



February 13, 2020
Re: Opposition to HB 2563

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Chief LA Lobbyist

The Liberty Alliance is a private membership association dedicated to advancing libertarian principles in the Kansas legislative process. All funding for Liberty Alliance comes from a publicly open membership in which each person pays the same, flat, very modest, annual fee.

The members of our association want me to ask you again and again, in one context or another as public policy issues continually percolate, to consider how significantly you're willing to value freedom – everybody's freedom. As new laws proliferate, government grows and taxes rise, the consistent consequence is less and less liberty for citizens.

At issue today in HB 2563 is whether many voting-age adults should be prohibited from doing something that may be unhealthy for themselves. The bill also endorses a ban of flavors – yes, it declares to be unlawful the benign consumable supplements in a legal product that produce interesting taste differences for the human palate.

The power we've given to government, and continue heaping upon the state's arsenal, is staggering. This bill may seem to many as a trivial restriction upon a disfavored and unenriching type of conduct. But instead, what it starkly means is that the state can ban Cheetos because they taste too good, result in obesity, drive up healthcare costs for everyone, and people would really be better off without it. There truly is no end to the things government can forbid us with this mode of thinking. Liberty Alliance implores you: beware, be skeptical of, and avoid any legislation regardless of how popular it might be, when its proponents justify by saying "It's for their own good."

Liberty Alliance is well aware that the Federal government has already promulgated national law that does what HB 2563 proposes. The relevant Kansas agencies have adopted "State Plans" and accept federal funds that require them to enforce this federal law and many, many others. So, why was HB 2563 been introduced and brought to hearing? There is no published fiscal note for the bill, a fact which suggests that Kansas will not lose federal funds if you decline to enact this bill. Furthermore, the absence of a fiscal note seems strange when Kansas law enforcement personnel and state agency staffers will have more people against whom to enforce the tobacco ban and more mandated conditions and prohibitions upon businesses that need extra monitoring, reporting, and enforcing.

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If the reason for today's bill is for Kansas to formally declare that it likes and endorses the new federal laws, you could do that with a simple Concurrent Resolution. If the reason is to create congruity, to make our state laws consistent with their federal counterparts, HB 2563 could have been far more simply drafted to repeal the inconsistent state laws. Just imagine how much thinner a set of KSAs (Kansas Statutes Annotated) would be if this state were more candid, less verbose, and replaced a plethora of its statutes with something like "Ditto the Feds".

In deference to the well-intended motives of everyone, the truth is clearly that many people believe HB 2563 represents good public policy. On January 2 of this year when the new tobacco laws went into effect, the FDA (Food & Drug Administration within the U.S. Dept HHS) released its rationale as being "epidemic levels of youth use of e-cigarettes and the popularity of certain products among children" and supported that with data showing "of current youth e-cigarette users in 2019, approximately 1.6 million were using the product frequently (use on 20 days or more in a 30-day period), with nearly one million using e-cigarettes daily".

With regard to the "epidemic", I refer this Committee to the data attached to this testimony that features another current HHS publication that compares youth tobacco usage rates over a longer span of time – since 1976. The attached data gives you more detail, but here are some highlights about the percent of 12th graders who use tobacco daily, which includes all forms of tobacco consumption per given year, including cigarettes, cigars, smokeless products, and e-cigarettes:

- 1976 -- 28.8%
- 1986 -- 18.7%
- 2002 -- 12.2%
- 2012 -- 9.3%
- 2018 -- 3.6%

With regard to banning flavors, last month's FDA news release includes an important caveat to what many represent as its "ban":

Importantly, the FDA's enforcement priorities are not a "ban" on flavored or cartridge-based ENDS. The FDA has already accepted and begun review of several premarket applications for flavored ENDS products through the pathway that Congress established in the Tobacco Control Act. Manufacturers that wish to market any ENDS product – including flavored e-cigarettes or e-liquids – are required by law to submit an application to the FDA that demonstrates that the product meets the applicable standard in the law, such as whether the product is appropriate for the protection of the public health. If a company can demonstrate to the FDA that a specific product meets the applicable standard set forth by Congress, including considering how the marketing of the product may affect youth initiation and use, then the FDA could authorize that product for sale.

Perhaps the future will show that the FDA review of marketing plans will be so stringent as to effectively constitute a ban on flavored e-cigarettes. I profess that Liberty Alliance has not had the time for legal research to investigate the breadth and reasonability of this federal caveat. However, taking the FDA notice at face value from its own press release, our Kansas proposal in HB 2563 is more severe and absolute by comparison.

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Consider this bill's criminalizing provision in Section 12 (p.19):

It shall be unlawful for any person...To sell: (1) Any electronic cigarette that contains flavored consumable material, except menthol-flavored consumable material; or (2) any flavored consumable material, except menthol-flavored consumable material.

What is absent from today's bill, but yet what is acknowledged by the FDA at least with regard to flavors, is the concept that intent matters. Whether a business is deceptively or insidiously trying to addict and corrupt youth – those who lack the “age of majority” and the legal capacity to make their own decisions and their own contracts with others – is a question of fact that should be determined case by case.

What intent should we discern is held by a 20 year-old consumer or a business that sells tobacco to her? The motive may be indulgent, hedonistic, rebellious, self-centered or purely commercial, but the Liberty Alliance reasons that the intent to harm is exceedingly rare. Also, that and any actual unintentional harm is outweighed by the liberty interest of adults who may legally make decisions for themselves and vote. Government policies, landmark litigation, and changing social preferences have in our lifetimes profoundly diminished the harms attributable to tobacco. It should be getting much easier for lawmakers to conclude that the toll on freedom is too high.

