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June 30, 2022

Center for Tobacco
U.S. Food and Drug Administration
10903 New Hampshire Ave
Silver Spring, MD 20993

Re: Tobacco Product Standard for Menthol in Cigarettes

Docket No: FDA-2021-N-1349

RIN: 0910-A160

Dear Dr. Califf:

The Competitive Enterprise Institute (CEI) welcomes the opportunity to offer comments on the Food and Drug Administration's (FDA) proposed ban on menthol as a characterizing flavor in cigarettes. As a non-partisan, non-profit public policy organization, CEI has a long history of research and advocacy on consumer issues with an emphasis on advocating for evidence-based policies based on objective analyses of intended, as well as unintended, effects on public health and consumer welfare.

The evidence is unambiguous that smoking combustible cigarettes is a dangerous habit that can cause serious harm to individuals' health over the long term. We share the FDA's desire to reduce the prevalence of smoking, as well as an interest in addressing longstanding health disparities in smoking and smoking-related health outcomes. But we share the concerns raised by civil rights and criminal justice advocates that approaching these public health goals with criminal law—as with the war on drugs—will fail to help smokers in the most vulnerable populations and exacerbate racial discrimination in the criminal justice and health care systems.¹

Based on our review of the available evidence, we fear that the proposal will neither substantially reduce smoking nor reduce racial health disparities, as expected. Moreover, we believe that the FDA's assessment that the proposal will not have a significant impact on illicit tobacco markets—based on its understanding of the drivers of the current illicit tobacco trade in the U.S.—fails to account for the transformation in demand and supply likely to result from this proposal and from other policy changes proposed or already implemented at both the federal and state level.

While the FDA's belief that some smokers will quit smoking as a result of eliminating menthol as a characterizing flavor in cigarettes may be correct, we project that it will lead to a lower quit rate than anticipated, as a greater portion of smokers switch to equally harmful non-mentholated cigarettes and many opt to purchase both menthol and non-menthol cigarettes from illicit suppliers, spurring a larger,

¹ American Civil Liberties Union, Statement on FDA Menthol Ban, April 28, 2021, <https://www.aclu.org/press-releases/aclu-statement-fda-menthol-cigarette-ban>.

more profitable, and more accessible illicit tobacco market that, ironically, will facilitate youth access to combustible tobacco products, lead to more over-policing of minority communities, worsen racial health disparities, and increase economic inequities.

Background: While there is mixed evidence that menthol flavoring may play a role in the initiation and sustainment of smoking behaviors, there is no credible evidence that mentholated cigarettes are more harmful than non-mentholated ones. In fact, some evidence finds that menthol smokers have lower risks for mortality from lung cancer (though this is likely due to menthol smokers tending to consumer fewer cigarettes on average).²

Furthermore, no credible evidence suggests that mentholated cigarettes are more addictive or harder to quit, with studies finding similar cessation rates among menthol and non-menthol smokers, regardless of ethnicity.³ For example, a study of over 16,000 low-income black and white adult smokers found that the odds ratio of quitting menthol cigarettes—adjusted for race, age, education, income, and smoking history—was 1.01 among black smokers and 1.02 among white smokers.⁴

While smoking remains a serious public health issue, particularly among certain groups, the overall smoking rates for among adults, at 12.5 percent, and youth, at 1.5 percent, are lower than ever, and there is little indication that the continued availability of menthol cigarettes has meaningfully impacted smoking rates among the general population, youth, or racial minorities. As noted in the FDA’s proposed rule, menthol cigarette use is disproportionately higher among youth smokers than among older smoking cohorts. Still, menthol smoking among youth smokers is lower than non-menthol cigarette smoking (with 60 percent of high school smokers and 65 percent of middle school smokers reportedly smoking non-mentholated cigarettes).⁵ Furthermore, while menthol smoking among youth may be proportionally higher compared to adult populations, the prevalence of smoking overall remains significantly lower in younger than in older cohorts, which suggests that menthol cigarettes have little effect on smoking prevalence.⁶

