cigarettes and the chemicals that are included. Yet, Juul has much higher rates of nicotine than its e-cigarette competitors, with earlier e-cigarettes on the market having nicotine levels between 1–2%.¹¹⁵ The increased rate of nicotine was a success, with Juul keeping initial users at six times the rate of their competitors and showing a high “attachment rate” thereafter.¹¹⁶ Juul uses lower nicotine levels in countries that require they do so, suggesting they could achieve the same stated goal of helping adult smokers switch with lower nicotine rates.¹¹⁷ Yet, they refuse to lower the nicotine levels in the United States.

Instead, Juul revolutionized e-cigarettes by using nicotine salt formulations in pods, which were less harsh than previous vaping models.¹¹⁸ These nicotine salt formulations remove the harshness and taste of nicotine, yet another similarity to menthols that mask the harshness of the tobacco and smoke.¹¹⁹ Like menthols, reducing irritation leads to easier uptake by first time users. The nicotine salt pods also had faster rates of nicotine uptake in the bloodstream, useful for converting heavy smokers but also problematic for users without a smoking habit.¹²⁰ And, as the company freely admits, each pod contains the same amount of nicotine as one pack of cigarettes.¹²¹ While there is no consistent usage of pods per day or per week across

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Robert K. Jackler & Divya Ramamurthi, *Nicotine Arms Race: Juul and the High-Nicotine Product Market*, 28 *TOBACCO CONTROL* 623, 623 (2019).

¹¹⁶ ETTER, *supra* note 88, at 174–75.

¹¹⁷ *Examining Juul’s Role in the Youth Nicotine Epidemic: Part II Hearing Before the H. S. Comm. on Economic and Consumer Policy*, 116th Cong. 19 (2019) [hereinafter *Examining Juul’s Role Part II*]. Though Juul did develop a turbo pod that would allow users to draw bigger hits, which allowed a bigger nicotine impact despite the lower levels of nicotine. ETTER, *supra* note 88, at 259.

¹¹⁸ ETTER, *supra* note 88, at 106.

¹¹⁹ *Examining Juul’s Role Part II*, *supra* note 117, at 19. In its purest form, nicotine has a high pH and leaves a sharp, burning sensation, but when nicotine is in a crystalized “salt” form, the pH is moderated. ETTER, *supra* note 88, at 106–07.

¹²⁰ ETTER, *supra* note 88, at 116. “The preferred formulation that was ultimately commercialized delivered a walloping amount of nicotine, higher than any e-cigarette on the market, but the organic acids had the effect of lowering the pH and tempering the harshness.” *Id.* The company used this in sales pitches: “comparing the blood-absorption rate of Juul to regular combustible cigarettes and other competing e-cigarettes . . . demonstrat[ing] how much Juul matched the nicotine delivery of regular cigarettes and exceeded its e-cigarette competitors, which would mean more customers.” *Id.* at 257.

¹²¹ “Bowen and Monsees insisted that the little cartridges contain the same amount of nicotine contained in a pack of cigarettes, so the device could compete directly in that space.” *Id.* at 118.

users, there are documented reports of teens going through more than a pod in one day.¹²²

Despite these risks, in congressional testimony, a ninth grader explained how a Juul representative spoke clearly about the safety benefits of Juul at a school event.¹²³ The outward advertising and direct marketing of Juul to high school students in a school setting contradicts the notion that the company was simply hoping to get adult smokers to switch for purposes of harm reduction. Instead, teens were informed that Juul was “totally safe” and “ninety-nine percent safer than cigarettes.”¹²⁴ The Juul representative went on to explain this was why Juul was very close to receiving FDA approval.¹²⁵ Even when a student specifically asked about what they should do for a friend addicted to nicotine—unbeknownst to the representative, the student was referring to an addiction to Juul—the representative specifically advocated recommending the fellow high schooler use Juul.¹²⁶

In addition to safety claims, Juul’s marketing strategies were heavily influenced by those used by tobacco companies. Juul examined archives of tobacco companies’ advertisements and marketing strategies, and co-founder James Monsees has admitted that tobacco advertising informed their company’s advertising strategy.¹²⁷ While the company suggests this was an effort to avoid the past mistakes of the tobacco industry, others have drawn comparisons between the advertisements and find the similarities too much to be mere coincidence.¹²⁸

The Juul marketing campaign emphasized pleasure, relaxation, socialization, romance, style, identity, and satisfaction.¹²⁹ Despite Juul’s claims that they were aiming to provide a safer alternative to adult smokers, their advertising choices early on suggest a strong emphasis on targeting youth consumers. The company chose forums such as social media, frequented by youth significantly more than older adults, to advertise their products.¹³⁰ Using these forums, Juul got social media influencers to provide the same social appeal found in cigarette advertising.¹³¹ Juul also set up lavish parties, with giveaways and chances to sample their many flavors.¹³² Indeed, while Juul years later decided to limit the availability of their flavors, early on they had options that hardly seem created to attract adult smokers, such as Gummy Bear, Whip Cream, Cotton Candy, and Unicorn Poop.¹³³

¹²² Michael S. Amato, Mia M. Bottcher, Sarah Cha, Megan A. Jacobs, Jennifer L. Pearson & Amanda L. Graham, “It’s Really Addictive and I’m Trapped:” A Qualitative Analysis of the Reasons for Quitting Vaping Among Treatment-Seeking Young People, 112 ADDICTIVE BEHAVIORS 1, 3 (2021).

