



LAW ENFORCEMENT ACTION PARTNERSHIP

ADVANCING JUSTICE AND PUBLIC SAFETY SOLUTIONS

121 Mystic Avenue, Suite 9
Medford, Massachusetts 02155
(781) 393.6985

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Date: July 1st, 2022

Re: FDA-2021-N-1349 Tobacco Product Standard for Menthol in Cigarettes

Position: OPPOSE

To: The Honorable Robert Califf

#: Dockets Management Staff (HFA-305)

Food and Drug Administration

5630 Fishers Lane, Rm. 1061

Rockville, MD 20852

Dear Commissioner Califf,

The Food and Drug Administration (FDA) has proposed a rule that will ban the sale of menthol cigarettes in the United States. The Law Enforcement Action Partnership (LEAP) [has long opposed](#) such a ban, on the grounds that it will criminalize personal health decisions and have unintended consequences for individuals and communities at large.

LEAP is a nonprofit group of police, prosecutors, judges, and other criminal justice professionals who speak from firsthand experience to endorse evidence-based public safety policies. Our mission is to make communities safer by focusing law enforcement resources on the most serious priorities, addressing the root causes of crime, and improving police-community relations.

Although this fact might be obvious, it's worth emphasizing that a federal menthol ban [will disproportionately affect communities of color](#), just as the rest of the drug war already has. The Centers for Disease Control and Prevention (CDC) states that 1 in 7 (around 14%) of non-Hispanic Black adults smoke cigarettes and, as of 2019, approximately 85% of non-Hispanic Black adults who smoked [used menthol cigarettes](#).

In general, supporters of the federal menthol ban contend that the prohibition will act as a recourse for the industry's targeting of Black communities. While it's true that Big Tobacco has aggressively advertised menthol cigarettes toward Black consumers, it's not accurate to couch the government's proposed policy as a remedy for those actions. As the Law Enforcement Action Partnership has consistently stated, rather than criminalizing the preferred product for Black smokers, the FDA should be investing in community-based health care solutions that make sense for these communities.

LawEnforcementActionPartnership.org

Formerly known as Law Enforcement Against Prohibition

With the CDC reporting that “among middle and high school students. . .” thirty-day smoking rates were [reduced by more than half to just 1.5%](#) from 2020 to 2021, the evidence is conclusive that consumer education, public awareness campaigns, therapeutic interventions, and other non prohibition-based policies are effective in driving down overall smoking rates in the same manner that these interventions work for non-nicotine related drugs.

But the country [appears to treat nicotine in a silo](#), as two polarized factions in tobacco control continue to fight over its future: on one hand, you have Michael Bloomberg–funded groups like the Campaign for Tobacco-Free Kids (CTFK), which have made their main political objective ridding society of both menthol cigarettes and menthol vaping products; on the other, you have a collection of academics, scientists, harm reductionists, and justice reform advocates who [warn that banning menthol cigarettes](#) — particularly when the FDA has yet to authorize a single menthol-flavored e-cigarette — could lead to a lucrative and dangerous illegal market, increase police interactions, and, ultimately, increase incarceration rates.

These arguments have, in many ways, become familiar for those involved in the debate. They may have even become predictable — and there is the uncomfortable truth that many harm reductionists and criminal- and social-justice advocates find themselves on the same side as the industry responsible for these longstanding harms. But just because some tobacco companies caution against a menthol ban for the same reasons, it does not make these claims untrue.

Furthermore, a federal menthol ban would not erase the known failings of a decades-long War on Drugs. Perhaps the two most prominent examples of police brutality in the last decade have involved the illegal sale of cigarettes: [Eric Garner](#), killed by an officer’s chokehold after he resisted arrest for selling “loosie” cigarettes on Staten Island, and [George Floyd](#), murdered by Officer Derek Chauvin after buying cigarettes with counterfeit bills in Minneapolis. The criminalization of tobacco products has already touched on vapers as well: last summer, a video [went viral](#) showing officers in Ocean City, Maryland, forcefully arresting a 19-year-old Black man for vaping on the boardwalk; this May, the Galveston County Sheriff’s Office in Texas [announced](#) that it would open an investigation into two deputies who beat then arrested an 18-year-old student, Keitherine Williams, caught with a vaping device at school.

