

**Proposition 31:  
Flavored Tobacco Products Ban  
Referendum**

Referendum

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## I. EXECUTIVE SUMMARY

Proposition 31 is a referendum on the 2020 Senate Bill 793 (SB 793) that would prohibit the retail sale of certain flavored tobacco products. SB 793 bans in-person stores and vending machines from selling most flavored tobacco products and tobacco product flavor enhancers.<sup>1</sup> The ban does not apply to shisha (hookah) tobacco, certain cigars, and loose-leaf tobacco. SB 793 defines a flavored tobacco product as one that has a flavor, apart from the regular tobacco flavor.<sup>2</sup> Flavors could include fruit, mint, menthol, honey, chocolate, and vanilla. SB 793 charges a penalty of \$250 for each violation of these requirements.<sup>3</sup> In 2020, the Legislature passed and the Governor signed Senate Bill (SB) 793. This law did not go into effect because a referendum on the law qualified for this ballot. When a referendum on a new state law qualifies for the ballot, the law is on hold until voters decide whether to put it into effect.<sup>4</sup>

A YES vote is to uphold the contested legislation, SB 793, which would ban the sale of flavored tobacco products.

A NO vote is to repeal the contested legislation, SB 793, thus keeping the sale of flavored tobacco legal in the state.

## II. BACKGROUND

Recently, California enacted various taxes and gradually restricted the advertising and availability of many types of tobacco products. A 2016 legislative package made a number of changes, including raising the minimum legal age to purchase or consume tobacco, from 18 to 21, broadening the definition of tobacco products to include electronic smoking devices, and extending a ban on workplace smoking.<sup>5</sup> Also in 2016, Proposition 56 increased the excise tax rate on cigarettes and electronic cigarettes by \$2 per pack of cigarettes with an equivalent tax rate increase on other tobacco products.<sup>6</sup> Tobacco control efforts are praised for reducing the health care cost and burden of tobacco-related diseases. California is known as a pioneer in reducing addiction and use of tobacco through consistent and effective anti-smoking campaigns.<sup>7</sup>

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<sup>1</sup> Legislative Analyst's Office, *The California Legislature's Nonpartisan Fiscal and Policy Advisor, Proposition 31*, <https://lao.ca.gov/BallotAnalysis/Proposition?number=31&year=2022> (last visited Oct. 17, 2022).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Assembly Appropriations*, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>6</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *supra* note 5 at Assembly Appropriations Committee Report dated Aug. 18, 2020.

<sup>7</sup> *Id.*

Over the last several years, electronic nicotine devices, also known as vape pens or electronic or e-cigarettes, have gained popularity. These products use an “e-liquid” that may contain nicotine, flavors, and other ingredients. Recent increases in the use of e-cigarettes are driving increases in tobacco product use among youth, as these e-cigarettes also contain nicotine.<sup>8</sup> Research shows flavored tobacco products play an important role in youth vaping and that many youths may be attracted to the flavoring and unaware they are vaping nicotine.<sup>9</sup>

SB 793 does not ban the sale of hookah water pipes and flavored shisha tobacco products. Hookah advocates argue that hookah pipes are not what contributes to teen smoking, as they take a considerable amount of time to start and put together and are not easily concealable.<sup>10</sup>

A 2009 federal law banned the sale of cigarettes with “characterizing” flavors other than menthol or tobacco.<sup>11</sup> There are already restrictions on other flavored tobacco products imposed by federal law.<sup>12</sup> A federal Food and Drug Administration (FDA) enforcement policy announced on January 2, 2020, stated that companies that do not cease the manufacture, distribution, and sale of unauthorized flavored cartridge-based e-cigarettes (other than tobacco or menthol flavor) within 30 days of the finalized policy risk enforcement actions.<sup>13</sup> The federal policy exempts tobacco flavor and menthol from enforcement, citing higher youth interest in fruit and mint flavors.<sup>14</sup>

In addition to addressing flavors in e-cigarettes, SB 793 bans menthol as a flavor in all tobacco products. The prevalence of menthol use is highest among people identifying as African-American or Black, and members of these communities are disproportionately burdened by the health harms of menthol cigarettes.<sup>15</sup> This policy rationale for banning menthol is to maximize the effectiveness of flavor bans among the youth community and to avoid increasing health disparities.

