



January 16, 2024

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

The Honorable Shalanda Young
Director
Office of Management & Budget
Eisenhower Executive Office Building
725 17th Street, NW
Washington, D.C. 20503

Dear President Biden and Director Young:

The undersigned Attorneys General write to you as the chief legal officers of our respective states and territories to respectfully request that the White House Office of Management and Budget (“OMB”) act quickly to finalize its review of the Food and Drug Administration’s (“FDA’s”) proposed rules to prohibit menthol as a characterizing flavor in cigarettes and prohibit all characterizing flavors, other than tobacco, in cigars (“Rule”).¹

Our offices have worked for decades to protect consumers from deceptive practices, including achieving groundbreaking settlements in 1998 against the tobacco industry for lying to the American people about the addictiveness of nicotine and deadliness of using tobacco products.² Since then, many of our offices have partnered with our respective state taxing and public health agencies to prevent smoking initiation, reverse addiction, and counter the tobacco industry’s hold on our vulnerable communities. In doing so, we have gained significant expertise in enforcing tobacco laws and regulations.

¹ Tobacco Product Management for Menthol in Cigarettes, 87 Fed. Reg. 26,454 (proposed May 4, 2022) & Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26,396 (proposed May 4, 2022).

² The Master Settlement Agreement (1998), <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/>.

I. Swift Action to Ban Menthol is Needed to Save Lives and Prevent Disease

The NAACP has called on the FDA to ban menthol-flavored cigarettes and flavored cigar products, stating, “[t]he failure to prohibit the sale of menthol cigarettes and products would be discriminatory and counter the goal and function of the FDA to protect and promote public health for all, including the African-American community.”³ The Rule is also supported by members of the Congressional Black Caucus, the African American Tobacco Control Leadership Council, 100 Black Men of America, Inc., the U.S. Conference of Mayors, over 300 faith leaders, and other Black civil rights groups from across the country.⁴ In addition, numerous public health organizations, including the Campaign for Tobacco-Free Kids, the Truth Initiative, the American Heart Association, the American Lung Association, and the American Cancer Society, have rallied behind the proposed menthol ban.⁵ We join their call for action and urge the OMB to finalize its review of the Rule without delay.

Tobacco companies add menthol to cigarettes and little cigars to make them seem less harsh and more appealing to youth and to people who have never smoked.⁶ Due to the tobacco industry’s long and relentless campaign of targeted marketing, youth, women, LGBTQ+ individuals, low-income persons, and racial and ethnic minorities are more likely than other groups to start smoking and become addicted to tobacco.⁷

These deadly products disproportionately harm Black Americans. Researchers found that in 2020, approximately 81% of non-Hispanic Black adults who currently smoked cigarettes used menthol cigarettes, compared to 34% of non-Hispanic White adults.⁸ Studies also show that

³ Letter from Derrick Johnson, President & CEO, NAACP, to Sec. Xavier Becerra, Dep’t Health & Human Servs. & Amb. Susan Rice, Dir. U.S. Domestic Policy Council (Apr. 20, 2022), <https://naacp.org/articles/naacp-writes-letter-urging-fda-ban-menthol-flavored-cigarettes-and-flavored-cigar-products>.

⁴ Letter from Congressional Black Caucus Health Braintrust to Dr. Robert M. Califf, Comm’r, FDA (July 31, 2023), <https://robinkelly.house.gov/media-center/press-releases/rep-kelly-leads-letter-support-menthol-cigarette-ban>; Press Release, 100 Black Men of America Approves Resolution in Favor of Ending Sales of Menthol Cigarettes and Other Flavored Tobacco Products (June 26, 2023), https://www.tobaccofreekids.org/press-releases/2023_06_26_100-black-men-of-america-menthol-flavored-ban-resolution; U.S. Conf. of Mayors, 2023 Adopted Resolutions (2023), https://legacy.usmayors.org/resolutions/91st_Conference/proposed-review-list-full-print-committee-individual.asp?resid=a0F4N00000S4up3UAB; Letter to Pres. Joseph R. Biden (Oct. 31, 2023), https://assets.tobaccofreekids.org/content/press_office/2023/2023_10_31_faith-leaders-letter-to-white-house.pdf; and Letter to Sec. Xavier Becerra, Dep’t Health & Human Servs. (Apr. 14, 2021), https://assets.tobaccofreekids.org/content/what_we_do/federal_issues/fda/regulatory/2021_04_14-aa-group-letter-becerra-menthol.pdf.