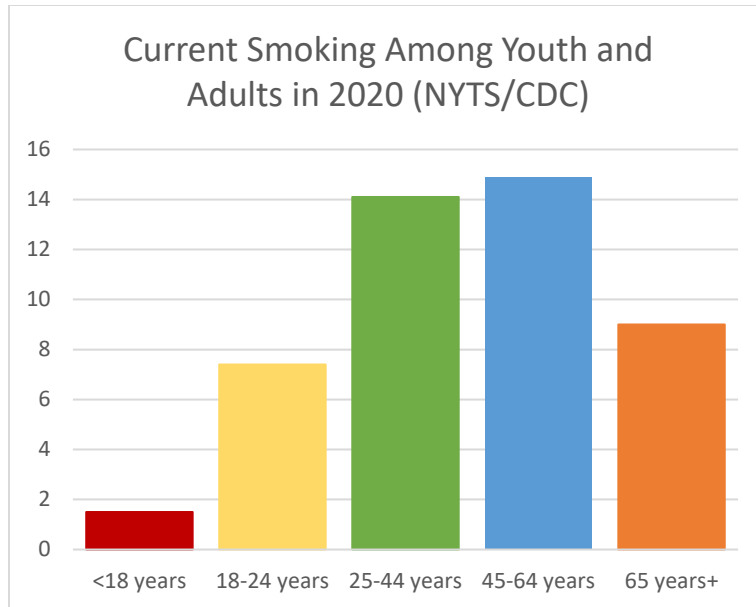
² William J Blot, Sara S Cohen, Melinda Aldrich, et al. “Lung Cancer Risk Among Smokers of Menthol Cigarettes,” *Journal of the National Cancer Institute*, Vol. 103, Issue 10 (May 18, 2011), pp. 810-816, <https://academic.oup.com/jnci/article/103/10/810/2516529>. Brian Rostron, “Lung Cancer Mortality Risk for U.S. Menthol Cigarette Smokers,” *Nicotine & Tobacco Research*, Vol. 104, No. 10 (October 2012), pp. 1140–1144, <https://academic.oup.com/ntr/article/14/10/1140/1749051>.

³ Allison C Hoffman and Donna Miceli, “Menthol cigarettes and smoking cessation behavior.” *Tobacco Induced Disease*, May 23, 2011, <https://tobaccoinduceddiseases.biomedcentral.com/articles/10.1186/1617-9625-9-S1-S6>.

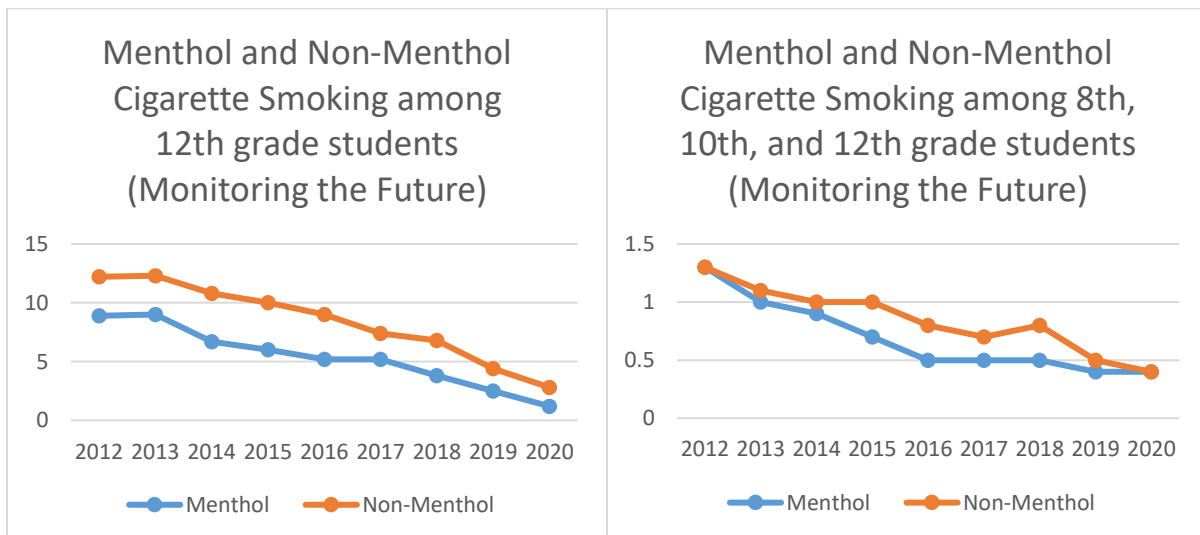
⁴ Heather M. Munro, Martha J. Shrubsole, Wei Zheng, et al. “Smoking Quit Rates Among Menthol vs Non-Menthol Smokers: Implications Regarding a US Ban on the Sale of Menthol Cigarettes,” *Journal of the National Cancer Institute*, April 21, 2022, <https://pubmed.ncbi.nlm.nih.gov/35445262>.

⁵ Andrea S Gentzke, Teresa W Wang, Monica Cornelius, et al., “Tobacco Product Use and Associated Factors Among Middle and High School Students — National Youth Tobacco Survey, United States, 2021,” *Morbidity and Mortality Weekly Report (MMWR)*, Vol. 1, No. 5 (March 11, 2022), 1–29, <https://www.cdc.gov/mmwr/volumes/71/ss/ss7105a1.htm>.

⁶ Gary A Giovino, Andrea C Villanti, Paul D Mowery, et al. “Differential trends in cigarette smoking in the USA: is menthol slowing progress?” *Tobacco Control*, January 2015, <https://pubmed.ncbi.nlm.nih.gov/23997070>.



Similarly, some researchers and anti-tobacco activists have suggested that menthol cigarettes are a driving factor of racial health disparities related to smoking because, as the FDA notes, menthol cigarette use is disproportionately high among black adult smokers compared to the general population. However, the prevalence of smoking among black adults is functionally no different from the prevalence among white adults (14.4 percent versus 13.3 percent).⁷ Again, as with youth, this suggests that menthol cigarette use is not a major factor driving smoking prevalence.



