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Testimony for: SB 273 (Electronic Smoking Device Regulation Act of 2021)

Committee: Senate Finance Committee

Position: OPPOSED

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Chairman Kelley and Members of the Committee:

Thank you for giving the public an opportunity to provide input as you consider this proposal. I sincerely hope you listen to the testimony from consumers, business owners, and experts in the field, like me. My name is Michelle Minton. I am a Senior fellow with the non-partisan think tank the Competitive Enterprise Institute, where I have dedicated my career to the study of consumer risk regulation. As professional, a Maryland resident, and someone who cares about public health, I urge you not to repeat the mistakes of our past by creating yet another drug war on nicotine that will harm more people than it helps.

If there is one thing I've learned over my 13-year career it is this: Prohibitions don't work. They have never and will never work. Policies meant to save people from the perils of their own choices, whether through taxation, restrictions on sales, or outright bans do not make people better off. In fact, well-meaning as they may be, bans invariably backfire, causing people to engage in *riskier* behaviors. In this case, bans on flavored vapor products and online sales will cause those in the most vulnerable categories to be forced either to return to smoking or to seek what they want from the illicit market.

We have seen the failure of this type of policy over and over again, yet we never seem to learn. Alcohol prohibition did not save people from excessive alcohol consumption; it led to harder drinking, speakeasies, funneled billions of dollars to organized criminals, and caused many deaths from tainted liquor.

New York state hasn't banned cigarettes, but has made them prohibitively expensive through taxation. As it always does, the black market rose to meet the demand for cheaper cigarettes, and now more than 60 percent of cigarettes sold in the state are from illegal sources. Not only is law enforcement incapable of preventing tobacco bootlegging, attempts to stop it have only resulted

in tragedies, such as the death of Eric Garner, the Staten Island man choked to death by police who believed he was selling untaxed cigarettes.

Marijuana prohibition didn't stop people from using pot. Attempts to enforce the law caused incalculable harm, primarily to lower income communities and people of color, while doing nothing to stop the rise of drug cartels and the creation of an enormous global cannabis black market. It was this very black market that caused the outbreak of lung injuries we saw over the summer. Most of those injured lived in states without legal marijuana or were not of age to legally purchase it, so they relied on the black market, which has zero quality control and no incentive to verify customers' age. As a result, nearly 3,000 people were hospitalized by THC vaping products tainted with vitamin E acetate and 60 people are dead.¹

Instead of recognizing this outbreak as a failure of prohibition, anti-tobacco activists used the outbreak, and public confusion around it, to urge state legislatures to ban nicotine e-cigarettes, which had nothing to do with it. And those states, like Massachusetts, which banned the sale of vapor products, succeeded only in driving customers to purchase products from New Hampshire or illegal dealers.²

Restrictions on nicotine e-cigarettes that ban certain devices, nicotine strengths, or flavors will do nothing to prevent another outbreak. It will also not address the other reason proponents assert for removing flavors from the market: the so-called "epidemic" of youth vaping.

First, there is no youth vaping epidemic. Despite the headlines, the vast majority of youth who report using e-cigarettes are not using them habitually. Analysis of the 2018 survey data shows that just 7 percent of students reported vaping five or more times in the last month. Of those who reported vaping more than five times a month, only 0.4 percent had never used tobacco.³ Between 2019 and 2020, the number of youth reporting past-month vaping declined by around 30 percent.

As defined by the Centers for Disease Control and Prevention (CDC), an "epidemic" refers to a usually sudden increase in the number of cases of a disease in a given population, above what is expected in that area.⁴ E-cigarette *use* by youth, though concerning, is not a disease. In fact, there is not a single case in the U.S. of any person—adolescent or adult—developing a disease as the result of inhaling the vapor produced by electronic nicotine delivery devices.

This is not an epidemic.