⁵ Press Release, Leading national groups voice “full support” for prohibiting menthol cigarettes and all flavored cigars (Nov. 5, 2023), <https://newsroom.heart.org/news/leading-national-groups-voice-full-support-for-prohibiting-menthol-cigarettes-and-all-flavored-cigars>.

⁶ Ctrs. for Disease Control & Prevention, “Menthol Tobacco Products,” (Aug. 23, 2023), https://www.cdc.gov/tobacco/basic_information/menthol/index.html.

⁷ *Id.*

⁸ Renee D. Goodwin et al., “Menthol Cigarette Use Among Adults Who Smoke Cigarettes, 2008–2020: Rapid Growth and Widening Inequities in the United States,” *Nicotine & Tobacco Research*, vol. 25(4), 692–698 (2023), <https://doi.org/10.1093/ntr/ntac214>; see also Ctrs. for Disease Control & Prevention, “Menthol Smoking and Related Health Disparities” (Nov. 2, 2023), https://www.cdc.gov/tobacco/basic_information/menthol/related-health-disparities.html.

over 93% of Black smokers initiated cigarette use with menthol cigarettes,⁹ and that Black female menthol smokers have the lowest quit rates among female smokers.¹⁰ In fact, “[t]he prevalence of menthol cigarette smoking is highest among [Blacks] across all socio-demographic and smoking-related categories, whether stratified by income, age, gender, marital status, region, education, age of initiation, and length of time smoking.”¹¹ Swift action may spare countless Americans from experiencing debilitating disease and early death stemming from the use of menthol tobacco products.¹²

II. Claims that a Menthol Ban Will Lead to Abusive Policing in Black Communities are Unfounded

Attorneys General take police misconduct very seriously and recognize concerns expressed by industry groups that a menthol ban could be used as a pretext to confront individuals possessing contraband menthol products. However, the proposed flavor bans do not criminalize individual purchase, possession, or use. The FDA emphasizes:

Importantly, the FDA cannot and will not enforce against individual consumers for possession or use of menthol cigarettes or flavored cigars. If these proposed rules are finalized and implemented, FDA enforcement will only address manufacturers, distributors, wholesalers, importers and retailers who manufacture, distribute, or sell such products within the U.S. that are not in compliance with applicable requirements. These proposed regulations do not include a prohibition on individual consumer possession or use.¹³

The FDA plainly states that federal authorities will not enforce the proposed menthol ban against individual consumers. In our role as Attorneys General, we are able to collaborate with federal, state, and local partners to educate policing authorities on the prosecutorial aspects of the Rule. In addition, our offices work alongside federal agencies to stem the flow of contraband tobacco products so that they do not fall into the hands of consumers. A national ban would likely reduce the distribution and sales of illegal tobacco products, thereby decreasing opportunities for law enforcement engagement.

⁹ Joanne D’Silva et al., “Differences in Subjective Experiences to First Use of Menthol and Nonmenthol Cigarettes in a National Sample of Young Adult Cigarette Smokers,” *Nicotine & Tobacco Research*, vol. 20(9), 1062–68 (2018), <http://dx.doi.org/10.1093/ntr/ntx181>.

¹⁰ Steven S. Smith et al., “Smoking cessation in smokers who smoke menthol and non-menthol cigarettes,” *Addiction*, vol. 109(12), 2107–17 (June 17, 2014), <https://pubmed.ncbi.nlm.nih.gov/24938369/>.

¹¹ Tobacco Prod. Sci. Comm., “Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations,” 36–37 (2011), http://www.njgasp.org/wp-content/uploads/2014/05/FDA_TPSAC_report_menthol_March_2011.pdf.