Though the FDA [has maintained](#) that the menthol prohibition will not target users, and focus only on the distributors, the agency’s position ignores very well-documented historical evidence about the trends, cycles, and motives of illicit markets that the United States bore witness to during the Prohibition Era. By outlawing more than [a third of the legal market](#), the FDA’s proposed rule will give rise to the emergence of yet another highly profitable illicit market and all the problems that go along with it.

The fact is, the illicit market problem will be principally one for *state and local communities and law enforcement* to deal with, not the FDA. In other words, the FDA will issue the rule – but the impact will be downstream, on communities and justice systems within our cities, towns, counties, and states. To date, the FDA has not made any indication that it understands the complexity of this problem. Responsibility for enforcing this ban will fall, almost entirely, on state and local law enforcement.

This is not a trivial point: All 50 states consider the sale of illicit cigarettes to be a serious crime, with 44 of them classifying it as a felony and 37 of them carrying mandatory minimum sentences. (Please refer to full attachment for a list of relevant state statutes pertaining to criminal penalties for crimes related to the illicit manufacturing, sale, or distribution of tobacco products). Prohibiting — and consequently criminalizing — the

sale of menthol cigarettes will only exacerbate this issue. A person caught selling or distributing menthol cigarettes cannot only be charged with a crime, but in some cases may receive enhanced prison terms, parole revocation, and disenfranchisement. More examples can be collected by the day: according to a new report, Massachusetts — which banned all flavored nicotine products in 2020, including menthol — [saw](#) its police force seize more than 100,000 e-cigarettes in 2021, [with the busts occurring in shops, homes, and vehicles](#).

Smoking in the United States [recently hit record lows](#), and more still needs to be done to invest in public awareness campaigns, consumer education, and therapeutic interventions. But harm reduction also works, and the FDA appears dead set on essentially erasing the independent vapor market and handing over tobacco harm reduction (THR) to Big Tobacco — to a collection of companies that can afford to meet the agency's regulatory hurdles.

If cessation methods don't work, a federal ban on menthol combustibles will now leave smokers with nowhere to go, as the safer alternatives they could switch to remain in a legal limbo.

LEAP recommends the Administration commission a panel of experts — to include representatives from the scientific, sociological, economic, and criminal justice fields — to study the potential societal consequences of a prohibition of menthol tobacco products.

Specifically, we recommend the commission examine the best practices that have contributed to the decrease in overall tobacco usage in the United States and charge that the commission include those findings in their report.

Additionally, LEAP recommends a comprehensive socioeconomic study to determine the impact of a prohibition of menthol tobacco products on all American communities. This study should evaluate the impact on neighborhoods, especially neighborhoods beset by poverty, poor educational systems, joblessness, violence, gang activity, property crime, health and mental health disparity, and small business and state revenue loss that will result in the decrease of sales as well as the loss of revenue from excise taxes of tobacco.

Finally, LEAP recommends the commission conduct a comprehensive evaluation of how a prohibition of menthol tobacco products will impact the criminal justice industry. Specifically, we recommend the commission study illicit cigarette markets, the entities engaged in illegal cigarette import and sales, the violence and potential violence associated with the illegal cigarette markets, the operational impact of American law enforcement, the potential for the misuse of force against American citizens by law enforcement because of illegal cigarette sales, and the overall impact of prohibition on police-community relations in America.

Thank you for your time and deliberation on this matter.

Lt. Diane Goldstein (Ret.)
Executive Director
The Law Enforcement Action Partnership

Maximum Criminal Penalties for Crimes Related to the Illicit Manufacturing, Sale, or Distribution of Tobacco Products ¹

