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TESTIMONY BEFORE THE R.I. CANNABIS CONTROL COMMISSION
ON POTENTIAL REGULATORY ACTIONS
August 4, 2023

As longtime proponents of the legalization of both medical and recreational cannabis, the ACLU of Rhode Island is appreciative of the community input that is being solicited prior to the institution of regulations addressing the recreational sale of cannabis. While the statute which formally codified the legality of this program into Rhode Island law addressed a number of civil liberties concerns, there remain a few lingering issues that our organization believes could benefit from being addressed in regulation. They are concerns that, when addressed, will strengthen protections for recreational cannabis consumers and ensure that this program does not unintentionally give rise to other issues affecting equity.

We believe regulatory action is appropriate on all the issues we raise below in light of the broad and open-ended authority given to the commission to adopt rules "for the implementation, administration and enforcement of this chapter." R.I.G.L. §21-28.11-5(a)(1). At this very preliminary stage of the commission's mission, however, we are not suggesting specific language to address the issues we raise, but will be happy to do so as the commission proceeds with its work.

1. Criminal Record Check Concerns

The new law is replete with provisions addressing criminal record checks for the many different personnel who will be working, managing, owning, and otherwise participating in cannabis establishments and facilities. However, some of these provisions are non-uniform and unintentionally appear to conflict with one another and with other state laws.

We note in particular the section of the legalization statute which generically addresses criminal record check procedures. R.I.G.L. §21-28.11-12.1. Subsection (d) provides that certain criminal offenses lead to automatic disqualification for any business or activity licensed or registered under this law. However, any type of automatic disqualification is contrary to the state's "fair chance licensing" law ("FCL"), which requires individualized consideration of each offender and offense. The FCL statute explicitly supersedes any contrary "existing or future state law or regulation relating to the granting, denying, suspending, or revoking of a license by a state agency." R.I.G.L. §28-5.1-14(m). In this regard, §21-28.11-12.1(d)(2) of the legalization law, which authorizes automatic disqualification for "substantially related" offenses, is in tension with FCL and subsection (f) which, by its wording, makes disqualification discretionary under those circumstances.

Because this section of the law appears internally inconsistent, as well as inconsistent with other provisions in this statute dealing with criminal record checks, we urge that the regulatory process be utilized to examine this issue in much more depth, promote greater uniformity in the background check process, and, in turn, structure these regulations to

clarify any inconsistencies found in the statute regarding criminal record check procedures. In doing so, we would emphasize that individuals with past criminal, drug-related records should not face greater scrutiny or disqualification than other offenders, especially considering the perspective of the express equity goals of this law. In that regard, it is critical that disqualifying "substantially related" offenses not be interpreted to encompass the types of drug offenders that the law was designed to offer second chances to.

2. Employment

One of the many positive provisions in the marijuana legalization statute is a restriction on the ability of employers to "fire or take disciplinary action against an employee solely for an employee's private, lawful use of cannabis outside the workplace," provided that the employee is not working under the influence of cannabis. R.I.G.L. §21-28.11-29(d).[1]

However, the statue does not *explicitly* address protections for individuals *seeking* employment who may engage in the off-hours legal recreational use of cannabis. It implicitly suggests similar limitations to those in effect for employees by specifying that employers can refuse to hire an individual because of their "violation of a workplace drug policy or because that person was working while under the influence of cannabis." R.I.G.L. §21-28.11-29(e). The inclusion of such language wouldn't be necessary if the legislature intended to allow employers to not hire job applicants solely because they lawfully used this drug off-hours. In addition, the state's medical marijuana statute has been interpreted for many years as barring employers from discriminating against job applicants based on their medical use of cannabis.[2] It is thus difficult to conceive that the legislature meant to allow employers to discriminate in hiring against an individual solely for engaging in this legal, off-hours activity while clearly allowing its use once hiring has occurred.

In both instances, the conduct involves an individual's lawful and private activity, and just as importantly – since, other than self-reporting, drug testing is likely the exclusive way an employer would find out about a job applicant's after-hours cannabis use – the results of drug testing job applicants for positive results are even more meaningless in light of the way that cannabis metabolites can show up in one's system for weeks after ingestion.

We therefore encourage the commission to adopt rules that clarify that individuals going through the hiring process are subject to the same protections and exemptions that the statute outlines for private and lawful use of cannabis outside the workplace by employees.

3. Law Enforcement and Motor Vehicles

(a) <u>*Car Searches*</u>: While other states – including Connecticut, New York and Maryland – have directly addressed in their cannabis legalization laws the limits of police authority to search motor vehicles based on the presence of cannabis odor, nothing in the legislation

[1] The statute does contain limited exemptions from this protection for employers who could lose monetary or licensing benefits if they fail to bar off-hours use of cannabis, or for employees who are in a work environment that is "hazardous, dangerous or essential to public welfare or safety." R.I.G.L. §21-28.11-29(d)(1) and (d)(2).

[2] *Callaghan v. Darlington Fabrics Corporation*, 2017 WL 2321181, No. PC-2014-5680 (R.I. Super. Ct. 2017).

passed to legalize cannabis in Rhode Island does so. In light of the legalization of the possession of cannabis, these other states have recognized that police should no longer be able to use that odor to engage in the intrusive activity of searching a person or vehicle. Court decisions in our neighboring state of Massachusetts have similarly held that police are constitutionally barred from using the mere detection of cannabis odor to engage in motor vehicle searches. Here in Rhode Island, our state Supreme Court recently held, as a matter of constitutional law, that police could consider the odor of marijuana as one factor in deciding whether to prolong a car traffic stop, while appearing to acknowledge that it could not by itself provide probable cause for a search. It is important to note that the case involved a stop that occurred prior to passage of the cannabis legalization statute.[3]

However, we agree with the dissent in that case which went further: that in light of the legalization of the possession and use of small amounts of marijuana, it is wrong to "allow law enforcement officers to presume that an individual possesses an *illegal* quantity of an otherwise *legal* substance."[4] That dissent further notes that "courts across the United States are struggling to articulate an appropriate approach to considering the implications of the odor of marijuana and analyses of reasonable suspicion and probable cause."[5] We believe it is within this body's powers to help with that articulation.

Rather than leave this issue to repeated, time-consuming and onerous litigation, the regulatory process presents an opportunity for this commission to clearly and definitively create policy around this important due process and Fourth Amendment concern and prohibit the odor of marijuana from serving as a "probable cause" factor for car searches.

(b) *Drug Recognition Experts*: We know that there has been significant discussion of the question as to how to address the problem of marijuana-impaired drivers. The legalization law references the use of certified "drug recognition experts" (DRE) to provide evidence of such an offense. However, the methodology and science behind the DRE approach have simply not reached a consensus state of reliability. Many consider it to be one of the latest examples of "junk science" trying to make its way into the courtroom.

Police continue to have many tools at their disposal to charge cannabis-impaired individuals with a DUI, just as they do for alcohol-related motor vehicle violations. Field sobriety tests, visual examination of the driver's behavior, and information about the individual's control of the car while driving can all be used now to make a determination of whether an incident qualifies as a DUI, regardless of whether it involves alcohol, marijuana, or another drug. In authorizing DRE-submitted evidence, the statute provides no standards or guidelines for its use, and we believe that the regulations should fill that gap in order to avoid the overzealous and potentially erroneous use of DRE-obtained testimony against individuals.

Thank you for your consideration of our views.

Submitted by: Steven Brown, Executive Director

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[3] *State v Li*, 2023 WL 4771928 (R.I. 7/27/2023).
[4] Id. (J.Long, dissenting, fn. 3).
[5] Id.