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Written Testimony of
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concerning

LD-1550: An Act Prohibiting the Sale of Flavored Cigarettes, Tobacco Products, Electronic Nicotine Delivery Systems and Vapor Products

Before the Committee on Health and Human Services
Maine Legislature

Chair Claxton, Chair Meyer, and Members of the Committee on Health and Human Services,

On behalf of Juul Labs, Inc. (“JLI”), thank you for the opportunity to submit testimony regarding LD-1550, which would prohibit a retailer from selling, distributing, or offering to sell or distribute in Maine any flavored tobacco product, including menthol vapor products.

As JLI strives to reset our company and category in the U.S., we are focused on listening and building constructive relationships with regulators, policymakers, and other stakeholders to advance the harm reduction potential for adult smokers. One of the key tenets of these efforts is our commitment to combat underage use of our products through evidence-based interventions.

JLI also supports risk-proportionate regulation for vapor and other reduced-risk, noncombustible products. Such a policy framework, at its core, applies the most stringent regulations to the riskiest products (e.g., combustible cigarettes) and encourages current adult users to migrate to potentially less harmful alternatives (e.g., vapor products). To be clear, risk-proportionate regulation does not mean a “lenient” approach to noncombustible alternatives. It certainly does not mean an unregulated marketplace. Rather, robust, informed regulation of tobacco and nicotine products and our category will always be appropriate.

The regulatory balance should be weighted in favor of harm reduction. That is, to establish public policy that moves adult smokers away from the most harmful tobacco and nicotine products (e.g., combustibles) towards potentially less harmful noncombustible alternatives - all while combating access to and use of these products by those underage.

For these reasons and those stated in more detail below, we respectfully request that LD-1550 be put aside, and the Committee instead engage with stakeholders to develop a thoughtful, risk-proportionate regulatory framework to help transition adult smokers away from combustible cigarettes—the number one cause of preventable death and disease in Maine and the rest of the country.

The Role of Menthol In Vapor and Other Alternative Products

Given its scientific expertise and public-health mandate, FDA is the body best-positioned to develop and implement policy relating to tobacco products, including on flavors such as menthol. The FDA issued flavor guidance in January 2020 that removed all non-tobacco, non-menthol flavored cartridge-based products until authorized through a Premarket Tobacco Product Application (PMTA). As it stated, the Agency's decision sought to strike the public health balance by maintaining vapor products as a potential off-ramp for adults using combustible tobacco while ensuring these products do not provide an onramp to those underage. FDA did so after careful consideration of the data and made the decision to continue enforcement discretion as to both tobacco- and menthol-flavored vapor products pending PMTA review.

In an environment in which Tobacco 21 is the law of the land and access controls are enforced to combat underage use, we believe menthol-flavored noncombustible products, including vapor, should remain available for adult smokers as FDA conducts its review of PMTAs.

While more work remains, meaningful progress is being made to combat underage use of vapor products. According to the 2020 NYTS, less than 4% of high school and middle school students used a menthol e-cigarette in the past 30 days.¹ A recent study analyzing data from the 2020 Monitoring the Future survey found that fruit was the most commonly used flavor at 59%, followed by Mint at 27%, Menthol at 7%, Tobacco at 3%, and Sweet at 2%. Only a minority of JUUL users reported use of menthol or tobacco, the only flavors distributed to retailers since November 2019.² FDA has made it clear that it will continue to closely monitor underage use of menthol-flavored products, and we are committed to do the same. While we are encouraged that underage use has declined significantly, significant work remains to reduce underage use of vapor products through evidence-based interventions.

For example, recent advancements in point-of-sale (POS) technology allow traditional retail outlets to incorporate new technological tools and update existing sales systems to restrict underage access through automated sales controls. Retailers now can incorporate automated quantity-purchase limits and electronic scanning of government-issued IDs to verify age and ID validity automatically, before completing purchases with consumers.

