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Testimony from:

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In opposition to Senate Bill No. 410, "AN ACT concerning Electronic Smoking Devices – Flavor Prohibition."

February 13, 2020

Senate Finance Committee

Chairman Kelley and Members of the Committee:

The federal government recently raised the legal age to purchase tobacco products from 18 to 21<sup>1</sup> and banned the sale of flavored, cartridge-based e-cigarettes with the exception of tobacco and menthol flavors.<sup>2</sup> R Street supports the decision to raise the legal age to keep products out of the hands of minors as well as the exception for menthol-flavored products, which aims to provide an off-ramp for current menthol smokers.

R Street is concerned, however, with SB 410, as it would remove menthol-flavored products from the legal market—taking away an appealing and safer alternative for menthol smokers—and would include severe penalties for selling unauthorized e-cigarettes, including a misdemeanor conviction and jail sentence of up to 30 days. We do not believe that e-cigarettes constitute a public health issue that warrants such a steep penalty. We also maintain that the negative public safety outcomes associated with jails and a criminal record far outweigh any deterrent value such consequences might provide.

As two researchers and advocates for criminal justice reform, we are most concerned with this bill's provision allowing for a penalty of up to 30 days in jail and a misdemeanor conviction. R Street's criminal justice program has long advocated against incarcerating individuals in jails for low-level, nonviolent offenses.<sup>3</sup> Jails often operate at the state and local levels and typically detain individuals before trial (known as "pretrial detention") and those serving sentences less than one year. Prisons, on the other

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<sup>1</sup> "Selling Tobacco Products in Retail Stores," Food and Drug Administration (2019).

<https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/selling-tobacco-products-retail-stores>.

<sup>2</sup> "FDA finalizes enforcement policy on unauthorized flavored cartridge-based e-cigarettes that appeal to children, including fruit and mint," FDA News Release, Jan. 2, 2020.

<https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children>.

<sup>3</sup> Arthur Rizer, "The Conservative Case for Jail Reform," *National Affairs*, Fall 2017.

<https://www.rstreet.org/2017/09/22/the-conservative-case-for-jail-reform/>.

hand, are run by states or the federal government and detain individuals serving felony sentences of a year or more.<sup>4</sup> While over 600,000 people go to prison annually, people go to jail 10.6 million times each year.

The explosion of jail populations is in large part due to policies that house the accused and those convicted of low-level crimes in jails instead of exploring community or rehabilitative options. And while jails hold individuals for shorter periods of time than prisons, their negative effects on individuals and communities are numerous.

The dire conditions and lack of resources that typify most jails have exposed an empirical relationship between jail stays and damaging mental health outcomes.<sup>5</sup> Even brief jail sentences are associated with alarming rates of suicide that outpace prison suicide rates.<sup>6</sup> Multiple peer-reviewed studies have concluded that short stints in jails—as little as a few days—increase the likelihood that an individual will commit future crimes.<sup>7</sup> The likelihood of recidivism increases with the amount of time spent in jail.<sup>8</sup> The relationship between recidivism and incarceration is complicated, but many factors contribute—possible explanations include: loss of job, eviction, introduction to crime-prone individuals, strains on social ties and difficulty gaining employment post-release. Indeed, due to the widespread use of background checks and occupational licensing laws that target those with criminal records,<sup>9</sup> a misdemeanor conviction or merely an arrest can make it impossible to access and maintain stable employment and stay crime-free.<sup>10</sup>

Maryland acknowledges the problems associated with unnecessary incarceration and the damage a criminal record can inflict on individuals and communities. The state has been a leader in criminal justice reform, having passed reforms like the Justice Reinvestment Act that reduced counterproductively long sentences, emphasized treatment and rehabilitation over incarceration and made it more feasible for individuals who have served their time to clear their record and access employment post-release.<sup>11</sup> In the spirit of these smart reforms, we believe this bill's penalties for low-level offenders should be revised, particularly given the net-positive public health outcomes offered by e-cigarettes.

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<sup>4</sup> Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2019," Prison Policy Initiative, March 19, 2019. <https://www.prisonpolicy.org/reports/pie2019.html>.

<sup>5</sup> Naomi Sugie and Kristin Turney, "Beyond incarceration: criminal justice contact and mental health," *American Sociological Review* 82:4 (2017), pp. 719-43. <https://journals.sagepub.com/doi/abs/10.1177/0003122417713188>.