This bill is more restrictive of personal freedom than even an onerous set of new federal laws. Please don't tell grown adults that you want to do this “for their own good”. Not every sin should be criminalized, and we're not here to delve into spiritual questions about all that may constitute “sin” that the state should do anything and everything in its power to discourage. There are other, more personal institutions, like family and church, to cope with such lifestyle issues.

The federal policy is bad enough. It doesn't need your endorsement. Our state will be enforcing it anyway. Please reject HB 2563.

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[Attachments below]

Office of Population Affairs

Adolescents and Tobacco: Trends

Approximately 4.9 million middle and high school students were current tobacco users in 2018.¹ Although tobacco use by adolescents has declined substantially in the last 40 years, in 2018, less than one in 25 high school seniors was a daily smoker.² Substantial racial/ethnic and regional differences in smoking rates exist. Among high school students, white teens are more likely to smoke than their black or Hispanic peers.³ Smoking rates are typically higher in nonmetropolitan areas, and in the Southern and Midwestern regions of the country.⁴

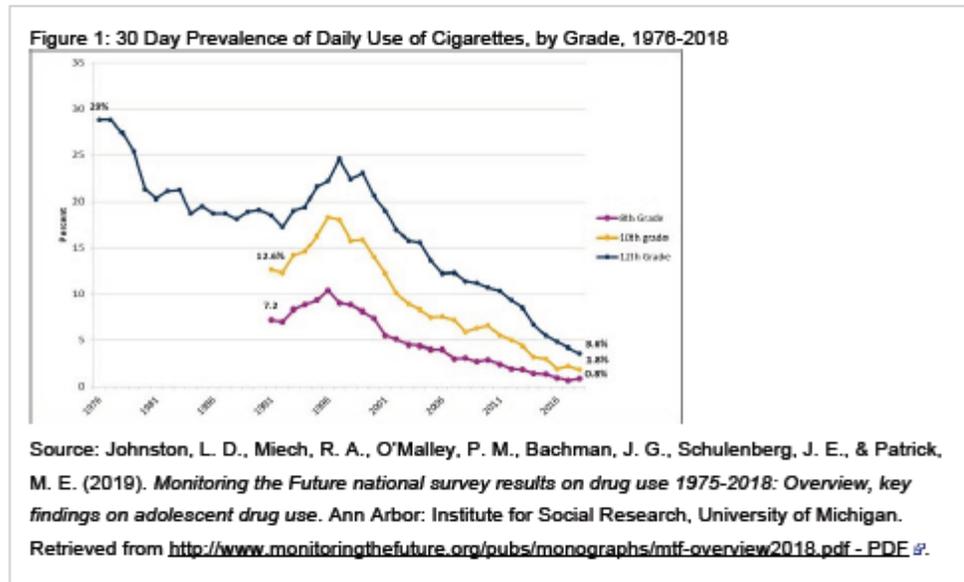


Table 1: Percent of students who report smoking cigarettes daily, by grade, 1976-2018

Year collected	8th Grade	10th Grade	12th Grade
1976			28.8
1977			28.8
1978			27.5
1979			25.4

Year collected	8th Grade	10th Grade	12th Grade
1980			21.3
1981			20.3
1982			21.1
1983			21.2
1984			18.7
1985			19.5
1986			18.7
1987			18.7
1988			18.1
1989			18.9
1990			19.1
1991	7.2	12.6	18.5
1992	7.0	12.3	17.2
1993	8.3	14.2	19.0
1994	8.8	14.6	19.4
1995	9.3	16.3	21.6
1996	10.4	18.3	22.2
1997	9.0	18.0	24.6
1998	8.8	15.8	22.4
1999	8.1	15.9	23.1
2000	7.4	14.0	20.6
2001	5.5	12.2	19.0
2002	5.1	10.1	16.9

Year collected	8th Grade	10th Grade	12th Grade
2003	4.5	8.9	15.8
2004	4.4	8.3	15.6
2005	4.0	7.5	13.6
2006	4.0	7.6	12.2
2007	3.0	7.2	12.3
2008	3.1	5.9	11.4
2009	2.7	6.3	11.2
2010	2.9	6.6	10.7
2011	2.4	5.5	10.3
2012	1.9	5.0	9.3
2013	1.8	4.4	8.5
2014	1.4	3.2	6.7
2015	1.3	3.0	5.5
2016	0.9	1.9	4.8
2017	0.6	2.2	4.2
2018	0.8	1.8	3.6

Products used by adolescents include cigarettes (both store-bought and hand-rolled), cigars, pipes, hookahs, smokeless tobacco, and newer oral products such as e-cigarettes, pouches, lozenges, strips, and sticks:

- **Tobacco cigarettes:** Nearly 90 percent of adult smokers began smoking before age 18, and 9.7 percent of high school seniors reported smoking in the last month.²
- **Smokeless tobacco:** Use of smokeless tobacco among adolescents is less common than cigarette smoking.
- **Hookahs:** Hookahs are no safer than other forms of tobacco smoking and may deliver even higher levels of toxic substances.
- **Flavored little cigars:** Of middle and high school students who used tobacco products in 2014, more than 80 percent smoked flavored little cigars.³
- **E-cigarettes:** From 2011 to 2016, the percentage of 12th-grade students who had ever used an e-cigarette increased from 4.7 to 13 percent, down from a peak in 2015 of 16 percent.² For the first time in 2014, more teenagers used e-cigarettes or vaped nicotine than smoked cigarettes—a trend that continues. In 2017, 11 percent of high school students reported vaping nicotine at least once in the past 30 days.¹²

Many adolescents use more than one tobacco product. In 2017, 9 percent of high school students and two percent of middle school students reported the current use of two or more types of tobacco.¹⁸