Jurisdiction	Criminal Statutes ²	Potential Prison Term
Alabama	Ala. Code §§ 28-11-8; 40-25-5; 40-25-15; 40-25-6; § 40-25-6; 40-25-12; 40-25-24	Up to 5 years
Alaska	Alaska Stat. Ann. §§ 43.50.105; 12.55.135; 12.55.125; 43.50.650(b); 12.55.135; 43.50.640(b); 12.55.125; 43.50.640(b); 12.55.125)	Up to 5 years
Arizona	Ariz. Rev. Stat. Ann. § 13-3711; § 13-707; § 42-3461; § 13-707; § 36-798.06; § 13-702; § 42-1127; § 13-702; § 42-1127; § 13-702; § 42-1127; § 13-702; § 42-3305; § 13-707)	Up to 2 years
Arkansas	Ark. Code Ann. §§ 26-57-245; § 5-4-401; § 26-57-245; § 5-4-401; § 26-57-241; § 5-4-401; § 26-57-231; § 5-4-401; § 26-57-226; § 5-4-401; § 26-57-240; § 5-4-401; § 26-57-240; § 5-4-401; § 26-57-240; § 5-4-401; § 26-57-204; § 5-4-401(a)(6); § 5-4-401(b)(4))	Up to 6 years
California	Cal. Rev. & Tax Code § 30473; Cal. Penal Code § 1203.1(A); Cal. Rev. & Tax Code § 30473.5(a)-(b); § 30474(a); § 30474 (b); § 30475(a); Cal. Rev. & Tax Code § 30480; Cal. Bus. & Prof. Code § 22980.2; Cal Rev. & Tax Code § 30101.7(e); Cal Rev. & Tax Code § 30101.7(e); Cal Rev. & Tax Code § 30101.7(e); Cal. Penal Code § 1203.1(A)	Up to 4 years
Colorado	Class 5 Felony (Colo. Rev. Stat. Ann. §§ 39-28-108, 39-21-118; § 18-1.3-401	Up to 1 year
Connecticut	Conn. Gen. Stat. Ann. § 12-285c; § 53a-36; § 53a-35a; § 12-304	Up to 10 years
Delaware	Del. Code Ann. tit. 30 § 4202; § 5343; § 571; Del. Code Ann. tit. 11, § 4205; Del. Code Ann. tit. 30, § 576; Del. Code Ann. tit. 30, § 5341; Del. Code Ann. tit. 30, § 572; Del. Code Ann. tit. 11, § 4205; Del. Code Ann. tit. 30, § 574; Del. Code Ann. tit. 11, § 4205	Up to 5 years
District of Columbia	D.C. Code Ann. §§ 22-3571.01, 47-2421; 47-2406; § 47-2405)	Up to 5 years
Florida	Fla. Stat. § 210.18; § 775.082-775.084; § 210.185; § 210.095	Up to 10 years
Georgia	Ga. Code § 48-11-23; § 17-10-3; § 17-10-4; § 48-11-28(b); § 48-11-30(a)	Up to 10 years
Hawaii	Haw. Rev. Stat. Ann. § 245-2.6; § 706-640; § 706-663; § 706-623(1)(c); § 245-2.6; § 706-660); § 706-623(1)(b); § 245-2.7	Up to 10 years
Idaho	Idaho Code Ann. § 63-2512; § 18-112; § 18-113; § 63-2525	Up to 1 year

¹ Even if the FDA does not use its enforcement authorities, the unregulated, unlicensed sale and distribution of prohibited products is a crime under multiple federal statutes and the laws of all 50 states.

²This chart identifies select statutes defining crimes related to the illicit sale or distribution of tobacco products in violation of tax, licensing, or other related state and federal laws. Criminal penalties for such crimes include those specifically enumerated for tobacco-related activity, as well as general criminal penalty provisions that increase maximum imprisonment terms for, among other things, repeat offenders.