¹²³ *Examining Juul’s Role Part I*, *supra* note 109 at 12–13.

¹²⁴ *Id.* at 13–14.

¹²⁵ *Id.* at 14.

¹²⁶ *Id.* at 13–14.

¹²⁷ Jackler et al., *supra* note 105, at 27.

¹²⁸ *See id.*

¹²⁹ *Id.* at 27–33.

¹³⁰ *Id.* at 19–21.

¹³¹ *Id.* at 19; *see also* ETTER, *supra* note 88, at 81 (discussing some of the early influencer hires to showcase the device). The early success of Juul’s mix of social media, influencers, and high-end parties set them on a path to cultivate a strong youth following. *Id.* at 82.

¹³² Jackler et al., *supra* note 105, at 5.

¹³³ *Examining Juul’s Role Part I*, *supra* note 109, at 31.

The popularity of vaping—and Juul in particular—among youth has raised serious concerns about the product, even with potential benefits to adult smokers looking for help to quit combustible cigarettes. For youth, health consequences from vaping can have a lasting impact, especially in terms of neurological development. And the creation of a new generation of nicotine users, many of whom likely would never have begun smoking combustible cigarettes, is especially troubling for communities of color that already suffer disproportionately from tobacco-related illness.¹³⁴

C. Targeting Communities of Color

Under the guise of safety and harm reduction, Juul made outreach efforts among communities of color. The company conducted focus groups, claiming these focus groups were to “understand the marketplace and to comply with the regulatory structure in place in each market.”¹³⁵ But they also made clear that these groups were used as a part of their effort to get people to use Juul.¹³⁶ One example is Baltimore, where approximately two-thirds of the population is Black.¹³⁷ The company even admits to meeting with public officials and community leaders in Baltimore and providing funding and sponsorships for Baltimore-based organizations.¹³⁸ Those organizations included faith-based groups, as well as the Black Mental Health Alliance.¹³⁹ These efforts—not simply to inform but to ingratiate within the Black community—echo efforts made by tobacco companies to integrate their company and their menthol cigarettes in these urban Black communities.

In continuing the tobacco companies’ tradition of giving to Black groups and organizations, Juul also donated \$7.5 million to Meharry Medical College, a 143-year-old historically Black institution to study public health issues affecting Black communities.¹⁴⁰ Perhaps as part of their strategy to keep the focus on the relative safety of Juul as compared to combustible cigarettes, a portion of the funding will be used to research and educate on the public health impact of tobacco.¹⁴¹ And similar to menthols’ use of Black celebrities and community leaders, Juul has hired many with ties to the Black community as lobbyists and consultants.¹⁴² This includes Benjamin Jealous, the former head of the NAACP, an organization that tobacco companies provided funding for during the menthol boom.¹⁴³ Juul has similarly

¹³⁴ For example, even tobacco executives realized that while Juul was increasing at a rapid pace, cigarette volumes were not declining at a similar rate, meaning new users were being added. ETTER, *supra* note 88, at 250–51.

¹³⁵ STAFF OF H. COMM ON OVERSIGHT AND REFORM, 116TH CONG., UPDATE ON THE SUBCOMMITTEE’S E-CIGARETTE INVESTIGATION 28 (Feb. 5, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-02-04.RK%20Memo%20re%20Juul.pdf>.

¹³⁶ *Id.* attachment A, at 1, 3–4.

¹³⁷ *Id.*

¹³⁸ *Id.* attachment A, at 2–3.

¹³⁹ *Id.* attachment A, at 3, 5.

¹⁴⁰ Sheila Kaplan, *Black Leaders Denounce Juul’s \$7.5 Million Gift to Medical School*, NY TIMES, June 19, 2019, at B1.

¹⁴¹ *Meharry Medical College to Launch New Center for the Study of Social Determinants of Health*, MEHARRY MED. COLL. (June 7, 2019), <https://home.mmc.edu/meharry-medical-college-to-launch-new-center-for-the-study-of-social-determinants-of-health/>.

¹⁴² Kaplan, *supra* note 140.

¹⁴³ *Id.*

donated to groups such as the Congressional Black Caucus Foundation and the National Newspaper Publishers Association, which is a trade group for Black community newspapers.¹⁴⁴ With menthol, the targeting of Black media sources was integral to preventing media critiques of the product in these news sources.

While a focus on Juul's outreach to the Black community helps to illustrate the parallels to the menthol growth among Black smokers, the Black community is hardly Juul's only target. In congressional testimony before the House Committee on Oversight and Reform, Rae O'Leary described the efforts Juul made to incorporate its product into her Cheyenne River Sioux Tribal community.¹⁴⁵ Again, she noted Juul's emphasis on switching when they discussed their product with the Tribe's Health Committee.¹⁴⁶ Juul suggested that any smokers twenty-one years or older be referred to the company's switching program, with anyone enrolling receiving a free Juul starter kit.¹⁴⁷ Juul proceeded to provide tribal leaders free products while proclaiming the effectiveness for smoking cessation and how the product was significantly safer, all of which likely violate federal law.¹⁴⁸

According to O'Leary, the tribe's refusal to sign a non-disclosure agreement is what ultimately ended their relationship with Juul.¹⁴⁹ Yet the impact of their visit was not nullified by their refusal to return. O'Leary testified that the free products provided by Juul during their visit resulted in multiple council members beginning and continuing to use Juul e-cigarettes.¹⁵⁰ The free products combined with the claims of safety very well may have misled members of the tribal leadership into believing there was no real threat to their health and wellbeing. This also provides another example of how the emphasis on Juul's safety compared with cigarettes likely got new users to engage with the product, rather than simply helping those who were already smokers.