Intended and Unintended Effects: In its rulemaking materials, the FDA asserts that its proposed rule on menthol cigarettes would avert up to 654,000 smoking-attributable deaths by 2060 due to declines in smoking initiation and increases in smoking cessation among menthol smokers “if menthol cigarettes

⁷ Centers for Disease Control and Prevention, “Current Cigarette Smoking Among Adults in the United States,” https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.

were no longer available.” However, as we have seen from the U.S. experience with drug and tobacco prohibitions, criminalizing the sale of substances for which demand remains high does not result in such substances being unavailable for those who want them. To the contrary, the higher price consumers are willing to pay for formerly legal substances can attract illicit suppliers into the market, perversely making access to such substances easier, particularly for minors who were previously blocked from purchasing such substances in a legal, regulated market.

Furthermore, the FDA’s estimate of life-years saved as a result of the menthol ban rely primarily on models presented by Levy et al., which as the authors themselves make clear, are limited by the assumptions used in the models.⁸ Specifically, the models are based on the current composition of the legal market for nicotine and tobacco products, current consumption patterns, and expert opinions about likely changes in consumer behavior in response to a menthol cigarette ban. However, we believe these predictions about future market and consumer behavior are inaccurate for two reasons:

- 1) The market for both legal and illicit tobacco, though previously relatively stable, will shift dramatically in response to product bans as consumers will likely shift to the illicit market for both tobacco products.
- 2) The market for cigarette alternatives, such as e-cigarettes, will continue to change dramatically in response to product bans.

The legal market for nicotine and tobacco products has become increasingly dynamic in recent years as non-combustible nicotine products rise and fall in popularity, are legalized, or prohibited. This market is likely to continue evolving dramatically as states, the U.S. government, and foreign governments implement new rules. Additionally, though the illicit tobacco market in the U.S. has remained relatively stable, that is likely to change in the wake of significant federal policy changes, such as a menthol ban and a move to reduce the nicotine concentration in tobacco cigarettes to non-addictive or near-non-addictive levels.

Predicted behavioral response to a menthol cigarette ban among current and would-be menthol smokers Levy et al.			
Initiate/switch to:	Non-smokers who would have become menthol smokers, ages 18-24	Current menthol smokers, ages 18-24	Current menthol smokers, ages 35-54
Non-menthol cigarette use	38.3%	48.0%	59.1%
Illicit menthol cigarette use	2.40%	10.1%	8.8%
Nicotine vapor product use	17.3%	24.2%	17.3%
No cigarette or nicotine vapor product use	42.0%	17.7%	14.7%

⁸ David T Levy, Rafael Meza, Zhe Yuan, et al. “Public health impact of a US ban on menthol in cigarettes and cigars: a simulation study.” *Tobacco Control*. September 2, 2021, <https://tobaccocontrol.bmj.com/content/early/2022/04/13/tobaccocontrol-2021-056604>.

First, the reduction in life-years lost that Levy et al. project from a menthol cigarette ban arises in part from the belief that many current and future “menthol smokers would be especially likely to switch to menthol [nicotine vapor products.]” In fact, the substitution of high-risk combustible menthol cigarettes for lower-risk menthol-flavored nicotine vapor products (NVPs) accounts for approximately half of the benefits Levy et al. estimate from a menthol cigarette ban. But menthol smokers’ interest in and ability to switch to lower-risk nicotine products as a substitute for combustible menthol cigarettes depends largely on the availability and acceptability of such products in the marketplace. Given that the FDA has yet to approve a single menthol-flavored e-cigarette (and has indicated it may never do so), consumer access to menthol-flavored NVPs will continue to decline. Therefore, it is likely that many current and future menthol smokers who Levy et al. predict would switch to menthol-flavored NVPs in response to a menthol cigarette ban will do something else, with an unknown impact on rates of combustible smoking, smoking cessation, and use of illicit market products.

Second, although Levy et al. do incorporate estimates about the impact a menthol cigarette ban would have on illicit tobacco sales, these estimates stem from experts’ beliefs about consumer behavior in relation to *current* illicit market conditions. They do not predict menthol smokers’ behavior in the presence of a larger and more accessible illicit tobacco market. Based on economic logic, a larger and more accessible illicit market for menthol cigarettes seems a highly likely outcome.

Under current market conditions, Levy et al. predict that upwards of 10 percent of current menthol smokers would turn to illicit sources in the wake of a menthol cigarette ban. Given the relative ease of converting legal, non-menthol cigarettes into contraband mentholated cigarettes, illicit suppliers would have little difficulty in meeting this growing demand. Furthermore, in the wake of a menthol ban, illicit sellers could charge a higher price for menthols than consumers currently pay for legal menthol cigarettes. That would make the illicit tobacco trade significantly more profitable than it is currently.