Concerns about youth initiation of nicotine products is valid and we should seek to discourage those who do not or would not smoke from starting to vape. But banning non-tobacco flavors for vaping products will not achieve that goal, because flavors are not the reason youth vape. According to the CDC, the number one reason youth say they vape is curiosity.⁵ In the United Kingdom, where e-cigarettes are embraced as a means of reducing harm for adult smokers and are available in every imaginable flavor, youth uptake of vaping is almost nonexistent. But in the United States, it is clear why adolescents have become so curious about these devices: An endless flood of headlines and multimillion-dollar campaigns telling them that vaping is for

adults only and that, even though all your friends are doing it, you shouldn't. One doesn't need a degree in child psychology to see why this has backfired.

Nobody is suggesting that youth vaping should be ignored. It shouldn't be, but the rate of use among adolescents and the relatively low risk associated with e-cigarettes do not justify stripping adults of access to products that could save their lives. And e-cigarettes *can* save lives.

This is no longer a controversial statement, as the evidence makes clear. Though we may not know the exact amount of risk e-cigarettes pose in the long-term, we know that it is far lower than with combustible tobacco. We also know that e-cigarettes are an effective smoking cessation option, with trials showing they are at least twice as effective as nicotine replacement therapy.⁶ And flavors are one of the main reasons they are so effective.

Despite absurd claims that adults don't like flavors, the vast majority of adult vapers use non-tobacco flavors. More importantly, adults who successively switch from smoking to exclusive vaping are more likely to use fruit, dessert, and candy flavored e-cigarettes, and research shows that using a wide variety of vapor flavors correlates with increased smoking abstinence.^{7,8} Flavors work because, in addition to making vaping pleasurable, they also help users disassociate the effects of nicotine from the taste of tobacco. As result, relapsing is less appealing, increasing users' intention and ability to stay smoke-free.⁹

Banning e-cigarette flavors won't stop youth vaping, but it will put at risk the more than 250,000 Maryland adults who rely-on e-cigarettes to stay smoke-free.¹⁰ The ban will significantly reduce the effectiveness and appeal of e-cigarettes for adults, causing fewer to switch from smoking and many to relapse back to smoking or turn to illegal substitutes.

The same outcome will occur if online delivery of these products is eliminated, particularly for residents with limited mobility, lack of transportation, and in rural communities. It would make obtaining the combustible cigarettes they are trying to quit much easier to acquire by comparison, reducing the likelihood that people in these groups will choose to switch to lower risk alternatives or stick with lower risk alternatives.

Some will make their own liquid at home. Thanks to YouTube tutorials and online forums, it is fairly simple to figure out how to do this safely. But more people making homemade e-liquid will mean more homes with liquid nicotine concentrate. No doubt, this will result in more cases of accidental poisoning as children get their hands on uncapped nicotine concentrate. This is exactly what happened in 2014 when a one-year-old died after drinking a bottle of nicotine that his mother used to make her own e-cigarette liquid in their New York home.¹¹

Those less inclined toward DIY products will turn to the burgeoning illicit market, where consumers will be presented with products of uncertain origin and quality. Some may not even be aware that what they are buying is counterfeit, as happened after Juul voluntarily removed some of its flavors from the market and knockoff versions—produced in China—made their way onto store shelves in America.¹² If all flavored e-cigarettes are banned, there will be a massive influx of illegal cartridges, more cases of illness, and more deaths related to tainted products.

I urge the members to seriously consider the consequences of this proposal. Smoking costs the state of Maryland nearly \$3 billion dollars a year in health care costs and claims the lives of 7,500 residents every year.¹³ Our public health goal should focus not only on the unknown risks that e-cigarettes may pose to youth, but also on reducing the death and disease caused by smoking. Thankfully, smoking (among adults and youth) is lower now than it has ever been. But if e-cigarettes can help reduce this rate by any amount, as the evidence indicates they can, we ought to do everything in our power not to squander that opportunity. Every new rule or law that makes e-cigarettes less attractive or less accessible means more deaths from smoking.

If you are serious about reducing tobacco-related harm for both adolescents and adults, you should reject proposed laws that would deter smokers from switching to lower risk products and push consumers into black markets. Instead, we should employ the strategies that have worked for other adult products, such as gambling, alcohol, and marijuana: stricter age verification requirements, responsible advertising standards, treatment over criminalization, and enforcement of existing laws. These approaches would address the youth vaping issue without producing the unintended consequences that always go hand-in-hand with prohibition.

