



American Vaping Association | [www.vaping.org](http://www.vaping.org)

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February 10, 2021

**RE: HB 134, banning flavors in tobacco products and vaping products**

Chair Davis, Vice-Chair Dumais, and members of the House Economic Matters Committee:

On behalf of the American Vaping Association, a nonprofit organization that advocates for sensible regulation of vaping products (otherwise known as electronic cigarettes), I am writing to urge the committee to reject House Bill 134. If enacted, this bill would ban the sale of vaping products in flavors other than tobacco and menthol, while leaving cigars, hookah tobacco, alcohol, and other flavored adult substances freely available on the market. If enacted, this bill would block the sale of all vaping products and other smoke-free nicotine products in flavors other than tobacco, even if the product receives authorization from the Food & Drug Administration.

Prohibition is a failed public policy and members of the Maryland General Assembly do not need to look far to see the consequences of broad prohibitions. A flavored tobacco and nicotine product ban was put into place in Massachusetts approximately one year ago. Nearly every dollar of excise tax revenue that Massachusetts lost has been made up in neighboring states like New Hampshire. There remains no evidence that this policy has translated into any significant decreases in usage in youth or adults.

There are sound public health reasons for rejecting this new prohibition as well. Maryland still has approximately 600,000 adult smokers. Many of them have tried and failed to quit smoking numerous times in the past; some have plain given up on trying to quit. These adults deserve the freedom to access appealing products that are safer than cigarettes and have been shown to be effective in helping even inveterate smokers completely replace their smoking habit.

**Contrary to the emotional rhetoric of anti-vaping activists, the importance of flavors to adult smokers has been demonstrated.**

Last year, researchers from the Yale School of Public Health published a study of 17,929 people between the ages of 12 to 54 years old. The study found that: (1) adults using flavors were more than twice as likely to quit smoking successfully as those using tobacco-flavored products; and (2) young people who used flavored vaping products were not more likely to subsequently smoke than those using tobacco-flavored product.<sup>1</sup> A second study by Yale researchers concluded that banning flavors in vaping products would result in increases in cigarette smoking.<sup>2</sup>

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<sup>1</sup> Friedman AS, Xu S. "Associations of Flavored e-Cigarette Uptake With Subsequent Smoking Initiation and Cessation." JAMA Netw Open. 2020;3(6):e203826. doi:10.1001/jamanetworkopen.2020.3826

<sup>2</sup> John Buckell, Joachim Marti, and Jody L. Sindelar, "Should Flavors Be Banned in E-Cigarettes? Evidence on Adult Smokers and Recent Quitters from a Discrete Choice Experiment." National Bureau of Economic Research. September 2017. <http://www.nber.org/papers/w23865.pdf>.

**Significant legislative and regulatory action on vaping products has occurred at the federal level. Even more is coming.**

The Food & Drug Administration has regulated vaping products since August 2016. In that time, it has conducted tens of thousands of retail compliance checks, forced the removal of non-menthol and non-tobacco closed pod systems (i.e., JUUL) from the market pending authorization, gone after companies selling products with labeling that may appeal to youth, and seized illegal disposable vaping products coming in from overseas.

Most significantly, as of September 9, 2020, the FDA now requires that manufacturers of nicotine-containing vaping products submit each of their products to a retroactive premarket review process. Right now, the FDA is reviewing applications from hundreds of different manufacturers. The agency must assess each product under a population-level health standard that considers potential impacts on users and non-users of the product, including youth. **A PMTA will not be authorized by the FDA unless the agency believes it will benefit population-level public health.** Regardless of a product's particular flavor, if an application is denied by the FDA, any manufacturer or retailer continuing to sell it will be in violation of federal law.

Furthermore, Congress recently passed a bill adding vaping products to the federal Prevent All Cigarette Trafficking Act of 2009 (PACT Act). This law strictly regulates the sale of vaping products through the internet and mail and imposes stiff penalties on those who violate the law. Beginning at the end of March, any retailer shipping products to Connecticut will have to register with the state, collect and remit Connecticut excise taxes, and ship the product using a non-USPS delivery service that checks the recipient's proof of age at delivery.