Jurisdiction	Criminal Statutes	Potential Prison Term
Illinois	35 Ill. Comp. Stat. Ann. 130/3-10(d-2); 730 Ill. Comp. Stat. Ann. 5/5-8-2; 730 Ill. Comp. Stat. Ann. 5/5-4.5-45; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50(b); 35 Ill. Comp. Stat. Ann. 130/3-10(d-2); 730 Ill. Comp. Stat. Ann. 5/5-8-2; 730 Ill. Comp. Stat. Ann. 5/5-4.5-45; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50(b); 35 Ill. Comp. Stat. Ann. 130/22; 35 Ill. Comp. Stat. Ann. 135/28; 730 Ill. Comp. Stat. Ann. 5/5-8-2); 730 Ill. Comp. Stat. Ann. 5/5-4.5-35; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50(b); 35 Ill. Comp. Stat. Ann. 130/23; 35 Ill. Comp. Stat. Ann. 135/29; 730 Ill. Comp. Stat. Ann. 5/5-8-2); 730 Ill. Comp. Stat. Ann. 5/5-4.5-35; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50(b); 730 Ill. Comp. Stat. Ann. 5/5-4.5-55; 35 Ill. Comp. Stat. Ann. 130/24; 35 Ill. Comp. Stat. Ann. 130/24.	Up to 14 years
Indiana	Ind. Code Ann. § 6-7-1-21; Ind. Code Ann. § 35-50-2-6; Ind. Code Ann. § 6-7-1-21; Ind. Code Ann. § 6-7-1-23; § 35-50-3-3; § 6-7-1-24; § 35-50-3-2; § 6-7-1-24; § 35-50-2-7; § 6-7-2-18; § 24-3-4-15; § 35-50-3-2; § 24-3-4-16; § 24-3-4-17	Up to 6 years
Iowa	Iowa Code Ann. § 903.1; § 714.9; § 902.9; § 714.10 § 902.9; § 714.13; § 902.9; § 714.11; § 714.12	Up to 10 years
Kansas	Kan. Stat. Ann. § 21-6602; § 50-6a16; § 21-6804; § 79-3335; § 79-3322; § 21-6611	Up to 4 years
Kentucky	Ky. Rev. Stat. Ann. § 138.990; § 534.040; § 532.090; Ky. Rev. Stat. Ann. § 534.040; § 532.060; § 534.030	Up to 5 years
Louisiana	La. Rev. Stat. Ann. § 47:877(B); § 47:858; § 47:859(A)	Up to 5 years
Maine	Me. Rev. Stat. Ann. tit. 36, § 4366; 17-A §§ 1252 and 1301; tit. 36, § 4374	Up to 5 years
Maryland	Md. Code Ann., Tax-Gen. § 13-1012(a)-(c); § 13-1014(a)(1)-(3); § 13-1015(a)-(c); § 13-1024(a); Md. Code Ann., Bus. Reg. § 16-214(b)(1)	Up to 5 years
Massachusetts	Mass. Gen. Laws ch. 64C § 10; § 34; § 35; § 37; § 38	Up to 5 years
Michigan	Mich. Comp. Laws § 205.428(3); § 205.428(4); § 205.428(11); § 205.428(6); § 205.428(7); § 750.42b(4)	Up to 5 years
Minnesota	Minn. Stat. § 297F.20(1)(b); § 609.03; § 297F.20(4); § 297F.20(6)(a); § 297F.20(6)(b); § 297F.20(6)(c); § 297F.20(12)	Up to 5 years
Mississippi	Miss. Code Ann. § 27-69-7; § 27-69-47; § 47-7-37; § 97-9-129; § 27-69-35	Up to 10 years
Jurisdiction	Criminal Statutes	Potential Prison Term
Missouri	Mo. Ann. Stat. § 149.076(2); § 559.016(1)(1); § 558.002(1)(1); § 558.002(1)(7); § 558.002(2)(1); § 149.071; § 149.081; § 149.200; § 558.011(1)(5); 558.011(2)	Up to 5 years
Montana	Mont. Code Ann. § 16-11-131(6); § 16-11-148(1); § 46-18-201(1)(a); § 16-11-132(3); § 46-18-201 (1)(a); § 16-11-133(1); § 16-11-134; § 16-11-146; § 45-6-325(4)(a); § 45-6-325(4)(a); § 45-6-325(4)(b); § 16-11-147; § 16-11-144	Up to 14 years