Traditionally, illicit tobacco sales in the U.S. have been driven by domestic bootlegging, with small-scale operators purchasing legal cigarettes in low-tax jurisdictions and transporting them for sale in higher-tax jurisdictions.⁹ Under this model, profits for illicit tobacco sellers are marginal, as the prices charged by illicit sellers must remain lower than the cost of legal cigarettes in high-tax jurisdictions. However, when products become illegal, illicit sellers can charge higher prices than products cost when they were legal, making such schemes significantly more profitable, and therefore more attractive to greater numbers of illicit and more sophisticated operators into the market.

As experience has shown, larger and more visible illicit tobacco sales increase the perceived acceptability of illicit tobacco markets in communities where they occur.¹⁰ And, given that illicit tobacco markets are frequently concentrated in low and primarily minority communities, such an outcome could significantly impact the projected effects of a menthol cigarette ban on public health and health disparities.

⁹ Understanding the U.S. Illicit Tobacco Market: Characteristics, Policy Context, and Lessons from International Experiences, National Academies Press, 2015, <https://nap.nationalacademies.org/read/19016/chapter/4#34>.

¹⁰ Donna Shelley, M. Jennifer Cantrell, Joyce Moon-Howard, et al. “The \$5 Man: The Underground Economic Response to a Large Cigarette Tax Increase in New York City,” *American Journal of Public Health*, Vol. 97, No. 8 (August 2007), pp. 1483–1488, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1931477>.

Effects of a menthol cigarette ban on smoking behavior: In assessing the likely effects of a menthol cigarette ban on consumer behavior, the FDA cites several studies conducted in countries, states, and cities that have banned menthol or other flavored-tobacco products. However, several of the studies cited, such as Gammon et al. rely exclusively on sales data, which cannot fully assess the impact of substitution, illicit sales, or cross-border sales, and therefore do not accurately reflect potential behavioral changes in response to the city's ban on flavored tobacco products.¹¹

In fact, studies that include survey data of smoking behavior pre- and post-ban show increased combustible cigarette sales in the wake of bans on menthol or other tobacco flavors. This includes Yang et al., which, as the FDA states, shows a reduction in *overall* tobacco product use following San Francisco's ban on flavored tobacco.¹² However, this same study indicates that that reduction was driven largely by decreases in the use of lower-risk NVPs and shows significant increases in combustible cigarette smoking, both menthol and non-menthol, particularly among young adults. Prior to the ban, Yang et al. show that 27.4 percent of adults reported any cigarette use, while after the ban 37.1 percent in this group reported smoking combustible cigarettes. Among those aged 18 to 24, Yang et al. show that 14.5 percent reported smoking menthol cigarettes prior to the ban, while this percentage increased to 19.4 percent after the ban.

The FDA claims that statewide sales of cigarettes declined in Massachusetts following its June 2020 ban on flavored tobacco, including menthol cigarettes, citing Asare et al.¹³ However, other studies of the regional effects of Massachusetts's flavored tobacco find that, while sales did decrease in Massachusetts, they *increased* in neighboring states, indicating that cigarette consumption did not decline in Massachusetts after the flavor ban, but rather that sales were simply diverted to neighboring states.¹⁴

Similarly, the FDA cites several studies examining the effects of flavored tobacco bans in Canadian provinces to project potential consumer responses to such a ban in the U.S. Among those cited is a study by Carpenter and Nguyen, which, according to the FDA, "found that provincial menthol sales restrictions were associated with decreases in menthol cigarette smoking."¹⁵ That is true, but the authors also found that when they supplemented their analysis of sales data with survey data about self-reported smoking behaviors in youth and adults, they "do not find that provincial menthol bans had any significant effects on population rates of cigarette smoking or quit behaviors for either youths or adults," with decreases in menthol cigarette sales and use offset by youth switching to non-menthol cigarettes and adults

¹¹ Gammon, D.G., T. Rogers, J. Gaber, et al. "Implementation of a Comprehensive Flavoured Tobacco Product Sales Restriction and Retail Tobacco Sales," *Tobacco Control*, 2021, <https://pubmed.ncbi.nlm.nih.gov/34088881/>.

¹² Yong Yang, Eric N Lindblom, Ramzi G Salloum, Kenneth D Ward, "The impact of a comprehensive tobacco product flavor ban in San Francisco among young adults," *Addictive Behaviors Reports*, June 2020, <https://pubmed.ncbi.nlm.nih.gov/32368612/>.

¹³ Asare S., M.A., J.L. Westmaas, et al. "Association of Cigarette Sales with Comprehensive Menthol Flavor Ban in Massachusetts," *JAMA Internal Medicine*, Vol. 182, No. 2 (2022), pp.231-234, <https://pubmed.ncbi.nlm.nih.gov/34982100/>.