**This is a complicated subject and simplistic policy solutions like prohibition will only serve to create illicit markets and decrease product safety.**

We share the goal of decreasing youth vaping and Maryland's vape businesses and vapers want to be a part of the solution. However, punishing adults by making it harder for them to quit smoking is not the answer. Maryland should vigorously enforce and strengthen its Tobacco 21 law, but legislators should be careful before it enacts policies that will have long-lasting impacts on public health and small businesses.

Sincerely,



Gregory Conley, J.D., M.B.A.  
President, American Vaping Association



# THE OHIO STATE UNIVERSITY

## COLLEGE OF PUBLIC HEALTH

### Knee-jerk vaping bans will fail public health, experts argue

Evidence supports e-cigarettes as a harm-reduction tool

Bans and other policies restricting e-cigarette sales could do more public harm than good, according to a group of public-health, tobacco-policy and ethics experts.

In a piece published online today (Dec. 12, 2019) in the journal [\*Science\*](#), the authors, including three public health deans, caution that blanket policies developed in a rush to address two different concerns come with dangerous downsides – most notably the risk of taking away a powerful tool to help smokers quit.



“Illnesses and deaths, which appear to be related to vaping illicit THC oils, have caused justifiable alarm as has the rise of young people who are vaping nicotine. But in our response we must not lump together these troubling developments and fail to consider the powerful evidence supporting the availability of legal nicotine products,” said lead author [Amy Fairchild, dean of The Ohio State University College of Public Health](#).

In *Science*, she and her co-authors write that “Restricting access and appeal among less harmful vaping products out of an abundance of caution while leaving deadly combustible products on the market does not protect public health. It threatens to derail a trend that could hasten the demise of cigarettes, poised to take a billion lives this century.”

The paper comes after the emergence this year of vaping-related lung injuries and deaths throughout the U.S. The Centers for Disease Control and Prevention has reported 2,291 cases of serious lung injury and 48 deaths as of last week. Authorities have identified vitamin E acetate, a THC-product additive, as a “chemical of concern” and said that many of the products appear to have been acquired through informal sources – not from retail establishments selling

products directly from known manufacturers. THC, or Tetrahydrocannabinol, is the primary psychoactive component of marijuana.

Many policymakers and organizations including the American Medical Association have called for an across-the-board ban on vaping, and some municipalities and states have moved to ban either all vaping products or those with flavors other than tobacco flavoring, including menthol.

Fairchild said that vaping policy discussions and debates should include an examination of the immediate crisis in the context of all of the scientific evidence regarding the risks and benefits.

“There are important distinctions to be made between nicotine and THC products, between products manufactured by reputable companies and those sold on the black market, and between the potential risks and benefits to adolescents and to adults,” she said.

Drawing comparisons to initial reluctance to offer needle exchange programs that promote safety by preventing life-threatening infections for people who aren’t ready to quit heroin, the authors write that evidence about harm reduction should outweigh emotional responses.

“We should be careful to remain aware of the unintended consequences of extreme measures and the important lessons that harm reduction has provided us in areas such as heroin use, HIV prevention and alcohol control,” said co-author [Cheryl G. Heaton, dean of New York University’s College of Global Public Health.](#)

The authors point to research showing that not only vaping – but flavored products, in particular – can help adult smokers quit and provide a more effective and appealing option than nicotine replacement therapy.

They urge continued efforts to better understand the risks and benefits of vaping and call for regulatory measures that strike a balance between “making regulated nicotine vaping products available to smokers while adopting forceful measures to limit the risks to and use by youth as much as possible.”

Among their suggestions to combat youth use: Implementation and enforcement of laws that restrict purchases to those 21 and older and prohibitions against predatory marketing to children and teens.

They call for the U.S. Food and Drug Administration to implement a product monitoring system and for a surveillance system to detect unanticipated harm early.

Regulatory bans on the menthol front should start with cigarettes and inexpensive little cigars, not with nicotine vape products, they argue.

“Despite two FDA-derived reports that recommended a ban on menthol in combustibles, there has been policy paralysis in the face of appalling evidence,” they write, citing statistics showing that more than half of young people and more than 90 percent of African-American youth start smoking with menthol.