What is also important in this debate is recognizing the goal of transitioning adult smokers away from combustible cigarettes — the leading cause of preventable death in the U.S. and worldwide. We believe, and evidence demonstrates, that flavors can play an important role in helping adult smokers transition away from combustible cigarettes. A recent third-party study by researchers affiliated with FDA's Center for Tobacco Products found 41.4% of prior adult menthol smokers reported using menthol or mint-flavored vapor products

¹ Wang T. et al. E-cigarette Use Among Middle and High School Students — United States, 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:1310–1312. DOI: <http://dx.doi.org/10.15585/mmwr.mm6937e1>.

² Miech R. et al. Trends in Use and Perceptions of Nicotine Vaping Among US Youth From 2017 to 2020. *JAMA Pediatr*. Published online December 15, 2020. doi:10.1001/jamapediatrics.2020.5667.

and 21.3% reported using them exclusively.³ The authors concluded that, “Menthol cigarette smokers are particularly likely to use menthol/mint-flavored e-cigarettes compared to non-menthol smokers.” Juul Labs’ data show that adult menthol cigarette smokers find tobacco-flavored JUUL products significantly less appealing than other flavors, and are more likely to transition away from combustible cigarettes with a mint or menthol alternative.⁴ To transition and completely switch adult smokers from combustible cigarettes, it is critical that noncombustible alternatives sufficiently appeal to smokers.

Additionally, the removal of menthol vapor products could have significant negative public health consequences, such as: increased or sustained cigarette use, reduced switching to potentially less harmful products, increased cross-border sales, reduced tax revenues, and increased black market activity. Research developed by JLI found that significantly higher than expected cigarette sales occurred in states that implemented temporary bans on flavored vapor products in the fall of 2019 — 4.6% in Washington and 5% in Rhode Island.⁵

There is a crucial balance between effectively reaching adult smokers and restricting access and limiting appeal to those underage. This balance and approach are critical to the effort to reduce the harm caused by cigarettes, particularly at a time when the country has recently experienced a rebound of combustible cigarette sales.⁶ Based on their review of the science and evidence, FDA can strike the appropriate balance to provide adult smokers with less harmful alternatives while limiting initiation among nonusers, including those underage.

Conclusion

We are concerned that LD-1550 would lead to adverse consequences in Maine while being an ineffective way to attempt to address underage use of vapor products. We respectfully request that the Committee put aside the proposed legislation and engage with stakeholders to develop a thoughtful, evidence-based regulatory approach that: (1) maintains access to potentially less harmful alternatives for adult smokers; (2) aligns with FDA’s review process and determinations regarding how vapor products will be available in the U.S. marketplace; and (3) addresses underage use through tailored measures to restrict access and limit appeal. At the very least, we believe any state-level flavor ban should provide an exception for tobacco and menthol flavors, and also provide an exception for any flavored vapor product that receives a market order from FDA after going through the rigorous PMTA process that allows for products to be marketed in the U.S. if FDA determines them to be appropriate for the protection of public health.

³ Rostron, B., et al. ENDS Flavor Preference by Menthol Cigarette Smoking Status among US Adults, 2018–2019. *Int. J. Environ. Res. Public Health* 2021, 18, 240. <https://doi.org/10.3390/ijerph18010240>.

⁴ Goldenson, N. et al. Effect of Mentholated Cigarette Smoking on Use of Flavored JL ENDS and Switching Behavior. Society for Research on Nicotine & Tobacco 2020 Annual Conference. March 14 2020.

⁵ Jian, L., Xu, Y., and Prakash, S. The Impact of Banning ENDS Products on Combustible Cigarette Sales: Initial Evidence from U.S. State-Level Policies. 3rd Scientific Summit on Tobacco Harm Reduction, 2020.

⁶ Jennifer Maloney, “Smoking’s Long Decline is Over,” *Wall Street Journal*, January 28, 2021, <https://www.wsj.com/articles/during-covid-19-lockdowns-people-went-back-to-smoking-11611829803>