



ACLU



**We are
the Drug
Policy
Alliance.**



Thursday, February 27, 2020

The Honorable Frank Pallone
Chairman, House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: Coalition Concerns with Blanket Prohibition on Menthol and Other Flavored Tobacco within H.R. 2339, Reversing the Youth Tobacco Epidemic Act

The undersigned civil rights and civil liberties organizations write to express concerns with a broad prohibition on menthol and other flavored tobacco products within H.R. 2339, the Reversing the Youth Tobacco Epidemic Act of 2019. While this legislation is a well-intended effort to address health issues associated with tobacco use among youth, we have concerns that a blanket prohibition on menthol and other flavored tobacco products, which will apply to adults, will (1) disproportionately impact people and communities of color; (2) trigger criminal penalties, prioritizing criminalization over public health and harm reduction; and (3) instigate unconstitutional policing and other negative interactions with local law enforcement.

I. H.R. 2339 Disproportionately Impacts People and Communities of Color

Of adults, approximately 80 percent of Blacks and 35 percent of Latinx who choose to smoke prefer menthol cigarettes.¹ Thus, any ban on menthol cigarettes will disproportionately affect people of color. While H.R. 2339 and similar legislation are often motivated by the desire to decrease and eliminate smoking among certain populations, Blacks and other people of color should not disproportionately bear the brunt of enforcement of such prohibitions, which a menthol ban would ensure.

¹ 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 (last visited Aug. 1, 2019).

Similarly, enforcement of a ban on flavored cigars will also disproportionately impact people of color given cigar preferences. Black adults are 60% of cigarillo and non-premium cigar smokers, with these products often flavored.² Additionally, at Committee markup, H.R. 2339 was amended to exempt certain traditional, expensive cigars from a prohibition of online tobacco sales.³ There is no justification for differentiating a La Palina from a Black and Mild. Making this distinction undermines the public health arguments made for this bill and suggests that some tobacco preferences, within certain communities, will be prioritized and protected over others.

II. H.R. 2339 Increases Criminal Penalties Over Public Health

H.R. 2339 prohibits menthol and other flavored tobacco products under the Food, Drug, and Cosmetic Act (FD&C Act). This prohibition criminalizes the manufacturing, importing, distributing, or selling of menthol and other flavored tobacco products under the FD&C Act, imposing up to three years of imprisonment.⁴ Violating a menthol and flavored tobacco ban would implicate other federal criminal penalties as well. For example, the Federal Cigarette Contraband Trafficking Act would be implicated, allowing up to five years of imprisonment.⁵

With a criminal legal system that incarcerates Blacks at nearly six times the rate of white Americans and a prison population that is 67 percent Black and Latinx,⁶ any prohibition on menthol and flavored tobacco products promises continued over-criminalization and mass incarceration of people of color. A ban on menthol and flavored tobacco products could reintroduce many of the harms imposed by the failed war on drugs as lawmakers work to legalize cannabis and take a public health approach to opioids. A bill criminalizing tobacco is contrary to those efforts. Righting the wrongs of earlier failed drug policy requires consideration of the unintended consequences of well-intentioned policies, especially on the most vulnerable communities. It also requires us to remember that harm reduction, including education and counseling, are what work to reduce usage and harm in our society, not prohibition.⁷

² Catherine G. Corey MSP, et. al., *US Adult Cigar Smoking Patterns, Purchasing Behaviors, and Reasons for Use According to Cigar Type: Findings From the Population Assessment of Tobacco and Health (PATH) Study, 2013–2014*, 20 NICOTINE TOBACCO RESEARCH 1457, Sep. 15, 2017, <https://academic.oup.com/ntr/article/20/12/1457/4159211?searchresult=1>.

³ Protecting American Lungs and Reversing the Youth Tobacco Epidemic Act of 2019, H.R. 2339, 116th Cong. Sec. 108 “Exemption from premarket approval of certain tobacco products,” (2019).