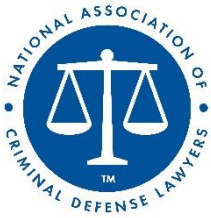
Fairchild and her co-authors stress that they take the illnesses and deaths due to vaping seriously but emphasize that each day more than 2,500 U.S. teens start smoking and about 1,300 adults die due to cigarettes. Taking vaping – including flavored products – away as a smoking-cessation and harm-reduction tool now will amount to a public health failure, they argue.

“It is crucial to identify the source of serious lung injuries and closely monitor and regulate the vaping industry – including how it markets its products to young people,” said co-author [James Curran, dean of the Rollins School of Public Health at Emory University.](#)

“But the evidence so far supports continuing to allow nicotine vaping as a harm-reduction alternative to smoking, which remains the largest preventable cause of death and disability in our country.”

Other authors of the paper were [Ronald Bayer of Columbia University](#) and [David Abrams of NYU.](#)

“Restricting access and appeal among less harmful vaping products out of an abundance of caution while leaving deadly combustible products on the market...threatens to derail a trend that could hasten the demise of cigarettes, poised to take a billion lives this century.”



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.<sup>1</sup> 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.

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<sup>1</sup> 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](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.<sup>2</sup> Additionally, at Committee markup, H.R. 2339 was amended to exempt certain traditional, expensive cigars from a prohibition of online tobacco sales.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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,<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> 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>.

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

<sup>4</sup> 21 U.S.C. § 333 (2017).

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

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

<sup>7</sup> 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](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.<sup>8</sup> Ninety percent of those stops were of Black and Latinx people.<sup>9</sup> 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."<sup>10</sup> 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.

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

<sup>9</sup> Id.

<sup>10</sup> 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](mailto:kvalley@nationalactionnetwork.net) or Kanya Bennett at the American Civil Liberties Union at [kbennett@aclu.org](mailto: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



BUSINESS

# Smoking's Long Decline Is Over

Slide in cigarette sales stopped last year amid Covid-19 lockdowns and health concerns about e-cigarettes

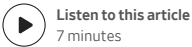


U.S. cigarette sales last year topped those of 2015, when many consumers switched back to cigarettes after trying first-generation vaping devices.

PHOTO: PAUL WEAVER/ZUMA PRESS

By [Jennifer Maloney](#)

Updated Jan. 28, 2021 10:58 am ET



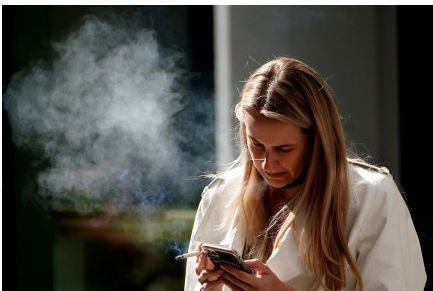
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The decadeslong decline in U.S. cigarette sales halted last year as people in lockdown lit up more frequently and health concerns around e-cigarettes caused some vapers to switch back to cigarettes.

Before the pandemic, U.S. cigarette unit sales had been falling at an accelerating rate, hitting 5.5% in 2019, as smokers quit or switched to alternatives like e-cigarettes. The pandemic put the brakes on that slide. In 2020, the U.S. cigarette industry's unit sales were flat compared to the previous year, according to data released Thursday by Marlboro maker Altria Group Inc.

People had more opportunities to smoke because they spent more time at home and had more money to spend on cigarettes because they spent less on gas, travel and entertainment, Altria said. They drank more liquor, too, buoying spirits makers.

At the same time, some e-cigarette users turned back to combustible cigarettes because of increased e-cigarette taxes, bans on flavored vaping products and confusion about the health effects of vaping, consumers and industry officials say. Altria on Thursday didn't offer a projection for cigarette sales in 2021, saying it would depend in part on the rollout of the Covid-19 vaccine and how consumers' behavior changes after they are vaccinated.



A woman smokes a cigarette while standing on Wall Street in New York City.

PHOTO: CARLO ALLEGRI/REUTERS

U.S. cigarette sales were even stronger last year than they were in 2015, when gas prices dropped sharply, allowing consumers more discretionary spending, and many people switched back to cigarettes after trying first-generation vaping devices. Those early products didn't deliver nicotine effectively enough to satisfy some addicted cigarette smokers. But e-cigarette sales took off again in 2017, spurred by the popularity of a new vaporizer called Juul.

