Marijuana Policy Project
P.O. Box 21824 • Washington, DC 20009
202-462-5747 • www.mpp.org

March 3, 2022 **SB 833**

Testimony from Olivia Naugle, senior policy analyst, MPP, favorable with amendments

Dear Chair Kelley, Vice Chair Feldman, and members of the Senate Finance Committee:

My name is Olivia Naugle, and I am senior policy analyst for the Marijuana Policy Project (MPP), the largest cannabis policy reform organization in the United States. MPP has been working to improve cannabis policy for 27 years; as a national organization, we have expertise in the various approaches taken by different states.

MPP has played a leading role in most of the major cannabis policy reforms since 2000, including more than a dozen medical cannabis laws and the legalization of marijuana by voter initiative in Colorado, Alaska, Maine, Massachusetts, Nevada, Michigan, and Montana. MPP's team spearheaded the campaigns that resulted in Vermont and Illinois becoming the first two states to legalize marijuana legislatively and played an important role in the recent Connecticut legalization effort.

The Marijuana Policy Project strongly supports legalizing and regulating cannabis for adults 21 and older and doing so in a way that repairs the damage inflicted by criminalization. That includes expungement of past cannabis convictions, provisions to ensure diversity and social equity in the industry, and reinvestment in communities hard-hit by the war on cannabis.

Given the trends in polling, and the increasing recognition by elected officials on both sides of the aisle that criminalizing cannabis users has done more harm than good, ending marijuana prohibition in Maryland has become less a question of *if* and more about *how*.

We applaud Senate leadership and Sen. Feldman for their leadership on this important issue. Marylanders have long supported moving forward with cannabis legalization, and it is past time Maryland joined the 18 states (and D.C.) that have legalized cannabis for adults.

SB 833 includes many strong provisions, including home cultivation, broad expungement, ensuring parole and probation are not revoked over cannabis, funding to promote a diverse industry and community reinvestment, and equity-centered licensing. I am here today to discuss the positive impacts cannabis legalization will have and offer amendments to strengthen SB 833 as it is currently written.

Legalization should go into effect immediately upon voter approval.

Since we learned of leadership's will to legalize adult-use cannabis through referendum, we have advocated strongly that the measure must be self-executing, meaning it would legalize possession for adults 21 and older immediately upon voter approval with no other legislative

action needed. Further, contingent legislation should be enacted with the referendum to include regulatory details rooted in social equity and reparative justice.

To underscore the importance of having the referendum be self-executing, Maryland should learn from New Jersey. New Jersey is the only state that has legalized through a constitutional amendment voter referendum. New Jersey's voters approved legalization on the ballot in 2020, but unfortunately, the will of the people alone did not immediately make cannabis legal. The legislature still had to come back to implement a law months later.

In the three months between two-thirds of voters adopting legalization and the governor signing implementing legislation, more than 6,000 charges for minor marijuana possession were filed. Maryland should learn from New Jersey and make the referendum self-executing. When voters legalize cannabis, cannabis needs to actually become legal.

The current House proposals to legalize cannabis — HB 1 and HB 837 — include an eight-month delay between referendum approval and cannabis possession and home cultivation becoming legal. The House bills also do not set up a regulatory framework. The longer the delay for implementation, the longer people will be at risk. With no regulated system, consumers will only have access from the illicit market, which brings risks of theft, violence, and the dangers of an unregulated product that can contain dangerous pesticides and additives. The sooner the details of regulation are sorted out, the sooner these harms will be reduced and then eliminated. With communities of color having borne the brunt of prohibition for decades, the sooner the legislature moves forward with regulation, the sooner it can begin to repair the past harms prohibition has caused.

We recommend that a final proposal to legalize cannabis this year take the approach of SB 833 — to provide that possession and home cultivation become legal when the election is certified without delay and set up a regulatory structure.

Recommendations to improve SB 833 as currently written

1) Remove the unscientific per se DUID limit (from p. 81, line 6 to p. 82, line 2)

SB 833 currently establishes a per se DUID limit of having a concentration of five nanograms or more of THC in the blood. Driving or attempting to drive while under the influence of cannabis per se would be punishable by a year of imprisonment, up to a $1,000 fine, or both for a first offense. The defendant can raise an affirmative defense — where *they have the burden of proof* — that they were not actually under the influence of cannabis.

