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**Maine Senate Health and Human Services Committee**  
**Testimony: LD 1693**  
**Guy Bentley, Director of Consumer Freedom, Reason Foundation**  
**February 4, 2022**

Chair Claxton, members of the committee, thank you for allowing me the opportunity to submit testimony on LD 1693.

My name is Guy Bentley, and I'm the director of consumer freedom at the Reason Foundation, a 501(c)3 nonprofit think tank. The consumer freedom project analyzes and promotes policy solutions that improve public health while avoiding unintended consequences and protecting consumer choice.

The intention behind LD 1693 to limit tobacco use, especially among youth, is to be applauded. However, the evidence on the success of such prohibitions should raise significant concern that the ban will promote further inequalities in the criminal justice system, push sales and tax revenue to other states, increase the illicit tobacco trade, and fail to improve public health in Maine.

**Case Studies: Massachusetts and Canadian Provinces**

Massachusetts's ban on flavored tobacco products went into effect in June 2020.

A preliminary analysis conducted by Reason Foundation which compared cigarette sales in Massachusetts the year prior to the ban and the year following the ban's implementation found that:

- Sales of menthol packs declined in Massachusetts by 45.6 million while sales of nonmenthol cigarettes rose by 15.6 million.
- Sales of menthol cigarettes in the surrounding states rose by 30.6 million and sales of nonmenthol cigarettes rose by 6.5 million.
- In total there was a net increase in cigarette sales of 7.2 million packs for Massachusetts and its bordering states.

These figures underestimate cross-border trade because they do not account for lost sales of flavored e-cigarettes, smokeless tobacco, or cigars.

Furthermore, according to a study published by the *Journal of Law and Economics*, Canadian provinces' menthol prohibition has significantly increased non-menthol cigarette smoking

among youths, resulting in no overall net change in youth smoking rates.<sup>1</sup> As for adult smokers, the study discovered, provincial menthol bans shifted smokers' cigarette purchases away from grocery stores and gas stations to First Nations reserves (where the menthol bans do not apply). These results are important not just because they demonstrate an immediate economic impact on jurisdictions that introduce prohibition but thanks to cross-border trade and the substitution of non-menthol cigarettes any health benefits are severely limited. In other words, the loss in tax revenue is unlikely to be made up by lower healthcare costs.

### **Public Health and Disparate Impacts**

Advocates for the prohibition of menthol cigarettes correctly observe a disproportionate number of Black smokers choose a menthol product, with around 85 percent using menthol. In Maine, some hope the ban will dramatically reduce the state's Black smoking rate. While Black smokers are more likely to use a menthol product and White smokers use a non-menthol product, smoking prevalence is, in fact, lower among Black youth and adults.

Black non-Hispanic youth are less likely to smoke than their White peers, at 2.5 percent and 3.7 percent, respectively.<sup>2</sup> These data conform to Reason Foundation's study published in 2021, showing that states with higher menthol cigarette use, such as Maryland, tend to have lower, not higher, youth smoking rates.<sup>3</sup> From a public health standpoint, as Black adults and youth smoke at lower rates than non-Hispanic Whites, it's hard to ascertain why non-menthol cigarettes, which are equally dangerous, will not be subjected to prohibition and menthol products will be.

Because menthol cigarettes are overwhelmingly the choice of Black smokers, prohibition will necessarily lead to a concentration of the illicit tobacco market in Black communities. The American Civil Liberties Union and other civil rights groups warn prohibition could disproportionately impact people of color, trigger criminal penalties, and prioritize criminalization over public health and harm reduction.<sup>4</sup> The National Organization of Black Law

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<sup>1</sup> Christopher Carpenter, Hai V. Nguyen. "Intended and Unintended Effects of Banning Menthol Cigarettes." *The Journal of Law and Economics*. August 2021.  
<https://www.journals.uchicago.edu/doi/abs/10.1086/713978>

<sup>2</sup> Gentzke AS, Wang TW, Jamal A, et al. Tobacco Product Use Among Middle and High School Students — United States, 2020. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6950a1.htm>

<sup>3</sup> Guy Bentley and Jacob Rich. "Does Menthol Cigarette Distribution Affect Child or Adult Cigarette Use?." <https://reason.org/policy-study/does-menthol-cigarette-distribution-affect-child-or-adult-cigarette-use/>

<sup>4</sup> American Civil Liberties Union. "Coalition Concerns with Blanket Prohibition on Menthol and Other Flavored Tobacco within H.R. 2339, Reversing the Youth Tobacco Epidemic Act." <https://www.aclu.org/letter/coalition-letter-criminal-justice-concerns-hr-2339-reversing-youth-tobacco-epidemic-act>

Enforcement Executives (NOBLE), Grand Council of Guardians (GCGNY), National Association of Black Law Enforcement Officers (NABLEO), and Law Enforcement Action Partnership (LEAP) have argued that prohibitions of all kinds disproportionately affect communities of color and this is especially the case when it comes to banning menthol cigarettes.<sup>5</sup>

### **Food and Drug Administration Review and Tobacco Harm Reduction**

Last year, the Food and Drug Administration authorized an e-cigarette as “appropriate for the protection of public health” for the first time. The FDA is also currently reviewing e-cigarette product applications that contain reams of data on safety, efficacy, and potential threats to youth. If the FDA finds that any product is a net harm to public health, it will be removed from the market. But if the product is deemed to be net beneficial, it will be authorized for sale as appropriate for the protection of public health.