⁴ 21 U.S.C. § 333 (2017).

⁵ Federal Cigarette Contraband Trafficking Act, 18 U.S.C. §§ 2341-2346 (2006).

⁶ THE SENTENCING PROJECT, CRIMINAL JUSTICE FACTS, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited Feb. 21, 2020).

⁷ See, Tim Lancaster & Lindsay F. Stead, *Individual behavioral counseling for smoking cessation*, Cochrane Systematic Review – Intervention (2017) (examining the positive effect of individually-delivered counselling on attempts to quit smoking); Centers for Disease Control and Prevention, Smoking & Tobacco Use: Quitting Smoking, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/index.htm (last visited Feb. 21, 2020) (highlighting counselling and medication as primary effective methods to quit smoking).

III. H.R. 2339 Encourages Harmful Police Practices

Recent history shows us that drug prohibitions and bans increase negative interactions between law enforcement and people of color. The New York Police Department's (NYPD) stop and frisk program resulted in nearly 700,000 stops in 2011, with drugs serving as the alleged pretext for most of those stops.⁸ Ninety percent of those stops were of Black and Latinx people.⁹ We are concerned that law enforcement's attempts to enforce a menthol and flavored tobacco ban will undoubtedly lead to fines, arrests, and eventual incarceration for those who continue to use and sell menthol and flavored tobacco products. While the legislation was amended at Committee to try to minimize law enforcement practices here, it only applies in the context of federal enforcement of the FD&C Act; it does not govern local enforcement around any state and city prohibition policies that will follow.

The death of Eric Garner in 2014 generated national attention not only for the brutality he experienced at the hands of NYPD police, but for the reason that led to the encounter with law enforcement. Mr. Garner died from an illegal chokehold having been stopped by police for selling single cigarettes in violation of state law. Gwendolyn Carr, Eric Garner's mother, cautions: "When you ban a product sold mostly in Black communities, you must consider the reality of what will happen to that very same over-represented community in the criminal justice system."¹⁰ With a federal prohibition on menthol and flavored tobacco products, states will develop their own prohibition and enforcement policies that could result in harmful police practices like that witnessed with Mr. Garner.

Based on our concerns, we urge you to not impose a blanket ban on menthol and related tobacco products. A prohibition on all menthol and flavored tobacco products will not achieve a public health goal of reducing smoking among Black people, young people, or others. We hope we can work together to avoid repetitions of policies that are intended to protect youth and communities of color, but instead only further engrain systemic criminalization and racism.

⁸ NYCLU, STOP AND FRISK DATA, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Feb. 21, 2020).

⁹ Id.

¹⁰ Roz Edward, *Mothers of Trayvon Martin, Eric Garner join fight against menthol cigarettes*, CHI. DEFENDER (Oct. 18, 2019), <https://chicagodefender.com/mothers-of-trayvon-martin-eric-garner-join-fight-against-menthol-cigarettes/>.

To follow up, please be in touch with Kyra Stephenson-Valley of the National Action Network at kvalley@nationalactionnetwork.net or Kanya Bennett at the American Civil Liberties Union at kbennett@aclu.org.

Sincerely,

American Civil Liberties Union
Center for Popular Democracy
Drug Policy Alliance
Friends Committee on National Legislation
Law Enforcement Action Partnership
National Action Network
National Association of Criminal Defense Lawyers

cc: The Honorable Nancy Pelosi, Speaker, U.S. House of Representatives
The Honorable Steny Hoyer, Majority Leader, U.S. House of Representatives
The Honorable James E. Clyburn, Majority Whip, U.S. House of Representatives
The Honorable Karen Bass, Chair, Congressional Black Caucus
The Honorable Joaquin Castro, Chair, Congressional Hispanic Caucus
The Honorable Mark Pocan, Chair, Congressional Progressive Caucus
The Honorable Pramila Jayapal, Congressional Progressive Caucus