

City of Piedmont  
COUNCIL AGENDA REPORT

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DATE: September 19, 2022

TO: Mayor and Council

FROM: Sara Lillevand, City Administrator

SUBJECT: 2<sup>nd</sup> Reading of Ordinance 765 N.S. – Amending Article II of Chapter 12 of the Piedmont City Code to Prohibit the Sale of Flavored Tobacco Products

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RECOMMENDATION

Approve a second reading of Ordinance 765 N.S. – Amending Article II of Chapter 12 of the Piedmont City Code to Prohibit the Sale of Flavored Tobacco Products.

BACKGROUND

On September 6, 2022, the City Council approved a first reading of Ordinance 765 N.S. – Amending Article II of Chapter 12 of the Piedmont City Code to Prohibit the Sale of Flavored Tobacco Products. A separate agenda report at this meeting will set the fine for violations of the City’s tobacco regulations.

A second and final reading is required for adoption. Since the first reading, one public comment has been received by the City Clerk’s office and it is attached to this report. If passed, this ordinance will become effective October 19, 2022.

Attachments

- A – Ordinance 765 N.S.
- B – Correspondence

By: John O. Tulloch, City Clerk

## ORDINANCE NO. 765 N.S.

## AN ORDINANCE AMENDING ARTICLE II OF CHAPTER 12 OF THE PIEDMONT MUNICIPAL CODE TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS

The City Council of the City of Piedmont hereby ordains as follows:

SECTION 1.                   INTENT

By adopting this ordinance, the Piedmont City Council intends to prohibit the sale of flavored tobacco products within Piedmont due to the detrimental effects flavored tobacco has on the health of adults and children.

SECTION 2.                   FINDINGS

The Surgeon General has declared e-cigarette use among youth an epidemic. While youth use of combustible cigarettes has decreased dramatically, e-cigarette use, also known as “vaping”, has significantly increased. The Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015. Studies show that among middle and high school students nationally, vaping has increased by 78 percent between 2017 and 2018, with over 3.6 million youth using e-cigarettes in 2018. In the 2019-2020 California Healthy Kids Survey, 13% of 9th grade, 16% of 10th grade, 24% of 11th grade, and 34% of 12th grade Piedmont students reported they had used vaping products 4 or more times;

According to the Federal Food and Drug Administration, nearly 80% of youth ages 12-17 and nearly 75% of young adults ages 18-25 who were currently tobacco users in 2014 reported that the first tobacco product they ever used was flavored. Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. Tobacco companies have used flavorings in vaping products as part of a “graduation strategy” to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine.

Based upon the facts stated above, the City Council finds that a local prohibition against the sale of flavored tobacco is an effective means to reduce the availability of these products to youth, thereby protecting the public health and safety by discouraging tobacco initiation and continued use.

SECTION 3.                   AMENDMENT OF EXISTING SECTION 12.25

The following definitions are added to Section 12.25 of the City Code. The City Clerk is instructed to insert these definitions into the section alphabetically and renumber the subsections accordingly.

““Characterizing Flavor” means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.”

““Flavored Tobacco Product” means any Tobacco Product that imparts a Characterizing Flavor.””

““Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products or Tobacco Paraphernalia.”

““Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.”

#### SECTION 4. AMENDMENT OF EXISTING SECTION 12.29

Section 12.29 of the City Code is renumbered to Section 12.30 and amended in its entirety to read as follows:

“Violations of Sections 12.26 through 12.29 of this Article shall be an infraction. The City Council shall set the fine for violations from time to time by resolution.”

#### SECTION 5. PROHIBITION OF THE SALE OF FLAVORED TOBACCO

A new section, numbered 12.29 is added to the Piedmont City Code as follows:

“No person, business, tobacco retailer, or any other legal entity, shall sell or offer for sale, or possess with intent to sell or offer for sale, any flavored tobacco product.

(a) Presumptions for flavored tobacco products. There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:

(1) Made a public statement or claim that the tobacco product imparts a Characterizing Flavor.

(2) Used text and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a Characterizing Flavor, including,

but not limited to, use of descriptive terms such as “sweet” or “spicy” that imply a Characterizing Flavor; or

(3) Taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a Characterizing Flavor.”