According to the Assembly Health Committee, smoking causes more deaths each year than the following causes combined: human immunodeficiency virus (HIV), illegal drug use,

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<sup>8</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *supra* note 5 at Assembly Appropriations Committee Report dated Aug. 18, 2020.

<sup>9</sup> *Id.*

<sup>10</sup> Garrova, Robert, *LA's Hookah Lovers Are Worried The Proposed Vaping Law Would Wipe Out Their Lounges*, LAist (January 16, 2020), <https://laist.com/news/hookah-vaping-tobacco-ban-sacramento-legislation-flavored-sb793>.

<sup>11</sup> Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised), FDA (April 2020), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-priorities-electronic-nicotine-delivery-system-ends-and-other-deemed-products-market>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 2.

alcohol use, motor vehicle accidents, and firearm-related incidents.<sup>16</sup> Smoking causes about 90% (or nine out of 10) of all lung cancer deaths.<sup>17</sup> Smoking causes about 80% (or eight out of 10) of all deaths from chronic obstructive pulmonary disease (COPD).<sup>18</sup>

The CDC, DPH, and other public health experts warn that smoking may increase the risk of severe illness from COVID-19 and are encouraging smokers to quit and urging the public to not smoke.<sup>19</sup> To date, various cities in California have enacted restrictions on the sale of flavored tobacco products.<sup>20</sup> The city of San Jose, CA enforced a flavored tobacco ban that went into effect on July 1, 2022.<sup>21</sup>

### III. THE LAW

#### A. Current Laws in California

As mentioned above, there have been numerous recent developments in California laws relating to tobacco products. An existing law, SB 151, raised the minimum legal age from 18 to 21 to buy tobacco products.<sup>22</sup> SB 151 helped establish the Department of Public Health (DPH) to protect the public's health and help shape positive health outcomes for individuals, families, and communities.<sup>23</sup> The California Tobacco Control Branch was created within DPH, which leads statewide and local health programs, services and activities that promote a tobacco-free environment.<sup>24</sup> The DPH must develop a program to reduce the availability of “tobacco products” to persons under 21 years of age through authorized enforcement activities pursuant to the Stop Tobacco Access to Kids Enforcement Act.<sup>25</sup> Stop Tobacco Access to Kids Enforcement

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<sup>16</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Assembly Health*, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *News Release: San Jose’s Ban on Sales of Flavored Tobacco Goes Into Effect July 1, 2022*, City of San Jose (June 23, 2022).

<sup>22</sup> *Tobacco products: minimum legal age*, Open States, <https://openstates.org/ca/bills/20152016/SB151/>, (last visited Oct. 17, 2022).

<sup>23</sup> California Legislative Information, SB 151 Tobacco Products: Minimum Legal Age, Senate Committee on Health, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>24</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Assembly Health*, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited September 20, 2022).

<sup>25</sup> *Id.* at 3.

(STAKE) is a program designed to reduce the illegal sales of tobacco products to individuals under 21 years of age.<sup>26</sup>

The current law requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers to establish the age of the purchaser if the purchaser reasonably appears to be under 21.<sup>27</sup> Additionally, it permits an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to a person who is under 21 any tobacco product, instrument, or paraphernalia that is designed for the smoking or ingestion of tobacco products ranging from \$400 to \$6,000 for a first, second, third, fourth, or fifth violation within a five-year period.<sup>28</sup>

Currently, the law defines “smoking” as inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic.<sup>29</sup> This includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking.<sup>30</sup>

The law defines “tobacco product” as a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, including an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, and any component, part, or accessory of a tobacco product, whether or not sold separately.<sup>31</sup> It prohibits any product approved by the federal Food and Drug Administration (FDA) for sale as a tobacco cessation product or for other therapeutic purposes from being deemed a tobacco product.<sup>32</sup>