Jurisdiction	Criminal Statutes	Potential Prison Term
Nebraska	Neb. Rev. Stat. § 77-2614; § 28-105(1); § 29-2263(1); § 77-2615; § 69-2706(17); § 28-106(1); § 24-1420; § 28-106(1); § 59-1522	Up to 2 years
Nevada	Nev. Rev. Stat. § 370.380(2); § 193.130(2)(c); § 176A.500(1)(c); § 370.410; § 193.140; § 176.087(4)(a)(2)	Up to 5 years
New Hampshire	N.H. Rev. Stat. Ann. § 78:11(IV); § 651:2(IV)(a); § 651:2(II); § 651:2(II)(a))	Up to 7 years
New Jersey	N.J. Stat. § 54:40A-27; § 2C:43-3; § 2C:43-8; § 2C:43-2(b)(2); § 54:40A-28; § 2C:43-3(b)(1); § 2C:42-6(a)(2)-(3); § 54:40A-28.1; § 2C:42-6(a); § 54:40A-29	Up to 5 years
New Mexico	N.M. Stat. Ann. § 61-37-18; § 31-19-1(A); § 31-20-5(A); § 7-12-13.2 (A)-(B); § 31-18-15(E)(11); § 31-20-5(A); § 7-12-13.2 (C); § 7-12-13.2 (D); § 31-18-15(A)(13); § 7-12-13.2 (E) Imprisonment of not more than 18 months (N.M. Stat. Ann. § 7-12-13.2 (E))	Up to 5 years
New York	N.Y. Tax Law § 1814(b); N.Y. Penal Law §§ 65.00(3)(d); 70.15(3); 80.05(3); N.Y. Tax Law § 1814(c)(1); N.Y. Penal Law §§ 65.00(3)(a)(i); 70.00(2)(e); 70.00(3)(b); 70.00(4); 80.00(1)(a)(b); N.Y. Tax Law § 1814(c)(2); N.Y. Penal Law §§ 65.00(3)(a)(i); 70.00(2)(d); 70.00(3)(b); 70.00(4); 80.00(1)(a)(b); § 65.00(3)(c); 70.15(2); 80.05(2); N.Y. Tax Law § 1814(g); N.Y. Tax Law § 1814(i)	Up to 7 years
North Carolina	N.C. Gen. Stat. § 105-113.33; § 15A-1340.23(b)-(c); N.C. Gen. Stat. § 15A-1340.23(b)-(c)	Up to 4 months
North Dakota	N.D. Cent. Code § 57-36-33; § 12.1-32-01(5); § 12.1-32-06.1)	Up to 1 year
Ohio	Ohio Rev. Code Ann. § 5743.99(A); § 2929.24(A); § 2929.14(A)(4); § 2929.18(A)(3); § 2929.15(A); § 2929.25(A)(2);	Up to 8 years
Oklahoma	Okla. Stat. Ann. tit. 68, § 317; 68, §§ 349.1(G) and 426(A); § 409; § 450.9(C)	Up to 20 years
Oregon	Or. Rev. Stat. § 323.480(6); § 161.615(1); § 161.655(1)(b); § 323.482(2)(a); Or. Rev. Stat. § 323.482(2)(b); Or. Admin. R. 213-017-0009; Or. Rev. Stat. § 161.605(3); Or. Rev. Stat. § 323.482(2)(c); Or. Admin. R. 213-017-0007; Or. Rev. Stat. § 161.605(3); § 161.655(1)(a); § 323.482(2)(b) and Or. Admin. R. 213-017-0005; Or. Rev. Stat. § 161.605(2); § 161.655(1)(a))	Up to 10 years
Pennsylvania	72 Pa. Stat. Ann. § 8206.1; § 8272; § 8273; § 8274; § 8278; § 228-A	Up to 10 years
Rhode Island	R.I. Gen. Laws Ann. § 44-20-3; § 44-20-43; § 44-20-17; § 44-20-35; § 44-20-39; § 44-20-45; § 44-20-51; § 44-20-51.2	Up to 15 years
South Carolina	S.C. Code Ann. § 12-21-2830; § 12-21-3070(B); § 12-21-3070(D); § 12-21-3080	Up to 2 years
South Dakota	S.D. Codified Laws § 10-50-21; § 22-6-16-1; § 10-50-32; § 22-6-2; § 10-50-65	Up to 10 years

