

June 28, 2021

The Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Chairman Mendelson and Councilmembers:

The undersigned civil rights, civil liberties, and free market organizations write to express our deep concerns regarding the Flavored Tobacco Product Prohibition Amendment Act of 2021 (B24-0020). Currently under consideration by the City Council, it would prohibit the sale and distribution of all “flavored” tobacco products.

While no doubt well-intentioned, this proposal raises serious concerns that many of the undersigned groups have previously expressed toward similar proposals.¹ Policies that amount to a prohibition for adults have serious implications for racial equity, in terms of both criminal and health justice. Such a ban will trigger law enforcement action, which disproportionately impacts people of color. Furthermore, by prioritizing criminalization over harm reduction and conflating all tobacco products—regardless of their relative risks and potential benefits—it may exacerbate longstanding health disparities in the District.

For these reasons, we urge you to reject the current proposal and seek an alternative means of protecting the health and welfare of District residents of all ages.

Eric Garner, who was killed by New York Police officers using excessive force, was initially approached for alleged selling “loosie” cigarettes. In 2020, a Rancho Cordova police officer was caught on video brutally beating 14-year-old Elijah Tufono for allegedly purchasing a Swisher cigar underage.² Just this month, four teenagers were beaten, tasered, and arrested for vaping in Ocean City, Maryland, after violating a ban on smoking or vaping on the boardwalk.³

While we understand the Council’s well-intentioned desire to discourage youth initiation of nicotine use and promote public health, this prohibitionist approach will serve as another point of law enforcement contact in over-policed communities.

Additionally, it is critical that such proposals weigh other unintended consequences that may cause harm to the health and welfare of D.C.’s residents, including pushing consumers toward illicit sources and discouraging harm reduction.

Congress and states across the nation are debating how to unravel the catastrophic prohibition on cannabis, by decriminalizing, legalizing, and regulating a cannabis market that protects the welfare of adult cannabis consumers, while also discouraging youth use. Recognition of the failure of cannabis prohibition and the incalculable harm it has caused to communities of color was a driving force behind D.C.’s 2014 Ballot Initiative legalizing the possession of cannabis.⁴

Yet, now the D.C. Council (along with many other cities and states) is rushing headlong in the opposite direction when it comes to recreational nicotine use.

Despite the good intentions behind it, a menthol cigarette ban would disproportionately impact smokers of color by criminalizing a product they prefer. Among adult smokers in the U.S., approximately 80 percent of Black and 35 percent of Latinx smokers choose menthol.⁵ This will lead to a massive illicit market for menthol cigarettes. For example, in New York City, where cigarettes are legal but heavily taxed, illegal cigarettes comprise over 60 percent of all cigarettes sold.⁶ Furthermore, these illicit markets are particularly pervasive in low-income and minority communities.⁷ In the wake of a ban on menthol cigarettes in the District, Black and Latinx smokers will either switch to non-mentholated cigarettes, with no meaningful benefit to their health, or pursue non-legal means of acquiring menthol cigarettes, potentially increasing their risks of contact with law enforcement or consumption of adulterated products.

Moreover, the proposed ban on flavored products will also likely result in significant decreases in revenue, more than estimated by the District's Office of the Chief Financial Officer. In Massachusetts, which banned flavored tobacco sales in June 2020, sales of cigarettes declined. However, because of the close proximity of other states, sales merely moved across the border. The same will likely occur in D.C., which is also close to neighboring states—but to an even greater extent because menthol cigarettes account for twice the share of total cigarette sales as in Massachusetts.⁸

To address some of the concerns about the proposal's impact on criminal justice, the prohibition would supposedly be enforced by the Department of Consumer and Regulatory Affairs and penalties would be limited to fines for violators. However, it will be up to the discretion of D.C. Police to enforce the city's statute prohibiting the transportation of untaxed cigarettes into the District—a violation punishable by fines and up to three years in prison.⁹

Perhaps more importantly, by lumping all tobacco products together, the D.C. Council's proposal ignores the evidence that non-combustible sources of nicotine, such as e-cigarettes, are not only significantly less harmful than combustible tobacco, but also highly effective for smoking cessation.¹⁰ It also ignores the research documenting the critical role that vapor flavors play in helping adult smokers switch to these less harmful alternatives and avoid relapsing back to smoking.¹¹ Already, White and high-income smokers are far more likely to switch to lower risk nicotine sources like e-cigarettes, while Black and Hispanic smokers are 73% and 74% less likely, respectively, to switch exclusively from smoking to e-cigarettes. Smokers living below the federal poverty line are 52% less likely to make the switch compared to those above.¹² Criminalizing flavored e-cigarettes for adults will only exacerbate these racial disparities.

As the District is currently seeking to do with the cannabis, and as it has already done with alcohol, there is a better way to regulate the recreational nicotine market than criminalization. We support laws that restrict adult products to certain licensees and limit minors' access to adult products. We also strongly support approaches that emphasize education on the harms of smoking, cessation options, well-funded health care for communities of color, and other

measures that can help to reduce rates of smoking without putting criminal justice reform and the welfare of people of color at risk.