California law requires the California Department of Tax and Fee Administration (CDTFA), under the Cigarette and Tobacco Products Licensing Act, to administer a statewide program to license cigarette and tobacco product manufacturers, importers, distributors, wholesalers, and retailers.<sup>33</sup> It also prohibits selling tobacco products without a valid license, makes violations punishable as a misdemeanor, and requires retailers to obtain a separate license for each retail location that sells cigarettes and tobacco products and to pay an annual license fee of \$265 for that location.<sup>34</sup>

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<sup>26</sup> *Stop Tobacco Access to Kids Enforcement (STAKE)*, California Department of Public Health, <https://www.cdph.ca.gov/Programs/CEH/DFDCS/Pages/FDBPrograms/STAKEProgram.aspx#:~:text=The%20Stop%20Tobacco%20Access%20to,enforcement%20of%20the%20STAKE%20Act,> (last visited Oct. 17, 2022).

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

Furthermore, local jurisdictions such as cities and counties are allowed to impose their own ordinances, which may include flavored tobacco product bans.<sup>35</sup> Recently, cities and counties— such as Sacramento— have enacted their own ordinances with such tobacco product restrictions.<sup>36</sup>

In 2021, R.J. Reynolds Tobacco Company sued the City of San Diego over their flavored tobacco ban.<sup>37</sup> R.J. Reynolds Tobacco Company argued that the ordinances were unconstitutional because they are expressly and impliedly preempted by the federal Family Smoking Prevention and Tobacco Control Act (“FSPTCA”).<sup>38</sup> The court held that the city’s local ordinance did not conflict with the FSPTCA, nor infringe on the federal government’s authority to regulate tobacco manufacturing.<sup>39</sup> According to the *R.J. Reynolds* court, local jurisdictions retain the authority to regulate tobacco sales and other consumer-related aspects.<sup>40</sup> Cities and Counties were allowed to implement their own flavor tobacco ordinances prior to SB 793, and still retain that authority even if Proposition 31 fails. As of October 2022, 10 of the 58 counties in California have enacted ordinances prohibiting the sale of flavored tobacco products.<sup>41</sup>

## B. Proposed Law

### 1. *Overview*

SB 793 was proposed by California Senator Jerry Hill and authored by Senators Jerry Hill, Steven Glazer, Mike Mcguire, Richard Pan, Nancy Skinner, and Scott Wiener.<sup>42</sup> The hearings on the bill occurred in the Health Committee, Appropriations Committee, and the Senate Floor between March 27, 2019 and August 4, 2020.<sup>43</sup> This bill prohibits the sale of flavored tobacco as well as 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

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<sup>35</sup> CAL. CONST., art. XI, § 7.

<sup>36</sup> Caiola, Sammy, Sacramento County bans flavored tobacco products, including e-cigarettes and menthol, Cap Radio (January 12, 2022), <https://www.capradio.org/articles/2022/01/12/sacramento-county-could-ban-flavored-e-cigarettes-menthol-under-proposed-ordinance/>.

<sup>37</sup> *R.J. Reynolds Tobacco Co. v. Cnty. of San Diego*, 529 F. Supp. 3d 1147 (S.D. Cal. 2021).

<sup>38</sup> 21 U.S. Code § 387.

<sup>39</sup> *R.J. Reynolds Tobacco Co.*, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> *Municipalities Prohibiting the Sale of Flavored Tobacco Products*, American Nonsmokers’ Rights Foundation, <https://no-smoke.org/wp-content/uploads/pdf/flavored-tobacco-product-sales.pdf>, (last visited Oct. 17, 2022).

<sup>42</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Senate Committee on Health*, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>43</sup> Jasmine Tang Ker, Natalie Delgadillo, Dania Amiri, David S. Timberlake, *Reframing the banning of flavored tobacco in unprecedented times- an example from California’s Senate bill 793*, Science Direct (April 6, 2022).

flavored tobacco product or tobacco product flavor enhancer.<sup>44</sup> The bill creates a presumption that “a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer’s agents or employees, in the course of his or her agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that is used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.”<sup>45</sup>

SB 793 requires a tobacco retailer, or agent or employee of a tobacco retailer, who violates the bill’s provisions to be found guilty of an infraction and punished by a \$250 fine for each violation.<sup>46</sup>