¹⁴ Ulrik Boesen, "Massachusetts Flavored Tobacco Ban: No Impact on New England Sales," *Tax Foundation*, February 3, 2022. <https://taxfoundation.org/massachusetts-flavored-tobacco-ban-sales-jama-study/#:~:text=The%20study%20found%2C%20not%20surprisingly,than%20in%20the%20control%20states.>

¹⁵ Christopher Carpenter, Hai V Nguyen, "Intended and Unintended Effects of banning Menthol Cigarettes," *National Bureau of Economic Research*, February 2020, https://www.nber.org/system/files/working_papers/w26811/w26811.pdf.

purchasing menthol cigarettes from First Nations reservations, where menthol bans do not apply. While the FDA asserts that this finding is “inconsistent with the authors’ supplemental analysis that found decreases in menthol cigarette sales and no effect on non-menthol cigarette sales post-implementation,” that apparent inconsistency is more likely due to the limitations of official sales data, which may not capture changes in other sources of cigarette acquisition, such as illicit and contraband cigarettes.

The FDA also cites evidence from Canada’s experience with a menthol cigarette ban to support its expectation that such a ban in the U.S. would promote smoking cessation attempts and success rates. This is likely an inapt comparison, as menthol cigarette use is substantially less prevalent in Canada than the United States—5 percent compared to 30 percent. Because of this lower demand for menthol cigarettes and the ability to continue purchasing menthol cigarettes through First Nations reservations, the demand for illicit menthol cigarettes does not appear to have been great enough to significantly increase illicit supply. Therefore, the stability in illicit tobacco sales observed in Canada after its nationwide menthol cigarette ban went into effect is unlikely to be replicated in the U.S.

Moreover, unlike in Canada, the menthol cigarette ban proposed for the U.S. would not exempt Native American reservations or flavored accessories. While the FDA suggests that this will increase the likelihood of a menthol ban having its intended effect, we propose that this will have the opposite effect. Because a much greater proportion of the U.S. population prefers menthols and, in the wake of the FDA’s proposal, would not be able to acquire menthol cigarettes from alternative sources like Native American reservations, the demand for illicitly supplied menthol cigarettes would be far greater in the U.S. than in Canada.

This higher demand, coupled with the relative ease by which illicit cigarette manufacturers can convert non-mentholated cigarettes into mentholated ones, makes it highly likely that illicit suppliers will be both motivated to, and capable of, meeting demand for illicit menthol cigarettes after the implementation of a national sales ban. Menthol cigarettes would remain more widely available in the U.S. than in Canada, which could diminish the predicted effects of the ban on smoking cessation.

In countries where menthol cigarette use is similar to U.S. rates, studies of the effects of national menthol cigarette bans on smoking behaviors have found mixed results. In Poland, for example, menthol cigarettes comprise approximately 28 percent of all cigarette sales (with 22 percent of current Polish smokers self-reporting menthol cigarette use.)¹⁶ That is similar to the U.S., where menthol cigarette sales comprise 37 percent of total cigarette sales and about 40 percent of smokers report smoking menthol cigarettes.¹⁷ In their study of Polish smoking behaviors after the implementation of a European Union-wide ban on menthol cigarette sales, Liber et al. found no significant change in cigarette sales

¹⁶ Alex C Liber, Michal Stoklosa, David T Levy, et al., “An analysis of cigarette sales during Poland’s menthol cigarette sales ban: small effects with large policy implications,” *European Journal of Public Health*, June 9, 2022, <https://academic.oup.com/eurpub/advance-article/doi/10.1093/eurpub/ckac063/6605008>.

¹⁷ Centers for Disease Control and Prevention, “Menthol and Cigarettes,” accessed visited June 13, 2022, https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html.

Liane M Schneller, Maansi Bansal-Travers, Martin C Mahoney, et al., “Menthol Cigarettes and Smoking Cessation among Adult Smokers in the US,” *American Journal of Health Behavior*, Vol. 44, No. 2 (March 1, 2020), pp. 252–256, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8143026>.

attributable to the ban. However, when stratified by region, Liber et al. did find that areas with higher menthol pre-ban consumption had significant reductions in total cigarettes after the ban.¹⁸

The results observed by Liber et al. in Poland could suggest that a similar ban on menthol cigarette sales in the U.S. would be particularly effective among black adult smokers, among whom menthol cigarette use is higher than in the general population. However, the results from Poland are likely not applicable to the U.S. population due to differences in the characteristics of the two populations. As Liber et al. note, menthol smokers in Poland tend to be more highly educated and wealthier than non-menthol smokers, unlike in the U.S. where menthol smokers tend to be less educated and have lower income—characteristics that are also associated with lower odds of smoking cessation attempts and successful quitting.¹⁹ Therefore, a ban on menthol cigarette sales in the U.S. is likely to be even less successful than it was in Poland.²⁰

Impact on illicit tobacco sales: The FDA states that the proposed rule would not have a significant impact on the illicit market, based on observations in countries that have banned menthol cigarettes, U.S. states that have implemented bans on flavored tobacco products, and projections about how the existing illicit tobacco supply chains in the U.S. might respond to a nationwide menthol cigarette ban. However, as noted, studies of other countries' experiences with menthol cigarette bans are limited by differences in the characteristics of smokers, menthol smokers, and levels of demand for menthol cigarettes. Furthermore, we believe that the FDA's assessment ignores the potential role of domestically produced tobacco and manufactured cigarettes and severely underestimates the resourcefulness of illicit supply chains to respond to increasing demand.