#### SECTION 6. CODIFICATION

The City Clerk is directed to codify this ordinance in a manner which reflects the legislative intent of the City Council.

#### SECTION 7. SEVERABILITY

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it should have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentence, clauses or phrases be declared unconstitutional.

#### SECTION 8. POSTING AND EFFECTIVE DATE

This Ordinance shall be posted at City Hall after its second reading by the City Council for at least 30 days and shall become effective 30 days after the second reading.

#### SECTION 9. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Adoption of this Ordinance prohibiting the sale of flavored tobacco products is not subject to review under the California Environmental Quality Act (CEQA) pursuant to Public Resources Code Section 21000, *et seq.* and the CEQA Guidelines (14 Cal. Code Regs. §§ 15000 *et. seq.*), including without limitation, Public Resources Code section 21065 and California Code of Regulations 15378 for the following reasons: the action is exempt under the “common sense” exception (14 Cal. Code Regs. § 15061(b)(3)) because it can be seen with certainty that there is no possibility that this action may have a significant effect on the environment.

[END OF ORDINANCE]

**Item #2 – 2<sup>nd</sup> Reading of Ord. 765 N.S. – Prohibiting the Sale of Flavored Tobacco**  
**Received before Thursday, September 15, 2022 at Noon**

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Dear Mayor and City Councilmembers,

My name is Rima S. Khoury and I am General Counsel for Fumari, a premium hookah tobacco manufacturer and one of the founding members of the National Hookah Community Association which was established to protect and preserve the cultural tradition of hookah. <https://www.nationalhookah.com/>

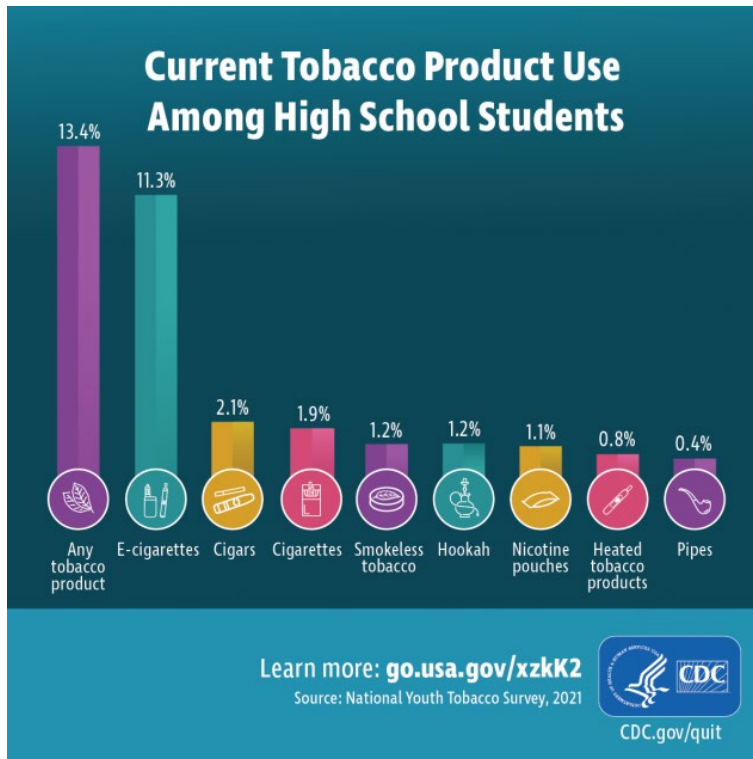
Before you inadvertently vote to ban the nearly thousand year cultural tradition of hookah at in the City of Piedmont, please understand the facts.

Please see presentation link below for your consideration.

<https://docs.google.com/presentation/d/15OyHjyrwqj2KbJGLaKmqv3HgZFx4Sm1Ardjkt8fgK4/present?usp=sharing>

There is no teen hookah epidemic. The FDA and CDC reports have made it clear that hookah is not the problem with youth. Current hookah use among high school students is less than 1% at 0.8%, and this number has been going down over the last decade. There are no facts that support a ban on hookah. If the goal is to protect kids, this would not be achieved by banning hookah as kids are not using hookah according to these reliable sources. There will be a disproportionate impact on Middle Eastern, Persian, Turkish, Indian, Armenian, and North African minority communities and minority owned businesses if you ban hookah.