SB 793 does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on access to tobacco products than the restrictions imposed by this section. To the extent that there is an inconsistency between the bill and a local standard that imposes greater restrictions on the access to tobacco products, the greater restriction on the access to tobacco products in the local standard must prevail.<sup>47</sup>

## 2. *Path to the Ballot*

### a. Senate Bill 793

The Assembly passed SB 793, voting 58 to 1 with 20 abstentions that would ban the sale of flavored tobacco products, flavored e-cigarettes, and flavored vaping products in California.<sup>48</sup> SB 793 started as a wide-scoped flavored-tobacco banning bill in January 2020, closely following bans in Massachusetts, Los Angeles County, and San Francisco.<sup>49</sup> SB 793 headed to the Senate for a final vote with amendments. On August 28, 2020, the Senate unanimously passed SB 793. Governor Gavin Newsom signed the bill into law shortly after.<sup>50</sup>

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<sup>44</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Senate Appropriations Hearing*, June 18, 2020, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Symon, Evan, *Flavored Tobacco Ban Bill Passes Assembly, Heads To Senate For Final Vote*, California Globe (August 26, 2020), <https://californiaglobe.com/articles/flavored-tobacco-ban-bill-passes-assembly-heads-to-senate-for-final-vote/>.

<sup>49</sup> *Id.*

<sup>50</sup> Glantz, Stanton A., *Gov Newsom signs Calif ban on sales of flavored tobacco products*, <https://tobacco.ucsf.edu/gov-newsom-signs-calif-ban-sales-flavored-tobacco-products-0>, UCSF (August 31, 2020).

b. Referendum - Proposition 31

Opponents of SB 793 filed a notice to request a title and summary for a proposed statewide referendum.<sup>51</sup> The proposed referendum of Proposition 31 was submitted to the Attorney General of California on August 31, 2020.<sup>52</sup> The California Coalition for Fairness is the committee pursuing the referendum to get the law overturned.<sup>53</sup>

The referendum process in California was developed through Article II, Section 9, of the California Constitution.<sup>54</sup> Electors are given the power to approve or reject statutes, with the exception of urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual, current state expenses.<sup>55</sup>

Referendums can qualify for the statewide ballot up to 31 days before an election.<sup>56</sup> A proponent is given “90 days from the date of the enactment of a bill to request and receive a circulating title and summary from the Attorney General, print petitions, gather the required number of legitimate signatures, and file petitions with the county elections officials.”<sup>57</sup> The petitions must be signed by registered voters in an amount equal to 5% of the votes cast for all candidates for Governor in the preceding election, totaling to 623,212 signatures required.<sup>58</sup> Once the statewide total reaches at least 100% of the required number of signatures, the Secretary of State directs the counties to begin a random sample verification of signatures.<sup>59</sup> Counties have 30 working days to complete a random sample of 3% or 500 signatures, whichever is greater, and report their results to the Secretary of State.<sup>60</sup>

If the statewide random sample total projects more than 110% of the required number of signatures (685,534), the referendum would qualify for the ballot.<sup>61</sup> If the statewide total is less

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<sup>51</sup> Glantz, Stanton A., *supra* note 50.

<sup>52</sup> *Qualified Statewide Ballot Measures*, <https://oag.ca.gov/system/files/initiatives/pdfs/20-0003%20%28Tobacco%20Products%20%29.pdf>, (last visited Oct. 17, 2022)

<sup>53</sup> Hammond, Hannah, *Referendum Could Overturn California Ban on Flavored Tobacco Sales*, CSP Daily News (Sept. 3, 2020), <https://www.cspdailynews.com/tobacco/referendum-could-overturn-california-ban-flavored-tobacco-sales>.

<sup>54</sup> CAL. CONST., art. II, §9.

<sup>55</sup> *California Secretary of State*, <https://www.sos.ca.gov/elections/ballot-measures/referendum>, (last visited Oct. 17, 2022).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



than 95% of the required number of signatures (592,052), the referendum would fail to qualify for the ballot and if the statewide total falls between 95% and 110%, counties would be required to perform a full check of signatures and report their results to the Secretary of State within 30 working days.<sup>62</sup> Once the statewide full count total reached 100% of the required number of signatures, the referendum would qualify for the ballot.<sup>63</sup> Once it is placed on the ballot, the law is repealed if voters cast more NO votes than YES votes on the referendum being voted on.