¹² It is estimated that menthol cigarettes resulted in a total of 3 million years of potential life lost from 1980 through 2018. See Thuy TT Le & David Mendez, “An Estimation of the Harm of Menthol Cigarettes in the United States from 1980 to 2018,” *Tobacco Control*, vol. 31(4), 564–68 (Feb. 25, 2021), <https://tobaccocontrol.bmj.com/content/31/4/564>; see also Ctrs. for Disease Control & Prevention, “Menthol Smoking and Related Health Disparities” (Nov. 2, 2023), https://www.cdc.gov/tobacco/basic_information/menthol/related-health-disparities.html.

¹³ FDA, Fact Sheet: Proposed product standards to prohibit menthol as a characterizing flavor in cigarettes and all characterizing flavors (other than tobacco) in cigars (Apr. 28, 2022), <https://www.fda.gov/media/158015/download>.

As this Administration recognizes, abusive policing requires a systemic response. The proper response, however, is not to cease enacting new laws, but rather to recognize the problem and educate, train, and hold accountable those that perpetuate the discrimination. To this end, the U.S. Department of Justice and many of our offices have taken direct steps to correct policing abuses and eliminate bias and discrimination in law enforcement.¹⁴ The tobacco industry's claims that a menthol ban will increase abusive policing is an attempt to mask the industry's decades of predatory marketing in vulnerable communities. If the industry is sincerely concerned about protecting Black and Brown lives, tobacco companies should cease manufacturing, marketing, and selling mentholated products. The real, quantifiable, and dramatic public health gains that will result from a nationwide menthol ban should not be stalled by the industry's inflammatory and unsubstantiated claims.

III. Claims that a Menthol Ban Will Significantly Increase Illicit Trade Are Unfounded

The Attorneys General do not anticipate that a significant increase in sales of illicit menthol tobacco products following a federal ban would be likely.¹⁵ There was little evidence of an increase in illegal sales after Congress banned flavored cigarettes (other than menthol) in 2009. Furthermore, over 150 state and local jurisdictions have already enacted bans on menthol cigarettes.¹⁶ Early assessments of Massachusetts' statewide flavored tobacco restrictions, which included menthol, found high retailer compliance, with sales of menthol and other flavored tobacco products decreasing sharply following implementation in June 2020.¹⁷ Sales of flavored products in bordering states remained consistent or temporarily increased for three months following the law's implementation.¹⁸

¹⁴ See, e.g., U.S. Dep't of Just., Nat'l Law Enf't Accountability Database, <https://www.justice.gov/olp/national-law-enforcement-accountability-database>; U.S. Dep't of Just., "Conduct of Law Enforcement," <https://www.justice.gov/crt/conduct-law-enforcement-agencies>; Cal. Dep't of Just., "Police Practices," <https://oag.ca.gov/civil/sections/policemis>; Ill. Gen. Assembly, "Public Act 101-0652," <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0652>; Commw. of Mass., "An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth," <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter253>; N.Y. State Att'y Gen., "Law Enforcement Misconduct Investigative Office," <https://ag.ny.gov/law-enforcement-misconduct-investigative-office>; see also "An Act Concerning Police Accountability," 2020 CT. P.A. 1, 2020 CT HB 6004, <https://www.cga.ct.gov/2020/BA/PDF/2020HB-06004-R00SS1-BA.PDF>; Penn. Att'y Gen., "AG Shapiro Accepts Accreditation for OAG & Statewide Agent Training Academy," <https://www.attorneygeneral.gov/taking-action/ag-shapiro-accepts-accreditation-for-oag-statewide-agent-training-academy/>.

¹⁵ Rather, "[a] menthol ban may actually decrease illicit trade." See Kevin R. J. Schroth et al., "Why an FDA Ban on Menthol Is Likely to Survive a Tobacco Industry Lawsuit," *Pub. Health Rep.*, vol. 134(3), 300–06 (Apr. 10, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6505334/>.

¹⁶ Campaign for Tobacco-Free Kids, "States & Localities That Have Restricted the Sale of Flavored Tobacco Products" (Nov. 30, 2023), <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.

