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Written Testimony of
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**LD-1693: An Act To Advance Health Equity, Improve the Well-being of All
Maine People and Create a Health Trust**

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-1693. The proposed legislation would prohibit a retailer from selling, distributing, or offering to sell or distribute in Maine any flavored tobacco product, including menthol vapor products. Additionally, this bill would ultimately double taxes on non-combustible alternatives that could disincentivize adult smokers from switching to a potentially less harmful alternative.¹ We are concerned LD-1693 would lead to significant negative consequences in Maine such as increased or sustained cigarette use, reduced switching to potentially less harmful products, increased cross-border sales, reduced tax revenue, and a proliferation in illicit trade and black markets.

Critically, the U.S. Food and Drug Administration (“FDA” or “the Agency”) provides extensive federal regulatory oversight of tobacco products, including vapor. FDA has exercised this authority by issuing guidance related to flavored vapor products that removed all non-tobacco, non-menthol flavored cartridge based products until authorized through a premarket tobacco product application (PMTA).² FDA can also regulate nicotine content and delivery of such products through the PMTA process or by establishing a tobacco product standard. The PMTA process is a rigorous, science-based process conducted by career scientists and technical experts, which we believe is the appropriate forum to determine the role vapor and other innovative products can play to transition and completely switch adult smokers from combustible cigarettes.

JLI’s mission is to transition the world’s billion adult smokers away from combustible cigarettes, eliminate their use, and combat underage usage of our products. To succeed in that mission and to preserve the harm-reduction potential of vapor products, we are focused on listening and building constructive relationships with regulators, policymakers, and other stakeholders.

¹ For cigarette taxes enacted after January 2, 2020. See e.g. <https://legislature.maine.gov/statutes/36/title36sec4403.html>.

² U.S. Food and Drug Administration (2020). Guidance for Industry, Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market without Premarket Authorization (Jan. 2020), available at <http://bit.ly/36xpplv>.

One of the key tenets to 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. Within this framework, JLI believes that the regulatory balance should be weighted in favor of harm reduction, moving adult smokers *away* from the most harmful tobacco and nicotine products (e.g., combustibles) *towards* potentially less harmful noncombustible alternatives. Robust, informed regulation of tobacco and nicotine products and our category will always be appropriate.

Unfortunately, the current bill does not reflect risk-proportionate regulation. We respectfully request that LD-1693 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.

Excise Taxation and Vapor Products

Specific to taxes, a risk-proportionate approach to policymaking entails having a lower, reduced rate for noncombustible products compared to combustible cigarettes in order to maintain access for adult smokers, while combating underage use through targeted, evidence-based interventions. We have been encouraged by national surveys that show continued declines in underage use of the products: the latest data from the 2021 National Youth Tobacco Survey showed 7.6% of U.S. middle and high school students reported using vapor products within the past 30 days. More work remains to reduce underage access to vapor products through targeted interventions, such as new technologies that restrict access at the retail point-of-sale.³

However, there is no compelling reason to punish adult consumers in Maine by effectively doubling the recently enacted 43 percent wholesale price excise tax on vapor products to 86 percent. While the text of the bill includes a provision that only doubles the excise tax on combustible cigarettes, excise tax rates on vapor products would also be affected because the assessor is required to calculate a rate of tax on other tobacco products “equivalent to the same percentage change in the tax rate for one cigarette” for cigarette tax increases enacted after January 2, 2020.⁴ This tax increase would further diminish the harm-reduction potential of these products for adult smokers and exacerbate the adverse, unintended consequences of the current tax structure.

³ Park-Lee E. et al. Notes from the Field: E-Cigarette Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2021. MMWR Morb Mortal Wkly Rep 2021;70:1387–1389. DOI: <http://dx.doi.org/10.15585/mmwr.mm7039a4>

⁴ See e.g. <https://legislature.maine.gov/statutes/36/title36sec4403.html>.