These types of health-focused policies have proven effective in helping to reduce smoking in both youth and adults to historic lows. **Underage smoking is down to 2.3% (from 13% in 2002) and adult smoking is now 13.8% among adults (down from 22.5% in 2002).**¹³ Youth vaping, which has always been primarily restricted to experimentation, has also declined significantly in recent years.¹⁴ But disparities continue to exist and we support policies that would achieve even greater reductions in smoking and disease related to smoking.

This must be done without threatening the progress we have made toward criminal justice reform and without exacerbating racial disparities in health.

Sincerely,

Americans for Tax Reform

American Consumer
Institute

Claudia Jones School for
Political Education

Competitive Enterprise
Institute

Consumer Choice Center

DC Justice Lab

DC Marijuana Justice

DC Working Families

Drug Policy Alliance

Harriet's Wildest Dreams

HIPS

Life for Pot

Legal Action Center

Law Enforcement Action
Partnership

Mommieactivist and Sons

Progressive Policy Institute

Students for Sensible Drug
Policy

Taxpayers Protection
Alliance

National Association of
Black Law Enforcement
Officers, Inc.

National Association of
Blacks in Criminal Justice

The Black Police
Experience

The Taifa Group

Young Voices

Due Process Institute

¹ Letter of Concern from over from over two Dozen Justice and Directly Impacted Organizations, April 26, 2021, https://www.aclu.org/sites/default/files/field_document/04262127_organizational_final_letter_on_menthol_bans_2021.04.23.pdf. Coalition Concerns with Blanket Prohibition on Menthol and Other Flavored Tobacco within H.R. 2339, Reversing the Youth Tobacco Epidemic Act, February 27, 2020, https://www.aclu.org/sites/default/files/field_document/h.r._2339_letter_of_concern_final_2-27.pdf.

² Jeremy Stahl, "Police Department Defends Grown Man Beating 14-Year-Old over Tobacco Purchase," *Slate.com*, April 29, 2020, <https://slate.com/news-and-politics/2020/04/rancho-cordova-police-department-elijah-tufono-beating.html>.

³ Abigail Constantino, “Investigations urged into videos of Ocean City police using force over vaping ban,” *WTOP News*, June 14, 2021, <https://wtop.com/maryland/2021/06/investigation-urged-into-videos-of-ocean-city-police-using-force-over-vaping-ban>.

⁴ ACLU “Billions of Dollars Wasted on Racially Biased Arrests- Behind the DC Numbers,” 2021, <https://www.acludc.org/en/node/43111>.

⁵ Centers for Disease Control and Prevention, “Smoking & Tobacco Use: Menthol and Cigarettes,” May 18, 2020, https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html.

⁶ Jon Campbell, “Smuggled, Untaxed Cigarettes Are Everywhere in New York City,” *The Village Voice*, April 7, 2015, <https://www.villagevoice.com/2015/04/07/smuggled-untaxed-cigarettes-are-everywhere-in-new-york-city>.

⁷ Donna Shelley 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>.

⁸ Ulrik Boesen, “Banning Tobacco Flavors Could Prove Costly for D.C.,” *Tax Foundation*, June 15, 2020, <https://taxfoundation.org/dc-flavored-tobacco-ban>.

⁹ Code of the District of Columbia: § 47–2405. Transportation of cigarettes and other tobacco products. <https://code.dccouncil.us/dc/council/code/sections/47-2405.html>.

¹⁰ Brown University, “Pod e-cigarettes less harmful than regular cigarettes, new study finds,” news release, November 18, 2020, <https://www.brown.edu/news/2020-11-18/e-cigs>. “Updated Cochrane Review shows electronic cigarettes can help people quit smoking,” October 14, 2020, <https://www.cochrane.org/news/updated-cochrane-review-shows-electronic-cigarettes-can-help-people-quit-smoking#:~:text=Newly%20updated%20Cochrane%20evidence%20published,treatment%2C%20or%20electronic%20cigarettes%20without>.

¹¹ Shannon Gravely et al., “The Association of E-cigarette Flavors with Satisfaction, Enjoyment, and Trying to Quit or Stay Abstinent from Smoking among Regular Adult Vapers from Canada and the United States: Findings from the 2018 ITC Four Country Smoking and Vaping Survey,” *Nicotine & Tobacco Research*, Vol. 22, Issue 10 (October 2020), pp. 1831–1841, <https://academic.oup.com/ntr/article/22/10/1831/5843872>.

¹² Alyssa F Harlow, Andrew Stokes, and Daniel R Brooks, “Socioeconomic and Racial/Ethnic Differences in E-Cigarette Uptake Among Cigarette Smokers: Longitudinal Analysis of the Population Assessment of Tobacco and Health (PATH) Study” *Nicotine & Tobacco Research*, October 2019, <https://academic.oup.com/ntr/article-abstract/21/10/1385/5050238?redirectedFrom=fulltext>.

¹³ National Survey on Drug Use and Health, 2019 data, <https://www.samhsa.gov/data/report/2019-nsduh-detailed-tables>.

¹⁴ Centers for Disease Control and Prevention, “Youth e-cigarette use is down, but 3.6 million still use e-cigarettes,” September 9, 2020, <https://www.cdc.gov/media/releases/2020/p0909-youth-e-cigarette-use-down.html>.