

Testimony Before the House Committee on Health and Human Services regarding HB 6396



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Prepared by: The Consumer Freedom Project at Reason Foundation

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Chair Casey, members of the committee, thank you for allowing me the opportunity to submit testimony on HB 6396.

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.

HB 6396's intention to reduce tobacco use, especially among youth, is to be applauded. However, the evidence on such prohibitions' success should raise significant concern that the ban will promote further inequalities in the criminal justice system, push tax revenue to other states, increase the illicit tobacco trade, and fail to improve public health.

Case Studies: Massachusetts, San Francisco, and Canadian Provinces

Massachusetts's ban on flavored tobacco products went into effect in June last year. In the eleven months following the ban, Massachusetts lost more than \$140 million on menthol cigarettes alone.¹ Adding lost sales from flavored e-cigarettes, cigars, and oral tobacco makes the actual figure even higher than \$140 million. Rather than actually reducing tobacco sales, it turns out that 88 percent of Massachusetts' lost tobacco sales were made up for by increased sales in Rhode Island and New Hampshire. With flavored tobacco sales shifting to those states, New Hampshire gained \$44 million in additional revenue, and Rhode Island's revenues increased \$25 million thanks to tobacco users seeking products that are now banned across

¹ Guy Bentley. "Maine Should Learn From Massachusetts' Failed Flavored Tobacco Ban." Reason Foundation. June 7, 2021.
<https://reason.org/commentary/maine-should-learn-from-massachusetts-failed-flavored-tobacco-ban/>

state lines in Massachusetts. The evidence is clear that Massachusetts residents are crossing the state line to obtain tobacco products.

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.² "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.

Furthermore, according to a study published by the National Bureau of Economic Research on menthol prohibition in Canadian provinces, the ban significantly increased non-menthol cigarette smoking among youths, resulting in no overall net change in youth smoking rates.³ 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 bind).

These results are important not just because they demonstrate an immediate economic impact to jurisdictions that introduce prohibition, but thanks to cross-border trade and substitution to non-menthol cigarettes, any health benefits are severely limited. In other words, the loss in tax revenue will not be accounted for by lower healthcare costs. Rhode Island ranks eighth in the nation for cigarette smuggling.⁴ Prohibition would undoubtedly increase this percentage substantially.

Public Health and Criminal Justice

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. It's hoped the ban will dramatically reduce the Black smoking rate.

² 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>

³ Christopher Carpenter, Hai V. Nguyen. "Intended and Unintended Effects of Banning Menthol Cigarettes." National Bureau of Economic Research. February 2020.

<https://www.nber.org/papers/w26811#fromrss>

⁴ Ulrik Boesen. "Cigarette taxes and cigarettes smuggling, 2018." Tax Foundation. November 24, 2020. <https://taxfoundation.org/cigarette-taxes-cigarette-smuggling-2020/>

From a public health standpoint, it's hard to ascertain why non-menthol cigarettes, which are equally dangerous, will not be subjected to prohibition, and menthol products will be. This is particularly relevant to Rhode Island as Black youth smoke at a lower rate than White youth at 3.4 percent and 4.1 percent respectively. Total youth smoking is lower in Rhode Island at 4.2 percent than the national average of six percent. Because menthol cigarettes are overwhelmingly the choice of Black smokers, prohibition will necessarily lead to a concentration of the illicit tobacco market in the Black community.

When Congress debated the merits of a tobacco flavor ban last year, the American Civil Liberties Union and other civil rights groups warned prohibition could disproportionately impact people of color, trigger criminal penalties, and prioritize criminalization over public health and harm reduction.⁵ The National Organization of Black Law 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 that in the case of menthol cigarettes it's truer than most.⁶

E-cigarettes and Tobacco Harm Reduction

The FDA is 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 on net harmful 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. Banning these products before the FDA concludes its review would limit consumer access to products the FDA may deem as a positive for public health later in the year.

The federal tobacco age was raised to 21 in 2019. Fortunately, youth vaping has fallen substantially in recent years. According to the 2020 National Youth Tobacco Survey (NYTS), youth vaping declined nationally by 30 percent in 2020.⁷ The survey was conducted before the closure of schools and the imposition of lockdowns in response to the coronavirus pandemic.

⁵ 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>

⁶ 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/>

⁷ Food and Drug Administration. "Youth Tobacco Use: Results from the National Youth Tobacco Survey." <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey>

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 third.⁸ While e-cigarette flavors have a weak appeal to youth, the same cannot be said for adult vapers trying to quit smoking. 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.⁹

Prohibition of flavored e-cigarettes, which are overwhelmingly the choice of adult vapers, risks fueling illicit markets, forcing the closure of Rhode Island vape shops and driving vapers back to smoking.

Thank you for your time.

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⁸ 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

⁹ 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>