The usage by leadership may also lead others within the tribe to falsely believe there is minimal harm that can come from using e-cigarettes. For example, as O'Leary noted, "American Indian middle school students in South Dakota are using e-cigarettes three times more than their white counterparts."¹⁵¹ O'Leary linked these current efforts by Juul to those made by tobacco companies in the past to target American Indians, which contributed significantly to health disparities and death on the Cheyenne River Reservation.¹⁵²

These efforts to target communities of color are particularly troubling when considered in conjunction with Juul's successful efforts to market its products to

¹⁴⁴ *Id.*

¹⁴⁵ *Examining Juul's Role Part I, supra* note 109, at 6–8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* While the company recommended the program for those twenty-one years of age and older, their marketing efforts targeting youth counter their narrative that they simply aim to help adult smokers. *See supra* text accompanying notes 123–33.

¹⁴⁸ *Examining Juul's Role Part I, supra* note 109, at 6.

¹⁴⁹ O'Leary also claimed that she heard other tribes were approached by Juul as well, but that she has been unable to acquire much information about those visits. *Id.* at 24–25. She believes this is likely due to nondisclosure agreements that were in fact signed by other tribes. *Id.* at 25.

¹⁵⁰ *Id.* at 27.

¹⁵¹ *Id.* at 7.

¹⁵² *Id.* at 6.

youth due to the impact of nicotine on the still-developing brain and the potential long-term impact of nicotine addiction described above. Given the increased awareness of the social determinants of health, the adverse impact on youth neurodevelopment is likely to exacerbate disparities in other areas, such as education. Meanwhile, Juul's efforts to target youth and communities of color could have a devastating impact on efforts to reduce smoking-related health disparities. Despite Juul's continued efforts to claim their goal is simply to provide a less dangerous alternative to adult smokers, their marketing patterns suggest a potentially insidious effort to target youth and communities of color, in hopes of hooking each as loyal customers unsuspectingly becoming addicted to a new threat to their health.

IV. AVOIDING JUUL 2.0

A. *The Black Shield*

The similarities between menthols and Juul cannot extend into our approach for addressing the harms they cause. The deliberation over whether to ban menthol cigarettes has had significant health impacts. Banning menthol, along with all other cigarette flavors, in the initial passage of the TCA could have saved thousands of lives.¹⁵³ But why was menthol exempted from the ban?

The federal government recognized the persistence of health disparities for certain racial groups and made it a priority to eliminate those disparities decades ago.¹⁵⁴ But specifically exempting the cigarette flavor overwhelmingly chosen by Black smokers seems a clear contradiction to the goal of addressing those health disparities. Indeed, some expressed suspicions about the connection between the menthol exemption and Philip Morris's support of the TCA.¹⁵⁵ Yet, even within the Black community there were many who opposed a menthol ban.

Organizations such as Congress of Racial Equality (CORE), the National Black Chamber of Commerce (NBCC), and the National Organization of Black Law Enforcement Executives (NOBLE) all expressed concerns that a menthol ban is a form of racial discrimination that will yield more negative consequences than positive ones.¹⁵⁶ Their primary concern was the potential for creating an illegal

¹⁵³ See *supra* note 18.

¹⁵⁴ Nicholas Freudenberg & Kenneth Olden, *Finding Synergy: Reducing Disparities in Health by Modifying Multiple Determinants*, 100 AM. J. PUB. HEALTH S25, S25 (Supp. 2010).

¹⁵⁵ Lawrence O. Gostin, *FDA Regulation of Tobacco: Politics, Law, and the Public's Health*, 302 J. AM. MED. ASS'N 1459, 1459 (2009). Once the tobacco industry realized regulation was inevitable, they positioned themselves to help shape that regulation: "Philip Morris was masterfully positioning itself so that instead of locking horns with government regulators, it could work in concert with them to shape the details of any bill that would inevitably emerge from Congress." ETTER, *supra* note 88, at 48. Encouraging and helping to frame what qualified as a "reduced-risk" tobacco product would allow Philip Morris to continue with prior research on combustible cigarette alternatives without risk of being labelled a drug company, thus, enabling them to become a key player in creating—and selling—the solution to the problem they helped create. *Id.* at 49.

¹⁵⁶ *The NAACP Legal Defense and Education Fund, National African American Tobacco Prevention Network and the African American Tobacco Control Leadership Council Join Legacy® in Urging Group to Re-Consider Evidence in Menthol Debate*, CISION: PR NEWSWIRE (Oct. 18, 2010), <https://www.prnewswire.com/news-releases/the-naacp-legal-defense-and-educational-fund-national-african-american-tobacco-prevention-network-and-the-african-american-tobacco-control-leadership-council-join-legacy-in-urging-groups-to-re-consider-evidence-in-menthol-debate-105194109.html>.

market of underground sales for menthol cigarettes, which would essentially criminalize their community's preferred method of conducting a legal act.¹⁵⁷ In short, because smoking is still legal, it is discriminatory to ban the cigarettes preferred by Black smokers while leaving those preferred by White smokers readily available. The argument is made stronger by the lack of regulations to prevent the decades of targeting the Black community into addiction, only to penalize them once the addiction has set in.