If Maine chose to ban these products prior to the FDA concluding its review it would limit consumer access to products the FDA may deem as a positive for public health. According to a survey conducted by the International Tobacco Control Policy Evaluation Project 57 percent of vapers said they would continue vaping if flavors were banned, but half said they would find a way to get their preferred flavour. Of most concern, was the finding that close to one five vapers said they would stop vaping and smoke instead.<sup>6</sup>

While prohibiting flavors may seem an attractive solution to the problem of youth vaping, policymakers should be recognize that according to the 2021 National Youth Tobacco Survey (NYTS), 87 percent of high schoolers are not using e-cigarettes at all and 92 percent are not using them frequently. Youth vaping has also fallen to its lowest point in seven years.<sup>7</sup> Furthermore, data released by the Centers for Disease Control and Prevention (CDC) shows flavors are not the leading reason why youth initiate vaping. According to the CDC, the primary reason youth initiate vaping is “curiosity,” followed by “friend or family member used them,” with “they are available in flavors, such as mint, candy, fruit, or chocolate” coming a very distant

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<sup>5</sup> Franklin, Neil. “Ban on Menthol Cigarettes Would Have Unintended Consequences.” *City Limits*. December 2, 2019.

<https://citylimits.org/2019/12/02/opinion-ban-on-menthol-cigarettes-would-have-unintended-consequences/>

<sup>6</sup> Gravely, Shannon et al. “Responses to potential nicotine vaping product flavor restrictions among regular vapers using non-tobacco flavors: Findings from the 2020 ITC Smoking and Vaping Survey in Canada, England and the United States.” *Addictive Behaviors*. Volume 125. February 2022.

<https://www.sciencedirect.com/science/article/pii/S0306460321003373?via%3Dihub>

<sup>7</sup> Park-Lee E, Ren C, Sawdey MD, et al. Notes from the Field: E-Cigarette Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2021.

[https://www.cdc.gov/mmwr/volumes/70/wr/mm7039a4.htm?s\\_cid=mm7039a4\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7039a4.htm?s_cid=mm7039a4_w)

third.<sup>8</sup> Banning flavored tobacco products may also induce perverse outcomes contrary to the promotion of public health among adolescents.

In 2018, San Francisco banned the sale of all flavored tobacco products, including e-cigarettes with flavors other than tobacco. Yale University’s Abigail Friedman found that after the ban was enacted, San Francisco area youth had double the odds of smoking compared to similar jurisdictions with no tobacco flavor ban.<sup>9</sup> “While neither smoking cigarettes nor vaping nicotine are safe per se, the bulk of current evidence indicates substantially greater harms from smoking, which is responsible for nearly one in five adult deaths annually. Even if it is well-intentioned, a law that increases youth smoking could pose a threat to public health,” said Friedman.

According to a 2020 study by researchers at Yale School of Public Health, the use of e-cigarette flavors is positively associated with smoking cessation outcomes for adults but not associated with increased youth smoking.<sup>10</sup> The prestigious Cochrane Review concluded e-cigarettes are more effective than traditional nicotine replacement therapies for helping smokers quit.<sup>11</sup> Prohibition of flavored e-cigarettes, which are overwhelmingly the choice of adult vapers, risks fueling illicit markets, forcing the closure of Maine’s vape shops, and driving vapers back to smoking.

Thank you for your time. I’d be happy to answer any questions.

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<sup>8</sup> Wang TW, Gentzke AS, Creamer MR, et al. “Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019.” *MMWR Surveill Summ* 2019;68(No. SS-12):1–22. [https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm#T6\\_down](https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm#T6_down)

<sup>9</sup> Friedman AS. “A Difference-in-Differences Analysis of Youth Smoking and a Ban on Sales of Flavored Tobacco Products in San Francisco, California.” *JAMA Pediatr*. Published online May 24, 2021. doi:10.1001/jamapediatrics.2021.0922

<https://jamanetwork.com/journals/jamapediatrics/fullarticle/2780248>

<sup>10</sup> Abigail S. Friedman, PhD; SiQing Xu, BS. “Associations of Flavored e-Cigarette Uptake With Subsequent Smoking Initiation and Cessation.” *JAMA*. June 5, 2020.

<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2766787>

<sup>11</sup> Cochrane Review. “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>