

Maryland House Economic Matters Committee
Testimony: House Bill 134
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Reason Foundation
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Chair Davis, members of the committee, thank you for allowing me the opportunity to submit testimony on House Bill 134.

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 HB 134 to reduce 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 tax revenue to other states, increase the illicit tobacco trade, and fail to improve public health.

Case Studies: Massachusetts and Canadian Provinces

Massachusetts's ban on flavored tobacco products went into effect in June last year. From June-November 2020, Massachusetts' cigarette excise tax stamp sales fell 24 percent.¹ Unfortunately, sales in Rhode Island and New Hampshire rose 18 and 29.7 percent, respectively, compared to the same period in 2019. Massachusetts lost \$62 million in cigarette excise tax revenue while Rhode Island and New Hampshire gained \$14 and \$28.5 million, respectively. These figures underestimate the total losses because they do not account for lost sales of flavored e-cigarettes, smokeless tobacco, or cigars. Total cigarette sales increased in New Hampshire by 46 percent, and menthol sales rose by 90 percent. Total cigarette sales in Rhode Island rose 20 percent, and menthol cigarette sales climbed by 29 percent. The evidence is clear that Massachusetts residents are crossing the state line to obtain tobacco products.

¹ CS News. "NECSEMA Speaks Out on Massachusetts' 'Increasingly Absurd' Flavored Tobacco Ban." <https://csnews.com/necsema-speaks-out-massachusetts-increasingly-absurd-flavored-tobacco-ban>

According to the Tax Foundation, prohibition could cost Massachusetts a total of \$120 million in the 2020–2021 fiscal year.² Combining the increased sales of non-flavored cigarette sales in Massachusetts, which amounts to 15 percent, with the rising cigarette sales in Rhode Island and New Hampshire, cigarette sales are up overall since the prohibition came into effect.

Furthermore, according to a study published by the National Bureau of Economic Research (NBER) 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 which 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.

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. It's hoped the ban will dramatically reduce the 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.

In 2019, the latest year for which we have data, Maryland's White adult smoking rate was 14.1 percent.⁴ The Black smoking rate was 12.6 percent. As for youth for whom HB 134 is primarily targeted, Maryland mirrors the national picture. Maryland's Black youth are less likely to smoke than their White peers, at 3.3 percent and 5.4 percent, respectively.⁵ These data conformed to Reason Foundation's work last year, showing

² Ulrik Boesen. "Massachusetts Flavored Tobacco Ban Has Severe Impact on Tax Revenue." <https://taxfoundation.org/massachusetts-flavored-tobacco-ban/>

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 Centers for Disease Control and Prevention. "BRFSS Prevalence and Trends Data."

⁵ Centers for Disease Control and Prevention. "High School YRBS: Maryland Results."

that states with higher menthol cigarette distribution rates, such as Maryland, tend to have lower, not higher, youth smoking rates.⁶ In terms of marijuana consumption, which is illegal for recreational use in Maryland, both Black and White youth use at similar rates at 17.9 percent and 18.7 percent respectively. Prohibition has not prevented youth marijuana use but the smoking rate has been reduced dramatically. From a public health standpoint, as Black adults and youth smoke at lower rates than 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 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.⁷ 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.⁸

E-cigarettes and Tobacco Harm Reduction

In 2018, there were 1,243 jobs in Maryland directly related to the vape industry as well as hundreds of secondary jobs, contributing more than \$31 million in state taxes and \$54 million in wages.⁹

⁶ 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/>

⁷ 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>

⁸ 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/>

⁹ Stroud, Lindsey. "Policy Tip Sheet: Tobacco Harm Reduction 101: Maryland." The Heartland Institute. January 12, 2020.

<https://www.heartland.org/publications-resources/publications/policy-tip-sheet-tobacco-harm-reduction-101-maryland>

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 prior to the FDA concluding its review would limit consumer access to products the FDA may deem as a positive for public health later in the year.

Maryland's tobacco age was raised to 21 in 2019. Fortunately, youth vaping has fallen substantially. According to the 2020 National Youth Tobacco Survey (NYTS), youth vaping fell nearly 28 percent in 2020.¹⁰ The survey was conducted before the closure of schools and the imposition of lockdowns in response to the coronavirus pandemic.

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.¹¹

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

Thank you for your time.

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¹⁰ 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>

¹¹ 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