E-cigarette sales were booming in the fall of 2019 when the U.S. Centers for Disease Control and Prevention, investigating an outbreak of a mysterious lung illness, warned consumers not to use any vaping products. Sales took a nosedive. The illness later was [linked to vitamin E oil](#) in marijuana vaping products, but the public's perception of e-cigarette safety hasn't rebounded and neither have sales.

Bisher Kunbargi, a software developer in San Antonio, gave up Marlboros for e-cigarettes around 2018 and switched back to cigarettes in late 2019.

"Trust the devil you know," said Mr. Kunbargi, who is 28. "I keep smoking, it's going to give me cancer. Whereas vaping is much more uncharted territory."

Working at home with a laptop outside on his front patio during the pandemic, he said, he is smoking more than he did before—as many 10 cigarettes a day.

"I can't take 10 breaks a day" at the office, he said. At home, "I can have a cigarette whenever I want."

Public health officials say that while e-cigarette use isn't risk-free, it poses significantly less risk than cigarette smoking, which is associated with more than 480,000 deaths in the U.S. each year. Yet according to a Euromonitor survey in early 2020, 73% of U.S. respondents said vaping products were as harmful or more harmful than cigarettes. Euromonitor reported that public perceptions of e-cigarette safety worsened in all 20 of the countries it surveyed.

"This weakness was undoubtedly a factor in the relative robustness of cigarette volumes in 2020," the research firm said.

Adults using e-cigarettes as an alternative to cigarettes shouldn't go back to smoking, said Brian King, a deputy director of the CDC's Office on Smoking and Health and a senior official involved in the agency's vaping-related illness response. Those people should consider using FDA-approved smoking cessation medications, and if they choose to use e-cigarettes, they should switch completely from cigarettes, he added.

During the lung-illness investigation, the CDC promptly shared the latest data with the public and [refined its recommendations](#) based on available scientific evidence, Dr. King said. The CDC now recommends that people avoid vaping products containing THC, the psychoactive ingredient in marijuana, particularly from informal sources like friends, family, or in-person or online dealers.

Other adult smokers said in interviews that restrictions on fruity and minty e-cigarette flavors have nudged them back to cigarettes.

Seeking to curb an uptick in underage vaping, federal legislation in 2020 raised the legal tobacco purchase age to 21 and the Food and Drug Administration [took some sweet and mint-flavored e-cigarette refill cartridges off the market](#).

Those measures appear to have worked. In a federal survey conducted between January and March of 2020, 19.6% of high-school students said they had vaped in the past 30 days, compared with 27.5% in the same period a year earlier. But vaping also declined among adults. The number of vapers 21 years or older in the U.S. fell to 9.8 million last year from 11.8 million in 2019, according to Altria's estimates.

An FDA spokeswoman said changes in tobacco consumption couldn't be attributed to a single policy, event or piece of legislation. She noted that adult consumers still had access to flavored vaping products like disposable e-cigarettes and tank systems.

“Covid-19 has created a drastic change in daily life, including increased stress and anxiety, that may contribute to a smaller-than-expected reduction in cigarette sales,” she said. She added that because cigarette smoking increases the risk of more severe illness with Covid-19, “There has never been a better time to try to quit.”

Altria, the biggest U.S. tobacco company, reported that sales rose 4.9% to \$6.3 billion in the quarter ended Dec. 31 from \$6.0 billion a year earlier. Its revenue from cigarettes and cigars was \$5.6 billion.

E-cigarette market leader Juul Labs Inc. reported \$1.9 billion in sales in the first nine months of 2019. The CDC in September of that year warned people not to vape, and Juul later that autumn voluntarily stopped selling its sweet and mint-flavored refill pods in anticipation of federal flavor restrictions. The company's revenue dropped to \$1.1 billion in the first nine months of 2020 and was an estimated \$340 million in the last quarter of the year. Altria holds a 35% stake in Juul.

Write to Jennifer Maloney at [jennifer.maloney@wsj.com](mailto:jennifer.maloney@wsj.com)

*Appeared in the January 29, 2021, print edition as 'American Smokers Quit Trying to Quit.'*

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