For former and current adult smokers, vapor products compete with cigarettes in the marketplace to provide smokers an off-ramp from combustible use toward a potentially less harmful pathway. Several economic studies conclude that excessive taxes on vapor products can have the unintended consequence of discouraging switching and, as a result, increasing cigarette smoking:

- In a recent study funded by a grant from the National Institute of Health to the National Bureau of Economic Research, the authors estimate that the high excise tax on vapor products in Minnesota deterred 32,400 adult smokers in the state from transitioning away from cigarettes.⁵
- Another recent study published in the *Journal of Risk and Uncertainty* uses two nationally representative public health surveys, the Behavioral Risk Factor Surveillance System and National Health Interview Survey, to estimate that a national tax on vapor products equivalent to \$1.65 per milliliter of vaping liquid would raise the proportion of adults who smoke cigarettes daily by approximately 1 percentage point, translating to 2.5 million additional adult daily smokers.⁶

Additionally, at a time when many Americans are grappling with inflation, the proposed tax increase that is price-sensitive for vapor products, but not cigarettes, will likely cause some adult consumers to purchase vapor products through the illicit market, which predominantly occur outside of tax regulation. A more prominent illicit market can potentially present additional health and safety risks for adult consumers and undermine underage-prevention measures. Other adults would likely shift to purchasing cheaper vapor products out-of-state, which would cause responsible retailers in the state to lose business and a reduction in expected revenue for the state.

The Role of Menthol In Vapor and Other Alternative Products

With regard to menthol, it is our bedrock belief that FDA is the body best-positioned to develop and implement policy relating to tobacco products, including on flavors. FDA's careful balancing of combating underage use while promoting harm reduction for adult smokers is supported by ample market and scientific studies.

In an environment in which Tobacco 21 is the law of the land and underage access controls are enforced, we believe menthol-flavored noncombustible products, including vapor, should remain available for adult smokers. While underage use of vapor products remains unacceptably high, it has

⁵ Saffer, H. et al. E-cigarettes and adult smoking: Evidence from Minnesota. *J Risk Uncertain* 60, 207–228 (2020). <https://doi.org/10.1007/s11166-020-09326-5>.

⁶ Pesko M. et al. The effects of traditional cigarette and e-cigarette tax rates on adult tobacco product use. *J Risk Uncertainty* *J Risk Uncertain* 60, 229–258 (2020). <https://doi.org/10.1007/s11166-020-09330-9> (2020).

declined by over 50% from its peak in 2019 following significant public health interventions. This includes Tobacco 21 laws and the removal of non-tobacco/-menthol flavored, pod-based products from the market without marketing authorization. Among current flavored e-cigarette users in 2021, Fruit was the most common flavor reported, followed by Candy, Mint, and Menthol: 4.6% of all middle and high schoolers were current users of fruit-flavored vapor products, while approximately 2% used menthol-flavored vapor products.⁷ The majority of flavors that students reported using were not sold by Juul Labs at the time of the survey.⁸ While we are encouraged that underage use has declined significantly, additional steps should be taken to reduce underage use of vapor products through evidence-based interventions.

Studies have shown that flavors are important to adult smokers considering alternatives to combustible cigarettes. For example, flavored products can help adult smokers switch and stay switched. Data from nationally-representative surveys and our internal data show that adult menthol cigarette smokers are more likely to use menthol-flavored vapor products.⁹ A study conducted by researchers at FDA's Center for Tobacco Products found that, "[m]enthol cigarette smokers are particularly likely to use menthol/mint-flavored e-cigarettes compared to non-menthol smokers."¹⁰ The FDA's study reported that 41.4% of smokers who switched to e-cigarettes using menthol flavor had smoked menthol cigarettes whereas, just 21.5% of those who switched using menthol flavor had smoked nonmenthol cigarettes.¹¹ To transition and completely switch adult smokers from combustible cigarettes, it is critical that noncombustible alternatives sufficiently appeal to smokers.

Furthermore, 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 presented by JLI at the 3rd Scientific Summit on Tobacco Harm Reduction examined the potential consequences of state-level bans on vapor products: the research found that significantly higher than expected cigarette sales occurred — 4.6% in Washington and 5% in Rhode Island.¹²

⁷ Park-Lee E. et al. Notes from the Field: E-Cigarette Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2021. *MMWR Morb Mortal Wkly Rep* 2021;70:1387–1389. DOI: <http://dx.doi.org/10.15585/mmwr.mm7039a4>

⁸ During the data collection for the 2021 survey, the only commercially marketed JUULpod flavors in the United States were Virginia Tobacco and Menthol.

⁹ 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.

¹⁰ 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. p. 6. <https://doi.org/10.3390/ijerph18010240>.

¹¹ Ibid.

¹² 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.

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. 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-1693 would lead to adverse consequences in Maine while being an ineffective way to attempt to address underage use of vapor products, and the additional tax increase would be particularly ill-timed as adult consumers deal with broader inflation pressures. 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.

Sincerely,

Nicholas Carton