This misguided approach can be expected to both result in convictions of completely sober drivers *and* in acquittals of impaired drivers who are below five ng/ml at the time of their blood test.

We suggest Maryland instead maintain its current approach, which is the same policy as most other states use — an "effects-based" law but with additional drug recognition training and public education. "Effects-based" driving under the influence of cannabis laws criminalize a

person for driving while they are truly impaired, which is determined based on all available evidence. That may include footage or testimony about how the person drove, the results of a 12-step analysis by a drug recognition expert, whether the person smelled of marijuana, and *the results of a blood test for THC* — the main psychoactive ingredient in marijuana.

Cannabis consumers can test positive for five ng/ml many hours after impairment wears off. Medical cannabis patients are particularly likely to be frequent consumers, so this limit would hit them particularly hard. One Colorado patient who was also a reporter used cannabis at night, got a full night's sleep, and then had his blood drawn 15 hours later. He tested at 13.5 nanograms of THC per milliliter of blood, nearly three times the proposed limit.[1]

As the National Highway Traffic Safety Administration has noted, "toxicology cannot produce per se proof of drug impairment. That is, the chemist can't analyze the blood or urine and come up with a number that 'proves' the person was or wasn't impaired."[2]

There is no magic number for a threshold of THC at which a driver is impaired by cannabis. The AAA Foundation for Traffic Safety evaluated data on THC-positive drivers and drug-free controls, along with results of drug recognition expert evaluations, to see if the data supported a set threshold for a *per se* driving law for cannabis. It did not.[3] As AAA Director of Traffic Safety Advocacy and Research Jake Nelson explained, "There is no concentration of [THC] that allows us to reliably predict that someone is impaired behind the wheel in the way that we can with alcohol."[4]

Given the length of time after impairment THC can stay in a person's system, no conviction for driving under the influence of marijuana should be based solely on the results of a blood test; rather, test results should just be one piece of evidence that is used to determine if the person was driving under the influence. Requiring a person over five ng/ml to prove they were *not* impaired to avoid a conviction flips the burden of proof and will cause people to be wrongly convicted of DUI.

In addition, creating a per se DUI level of five ng/ml may make it difficult to secure a conviction of an individual who tests below that threshold. This is a problem because some individuals will be impaired while testing at lower levels, especially if they also drank alcohol or are an infrequent consumer of cannabis and a significant amount of time elapsed before a blood test was administered.

2) Significantly increase the number of new stores licensed in 2024 (p. 63, lines 15-18)

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[1] "THC blood test: Pot critic William Breathes nearly 3 times over proposed limit when sober," *Denver News*, April 18, 2011.
[2] "The Drug Recognition Expert School Student Manual," National Highway Traffic Safety Administration, 2011. *Available at* http://www.maine.gov/dps/bhs/impaired-driving/law-enf-resources/dre/documents/7daystu1- 10-11.pdf.
[3] Barry Logan, Ph.D., et al., "An evaluation of data from drivers arrested for driving under the influence in relation to per se limits for cannabis," AAA Foundation for Traffic Safety, May 2016.
[4] Jonah Bromwich, "How Much Is Too Much Marijuana to Drive? Lawmakers Wonder," *The New York Times*, May 13, 2016.

SB 833 provides that 47 new retail licenses will be issued in 2024, with one per senatorial district. This would be less than a 50% increase, even as the number of legal consumers increases by more than five-fold (Maryland has 147,070 medical patients, while 758,000 Maryland adults admit past-year cannabis use according to SAMSHA). This would result in far fewer stores than other states. For example, Washington has as statewide cap of 556, which would be 442 in Maryland if adjusted per capita.

This too-low limit would leave many cannabis consumers without access to safe, lab-tested cannabis and is determinantal to a healthy, competitive market with reasonable pricing. Only 47 new retailers in 2023 would mean far fewer opportunities for social equity applicants. It would also mean patients and other consumers would have to travel further and have fewer product choices. This would also likely lead to more illicit market activity.