[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm#:~:text=In%202021%2C%20about%201%20of%20every%20100%20middle%20school%20students,in%20the%20past%2030%20days.&text=In%202021%2C%20nearly%202%20of,in%20the%20past%2030%20days](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#:~:text=In%202021%2C%20about%201%20of%20every%20100%20middle%20school%20students,in%20the%20past%2030%20days.&text=In%202021%2C%20nearly%202%20of,in%20the%20past%2030%20days)



Hookahs are not being confiscated in schools. Hookahs are 3 feet tall and cannot be easily concealed in your pocket or backpack like vape. Hookahs take 25 – 30 minutes to set up and need hot coals, therefore it cannot be smoked during recess in the bathroom at school. Hookahs are not being confiscated in schools. Hookah's cost over \$200 for all the ten parts and accessories, making it out of reach for most kids.

The FDA recently stated in their Guidance for the Industry dated April 2020 that although data shows that flavored tobacco entice youth, that such data does NOT appear to raise comparably urgent public health concerns with youth usage of hookah products because the lower prevalence of youth use of these products suggests that they do NOT appear to be as appealing to youth at this time. Emphasis added.

Hookah is not the problem.

Yet hookah is becoming collateral damage in the war against vape. Hookah is not vape. Hookah has been practiced for nearly a thousand years by Persians, Arabs, Armenians, Turks, Indians, North Africans, and other minority groups many of which have immigrated to America and still practice their cultural traditions. Hookah is the center piece of social gatherings and is often offered to guests as a sign of hospitality and respect.

Many immigrant small business owners have built their business doing what they know from their home country. Often times they work 20 hour days, seven days a week to support multiple generations of their family. Rather than banning hookah and crippling these immigrant small business owners who are already struggling due to COVID-19, please consider passing reasonable regulations that address youth usage and access while increasing enforcement and

education. Many of these business owners that have been operating legally for years would be happy to work with law makers to address youth access issues verses losing their livelihood. These hookah lounge and retailer owners often have several years remaining on their leases and have personally guaranteed their leases. They will not only lose their business, but their homes and no longer be able to support their family and extended family.

**A tobacco flavor ban is a ban on hookah because it only comes in flavors.** Even hundreds of years ago hookah was made with molasses and honey which is still the case today.

The federal government is doing a lot to address youth access and usage of flavored tobacco products. At the end of 2019 the federal government passed a 21 and over minimum for tobacco products across all fifty states, called Tobacco-21. In addition, in February 2020 the FDA passed an e-cigg ban on flavored e-cartridges. September 9, 2020 was the FDA deadline for all vape and hookah products to be accepted for FDA review through PMTA or SE applications, after which any products without FDA authorization will be unlawfully on the market and their products seized and injunctions restricting sales will be issued along with fines and penalties. Currently, FDA has issued approximately six million refusals or Marketing Denial Orders for these applications. Furthermore, the FDA announced that they will be banning menthol and flavored cigars. The federal government is addressing the youth access issue and also providing legislation across the board, eliminating the patchwork of laws from city to city and closing loop holes for bad actors to skirt the law.

Moreover, Hookah has been exempted from the California State flavored tobacco ban, SB793, because of its cultural significance and that it is fundamentally different from vape. Please see attached video of Senator Hill, author of the bill, explaining why hookah was exempted from SB793 at the Senate Appropriations hearing on June 25<sup>th</sup>, 2020. Senator Hill learned the difference between vape and hookah and understood that hookah was not the problem and took steps to exempt it due to its cultural significance. We ask that the city of Piedmont do the same and not waste valuable city resources to ban something that is already on the ballot and according to the polls will pass and go into effect on January 1, 2023.

SB793, which, as amended and revised, prohibits the sale of all flavored tobacco products and flavored tobacco product enhancers, exempting hookah tobacco, cigars with a wholesale price of \$12.00 or more, loose leaf pipe tobacco was signed by Governor Gavin Newsom on August 28, 2020. SB793 was referendized and is expected to be on the November 2022 general election ballot.