Compared to other types of trafficking—such as for narcotics, human, and weapons—cigarette smuggling is a low-risk criminal activity, with less chance of detection and less harsh penalties. In an effort to diversify income sources, drug cartels have already begun expanding into the illicit tobacco trade.²¹ That trend is likely to continue as nations around the world impose stricter laws on cigarette sales and higher tobacco taxes, increasing demand for illicitly-supplied tobacco products and, as a result, increasing the profitability of illicit tobacco sales. Given the size of the U.S. menthol cigarette market, estimated at \$17 billion in revenue each year, it is highly likely that existing illicit tobacco suppliers and other criminal outfits attracted to the more profitable market will attempt to profit from this unmet demand.²²

¹⁸ Alex C Liber, Michal Stoklosa, David T Levy, et al., "An analysis of cigarette sales during Poland's menthol cigarette sales ban: small effects with large policy implications," *European Journal of Public Health*, June 9, 2022, <https://academic.oup.com/eurpub/advance-article/doi/10.1093/eurpub/ckac063/6605008>.

¹⁹ Jessica L Reid, David Hammond, Christian Boudreau, et al., "Socioeconomic disparities in quit intentions, quit attempts, and smoking abstinence among smokers in four western countries: Findings from the International Tobacco Control Four Country Survey," *Nicotine & Tobacco Research*, October 2010, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2948137>.

²⁰ Centers for Disease Control and Prevention, "Cigarette Smoking and Tobacco Use Among People of Low Socioeconomic Status," accessed June 29, 2022, <https://www.cdc.gov/tobacco/disparities/low-ses/index.htm>.

²¹ Peter Appleby, "Jalisco Cartel Cashing in on Mexico's Illegal Cigarette Market," *InSight Crime*, June 8, 2022, <https://insightcrime.org/news/jalisco-cartel-cashing-in-on-mexicos-illegal-cigarette-market>.

²² "Cigarette & Tobacco Manufacturing in the US – Market Size 2005–2028," Ibis World, <https://www.ibisworld.com/industry-statistics/market-size/cigarette-tobacco-manufacturing-united-states/>.

In addition to its impact on tax revenue collection, crime, and national security, an increase in the illicit tobacco trade also has implications for the public health effects of tobacco policies.²³ Currently, illegal cigarette sales tend to be concentrated in lower-income and minority communities, contraband cigarettes tend to be lower-priced than their legal equivalents, and illicit dealers have little incentive to comply with age restrictions and prohibitions on single-cigarette sales.²⁴ Should a menthol cigarette ban lead to a larger or more accessible illicit tobacco market, it may have the unintended effect of making non-mentholated cigarettes more available and affordable for the very populations the policy intends to help: minors and people of color. Thus, while a ban on menthol cigarettes may result in decreased consumption of menthol cigarettes as the FDA predicts, the consumption of non-mentholated cigarettes, legal and illicit, may increase to a significantly higher degree than the FDA predicts.

Because the U.S.-based illicit tobacco market operates primarily by smuggling cigarettes from lower-tax states into higher-tax jurisdictions, some—including the FDA—assume that a national ban on menthol cigarette sales would make it harder for illicit cigarette dealers to find supplies, resulting in fewer illicit sales compared to regional bans. However, as seen from trafficking in other nationally prohibited substances, such as narcotics, a federal ban is unlikely to prove a significant hurdle to international illicit supply chains.

Moreover, while the current illicit tobacco market is predicated on offering customers lower-priced cigarettes, the return on investment from illicit tobacco sales is relatively small. A national ban on menthol cigarettes, however, could allow illicit tobacco dealers to charge higher prices for contraband menthol cigarettes. As such, while the ban might increase transaction costs for suppliers attempting to transport tobacco across national borders, it would also increase the profitability of doing so successfully, potentially attracting more sophisticated drug trafficking outfits—with already established supply chains—to enter the market for illicit tobacco.

Furthermore, the FDA does not account for the impact of domestic production of menthol cigarettes. Unlike the production of non-menthol cigarettes, which requires growing tobacco and rolling it into cigarettes on a mass scale, the production of illicit menthol cigarettes would be significantly less burdensome. To produce illicit menthol cigarettes, producers need only to have access to raw tobacco or non-menthol cigarettes, which they can then convert into menthol by adding menthol to raw tobacco

²³ “FBI: Cigarette-Smugglers Funded Terrorism,” ABC News, July 22, 2000, <https://abcnews.go.com/US/story?id=96402&page=1>. U.S. Department of State, “The Global Illicit Trade in Tobacco: A Threat to National Security,” December 2015, <https://2009-2017.state.gov/documents/organization/250513.pdf>.