¹⁷ Melody Kingsley et al., "Impact of Massachusetts' Statewide Sales Restriction on Flavored and Menthol Tobacco Products on Tobacco Sales in Massachusetts and Surrounding States, June 2020," *Am. J. of Pub. Health*, vol. 112(8), 1147–50 (2022), <https://pubmed.ncbi.nlm.nih.gov/35830660/>.

¹⁸ *Id.*

Canada adopted a national menthol ban in October 2017, following earlier bans in two provinces, Alberta and Nova Scotia.¹⁹ Researchers there found the nationwide ban has not promoted illicit trade in menthol cigarettes.²⁰ And research indicates that tobacco manufacturers largely complied with the prohibition on menthol cigarettes in Alberta and Nova Scotia.²¹ Similarly, Nova Scotia's tax data, after the implementation of a 2014 menthol ban, did not reveal evidence of increased seizures of menthol (as opposed to non-menthol cigarettes), suggesting that province's ban did not result in an illicit market of menthol cigarettes.²²

The implementation of a federal menthol ban, in combination with Canada's national ban, reduces the likelihood of illegal tobacco products entering our communities. Moreover, our offices have longstanding and collaborative working relationships with federal officials via the Prevent All Cigarette Trafficking Act²³ to detect and stop illicit trade. The Contraband Cigarette Trafficking Act²⁴ further imposes recordkeeping and reporting requirements and enables the Attorneys General to enforce strict penalties for violators. These robust enforcement mechanisms enable authorities to investigate and prosecute illicit trade, and to the extent that smuggled tobacco products are identified, our offices are well-equipped to work with appropriate federal officials to address it. The Attorneys General have confidence that these agency partnerships will deter illicit trade.

There is little evidence to support the industry's assertions that prohibiting menthol tobacco products would cause the emergence of a sizable illicit market, or that state and federal authorities would be unprepared to counter any illicit activity. We urge the OMB to disregard the tobacco industry's self-serving, doomsday predictions of increased illicit trade.

Conclusion

Protecting the public from dangerous products, including tobacco products prohibited by the FDA, is one of the utmost priorities for the Attorneys General. Compelling and consistent scientific evidence shows that removing menthol cigarettes from the U.S. market and prohibiting characterizing flavors in cigars are likely to reduce youth smoking initiation, improve smoking cessation outcomes in adult smokers, and advance health equity. The undersigned respectfully request that the OMB complete its review of the Rule. Swift action will save lives.

¹⁹ Gov't of Canada, "Order Amending the Schedule of the Tobacco Act (Menthol), P.C. 2017-256 March 24, 2017," vol. 151(7) (Apr. 5, 2017), <http://www.gazette.gc.ca/rp-pr/p2/2017/2017-04-05/html/sor-dors45-eng.php>; Jennifer Brown et al., "Tobacco industry response to menthol cigarette bans in Alberta and Nova Scotia, Canada," *Tobacco Control*, vol. 26, e71–e74 (2017), <https://doi.org/10.1136/tobaccocontrol-2016-053099>.

²⁰ Janet Chung-Hall et al., "Illicit cigarette purchasing after implementation of menthol cigarette bans in Canada: findings from the 2016-2018 ITC Four Country Smoking and Vaping Surveys," *Tobacco Control*, vol. 0, 1–4 (Jan. 6, 2023), <https://tobaccocontrol.bmj.com/content/early/2023/01/06/tc-2022-057697>.

²¹ Brown, *supra* note 19.

²² Michal Stoklosa, "No surge in illicit cigarettes after implementation of menthol ban in Nova Scotia," *Tobacco Control*, vol. 28(6), 702–04 (Oct. 11, 2018), <https://pubmed.ncbi.nlm.nih.gov/30309981/>.

²³ See 15 U.S.C. §§ 375–378 & 18 U.S.C. § 1716E.

²⁴ See 18 U.S.C. §§ 2341–2346.



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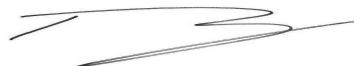
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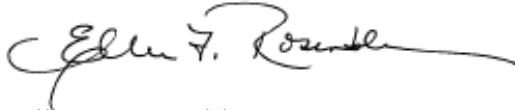
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