In a letter written to the Tobacco Products Scientific Advisory Committee—the group tasked with recommending to FDA what to do about menthols shortly after the TCA was passed—Harry C. Alford, co-founder and President/CEO of the NBCC, expressed his concern that the primary social consequence of a ban on menthols would be the creation of an illicit market of unsafe, unregulated cigarettes that would increase street sales in Black communities and most likely increase sales to minors.¹⁵⁸ Under the TCA, tobacco manufacturers must submit a listing of all of their cigarettes' ingredients, including tobacco, substances, compounds, and additives.¹⁵⁹ After inspection, FDA also has the authority to regulate and require a reduction in certain ingredients, including the levels of tar, nicotine, and other harmful components.¹⁶⁰

Under this framing, a menthol ban would have increased risk, especially among youth, because of increased criminalization and the use of unregulated cigarettes. In an underground, unregulated market of menthols, there is no requirement to check identification and age or to have the contents of the product checked before they are sold. In arguing against a menthol ban, these groups cited evidence such as an illegal market for cigarettes developing in some provinces in Canada after a substantial tax increase.¹⁶¹ And it was in these provinces where illegal sales increased that saw increased teen smoking rates as well.¹⁶²

These concerns may help to clarify the delay in determining whether menthol should join the other flavors banned under the TCA, but it is important to recognize that many of the concerns raised and research cited by opponents of the ban were supported, if not outright funded, by the tobacco companies themselves. For example, it was Lorillard, the tobacco company that produces the popular menthol cigarette Newport, that presented data to the Advisory Committee that black market menthol sales would be over 70% of what was sold on the legitimate menthol market, while creating consequences such as growth in organized crime activity, increased sales of counterfeit cigarettes, and greater access to cigarettes for youth in

¹⁵⁷ *Id.*

¹⁵⁸ Letter from Harry C. Alford, President/CEO of National Black Chamber of Commerce, to the Menthol Subcommittee of the Tobacco Products Scientific Advisory Committee (Sept. 15, 2010), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM232842.pdf>.

¹⁵⁹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 904(a)(1), 123 Stat. 1776, 1790.

¹⁶⁰ *Id.* § 3(5), 123 Stat. at 1782.

¹⁶¹ Jessie Lee, *Burning Issues of a Menthol Cigarette Ban: Exploding Contraband Market Would Hurt Black Communities*, WASH. TIMES, Oct. 19, 2010.

¹⁶² Paul Bedard, *Menthol Ban Could Boost Kid Smoking*, U.S. NEWS & WORLD REP. (Nov. 18, 2010, 5:50 PM), <http://www.usnews.com/news/blogs/washington-whispers/2010/11/18/menthol-ban-could-boost-kid-smoking.html>.

urban areas.¹⁶³ Al Sharpton—along with the civil rights organization he founded, the National Action Network—has been a long-time critic of the proposed ban on menthols, most commonly citing concerns over policing in Black communities.¹⁶⁴ Others, however, emphasize the lack of supporting evidence for this conclusion, that the regulations focus on manufacturers and retailers, and Al Sharpton’s strong ties to the tobacco industry—including a country-wide trip taken by Sharpton to speak out against menthol bans that was funded by the parent company of R.J. Reynolds.¹⁶⁵

This provides insight into the underexplored benefit of targeting minority populations: creating a shield against regulation. The ability to claim that regulations aimed to address health disparities are in fact discriminatory has proven a useful defense, a distraction from the profits made while communities of color suffer. This defense is even more persuasive when you can recruit leaders within the community to support these claims, which is something the tobacco companies have known for decades.

As discussed above, part of the tobacco companies’ strategy for gaining a stronger foothold in the Black community was to support civil rights groups and leaders in the civil rights movement.¹⁶⁶ This long connection has paid dividends both in terms of garnering revenue through a growing customer base, as well as providing added protection against a more straightforward public relations problem and government regulation. And Juul has followed suit. The hiring of Black leaders, including those with ties to the NAACP, is in fact much more likely to serve as protection against regulation and manage public perception than it is to have an immediate impact on revenue. Indeed, Juul’s most pressing problem is its diminishing reputation among legislatures, attorneys general, and the public.

This is worth noting because of the relatively small user rate of e-cigarettes in the Black community. Black e-cigarette use increased between 2014 and 2019 but marginally when compared to the 2.5-fold increase among White users.¹⁶⁷ This should not suggest concern is unwarranted. Any percentage of youth using products containing tobacco and nicotine is troubling, especially in communities of color that already suffer disproportionately from tobacco-related morbidity and mortality. But there are also reasons to think this racial discrepancy will not remain constant. For example, Black e-cigarette users were 1.8 times more likely to report dual use of tobacco products than their White peers, with the disparity increasing over time.¹⁶⁸ There is speculation that this difference may stem from the prevalence of menthol

¹⁶³ *Id.* (quoting an estimate from the research firm Compass Lexecon, which was hired by Lorillard, makers of Newport, to conduct research on the potential effects of a menthol ban).