²⁴ Klaus von Lampe, Marin Kurti, and Jacqueline Johnson, “I’m gonna get me a loosie” Understanding single cigarette purchases by adult smokers in a disadvantaged section of New York City,” *Preventive Medicine Reports*, Vol. 12 (December 2018), pp. 182-185, <https://www.sciencedirect.com/science/article/pii/S2211335518302195>. Sheila Dutta, ed., “Confronting Illicit Tobacco Trade: A Global Review of Country Experiences,” Technical report of the world bank group global tobacco control program, January 18, 2019, <https://documents1.worldbank.org/curated/en/677451548260528135/pdf/133959-REPL-PUBLIC-6-2-2019-19-59-24-WBGTobaccollicitTradeFINALvweb.pdf>.

or menthol accessories to rolled tobacco cigarettes, such as flavored filters, capsules, sprays, and other devices already gaining popularity in countries where menthol cigarettes are banned.²⁵

Effects on social justice: While it is possible that the proposed menthol ban would result in measurable smoking reductions among certain populations, we believe that the FDA has not fully weighed the societal cost of pursuing this well-intentioned public health goal through criminal enforcement policies. In particular, we are concerned that enforcement efforts, particularly in the event of increased illicit activity, will have the unintended effect of exacerbating economic, social, and criminal justice disparities.

Contraband cigarettes already make up a significant portion of the cigarettes consumed by American smokers. That is particularly true in states with higher tobacco taxes, like New York, where an estimated half consumed cigarettes are contraband, and in lower-income neighborhoods, such as in the South Bronx, where contraband cigarettes make up an estimated 80 percent of cigarette sales, with Newport cigarettes comprising over 80 percent of contraband cigarettes sold.²⁶

In an attempt to address concerns about the social justice implications of outlawing menthol cigarette sales, the FDA announced its intent not to enforce the ban on individual consumers and target enforcement only at operators of illicit tobacco sales. However, that disregards the fact that illicit market operators are mostly people who use those illicit products.²⁷ It also disregards that the FDA has little control over how state and local authorities will enforce the law.

The sale and distribution of contraband cigarettes is a felony under federal law, as well as state law in 44 states. 37 states make the punishment for such crimes subject to mandatory minimum prison sentences.²⁸ Additionally, 36 states, plus the District of Columbia, treat the mere possession of contraband cigarettes as a crime.²⁹ Outlawing menthol cigarettes and subsequent efforts by local authorities to enforce the law will result in more negative and potentially violent interactions between law enforcement and citizens. We have already observed such incidence arising from tobacco law enforcement around the country, such as the death of Eric Garner in New York, the tasing of young

²⁵ Katherine A East, Jessica L Reid, Robin Burkhalter, et al, "Evaluating the Outcomes of the Menthol Cigarette Ban in England by Comparing Menthol Cigarette Smoking Among Youth in England, Canada, and the US, 2018-2020," *Jama Network Open*, Vol. 5, No. 5 (2022), <https://jamanetwork.com/journals/jamanetworkopen/article-abstract/2791805>.

²⁶ Ulrik Boesen, "Cigarette Taxes and Cigarette Smuggling by State, 2018," *Tax Foundation*, November 24, 2020, <https://taxfoundation.org/cigarette-taxes-cigarette-smuggling-2020>. von Lampe, Kurti, and Johnson, "I'm gonna get me a loosie."

²⁷ Bruce D Johnson, "Patterns of Drug Distribution: Implications and Issues," *Substance Use and Misuse*, 2003; 38 (11-13), pp. 1789-1806. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1975811>.

²⁸ 18 U.S.C. 2344; 15 U.S.C. 375-378.

Jillian Snider, "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," R Street Institute, April 5, 2022, <https://www.rstreet.org/2022/04/05/bipartisan-agreement-that-over-criminalizingtobaccowill-disproportionately-impact-people-and-communities-of-colortrigger-criminal-penalties-and-lead-to-negative-interactions-with-law-enforcement>.

²⁹ Guy Bentley, "A ban on menthol cigarettes would hurt communities of color and undermine criminal justice reforms," *Reason*, April 14, 2022, <https://reason.org/commentary/a-ban-on-menthol-cigarettes-would-hurt-communities-of-color-and-undermine-criminal-justice-reforms>.

men in Maryland and Georgia, and numerous other cases.³⁰ That is a major reason that groups like the National Association of Black Law Enforcement Officers, National Association of Blacks in Criminal Justice, the National Association of Criminal Defense Lawyers, and a coalition of mothers whose black children have been killed by police have spoken out in opposition to outlawing menthol cigarette sales.³¹

The size of the illicit tobacco market has already led to calls for authorities to crack down on the activity.³² Suggestions on how authorities can tamp down on illicit tobacco sales, provided by health groups, include expanding definitions of illegal tobacco activity subject to state prosecution and penalties, reducing requirements to trigger violations, assigning additional enforcement agents looking for illegal sales, steeper fines for violators, jail or prison sentences for those participating in large smuggling efforts or who are guilty of repeatedly violating states' anti-smuggling or tax-avoidance laws, and the seizure of property suspected of being used in connection with cigarette smuggling.³³

It is unclear how effective such policies are in reducing illicit sales. What is clear is that these punitive approaches fall disproportionately on minority communities.³⁴ As illicit tobacco sales are concentrated in lower-income and minority communities, assigning more police to look for such activity would mean more over-policing in those communities. It would also increase opportunities for potentially violent interactions between people of color and authorities, more arrests, and more incarceration.

