



July 27, 2022

RE: Docket No. FDA-2021-N-1349 for “Tobacco Product Standard for Menthol in Cigarettes”

To Whom It May Concern:

The Sentencing Project respectfully submits comments on the proposed Tobacco Product Standard for Menthol in Cigarettes. The Sentencing Project is a research and advocacy organization that advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice.

We oppose the proposed FDA ban on menthol cigarettes because it is a continuation and deepening of the War on Drugs. The War on Drugs demonstrates the failures of criminalization as a public health response: over fifty years after the War on Drugs began overdoses have reached an all-time high.¹ Criminalization does not halt substance use, it stigmatizes it, forces people into riskier patterns of use, compels individuals to rely on the illicit market for their supply, and raises the risk of exposure to contaminated or adulterated substances.²

A ban on menthol cigarettes would perpetuate the harms of the War on Drugs and deepen racial disparities in policing and contribute to the increased criminalization of communities of color. The profound individual and public health harms associated with racially disparate law enforcement and incarceration have the potential to outweigh any potential public health benefits of menthol cigarette prohibition. We urge the FDA to instead embrace a harm reduction approach.³

The FDA seeks to ban menthol cigarettes because they are preferred by Black individuals, with the goal of reducing racial health disparities. Black Americans smoke fewer cigarettes and tend to start at a later age than white Americans, but experience more adverse health consequences⁴ – a disparity that reflects factors beyond menthol cigarette usage, such as barriers to accessing healthcare and poverty.⁵

¹ N. Weiland and M. Sanger-Katz (2022), Overdose Deaths Continue Rising, With Fentanyl and Meth Key Culprits, New York Times, <https://www.nytimes.com/2022/05/11/us/politics/overdose-deaths-fentanyl-meth.html>.

² N. Volkow (2021), Punishing Drug Use Heightens the Stigma of Addiction, National Institute on Drug Abuse, <https://nida.nih.gov/about-nida/noras-blog/2021/08/punishing-drug-use-heightens-stigma-addiction>.

³ B. Rodu (2011), The scientific foundation for tobacco harm reduction, 2006-2011, <https://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-8-19>.

⁴ Center for Disease Control (2022), Unfair and Unjust Practices and Conditions Harm African American People and Drive Health Disparities, <https://www.cdc.gov/tobacco/health-equity/african-american/unfair-and-unjust.html>

⁵ Kaiser Family Foundation (2022), Disparities in Health and Health Care Among Black People, <https://www.kff.org/infographic/disparities-in-health-and-health-care-among-black-people/>.

An FDA ban would, in effect, criminalize the sale and distribution of menthol cigarettes under federal, state, and local laws, while failing to address the other drivers of disparate health outcomes. Instead Black individuals would bear the brunt of ensuing law enforcement interactions and sanctions, which themselves have a negative health impact.⁶

The potential human toll of increased policing in Black communities to enforce criminal laws banning the unlicensed sale of tobacco products, which would include all menthol cigarette sales under an FDA ban, is apparent. In 2014, the New York Police Department alone made 581 arrests for the sale of untaxed cigarettes, including “loosies.”⁷ One of those arrests was Eric Garner, who was killed by a police officer who placed him under arrest for selling loose cigarettes and fatally strangled him using a prohibited chokehold.⁸ A menthol cigarette ban only raises the risk of similar future police encounters and violence.

Black communities have long been exploited and targeted by the tobacco industry – from historic enslavement to aggressive marketing today. A menthol ban would do little to hold the tobacco industry accountable for that exploitation or to repair harm. Instead it would expose those victimized by the tobacco industry to the risk of criminalization. We urge the FDA to reconsider this proposed ban and instead develop a strategy to improve health outcomes for Black cigarette users rooted in harm reduction.

Sincerely,



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⁶ A. Fernandes (2019), How Far Up the River? Criminal Justice Contact and Health Outcomes, <https://journals.sagepub.com/doi/10.1177/2329496519870216>; A. Binswanger et al (2009), Prevalence of chronic medical conditions among jail and prison inmates in the USA compared with the general population, <https://pubmed.ncbi.nlm.nih.gov/19648129/>.

⁷ R. Parascandola (2019), NYPD arrests for untaxed cigarettes down sharply since Garner’s chokehold death, New York Daily News, <https://www.nydailynews.com/new-york/nyc-crime/ny-garner-chokehold-cigarettes-arrests-20190915-6jvfdpltzvb7xpa3jft55bm2m-story.html>.

⁸ C. Francescani (2015), Loose Cigarette Arrests in NYC Drop in Year After Eric Garner’s Death, Wall Street Journal, <https://www.wsj.com/articles/loose-cigarette-arrests-in-nyc-drop-in-year-after-eric-garners-death-1436992014>.