¹⁶⁴ Hannah Knowles & Laurie McGinley, *As Trump Tackles Vapes, African Americans Feel Stung by Inaction on Menthol Cigarettes*, WASH. POST (Nov. 1, 2019, 7:00 AM), https://www.washingtonpost.com/national/health-science/as-trump-tackles-vapes-african-americans-feel-stung-by-inaction-on-menthol-cigarettes/2019/10/31/d06e93d2-e6ec-11e9-a331-2df12d56a80b_story.html.

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* Part I.A.

¹⁶⁷ Hongying Dai, Athena K. Ramos, Babalola Faseru, Jennie L. Hill & Steven Y. Sussman, *Racial Disparities of E-Cigarette Use Among US Youths: 2014–2019*, 111 AM. J. PUB. HEALTH 2050, 2054 (2021).

¹⁶⁸ *Id.* at 2053.

cigarette and flavored little cigars by Black tobacco users.¹⁶⁹ Yet, if FDA does indeed ban menthol cigarettes and flavors in little cigars as well, this may create an opportunity for e-cigarettes to capitalize and bring in more Black users. This too, would be a case of history repeating itself.

As documented by Keith Wailoo in his book *Pushing Cool*, the turn to aggressively advertising menthols to the Black community stemmed largely from regulatory changes.¹⁷⁰ Black smokers chose menthols less than smokers generally, with a significant portion reporting a distaste for the menthol flavor.¹⁷¹ And tobacco companies were hesitant to advertise directly to Black consumers given racial tensions and the potential to turn off White consumers.¹⁷² But once regulators began focusing on the tobacco industry's targeting of youth smokers, the industry turned to other areas to seek growth.¹⁷³ It was in 1964, as the tobacco industry realized the future growth of menthol smoking could not explicitly be youth, that "the menthol campaign began to tailor itself more aggressively to Black aspirations, and to cultivate new markets that might sustain the product and withstand criticism in the years ahead."¹⁷⁴

Thus, when considering Juul, e-cigarettes, and health disparities, we should not become overly focused on simply the current state of race-based user rates. New regulations around menthol and flavored little cigars, both much more popular in the Black community than e-cigarettes, could again be a regulatory justification to increase targeting communities of color. After all, "[h]ow the 'health cigarette' became a 'race cigarette' has everything to do with government's ratcheted-up restrictions on the industry's youth marketing, the industry's loss of that lucrative outlet, and its deliberate turn to new urban exploits."¹⁷⁵ As Juul too begins to lose its luster—and revenue—built around health benefits and youth appeal, it may also find communities of color to be a useful target. And, coincidentally, menthol is one of the e-cigarette flavors still widely available—including on Juul's website—creating an obvious avenue to pursue those looking for smoking products with flavor. This also creates another potential shield for regulation, with the argument that menthol e-cigarettes should be free from regulatory interference so that they may act as a cessation tool for Black smokers addicted to menthol cigarettes.

B. *Lessons from the Past*

The response to the potential dangers of e-cigarettes, and Juul in particular, has been much quicker than the time it took to seriously take on the tobacco industry. In fact, the response may be attributed to the high usage rates of White youth, similar to the discrepancies in approach to the opioid crisis as compared to the "crack epidemic." But the fact that a menthol ban has yet to be fully implemented—nearly

¹⁶⁹ *Id.* at 2054.

¹⁷⁰ WAILOO, *supra* note 10, at 150.

¹⁷¹ *Id.* at 129.

¹⁷² *Id.* at 145 ("remaining wary of alienating white consumers in an atmosphere of inflamed racial tensions, the industry bent hesitantly toward Black aspirations").

¹⁷³ *Id.* at 141 ("tampering down in one market would lead industry to seek other markets to exploit").

¹⁷⁴ *Id.* at 142.

¹⁷⁵ *Id.* at 128.

sixty years after the Surgeon General's report linking smoking to cancer, over two decades since the Master Settlement Agreement, and over a decade since the Tobacco Control Act—demonstrates that recognition of a public health problem does not equate to elimination of that threat to the public. Even the lessons we should have learned from the MSA, which it should be noted did not eliminate the threat of cigarettes or put tobacco companies out of business, are at risk of being ignored.

Take, for example, the recent settlement between Juul and North Carolina. The headlines focused on the money: \$40 million to the state.¹⁷⁶ And the North Carolina Attorney General, Josh Stein, emphasized that the state was the first to hold Juul accountable for targeting youth: “This win will go a long way in keeping Juul products out of kids’ hands, keeping its chemical vapor out of their lungs, and keeping its nicotine from poisoning and addicting their brains.”¹⁷⁷ However, as with most settlements, it expressly states that Juul is not admitting fault or conceding they did anything wrong.¹⁷⁸ In fact, the settlement makes clear that Juul “expressly denies” they have violated any law or regulation.¹⁷⁹

This is not to say nothing was gained from the settlement. A significant portion of the agreement aims to limit marketing to youth. Limitations are placed on using content that would appeal to youth, use of social media, use of influencers or brand ambassadors, use of hashtags, providing free products, direct-to-consumer marketing, using individuals under thirty-five for marketing, outdoor marketing near schools and playgrounds, and directly funding or operating youth education campaigns or prevention activities.¹⁸⁰ And, to be sure, these limitations, among others included, could have a serious impact on curbing youth vaping, especially for Juul. But much of the settlement places Juul in charge of their own oversight.