Since enough signatures were secured within the 90 day period, implementation of SB 793 was suspended.<sup>64</sup> If the referendum had not qualified, the law would have taken effect on January 1, 2021.<sup>65</sup> Since the referendum qualified for the ballot, it will be voted on as Proposition 31 in November 2022.

The proposed referendum on SB 793 was approved for petition circulation on September 10, 2020, and had a circulation deadline of November 30, 2020. Proposition 31 was placed on the November 2022 ballot and will be voted on by the public to see if the referendum qualifies.<sup>66</sup>

### C. Other States

Currently, there are several states that have placed restrictions or banned flavored tobacco products. New York City restricted sales of flavored tobacco products (excluding e-cigarettes and menthol cigarettes) in 2009 and began enforcement in November 2010.<sup>67</sup> In 2020, New York City's law was strengthened to prohibit flavored e-cigarettes.<sup>68</sup> In 2016, the state of Minnesota had both Minneapolis and St. Paul implement laws restricting all flavored non-cigarette tobacco products to adult-only retailers.<sup>69</sup> In both Minneapolis and St. Paul, significantly fewer convenience and grocery stores sold flavored tobacco after policy implementation.<sup>70</sup> In January 2013, Providence began enforcement of its sales restriction on flavored non-cigarette tobacco products (except mint, menthol, and wintergreen).<sup>71</sup> Massachusetts' ban on flavored tobacco

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Hammond, Hannah, *supra* note 53.

<sup>65</sup> *Id.* at 1.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> McDonald, Jim, *Vape Bans: E-cigarette Restrictions in the U.S. and Worldwide*, Vaping 360 (September 14, 2022).

<sup>68</sup> *Id.*

<sup>69</sup> *Flavored Tobacco Sales Restrictions: Promising Evidence For Reducing Youth Access and Tobacco Use*, Tobacco Free Kids, <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>, (last visited Oct. 17, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

sales went into effect on June 1, 2022, and within the first week of the ban, retailers noticed a drop in tobacco sales.<sup>72</sup>

Compared to the Massachusetts flavor ban, the California law exemptions go further by allowing direct sale to consumers, while Massachusetts requires onsite consumption.<sup>73</sup> However, the Massachusetts law exempts the sale of any flavored tobacco product for onsite consumption — not just hookah or cigars — so long as the sale is at a smoking bar that limits food and beverage consumption and meets other requirements.<sup>74</sup>

California is now the fifth state to ban menthol-flavored e-cigarettes, joining Massachusetts, Rhode Island, New Jersey, and New York.<sup>75</sup>

#### D. Drafting Issues

Proposition 31 is singularly focused on overturning SB 793, so there are not any drafting issues with the referendum. SB 793 was approved by the Assembly and Senate and signed into law by California Governor Newsom. While signed into law, SB 793 is currently paused and suspended while Proposition 31 is pending the referendum vote in 2022.<sup>76</sup> SB 793 will be implemented immediately after the election is certified if Proposition 31 receives more Yes votes than No votes.

### IV. CONSTITUTIONAL ISSUES

Tobacco control has been attempted to be implemented across the United States. In 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act, H.R. 1256, giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products.<sup>77</sup> In October 2019, President Trump announced that the Food and Drug Administration would issue a policy to remove flavored vaping products from the market.<sup>78</sup>

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<sup>72</sup> Hammond, Hannah, *supra* note 53.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 4.

<sup>76</sup> *Id.* at 1.

<sup>77</sup> *Tobacco control in the United States: Failure to protect the right to health*, PubMed Central, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7398129/>, (last visited Oct. 17, 2022).