As a result, the quest to enforce a menthol cigarette ban would likely exacerbate the economic, social justice, and criminal justice disparities our country is just now beginning to address. We urge the FDA to consider more thoroughly whether the small, but likely overestimated decreases in smoking it predicts a

³⁰ Jacob Sullum, "It Wasn't Just a Chokehold That Killed Eric Garner," *Reason*, August 21, 2019, <https://reason.com/2019/08/21/it-wasnt-just-a-chokehold-that-killed-eric-garner>.

Andrew Boryga, "Black Teens Tased, Knead by Cops for Boardwalk Vaping: 'Glad We Made It Out Alive'," *Daily Beast*, June 14, 2021, <https://www.thedailybeast.com/black-teens-tased-knead-by-maryland-cops-after-vaping-on-ocean-city-boardwalk>.

Liset Cruz, "Taser used to detain teen vaping at Atlanta skate park, cops say," *The Atlanta Journal-Constitution*, March 28, 2022, <https://www.ajc.com/news/crime/taser-used-on-teen-at-atlanta-skate-park-after-police-target-alleged-vaping/YSVEZ6BSDRHJLIRYAHXF7GRQ4A>.

Antonio Ray Harvey, "Blunt Trauma: Cop Beats Black Teen Over Cigar, Sparking Outrage and Familiar Swisher Sweet Debate," *Los Angeles Sentinel*, May 7, 2020, <https://lasentinel.net/blunt-trauma-cop-beats-black-teen-over-cigar-sparking-outrage-and-familiar-swisher-sweet-debate.html>.

³¹ Ayanna Alexander, "Black Cops Fear Menthol Ban Will Bring Heavy Police Crackdown," *Bloomberg Law*, April 30, 2021, <https://news.bloomberglaw.com/social-justice/black-cops-fear-menthol-ban-will-bring-heavy-police-crackdown>.

Roz Edward, "Mothers of Trayvon Martin, Eric Garner join fight against menthol cigarettes," *Chicago Defender*, October 18, 2019, <https://chicagodefender.com/mothers-of-trayvon-martin-eric-garner-join-fight-against-menthol-cigarettes/>.

³² John Marzulli, Rocco Parascandola, and Thomas Tracy, "NYPD No. 3's order to crack down on selling loose cigarettes led to chokehold death of Eric Garner," *New York Daily News*, August 7, 2014, <https://www.nydailynews.com/new-york/nyc-crime/wife-man-filmed-chokehold-arrested-article-1.1893790>.

³³ Campaign for Tobacco-Free Kids, "State Options to Prevent and Reduce Cigarette Smuggling and Block Other Illegal Sate Tobacco Tax Evasion," accessed June 29, 2022, <https://www.tobaccofreekids.org/assets/factsheets/0274.pdf>.

³⁴ American Civil Liberties Union of New Jersey, "ACLU-NJ Report Reveals Abuse and Overuse of Civil Asset Forfeiture in New Jersey," news release, December 11, 2018, <https://www.aclu-nj.org/en/press-releases/aclu-nj-report-reveals-abuse-and-overuse-civil-asset-forfeiture-new-jersey>.

menthol cigarette ban will accomplish justify the harms such a prohibition will inevitably produce, particularly for the people and groups it claims to want to help most.

Conclusion: Based on the evidence we have analyzed, we estimate far lower reductions in smoking initiation and lower rates of smoking cessation as a result of the proposed rule than those envisioned by the FDA.

Just as importantly, we estimate a far higher non-compliance rate, with a significant portion of the current and future menthol smoking population turning to the illicit supply chain. In addition to the criminal and social justice implications arising from attempts to enforce the proposed standard, we fear that increasing the size and accessibility of illicit tobacco sales will have the perverse effect of increasing youth access to combustible tobacco products. Under such conditions, the effects of the proposed ban would be significantly more harmful than beneficial to public health.

In light of this, we urge the FDA to pursue public health approaches, rather than criminal policies, aimed at discouraging combustible cigarette smoking or encouraging smokers to switch to less harmful alternatives. These may include increasing access to FDA-approved smoking cessation products or encouraging smokers to switch to lower risk non-combustible substitutes, such as e-cigarettes, snus, and heated tobacco. That will require for the FDA to drastically alter its current course on non-combustible nicotine products, by approving a wider array of products and flavors that smokers might switch to, including menthol. This harm-reduction approach, rather than one focused on criminal penalties, would more likely help reduce the harmful health consequences of smoking, address racial health disparities, and avoid exacerbating criminal justice disparities as happened with the war on drugs.

Sincerely,

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