In-person promotional events, which have played a significant role in Juul's promotion and growth, are eligible to have individuals participate as brand ambassadors if the operator of the event informs Juul that they will undertake reasonable measures to prohibit access to underage individuals.¹⁸¹ It is Juul that is responsible for monitoring social media platforms and third-party websites that resell Juul products to ensure neither contains violations of the settlement, a task they are actually eligible to delegate to another service provider.¹⁸² A third party, hired by Juul, hardly seems the best option for oversight of social media and websites that

¹⁷⁶ Press Release, Josh Stein, North Carolina Attorney General, Attorney General Stein Reaches Agreement with JUUL for \$40 Million and Drastic Business changes (June 28, 2021), <https://ncdoj.gov/attorney-general-stein-reaches-agreement-with-juul-for-40-million-and-drastic-business-changes/> [hereinafter AG Stein Press Release].

¹⁷⁷ *Id.*

¹⁷⁸ Final Consent Judgment at 1–4, *State of North Carolina v. Juul Labs, Inc.* (June 28, 2021) (No. 19-CVS-2885).

¹⁷⁹ *Id.*

¹⁸⁰ AG Stein Press Release, *supra*, note 176; Final Consent Judgment, *supra* note 178, at 11–14.

¹⁸¹ *Id.*

¹⁸² *Id.* Evidence already exists that these efforts will be unsuccessful even if followed. The creator of the @JuulNation Instagram account was unphased by a letter from Juul requesting the account be stopped because he was making too much money and was enjoying the process. ETTER, *supra* note 88, at 224. UnderageJuul is a subreddit that offered tips on how to conceal Juul and had older people offering to ship Juul to those underage for a Venmo fee. *Id.* at 225. Meanwhile, eBay made plenty of money reselling Juul pods with very little in terms of age verification. *Id.* at 226.

have been central to Juul's popularity and sales. And if Juul or a subcontractor does find a violation, they need only to submit a request that the content be removed to comply with the settlement.¹⁸³ Failure of the third party to remove the content does not create liability for Juul.¹⁸⁴ Similarly, Juul is responsible for investigating and halting violations by retailers, and even to issue penalties to those retailers.¹⁸⁵

But the settlement is problematic both for its inability to address the problem at hand and to convey to Juul and the public that youth vaping is a critical issue. Having the fox guard the henhouse hardly demonstrates a legitimate concern over the health and welfare of the hens.¹⁸⁶ Even the limitations placed on sponsoring sports, entertainment, or charity events only require that Juul itself not display their products or brand.¹⁸⁷ And the vaunted monetary penalty is not exactly what it appears to be. The payments are to be made over six years, but the Attorney General can waive the last two years if Juul complies with the terms of the settlement, which could reduce the amount by \$4.5 million.¹⁸⁸ More importantly, and echoing problems from the MSA, the money is not required to be used for those who have suffered from Juul's marketing. Instead, it is the "intent" that the money be used "to the maximum extent practicable" for programs related to vaping harms.¹⁸⁹ But if the MSA is any indication, this is an unlikely outcome.¹⁹⁰

Perhaps the most troubling aspect of the settlement is the quantity limitations placed on sales. Under the agreement, Juul cannot sell more than two Juul devices per month, ten Juul devices per year, and sixty Juul pods per month through its website. By Juul's own admission, a single Juul pod has the same amount of nicotine as a pack of cigarettes.¹⁹¹ This means the settlement allows an individual to purchase the nicotine equivalent of sixty packs of cigarettes each month. And some studies suggest the nicotine in one pod could contain even more nicotine, perhaps the equivalent to a pack and a half.¹⁹² While the site requires age verification, this amount could easily enable sales on the secondary market to youth. And, again,

¹⁸³ Final Consent Judgment, *supra* note 178, at 14.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 19.

¹⁸⁶ Industry-led "efforts" to regulate or provide education to youth have been proven to have a positive effect for tobacco companies. "Exposure to 'Think. Don't Smoke.' engendered more favorable feelings toward the tobacco industry than we found among those not exposed to 'Think. Don't Smoke.' advertisements." Matthew C. Farrelly, Cheryl G. Healtan, Kevin C. Davis, Peter Messeri, James C. Hersey & M. Lyndon Haviland, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM. J. PUB. HEALTH 901, 906 (2002). Meanwhile, Juul has offered schools \$10,000 to adopt a prevention program of its own creation (though it inaccurately intimated it was developed with Stanford Medicine). ETTER, *supra* note 88, at 232–33. More evidence that Juul may not be trustworthy to self-regulate is the ballot measure it backed, titled "An Act to Prevent Youth Use of Vapor Products," which actually was designed to overturn San Francisco's citywide ban on e-cigarettes. *Id.* at 330.

¹⁸⁷ Final Consent Judgment, *supra* note 178, at 15.

¹⁸⁸ *Id.* at 27–28.

¹⁸⁹ *Id.* at 27.

¹⁹⁰ Micah Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 KANSAS L. REV. 1029, 1037–47 (2019).

¹⁹¹ Judith J. Prochaska, Erin A. Vogel & Neal Benowitz, *Nicotine Delivery and Cigarette Equivalents from Vaping a JUULpod*, 31 TOBACCO CONTROL e88 (2021), <https://tobaccocontrol.bmj.com/content/early/2021/03/23/tobaccocontrol-2020-056367.info>.

