

April 26, 2021

**LETTER OF CONCERN FROM OVER TWO DOZEN JUSTICE,
LAW ENFORCEMENT, LEGAL, DRUG POLICY,
AND DIRECTLY IMPACTED ORGANIZATIONS**

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SE
Washington, DC 20201

The Honorable Janet Woodcock
Acting Commissioner
U.S. Food and Drug Administration

Cc: Cedric Richmond, Special Advisor to the President and
Director, White House Office on Public Engagement
Members of the Congressional Black Caucus
Members of the Senate Judiciary Committee
Members of the House Judiciary Committee

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

The undersigned organizations write to express our deep concerns over reports that the U.S. Food and Drug Administration (FDA) may be contemplating regulations to prohibit menthol cigarettes. While no doubt well-intentioned, these proposals raise the same concerns a number of organizations expressed last year with respect to H.R. 2339, the Reversing the Youth Tobacco Epidemic Act of 2019.¹ Policies that amount to prohibition for adults will have serious racial justice implications. Such a ban will trigger criminal penalties, which will disproportionately impact people of color, as well as prioritize criminalization over public health and harm reduction. A ban will also lead to unconstitutional policing and other negative interactions with local law enforcement.

¹ https://www.aclu.org/sites/default/files/field_document/h.r._2339_letter_of_concern_final_2-27.pdf

Since the murder of George Floyd, the racially disparate impact of the criminal legal system has captured the nation's attention. Yet police killings persist. As the public's eyes were on the trial of Derek Chauvin, the officer who killed George Floyd, Daunte Wright was killed by police a scarce 10 miles away and Ma'khia Bryant, only 16 years old, was gunned down by police in Columbus, OH. A number of police encounters resulting in tragic deaths are linked to police enforcement of tobacco laws: Eric Garner, killed by a police chokehold, was illegally selling "loosie" cigarettes, and Michael Brown was killed after being suspected of stealing a box of cigarillos. Even in the case of George Floyd, police were called to investigate a counterfeit bill used to purchase cigarettes. Indeed, the New York Police Department's (NYPD) stop and frisk program resulted in nearly 700,000 stops in 2011, with the vast majority being innocent Black and Latinx people.²

For these reasons, well-intentioned efforts to continue to reduce death and disease from tobacco products must *avoid* solutions that will create yet another reason for armed police to engage citizens on the street based on pretext or conduct that does not pose a threat to public safety. Of adults, approximately 80 percent of Blacks and 35 percent of Latinx who choose to smoke prefer menthol cigarettes.³ Banning menthol cigarettes risks massive setbacks to our criminal justice system at precisely the moment we should be advancing reform. If menthol cigarettes are banned, their sale and distribution would be a crime punishable as a felony under federal criminal statutes.⁴

At this very moment, Congress is debating how and when to discontinue cannabis prohibition and sanction legal, regulated adult sale, in order to reverse the human catastrophe of decades of criminalization. Criminal justice reform is a huge driver in this debate, as Black people are incarcerated at nearly six times the rate of White people, and our prison population is 67 percent Black and Latinx. Policymakers like the FDA should be careful not to make the mistake of moving tobacco products in the *opposite* direction – *from* legal regulated adult sale *to* prohibition.

And yet that is precisely the issue this ban raises. A menthol cigarette ban would disproportionately impact communities of color, result in criminalization of the market, and exacerbate mass incarceration. It also risks creating large underground, illegal markets. In addition, underground cigarette sales would be a massive law enforcement problem for states, counties, and cities, since all states treat unlicensed sale of tobacco products as a crime – usually as a felony punishable by imprisonment. In the end, tobacco policy will no longer be the responsibility of regulators regulating, but police policing. Our experience with alcohol, opioid, and cannabis prohibition teaches us that that is a policy disaster waiting to happen, with Black and other communities of color bearing the brunt.

There is a better approach that avoids criminalization. We strongly support the FDA and other policymakers continuing with harm reduction policies emphasizing education for adults and minors, cessation, well-funded health care for communities of color, and other measures

² <https://www.nyclu.org/en/press-releases/nyclu-releases-report-analyzing-nypd-stop-and-frisk-data>

³ Centers for Disease Control and Prevention, Smoking & Tobacco Use: Menthol and Cigarettes, https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html.

⁴ 18 U.S.C. 2344; 15 U.S.C. 375-378.

that push tobacco use down without putting criminal justice reform at risk. Decades of policies like these have produced enormous gains. Cigarette consumption is the lowest today in a generation. Underage cigarette use is down to 2.3% from 13% in 2002, and for adults it's down to 17.5% from 25.2% in 2002.⁵ Underage cigarette use among African American kids is down to 1.1%, and for Latino kids 1.7%.⁶ We agree with those who want to see even more progress in addressing the health needs of communities of color and support policies that would achieve those goals without threatening the progress we have begun in making criminal justice reform a reality.

Thank you for your attention to these critical concerns. For more information please contact Aamra Ahmad, aahmad@aclu.org or Kyle O'Dowd, kyle@nacdl.org.

Sincerely,

A Little Piece of Light

American Civil Liberties Union

The Black Police Experience

CAN-DO Foundation

Center for Employment Opportunities

College and Community Fellowship

CURE (Citizens United for the Rehabilitation of Errants)

Due Process Institute

Drug Policy Alliance

Law Enforcement Action Partnership

Legal Action Center

Life for Pot

Mommie Activist and Sons

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

⁵ National Survey on Drug Use and Health, 2019 data, <https://www.samhsa.gov/data/report/2019-nsduh-detailed-tables>.

⁶ NSDUH, 2018 data.

National Health Care for the Homeless Council

The Sentencing Project

Southern Center for Human Rights

StopTheDrugWar.org

Students for a Sensible Drug Policy

The Taifa Group

Urban Survivors Union

WE GOT US NOW