Jurisdiction	Criminal Statutes	Potential Prison Term
Tennessee	Tenn. Code Ann. § 67-4-1007; § 40-35-111; § 67-4-1024(a); § 67-4-1026(b)	Up to 6 years
Texas	Tex. Tax Code § 154.510; Tex. Penal Code § 12.21; Tex. Tax Code § 154.517; Tex. Penal Code § 12.34; Tex. Tax Code § 154.520; Tex. Health & Safety Code § 161.458; Tex. Penal Code § 12.23; Tex. Penal Code § 12.22	Up to 20 years
Utah	Utah Code § 59-14-203; § 76-3-204, 76-3-301; § 59-14-208; § 76-3-301; § 59-14-209(1); § 59-14-211	Up to 5 years in prison
Vermont	Vt. Stat. Ann. tit. 32, § 7778: § 1010(d)	Up to 5 years
Virginia	Va. Code § 58.1-1006; § 18.2-11; § 58.1-1007; § 18.2-498.3; § 18.2-10; § 58.1-1017.B; § 58.1-1017.C; § 58.1-1017.1; § 18.2-10; § 58.1-1036; § 18.2-246.14; § 58.1-3832	Up to 5 years
Washington	Wash. Rev. Code § 82.24.100; § 9A.20.021; § 9A.20.021; § 82.24.110(1); § 82.24.110(3); § 82.24.500; § 82.24.570; § 82.24.570	Up to 10 years
West Virginia	W.Va. Code § 16-9A-10(a); § 11-17-19a(a); § 11-17-19a(b); § 60-9-4	Up to 5 years
Wisconsin	Wis. Stat. § 139.44(8)(a); § 139.44(8)(c); § 139.44(1); § 939.50; § 139.44(2); § 139.44(4); § 139.44(5); § 139.44(6)	Up to 1 year
Wyoming	Wyo. Stat. Ann. § 39-18-108	Up to 1 year
Federal ³	15 U.S.C. 375-378; 18 U.S.C. 2344; 18 U.S.C. 2341 – 2346	Up to 5 years

³ This is not an exhaustive list of federal criminal statutes for crimes related to the illicit manufacturing, sale, or distribution of tobacco products.

Emerging Illicit Markets Related to the Manufacturing, Sale, or Distribution of Prohibited Tobacco Products

The fact remains that the illicit market for cigarettes is large and growing; it now accounts for between 8.5% and 21% of cigarette sales in the United States. These percentages represent roughly 10 to 25 billion cigarettes traded on the illicit market and \$3 billion in tax losses for the U.S. at the state and federal levels.⁴ These markets are adaptable and dynamic, and have the ability to rapidly adjust to prohibitions, as well as to consumer desires.

In fact, the Government Accountability Office (GAO) has characterized the illicit market trade in tobacco products as a “whack-a-mole” problem, as illustrated by examples from New York City, Massachusetts, and other jurisdictions. These markets come in many forms, including smuggling or bootlegging, illegal domestic manufacture, illegal international manufacture and smuggling, illicit markets, counterfeiting, and internet sales, each with their own unique problems and harms to consumers and local, state, and federal governments.

After the Massachusetts flavor ban went into effect, adult consumers shifted their flavored tobacco purchases to neighboring states. The ban also fueled the already robust illegal market. In the 6 months immediately following the implementation of their total flavor ban, Massachusetts excise tax stamp revenues decreased, but neighboring state border counties’ tax stamp revenues saw a proportional increase. Statewide, Rhode Island saw an increase of 29% in menthol cigarette sales and, because of the proximity between major population centers, New Hampshire’s statewide increase was nearly 90%.⁵ In other words, rather than decreasing availability of cigarettes, the market shifted so that cigarette volumes in the region stayed at trend, but there is now an increase in [reports](#) of new [criminal activity](#) in Massachusetts while the state loses excise tax revenue.

Looking back at the catastrophic failures of Prohibition in the 1920s, we know that illicit markets are caused by excessively restrictive public policies. When it comes to tobacco, the case is no different.

Recent calls to ban menthol cigarettes or flavored tobacco, which would criminalize the sale of products that make up over a third of all cigarettes, and as much as two-thirds of all cigars and smokeless tobacco, would have the same effect.

While regulatory enforcement can be effective as to people and businesses operating within the legitimate supply chain — using, for example, the warning letters mentioned in the FDA Illicit Trade Paper — that same type of enforcement is completely ineffective against criminal enterprises.

⁴ National Academies of Sciences, Engineering, and Medicine. 2015. Understanding the U.S. Illicit Tobacco Market: Characteristics, Policy Context, and Lessons from International Experiences. Washington, DC: The National Academies Press. Date Accessed: 06/23/2022. [Source]

⁵ NECSEMA Speaks Out on Massachusetts’ ‘Increasingly Absurd’ Flavored Tobacco Ban. Date Published: 01/14/2021. Date Accessed: 06/29/2022. [Source]