<sup>78</sup> *Id.*

The Fourteenth Amendment explicitly prohibits States from violating an individual's rights of due process and equal protection.<sup>79</sup> Equal protection challengers have argued that a smoke-free law with exemptions discriminates against business owners, such as proprietors of bars and restaurants, and have claimed that the law creates an undue economic burden or gives privileges to some businesses but not others.<sup>80</sup> Additional arguments under the equal protection clause have also been raised in cases involving tobacco regulations. Specifically, retailers have raised concerns when laws prohibit the sale of tobacco products by some stores, but not others.<sup>81</sup> While equal protection arguments rarely succeed, one exception occurred when Walgreens brought an equal protection challenge to a San Francisco law that prohibited the sale of tobacco products in retail pharmacies, but exempted supermarkets and “big box” stores with pharmacies co-located in the store.<sup>82</sup> The California Court of Appeal found that the complaint adequately stated a cause of action for violations of the equal protection clause.<sup>83</sup> Eventually, the San Francisco ordinance was expanded to remove the exemptions for grocery stores and big box stores with pharmacies and make the law more comprehensive.<sup>84</sup>

## V. PUBLIC POLICY ISSUES

### A. Proponent Argument - Proposition 31

Proponents of Proposition 31 are the opponents of SB 793. They advocate for a No vote for the referendum.

The No on Prop 31- Californians Against Prohibition is leading the campaign in support of a “no” vote on Proposition 31, which would repeal the legislation. The referendum's success would be a “No” vote.

The California Fuels and Convenience Alliance (CFCA) opposes SB 793, stating it will have a significant impact on state tax revenues, while failing to truly address the issue of teen vaping.<sup>85</sup> CFCA states this bill arbitrarily prohibits the sale of flavored tobacco products in brick-and-mortar retail stores and simply shifts the market to online vendors and unscrupulous out-of-state actors that will continue to provide unauthorized access to these products.<sup>86</sup> Last year, CDTFA asserted in its fiscal analysis that this proposal is cost neutral because the money spent

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<sup>79</sup> *Tobacco Control and the Equal Protection Clause*, Public Health Law Center, <https://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-equalprotectionclause-2011.pdf>, (last visited Oct. 17, 2022).

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 10.

<sup>86</sup> *Id.*

on vaping would go to the purchase of other retail products.<sup>87</sup> CFCA strongly disagrees with this analysis; stating, based on the data they have seen with local flavor bans, consumers simply find another avenue to purchase the product online or outside the boundaries of the ban.<sup>88</sup> CFCA concludes that this bill could result in tens of billions in lost sales for their 12,000 convenience stores.<sup>89</sup>

The Vapor Technology Association (VTA) opposes SB 793, stating that any ban or limitation on access to vapor products directly impacts consumers who are reliant upon vapor products as an alternative to combustible cigarettes, not to mention, jeopardizes the businesses that Californians have built and are still building.<sup>90</sup> VTA contends that every day millions of people are using vapor products and either reducing their smoking or quitting altogether.<sup>91</sup> VTA concludes limiting access to flavored vapor products is a bad public health policy.<sup>92</sup>

#### B. Opponent Argument - Proposition 31

Opponents of Proposition 31 are the proponents of SB 793. They advocate for a Yes vote for the referendum.

Yes on Proposition 31, the Committee to Protect California Kids is leading the campaign in support of a “yes” vote on Proposition 31, which would allow the legislation to take effect.

SB 793 was sponsored and supported by the Campaign for Tobacco-Free Kids, American Lung Association in California, American Heart Association, the American Cancer Society Cancer Action Network, and Common Sense.<sup>93</sup> The sponsors state that nationally, eight out of 10 of current youth tobacco users have used a flavored tobacco product in the past month and that prohibiting the sale of flavored tobacco products, including menthol cigarettes, in all tobacco retailers is a critical step that will help protect children living in California from the unrelenting efforts by the tobacco industry to hook them to a deadly addiction.<sup>94</sup>

The African American Tobacco Control Leadership Council (AATCLC) supports SB 793 and notes that 85% of African American adults and 94% of Black youth who smoke are using menthol products.<sup>95</sup> AATCLC states that these striking statistics arise from the predatory

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<sup>87</sup> *Tobacco Control and the Equal Protection Clause*, Public Health Law Center, *supra* note 79 at 10.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Assembly Health*, [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.*

marketing of these products in the Black Community, where there are more advertisements, more lucrative promotions, and cheaper prices for menthol cigarettes compared to other communities.<sup>96</sup>