¹⁹² *Id.*

allowing this many pods to be purchased by an individual each month hardly sends the message that the state is concerned about the nicotine content within Juul's products.

C. A Path Forward: Flavors, Nicotine, and the Costs of the Smoking Business

Though the North Carolina settlement with Juul contains limitations that may help mitigate the nicotine intake of youth within the state, the shortcomings of the settlement suggest we may not have learned from the mistakes made in the MSA that allowed the tobacco industry to continue to survive and profit. An essential part of moving forward must be correcting mistakes from the past. It seems like a cruel irony that if FDA does indeed ban menthol cigarettes and flavored little cigars, that a ready-made replacement already addicting youth across the country is available to take its place.¹⁹³ The delay in tackling the ills of menthol, enabling the continuation of health disparities for communities of color, has resulted in menthol 2.0 to arrive as a substitute.¹⁹⁴ A similar delay in the handling of Juul and other nicotine-based products has allowed Juul 2.0 to develop and prosper: Puff Bar.

Puff Bar entered the U.S. market in 2019, but began finding more traction in 2020 when FDA implemented new restrictions on the flavors for reusable e-cigarettes such as Juul that did not apply to disposable devices such as Puff Bar. FDA then ordered the product off the market in July of 2020, saying the company did not have agency authorization because it was introduced after regulations issued in August 2016.¹⁹⁵ Puff Bar resurfaced in 2021, but instead using synthetic nicotine to evade federal regulations.

When passed, the TCA applied to tobacco products, including any product derived from it.¹⁹⁶ Therefore, an e-cigarette or any other products that did not use ingredients derived from tobacco was not subject to the TCA's regulatory restrictions. This led to the creation of synthetic nicotine.¹⁹⁷ Hence, a company that used nicotine created in a laboratory, and not derived from tobacco, allowed their product to avoid FDA regulations. This provided a significant advantage over competitors that had to work within the constraints of the TCA.

This loophole was recently addressed, with Congress amending the definition of "tobacco products" within the TCA to include "any product made or derived from

¹⁹³ According to one study, even with other flavor options available, mint- or menthol-flavored e-cigarettes were most popular among teen users. Karen A. Cullen, Andrea S. Gentzke, Michael D. Sawdey, Joanne T. Chang, Gabriella M. Anic, Teresa W. Wang, MeLisa R. Creamer, Ahmed Jamal, Bridget K. Ambrose & Brian A. King, *E-Cigarette Use Among Youth in the United States, 2019*, 322 JAMA 2095, 2101 (2019).

¹⁹⁴ Tobacco companies spent decades and billions of dollars trying to create products that could avoid regulations. After the TCA, extensive money and research went into crushable capsules in the filter to release a minty flavor, orbs and strips that melt on the tongue, and snus bags filled with ground tobacco leaves to be tucked into the cheek. ETTER, *supra* note 88, at 90. Many of these have failed to catch on because they do not provide the nicotine hit needed to hook consumers or satisfy the cravings of those already addicted, as can be done through the lungs. *Id.* at 104–05.

¹⁹⁵ *Id.*

¹⁹⁶ Pub. L. 111-31 § 101(rr)(1).

¹⁹⁷ The development of synthetic nicotine demonstrates yet another similarity to the menthol story. A decline of Japanese menthol supplies resulted in an investigation into the possibility of developing menthol synthetically in a lab. WAILOO, *supra* note 10, at 69.

tobacco, or containing nicotine from any source.”¹⁹⁸ Yet, it is unclear how or when this change will impact products such as Puff Bar. Similar to Juul and other e-cigarettes that contain nicotine, Puff Bar’s website has a banner along the top warning the consumer that their product contains nicotine, which it states is an addictive chemical.¹⁹⁹ Given this had little impact on Juul’s sales, there is no reason to believe it will deter consumers from Puff Bar either. What we do know worked well for Juul was the flavors that were previously offered, which have now been whittled down to menthol and Virginia tobacco.

Yet, as of the date of this Article, Puff Bar has no such limitation, offering a wide variety of flavors.²⁰⁰ These flavors include mango, which was one of Juul’s most popular flavors, as well as blueberry ice, watermelon, grape, peach, strawberry, melon ice, strawberry banana, and cool mint.²⁰¹ Puff Bar also offers four devices that allow 400, 800, and 2,000 and 5,000 puffs, each with a similar sleek design to Juul, which consumers preferred to earlier models meant to look like cigarettes.²⁰² Some flavors, such as melon kiwi ice and pineapple mango orange, are only available for the larger devices.²⁰³ Menthol is another available flavor, which could encourage consumers looking to replace menthol cigarettes if they are banned in the future to purchase the larger vapes.²⁰⁴ And the homepage has a link to explain that Puff Bars, and this array of flavors, are not and have never been banned.²⁰⁵

This may change, and perhaps it will in the near future. Though, it is worth noting FDA’s limitations in acting swiftly in these markets, especially in a retroactive fashion. The agency claims it is reviewing one million applications for synthetic nicotine products, but initially only sent warning letters to two companies that did not submit applications for premarket approval before the May 14, 2022 deadline.²⁰⁶ Those companies who did not receive FDA authorization by July 13, 2022 were supposed to pull their e-cigarettes from the market, but Puff Bar—among what is likely many others—was still available after the deadline.²⁰⁷

Looking at menthols, Juul, and now Puff Bar, there are important lessons to be learned and clear mistakes to be avoided. Most importantly, policymakers and the public health community need to be proactive. Further delays and reactionary, incremental steps allow time for companies to research and develop harmful

¹⁹⁸ Tobacco Control Act, *supra* note 159.