I sincerely urge you to reject this proposal and find an approach that doesn't sacrifice adult lives and the freedom to make our own choices about health because of exaggerated claims that these products pose a risk to youth. We can protect youth and adults with temperate regulation, similar to how we regulate alcohol, not prohibition.

Thank you for your time,

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¹ Centers for Disease Control and Prevention, "Outbreak of Lung Injury Associated with E-cigarette Use or Vaping," February 25, 2020, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

² Zeninor Enwemeka, "'Thank You, Gov. Baker': N.H. Vape Shops See Rush After Mass. Ban," *WBUR*, October 9, 2019, <https://www.wbur.org/bostonmix/2019/10/09/massachusetts-vaping-ban-new-hampshire-sales-boost>.

³ Allison M. Glasser, Amanda L Johnson, Raymond S Niaura, et al., "Youth Vaping and Tobacco Use in Context in the United States: Results from the 2018 National Youth Tobacco Survey," *Nicotine & Tobacco Research*, January 13, 2020, <https://academic.oup.com/ntr/advance-article-abstract/doi/10.1093/ntr/ntaa010/5701081?redirectedFrom=fulltext>.

⁴ Centers for Disease Control and Prevention, "Principles of Epidemiology in Public Health Practice, Third Edition An Introduction to Applied Epidemiology and Biostatistics," May 18, 2012, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html>.

⁵ Teresa W. Wang, Andrea S. Gentzke, et al, "Tobacco Product Use and Associated Factors Among Middle and High School Students—United States, 2019," *Morbidity and Mortality Weekly Report*, Vol. 68, No. 12 (December 6, 2019), Centers for Disease Control and Prevention, pp.1–22, <https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm>.

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- ⁶ Peter Hajek, Anna Phillips-Waller, Dunja Przulj, et al., “A Randomized Trial of E-Cigarettes versus Nicotine-Replacement Therapy,” *The New England Journal of Medicine*, 2018, <https://athra.org.au/wp-content/uploads/2019/01/Hajek-P.-A-randomised-trial-of-e-cigarettes-versus-nicotine-replacement-therapy.-NEJM-2019.pdf>.
- ⁷ Christopher Russell, Neil McKeganey, Tiffany Dickson, and Mitchell Nides, “Changing patterns of first e-cigarette flavor used and current flavors used by 20,836 adult frequent e-cigarette users in the USA,” *Harm Reduction Journal*, Vol. 15, Article 33 (2018), <https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-018-0238-6>.
- ⁸ Konstantinos Farsalinos, Giorgio Romagna, Dimitris Tsiapras, Stamatis Kyrzopoulos, Alketa Spyrou, and Vassilis Voudris, “Impact of Flavour Variability on Electronic Cigarette Use Experience: An Internet Survey,” *International Journal of Environmental Research and Public Health*, Vol. 10, No. 12, (December 2013), pp. 7272-7282, <https://europepmc.org/abstract/med/24351746>.
- ⁹ Caitlin Notley, Emma Ward, Lynne Dawkins, and Richard Holland, “The unique contribution of e-cigarettes for tobacco harm reduction in supporting smoking relapse prevention,” *Harm Reduction Journal*, 2018, Vol. 15, Article 31 (2018), <https://harmreductionjournal.biomedcentral.com/articles/10.1186/s12954-018-0237-7>.
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- ¹¹ Keshia Clukey, “Case closed in Fort Plain liquid nicotine death,” *Times Union*, April 12, 2015, <https://www.timesunion.com/news/article/Case-closed-in-Fort-Plain-liquid-nicotine-death-6195411.php>.
- ¹² Angelica LaVito, “Fake Juul pods line store shelves, worrying users and posing another threat to the embattled company,” CNBC, August 26, 2019, <https://www.cnbc.com/2019/08/26/fake-juul-pods-fill-shelves-after-vaping-giant-pulled-fruity-flavors.html>.
- ¹³ Campaign for Tobacco-Free Kids, Broken Promises to Our Children: a State-by-State Look at the 1998 State Tobacco Settlement 22 Years Later, <https://www.tobaccofreekids.org/what-we-do/us/statereport>.