Please see the hookah exemption language from SB793 below:

(c) Subdivision (b) does not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:

(1) The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with Section 22971.7) of Division 8.6 of the Business and Professions Code.

(2) The hookah tobacco retailer does not permit any person under 21 years of age to be present or enter the premises at any time.

(3) The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.

(4) If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, Section 6404.5 of the Labor Code.

SB793 balances the interests of law makers by addressing youth access and usage of flavored tobacco products, while protecting the cultural tradition of hookah. The SB793 hookah exemption limits sales to 21 and over establishments, meaning you have to be 21 and over to enter a retail establishment or lounge in order to purchase hookah and requires these establishments to comply with local and state laws. This shows that law makers can reach their regulatory goals without creating unintended consequences like eliminating the rich cultural tradition of hookah.

Please do not eliminate the rich cultural tradition of hookah without understanding what the real issues are. There is a way to achieve regulatory goals while balancing the interests of minority communities that practice hookah. We respectfully request the City of Piedmont to consider adopting the language of SB793 for their proposed flavor ban just as State of Massachusetts and soon California, Washington D.C., Denver, CO; and the following California Cities: Los Angeles City, San Jose, Elk Grove, Walnut Creek, West Hollywood, Burbank, Glendale, Irvine, Long Beach, Encinitas, San Diego County, El Cajon, Ventura, Pleasant Hill, Redwood City and Culver City have done. Please feel free to contact me with any questions or to discuss further. We are merely trying to protect our right to protect our cultural traditions. Know the facts to avoid the unintended consequences of eliminating this rich cultural tradition that has nothing to do with the vape epidemic and is often conflated with this issue. Thank you for your consideration.

Enclosed, please see an attachment of Most Commonly Misrepresented Hookah Facts to better understanding of what hookah is and isn't along with three studies conducted after the San Francisco Flavor ban in 2018 which resulted in a rise in teen combustible cigarette use by 32 – 34%.

<https://www.youtube.com/watch?v=9qlUH3hmvUc>

The Culture of Hookah | An Exploration of History and Tradition



**RIMA KHOURY, ESQ.**  
GENERAL COUNSEL

**FUMARI INC.**

**Three Studies Find that Banning Flavored Tobacco Products Is Associated with Increased Youth and Young Adult Smoking**

According to a growing number of studies, the banning of all flavored tobacco products can result in increasing the number of underage youth and young adults that return to smoking cigarettes.

**Study No. 1: University of Memphis School of Public Health, Science Direct-Addictive Behavior Reports (June 2020):** The first study investigating the impact of the City of San Francisco flavored tobacco ban ordinance found that after the ban was in force for nearly a year, flavored tobacco product use was reduced, but *cigarette smoking among 18-24-year-olds increased by over 35%*. The study also found that most consumers of flavored tobacco find other sources for these products.

Link: <https://www.sciencedirect.com/science/article/pii/S2352853220300134?via%3Dihub>

**Study No. 2: Yale School of Public Health Study, JAMA Pediatrics (May 2021):** The second study regarding San Francisco's flavored tobacco ban ordinance was conducted by the Yale School of Public Health and compared youth smoking rates among high school students in the San Francisco School District to the smoking rates of high school students in seven other metropolitan school districts located in cities that did not have a flavored tobacco ban.

According to the study, the smoking rate for San Francisco high school students under the age of 18 increased from 4.7% in 2017 before the adoption of the city's ordinance to 6.2% in 2019, the year after the ordinance was enacted. This is a 32% increase in underage youth cigarette smoking rates in the San Francisco school district. At the same time, the underage smoking rates in the other metropolitan school districts that are located in cities which did not have a flavored tobacco product sales ban continued to decline and averaged 2.8% as of 2019.

