



TO: The Honorable Xavier Becerra
 Secretary
 U.S. Department of Health and Human Services
 200 Independence Avenue, S.W.
 Washington, D.C. 20201

The Honorable Robert Califf
 Commissioner
 U.S. Food and Drug Administration
 10903 New Hampshire Ave
 Silver Spring, MD 20993-0002

CC: The Honorable Cedric Richmond
 Director
 U.S. Office of Public Engagement

The Honorable Shalanda Young
 Director
 U.S. Office of Management and Budget

Members of the Congressional Black Caucus

Members of the U.S. Senate Judiciary Committee

Members of the U.S. House of Representatives
 Judiciary Committee

Re: Bipartisan Agreement that Over-Criminalizing Tobacco Will Disproportionately Impact People and Communities of Color, Trigger Criminal Penalties, and Lead to Negative Interactions with Law Enforcement

Dear Secretary Becerra and Commissioner Califf,

Many of the undersigned organizations submitted a letter last year on April 26, 2021 detailing our deep concerns about banning the legal sale of menthol cigarettes to adults 21 and older and the impact that will have on communities of color. As we said then, and repeat now, policies that amount to prohibition for adults have serious racial justice implications. Banning the legal sale of menthol cigarettes through licensed businesses will lead to illegal, unlicensed distribution in communities of color, trigger criminal laws in all 50 states, increase the incidence of negative interactions with police, and ultimately increase incarceration rates. There are far better solutions for reducing menthol cigarette use than criminalizing these products and turning the whole issue over to the police.

We write today because it now appears FDA is rushing forward with its menthol cigarette ban without concern for these issues. On February 25, HHS issued a public notice that it had submitted to the Office of Management and

Budget a proposed rule to “ban menthol as a characterizing flavor in cigarettes.”¹ FDA has said it intends to publish this rule at the end of April, despite government data showing cigarette smoking, menthol cigarettes smoking, and underage menthol smoking are at all-time lows.² OMB now has the opportunity to review the proposed rule to determine if FDA has adequately assessed the full range of costs, including the potentially massive social costs of criminalizing the sale and distribution of this product.

There is nothing in HHS’s Notice that reflects any awareness on FDA’s part of the magnitude of the risk this rule would impose on communities of color from the standpoint of over-criminalization. Rather, the Notice says only that it expects the rule to “reduce the availability” of these products and “improve the health of menthol cigarette smokers by decreasing consumption and increasing the likelihood of cessation.”³ The Notice makes no mention – none – of the potentially gigantic impact this policy will have on justice issues in our communities, nor any mention of *alternative* policies FDA could pursue to drive smoking rates further down *without* resorting to criminalization.

Indeed, FDA’s public statements on the menthol ban since our April 2021 letter suggest FDA is paying no real attention to these concerns. None of FDA’s public statements⁴ provide any real, substantive explanation for how this prohibition-based rule will impact police-citizen interactions, police-community relationships, mass incarceration, or violence in our communities. All FDA has said on the matter is that *FDA itself* won’t enforce the specific federal statutory provisions the FDA is in charge of enforcing.

These statements are alarming, to say the least. The fact is, the illegal market problem will be principally one for *state and local communities and law enforcement* to deal with, not the FDA. In other words, FDA will issue the rule – but the impact will be downstream, on communities and criminal justice systems in our cities, towns, counties, and states.

In fact, all 50 states already treat the sale and distribution of illicit cigarettes as a serious crime. In 44 of these states, the crime is classified as a felony. In 37 states, the crime is subject to *mandatory minimum sentences*. *Mere possession* is treated as a crime in 37 states.⁵

And as those who are experienced in these issues understand, people caught up in the criminal justice system – especially if they are black or brown – face enormous hurdles to escaping that system due to the web of criminal laws that *compound* the impact of any single arrest, prosecution, or conviction. Once this ban goes into effect, a person arrested for a menthol cigarette-related crime would face not only prosecution for that crime itself, but potentially even more devastating consequences:

- Multiplied prison terms under three-strikes and other repeat offender statutes
- Immediate revocation of parole and, thus, immediate return to prison
- Disenfranchisement in the states that remove the right to vote for felony convictions
- Deportation, even for persons with legally issued visas

One need only review the history of criminal law enforcement with crack cocaine, cannabis, opioids, or other drugs, and alcohol in the 1920s, to know that law enforcement is the wrong tool here, especially when there are other, far more helpful interventions the federal government could be emphasizing. Any proposal to effectively criminalize the

¹ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0910-AI60>

² National Survey on Drug Use and Health 2002-2020.

³ *Id.*

⁴ <https://www.fda.gov/news-events/fda-voices/fda-track-take-actions-address-tobacco-related-health-disparities#:~:text=In%20April%202021%2C%20the%20U.%20S.,as%20a%20characterizing%20flavor%20in;https://www.fda.gov/news-events/press-announcements/fda-commits-evidence-based-actions-aimed-saving-lives-and-preventing-future-generations-smokers>

⁵ Summary of criminal statutes addressing unlicensed, untaxed tobacco sale and distribution, attached.

sale and distribution of a product used by 18 million adults, particularly a product *preferred by black and brown* citizens, must take these issues with the utmost seriousness and undertake genuine efforts to find *better policy solutions*.

As we have said from the start, we completely support resolving inequities in health care. Systemic racism has indeed left communities of color behind – in health care, in the economy, and in the criminal justice system. But prohibition is not the answer. Harm reduction is. Rather than criminalizing this product, FDA and the Administration should be massively investing in community-based health care solutions that make sense for these communities. The evidence is conclusive that consumer education, public awareness campaigns, therapeutic interventions and other non-prohibition-based policies work in driving down overall smoking rates (just as they do with drug use), including in communities of color.⁶ Overall, we should be addressing tobacco use, drug use, and other issues with evidence-based solutions that move us forward, not with prohibition-based policies that move us backward.

Sincerely,

Americans for Prosperity
Americans for Tax Reform
A Little Piece of Light
Better Organizing to Win Legalization
The Black Police Experience
Blacks in Law Enforcement of America
CAN-DO Foundation
Center for Employment Opportunities
College and Community Fellowship
CURE (Citizens United for the Rehabilitation of Errants)
Dream Corps Justice
Due Process Institute
Drug Policy Alliance
Just leadership USA
Law Enforcement Action Partnership
Legal Action Center
Life for Pot
Mommie Activist and Sons
Nadia PR
National Association of Black Law Enforcement Officers
National Association of Blacks in Criminal Justice
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Black Justice Coalition
National Center for Disability Rights
National Health Care for the Homeless Council
Reason Foundation
R Street
The Sentencing Project

⁶ The CDC has acknowledged the significant reduction in smoking rates including among people of color. These trends have coincided with decades of public health efforts intended to drive down tobacco use through non-prohibition interventions including education, cessation, underage prevention, and access to more affordable health care.

<https://www.cdc.gov/media/releases/2019/p1114-smoking-low.html>;

[https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm#:~:text=Current%20smoking%20has%20declined%20from,who%20have%20quit%20has%20increased](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm#:~:text=Current%20smoking%20has%20declined%20from,who%20have%20quit%20has%20increased;);

Southern Center for Human Rights
StopTheDrugWar.org
Students for a Sensible Drug Policy
The Taifa Group
Urban Survivors Union
WE GOT US NOW