### C. Fiscal Impact

According to the Senate Appropriations Committee, there would be a substantial revenue loss, potentially in the high tens of millions to low hundreds of millions.<sup>97</sup> CDTFA previously estimated an excise tax revenue loss of “\$110 million in the fiscal year 2020-21 (\$85 million from cigarettes, \$2 million from other tobacco products) and \$218 million for 2021-22, the first entire fiscal year the ban would be in effect.”<sup>98</sup> In addition, the Legislative hearings contemplated associated sales tax losses of \$26.6 million (\$12 million General Fund) in 2020-21 and \$53 million (\$24.3 million General Fund) in 2021-22 would occur.<sup>99</sup> There is no reason to think that similar losses would not be experienced in 2022-2023 and 2023-2024 if SB 793 took effect belatedly.

Counter-balancing the loss in sales tax revenue, SB 793 would provide potentially significant cost-avoidance and long-term savings to state public health systems and public health (cardiovascular and respiratory health-related illnesses) to the extent tobacco use is reduced and prevented in youths, and smoking cessation attempts are successful.<sup>100</sup> State and local governments pay for health care for their employees and for qualifying low-income people.<sup>101</sup> Proposition 31 likely would reduce tobacco use, leading to better health, and in the short term better health likely would reduce some health care costs for state and local governments.<sup>102</sup> Over time, better health could lengthen some people’s lives, which could increase healthcare costs.<sup>103</sup> Given that the proposition could result in both healthcare savings and increased healthcare costs for state and local governments over time, the resulting long-term net change in state and local government healthcare costs is uncertain.<sup>104</sup>

California received \$2.8083 billion (estimated) in revenue from tobacco settlement payments and taxes in the fiscal year 2019.<sup>105</sup> Of this, the state allocated \$250.4 million in state

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<sup>96</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *supra* note 93 at 9.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Legislative Analyst’s Office, *Proposition 31 Referendum on 2020 Law That Would Prohibit the Retail Sale of Certain Flavored Tobacco Products*, <https://lao.ca.gov/ballot/2022/Prop31-110822.pdf>, (last visited Oct. 17, 2022).

<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 4.

<sup>105</sup> Campaign for Tobacco-Free Kids, *Broken Promises to Our Children: a State-by-State Look at the 1998 State Tobacco Settlement 20 Years Later FY2019*, 2018.

funds to tobacco prevention in the fiscal year 2019, 72% of the Centers for Disease Control and Prevention's annual spending target.<sup>106</sup>

CDTFA has noted few data sources are available on consumer responses to banned flavored products, so consumer impacts are highly uncertain.<sup>107</sup> The original revenue loss estimate would need to be reviewed and revised to reflect a more narrow scope of products affected by the ban. However, this loss could potentially mean less money for health care, education, programs for seniors, and law enforcement.

## VI. CONCLUSION

Proposition 31 determines whether California will implement SB 793, an enacted piece of legislation that aims to prohibit a tobacco retailer, or any of its 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. Exempt from this prohibition are the sale of hookah water pipes and flavored shisha tobacco products. A "yes" vote is to uphold the contested legislation, SB 793, which would ban the sale of flavored tobacco products, while a "no" vote is to repeal the contested legislation, thus keeping the sale of flavored tobacco legal in the state. The fiscal impact of this legislation is likely to result in decreased state tobacco tax revenues ranging from tens of millions of dollars annually to around \$100 million annually.<sup>108</sup>

A YES vote is to uphold the contested legislation, SB 793, which would ban the sale of flavored tobacco products.

A NO vote is to repeal the contested legislation, SB 793, thus keeping the sale of flavored tobacco legal in the state.

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<sup>106</sup> *Id.*

<sup>107</sup> California Legislative Information, SB-793 Flavored Tobacco Products, *Assembly Health*, [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB793](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB793), (last visited Oct. 17, 2022).

<sup>108</sup> Legislative Analyst's Office, *Proposition 31 Referendum on 2020 Law That Would Prohibit the Retail Sale of Certain Flavored Tobacco Products*, <https://lao.ca.gov/ballot/2022/Prop31-110822.pdf>, (last visited Oct. 17, 2022).