Link: [https://jamanetwork.com/journals/jamapediatrics/fullarticle/2780248?utm\\_source=twitter&utm\\_campaign=content-shareicons&utm\\_content=article\\_engagement&utm\\_medium=social&utm\\_term=052421&s=03#.YKwb0ZyP66Y.twitter](https://jamanetwork.com/journals/jamapediatrics/fullarticle/2780248?utm_source=twitter&utm_campaign=content-shareicons&utm_content=article_engagement&utm_medium=social&utm_term=052421&s=03#.YKwb0ZyP66Y.twitter)

**Study No. 3: Milken Institute School of Public Health, George Washington University, Nicotine & Tobacco Research (July 31, 2021):** A third study conducted through the Milken Institute School of Public Health at George Washington University found similar impacts from flavored vapor bans on young adult tobacco users. The study complied young adult smoking rates in six major metropolitan cities which enacted a flavored tobacco product ban. The study abstract included the following findings:

Moreover, if vape product sales were restricted to tobacco flavors, 39.1% of users reported being likely to continue using e-cigarettes but 33.2% were likely to switch to cigarettes. If vape product sales were entirely restricted, e-cigarette users were equally likely to switch to cigarettes versus not (~40%).

Link: <https://doi.org/10.1093/ntr/ntab154>



Preserving Hookah Culture & Protecting Hookah Tradition across the USA

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### **MOST COMMONLY MISREPRESENTED HOOKAH FACTS**

- **Hookah tobacco has not been around for 1,000 years because tobacco originated in the New World (United States) just a few centuries ago, therefore it is not possible for hookah tobacco to predate tobacco from the New World.**

Not true. Tobacco use has been documented for over 8,000 years. Tobacco cultivation likely began in 5000 BC with the development of maize-based agriculture in Central Mexico. Radiocarbon methods have established the remains of cultivated and wild tobacco in the High Rolls Cave in New Mexico from 1400 – 1000 BC.

Dokha tobacco and its derivatives have been cultivated and used in Middle Eastern countries for approximately 500 years. It originated in Iran during the 15th century, as use spread among sailors in the Caspian Sea, which led to its eventual spread throughout all of the Middle East during the following centuries.

Middle Eastern countries also acquired tobacco through trade routes in Greece, Indonesia and Malaysia, as is still the practice today.

- **Hookah flavors were not introduced until the 90's, therefore flavors are not traditional.**

Not true. Hookah tobacco was originally made with molasses or honey hundreds of years ago called Muassel. Dried fruit such as apple and spices like cinnamon were also added to enhance the flavors.

Although hookah tobacco has been flavored for hundreds of years, new flavors were developed in the 90's as a result of the flavor demands of Americans. Very similar to the evolution of Middle Eastern fare, such as hummus which can now be found in supermarkets with a variety of flavors such as chipotle, cilantro, and garlic. None of these particular flavors are Middle Eastern, however it doesn't change the fact that it is still hummus and it is still a Middle Eastern dish. Same with hookah tobacco. Hookah tobacco has been flavored for centuries, and had characterizing flavors. Just because the types of flavors have changed doesn't change the fact that it is still traditional hookah.

- **Hookah smoking is not cultural.**



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Preserving Hookah Culture & Protecting Hookah Tradition across the USA

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Not true. It is undisputed that hookah is a cultural tradition amongst Arabs, Persians, Armenians, Turks, N. Africans and other minority groups. Like music, dancing, art and customs, hookah is the center piece of social and celebratory events.

- **We are not banning hookah, which is the water pipe, we are banning flavored tobacco. You can still smoke a hookah.**

Hookah tobacco only comes in flavors, therefore a ban on flavored tobacco is a de facto ban on the practice of hookah. Said another way, we are not banning guns, we are just banning bullets. Without hookah tobacco, which is only used in hookah waterpipes, there is no way to smoke a hookah. It is important to note that you cannot smoke any other type of tobacco other than hookah tobacco, in a hookah waterpipe.