<sup>6</sup> Maurice Chammah and Tom Meagher, "Why Jails Have More Suicides than Prisons," *The Marshall Project*, Aug. 4, 2015. <https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons>.

<sup>7</sup> Paul Heaton, Sandra Mayson and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69 (2017), p. 711. <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.

<sup>8</sup> Christopher T. Lowenkamp, Marie VanNostrand and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes," Laura and John Arnold Foundation, November 2013. [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf).

<sup>9</sup> Jonathan Haggerty, "How occupational licensing laws harm public safety and the formerly incarcerated," *R Street Policy Study* No. 143, May 2018. <https://www.rstreet.org/2018/05/31/how-occupational-licensing-laws-harm-public-safety-and-the-formerly-incarcerated/>.

<sup>10</sup> Megan Denver, Garima Siwach and Shawn Bushway, "A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check," *Criminology* 55:1 (2017), pp. 174-204. <https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9125.12130>.

<sup>11</sup> Michael Dresser, "Hogan signs bill to overhaul Maryland criminal justice system," *The Baltimore Sun*, May 19, 2016. <https://www.baltimoresun.com/politics/bs-md-justice-reinvestment-20160518-story.html>.

According to a well-respected British public health agency<sup>12</sup> as well as the National Academy of Sciences,<sup>13</sup> e-cigarettes are 95 percent safer than combustible cigarettes. One study found that e-cigarettes could save up to 6 million lives by 2100 if only 10 percent of current smokers switch to e-cigarettes over the next 10 years.<sup>14</sup> E-cigarettes have also been shown to help current smokers quit their deadly habit,<sup>15</sup> and recent research demonstrates that e-cigarette users who use non-tobacco flavors, including menthol, are more likely to switch from combustible cigarettes than those who do not.<sup>16</sup>

Although there is not good evidence that vaping acts as a gateway to regular smoking for youth,<sup>17</sup> we acknowledge it is best that minors do not form nicotine habits, and therefore we support mandating stronger point-of-sale age verification, increased compliance checks on retailers as well as swift and meaningful enforcement for retailers who violate minimum-age-to-purchase laws. Maryland already provides for suspension or revocation of licenses as well as civil penalties.<sup>18</sup>

Because of the many health and public safety problems associated with jail, R Street does not support the incarceration of an individual unless there is a compelling public interest. Given the relatively low public health problems associated with vaping and the ameliorative benefits of e-cigarettes—including those containing menthol—R Street opposes banning menthol-flavored e-cigarettes as well as any penalties stipulating incarceration and a criminal record.

Thank you for your consideration,

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<sup>12</sup> “Nicotine without smoke: tobacco harm reduction,” Royal College of Physicians Tobacco Advisory Group, 2016. <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0>.

<sup>13</sup> “The Public Health Consequences of E-cigarettes,” National Academies of Science, Engineering and Medicine, January 2018. <http://nationalacademies.org/hmd/reports/2018/public-health-consequences-of-e-cigarettes.aspx>.

<sup>14</sup> David Levy et al., “Potential deaths averted in USA by replacing cigarettes with e-cigarettes,” *Tobacco Control* 27:1 (2018), pp. 18–25. <https://tobaccocontrol.bmj.com/content/27/1/18>.

<sup>15</sup> Peter Hajek et al., “A Randomized Trial of E-Cigarettes versus Nicotine-Replacement Therapy,” *The New England Journal of Medicine* 380 (2019), pp. 629-37.

<sup>16</sup> Christopher Russell et al. “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* 15:33 (2018).

<sup>17</sup> Carrie Wade, “Why Vaping Isn’t a ‘Gateway’ to Smoking,” *RealClearScience*, Jan. 6, 2018. [https://www.realclearscience.com/articles/2018/01/06/why\\_vaping\\_isnt\\_a\\_gateway\\_to\\_smoking.html](https://www.realclearscience.com/articles/2018/01/06/why_vaping_isnt_a_gateway_to_smoking.html).

<sup>18</sup> Md. Code Ann., Bus. Reg. § 16.7-207. <https://codes.findlaw.com/md/business-regulation/md-code-bus-reg-sect-16-7-207.html>.