¹⁹⁹ PUFF BAR, <https://puffbar.com/> (last visited Aug. 10, 2022). Juul also investigated the possibility of developing nicotine from non-tobacco, synthetic sources to evade regulation as well. ETTER, *supra* note 88, at 290.

²⁰⁰ PUFF BAR, *supra* note 199.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Jen Christensen, *FDA Sends Warning Letters on Synthetic Nicotine, Missing Deadline for More Severe Action*, CNN (July 14, 2022, 9:44 AM), <https://www.cnn.com/2022/07/14/health/fda-synthetic-nicotine/index.html>.

²⁰⁷ Nicholas Florko, *PhRMA and BIO Descend on D.C. & Unpacking the Senate’s FDA Funding Drama*, STAT NEWS (July 19, 2022), <https://www.statnews.com/2022/07/19/phrma-and-bio-descend-on-d-c-unpacking-the-senates-fda-funding-drama/>.

products that can evade current regulations. Rather than wait to see if the menthol and flavor bans in cigarettes and little cigars do turn Black tobacco users to e-cigarettes like Juul, a broader attack must be waged on flavors of any product containing tobacco or nicotine.

We know from experience that flavors are key to indoctrinating youth with tobacco products. They enable colorful marketing, mask unpleasant tobacco and nicotine flavors, and mislead consumers into a mistaken belief of harmlessness. The current process has been a piecemeal approach, banning some cigarette flavors, then potentially menthol cigarettes, and then potentially flavors in little cigars, another product that has plagued communities of color and Black youth in particular. Currently, Juul has voluntarily discontinued many of their early flavor offerings, an approach paralleling self-imposed advertising restrictions by tobacco companies in an effort to avoid government-enforced restrictions. To continue along this path will only enhance the opportunity for products such as Puff Bar to step into the void left by the previously dominant product that is the focus of the government's attention. A proactive approach would ban flavors completely, leaving those addicted to combustible cigarettes a tobacco-flavored cessation option.

While flavor bans would be most effective for preventing youth initiation, capping nicotine levels would help minimize current and future addiction. Moreover, this would prevent concerns over synthetic nicotine if it too was capped. FDA has estimated that dropping nicotine levels could help approximately 5 million adults smokers quit within the first year; another 33 million people, mostly youth and young adults, would avoid becoming regular smokers over the next eighty years; and smoking rates could drop to as low as 1.4%.²⁰⁸ The shift from combustible cigarettes to e-cigarettes was, at least in part, in recognition of the harms caused by the tar and chemicals being consumed. Juul, with its drastic increase in nicotine levels from prior e-cigarettes, has made it clear that nicotine should be the next step in reducing tobacco- and nicotine-related harms. This prevents future products, including those using synthetic nicotine, from having another arms race to see who can addict a new set of consumers the fastest.

Another critical step moving forward will be to ensure that the United States' taxpayers do not continue to foot the bill to address the harms caused by the misleading marketing of these companies. While the MSA has raised a substantial amount of money, much of which has been used for helpful organizations and programs, much of those funds have not gone to help those in need. And as we have seen with the North Carolina settlement with Juul, there is the potential for this mistake to be continued in the future. Companies profiting off addicting youth to harmful nicotine products should help alleviate the costs of those harms in perpetuity. Moreover, any company that seeks to enter the market of selling products with tobacco or nicotine—synthetic or otherwise—should expect to contribute to these funds. As with tobacco user fees, this money can help to alleviate the costs of regulatory oversight in addition to mitigating the health consequences of these products. To do so, the funds raised should be specifically tied to addressing the

²⁰⁸ Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb on Pivotal Public Health Step to Dramatically Reduce Smoking Rates by Lowering Nicotine in Combustible Cigarettes to Minimally or Non-Addictive Levels (Mar. 14, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-pivotal-public-health-step-dramatically-reduce-smoking>.

communities targeted and suffering from health disparities. In doing so, we may finally begin to prevent the continued exploitation of communities of color, as well as ameliorate the long-lasting disparities they have faced.

V. CONCLUSION

If we do not learn from history, it is likely to repeat itself. The story of menthol cigarettes exploiting and drawing profits and pain from the Black community is now well understood. If menthols, along with flavored cigars, are indeed banned, we cannot rest to celebrate a public health victory. Government indifference toward health disparities too has a long and egregious history. If we are to take seriously the concern over nicotine addiction among the country's youth, the concern must be for all youth. Continuing to follow the lead of the tobacco industry, Juul has already taken steps to create a new "Black shield." An ensuing menthol ban would only strengthen their incentive to further infiltrate and exploit the Black community. Meanwhile, synthetic nicotine offers a replacement for flavored cigars, should they be removed from the market. A proactive approach must be taken to avoid the mistakes of the past and to help alleviate the suffering for communities of color. An incremental approach that focuses simply on raising money untethered to these communities and those suffering harm will only further a legacy of placing the interests of corporations above the health and wellbeing of underserved people of color.