- **According to the CDC Middle School and High School Student hookah smoking rates are 9.3 % in California.**

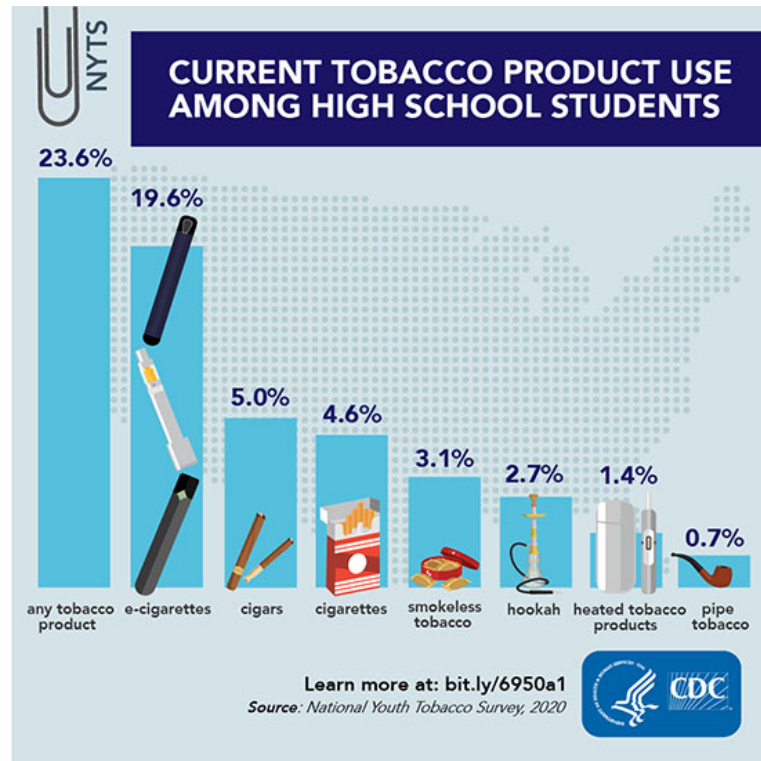
Not true. According to the CDC, from 2011 to 2020, current use of hookahs did not change much among middle schools students. Current use of hookahs among high school students declined from 2011 to 2019, then saw no change from 2019 to 2020.

[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm)

See table below.



## Preserving Hookah Culture & Protecting Hookah Tradition across the USA



### Tobacco Use\* Among High School Students in 2020<sup>6</sup>

| Tobacco Product                  | Overall | Girls | Boys  |
|----------------------------------|---------|-------|-------|
| Any tobacco product <sup>†</sup> | 23.6%   | 22.5% | 24.7% |
| Electronic cigarettes            | 19.6%   | 18.7% | 20.4% |
| Cigarettes                       | 4.6%    | 3.9%  | 5.4%  |
| Cigars                           | 5.0%    | 4.7%  | 5.4%  |
| Smokeless tobacco                | 3.1%    | 1.4%  | 4.8%  |



Preserving Hookah Culture & Protecting Hookah Tradition across the USA

### Tobacco Use\* Among High School Students in 2020<sup>6</sup>

| Tobacco Product         | Overall | Girls | Boys |
|-------------------------|---------|-------|------|
| Hookahs                 | 2.7%    | 2.9%  | 2.6% |
| Heated Tobacco Products | 1.4%    | 1.5%  | 1.3% |
| Pipe tobacco            | 0.7%    | 0.4%  | 1.0% |

- Hookahs come in small, 2” sizes, that are portable. See picture below.



This is not a hookah. It is a crack pipe. The presentation of a crack pipe is not only apprehensible, but an insult to the history and all minority communities that partake in hookah's rich cultural tradition. This is a mockery of the history and culture of Arabs, Armenians, Persians, Turks, Indians and North Africans. Comparing a hookah to a crack pipe is like comparing the Native American peace pipe to a crack pipe, it is misleading, false, and unjust. In addition to being highly offensive, it is a complete misrepresentation of traditional hookah.



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Preserving Hookah Culture & Protecting Hookah Tradition across the USA

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If anyone can use a crack pipe as a hookah, we would be very interested in seeing that because in the 1,000 years that hookah has been around, it has not been done. Hookah tobacco is a unique tobacco product that cannot be used in a bong, crack pipe, rolled into a blunt or chewed, it can only be used in a hookah water pipe.

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Do not be misled but the strategic and malicious misinformation that is being disseminated by private interest groups. The culture and history of hookah is easy to fact check. If you have any questions, please do not hesitate to contact the National Hookah Community Association, that was established to preserve the cultural tradition of hookah. Thank you.

<https://www.youtube.com/watch?v=9qlUH3hmvUc>

The Culture of Hookah | An Exploration of History and Tradition