3) Increase the number of growers, including with uncapped micro-grows (p. 61, lines 24-29)

Capping licenses results in the government picking winners and losers. SB 833 would require applicants to spend large sums on applications to throw their hats in the ring. Avoiding a cap, and instead having discrete application periods, prevents that injustice and related litigation and delays. Uncapped micro-grow licenses give small businesses a fair shot to compete in the free market without causing oversupply.[5]

Many states, including New Jersey, do not cap micro-grows. In contrast, SB 833 only allows 14 micro-cultivation licenses to be issued in the social equity round. Allowing uncapped micro-grows also avoids creating a massive unfair advantage for existing grows and the businesses they have relationships with. Failing to allow uncapped micro-grows will allow existing vertically integrated operators to squeeze out their competitors, including new social equity applicant-run dispensaries and infused product manufacturers.

4) Change "or" to "and" in the possession limit (p. 7, lines 5-16)

Cannabis consumers often possess and purchase flower, edibles, *and* concentrates, not just one or the other. However, the limit says a person can possess two ounces, 15 grams of concentrates, ***or*** products with 1,500 mg of THC. It is not clear if a person can even possess a gram and an edible. "Or" must change to "and" to ensure a person is not subject to a citation or criminal penalty if they have edibles and flower.

5) Increase possession and cultivation limits (p. 7, lines 5-16)

We suggest legalizing personal cultivation of up to six plants, rather than four, which is more in line with other states.[6] We also recommend allowing personal possession of four ounces to mirror the medical law. Having consistency in the possession limits between adult-use and

[5] "Key Considerations for Marijuana Legalization," Joint Legislative Audit and Review Commission, November 16, 2020, http://jlarc.virginia.gov/pdfs/reports/Rpt542-6.pdf. (p. 48, starting, "Small cultivators could be excluded from caps to provide more opportunities for small businesses to enter the market.")
[6] *See* https://www.mpp.org/assets/pdf/issues/legalization/Review-of-State-Legalization-Laws.pdf.

medical cannabis will further protect patients, who may not have their card on them or have an expired card. Further, other adult-use states have possession limits greater than two ounces. In New Jersey, for example, adults can possess up to six ounces of cannabis. Allowing for a higher possession limit will further reduce arrests, citations, criminalization, and police interactions for cannabis possession.

6) Provide that the odor of cannabis is not grounds for a search

To further reduce police interactions for cannabis, it should be explicitly included in statute that the odor of cannabis is not grounds for a search.

We recommend using language like Connecticut's P.A. 21-1, § 18 to ensure cannabis is not grounds for a search, but to allow the odor of burnt cannabis to form part of the basis for a DRE examination to determine whether a driver is impaired.

We do not recommend the language in SB 692's 1-211 (B), which creates an exception that swallows the rule, by seemingly allowing searches of areas "(1) readily accessible to the driver or operator; or (2) reasonably likely to contain evidence relevant to the condition of the driver or operator" when an officer claims they are investigating a suspected DUI.

A DUI exception closer to Connecticut's allows officers to use the odor if it's relevant to probable cause for a sobriety test for driver *impairment* rather than to allow them to tear apart a car looking for legal cannabis.

For the DUI exception, we recommend language along the lines of:

> "A law enforcement official may conduct a test for impairment based in part on the odor of burnt cannabis if such official reasonably suspects the operator of a motor vehicle of violating [DUI statutes]."

7) Provide for a deadline and a local referendum on any local ban (p. 68, line 32 to p. 69, line 3)

States are increasingly putting deadlines on local bans so there will be certainty in where establishments can locate. If localities will be allowed to opt out of cannabis sales, thus causing the illicit market to persist, voters should be given the final say, and there should be a clear deadline. For example, counties and cities could be required to decide by July 1, 2023, and any ban could be automatically referred to voters no later than September 26, 2023.

8) Consider delaying medical licensing until social equity licensing begins

In Illinois, we have seen a years-long delay in social equity licensing while medical businesses expand their market share. Many equity advocates are now skeptical of allowing medical businesses to have a head start.

Conclusion

Thank you, Chair Kelley and members of the committee, for your time and attention.

I respectfully urge the committee to consider our suggested amendments and issue a favorable report of SB 833. If you have any questions or need additional information, I would be happy to help and can be reached at the email address or phone number below.

Sincerely,

Olivia Naugle
Senior Policy Analyst
Marijuana Policy Project
onaugle@mpp.org
202-905-2037