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April 26, 2023

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 556 and Senate Bill 516, "Cannabis Reform"

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 556 and Senate Bill 516, "Cannabis Reform." Although the bills are designated as cross-filed bills, they are not identical. In each case where the difference is substantive, the Senate version is preferred.[1] For that reason, it is our recommendation that the Senate

[1] We have identified the following differences between the House and Senate versions of the bill:

- In the purpose paragraph, the Senate bill identifies the Office of Social Equity as being established in the "Maryland Cannabis Administration" (page 1, line 9), whereas the House bill incorrectly describes the Office as being established in the "Maryland Cannabis Commission" (page 1, line 9).
- In the purpose paragraph, on page 1, line 10 of both bills, the House bill has a comma that does not appear in the Senate bill.
- The Senate bill describes the State cannabis testing laboratory as supporting the regulatory authority "of the Commission" (page 38, line 15), while the House bill refers to the regulatory authority "of the or Administration."
- The Senate bill, on page 57, in line 16, requires the submission of "a final report." The House bill refers to "a report" (page 58, line 10).
- On page 61 of the House bill an "and" was omitted from the end of line 2.

bill be signed last. As explained below, it is our view that the five-year residency requirement for appointment to the Advisory Board on Medical and Adult-Use Cannabis ("Advisory Board") risks being found unconstitutional. Accordingly, we recommend that the General Assembly amend the provision next legislative session to repeal the requirement that an appointed member of the Advisory Board reside in the State for at least five years before the appointment.

The bills rename the Alcohol and Tobacco Commission as the Alcohol, Tobacco, and Cannabis Commission ("ATCC"), establish the Maryland Cannabis Administration ("Administration") as an independent unit of State government and the Office of Social Equity as an independent office within the Administration, designate the Administration as the successor to the Maryland Medical Cannabis Commission, and create a licensing framework for the regulated sale of cannabis in the State. The bills also establish the Advisory Board to consider matters submitted by the Governor, ATCC, Administration and General Assembly and to provide recommendations to the ATCC and Administration regarding guidelines, rules, and regulations for their review and consideration. An individual appointed to the Advisory Board must have resided in the State for at least the immediately preceding five years before the appointment. Alcoholic Beverages and Cannabis Article, § 1-309.2(g).[2]

Both bills require that the Administration employ remedial measures in connection with the award of cannabis licenses in a manner that is "consistent with constitutional requirements," and only if a disparity study demonstrates a strong basis in evidence of discrimination against firms owned by minorities and women in the cannabis market. The use of race or gender in a government program must meet the requirements of the Equal

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- The Senate bill, on page 63, refers to ownership of the "facility" (line 13), whereas the House bill refers to the "facilities" (page 64, line 14).
- The Senate bill describes on-site consumption licenses as authorizing an entity to operate a licensed premises "on" which cannabis may be consumed (page 63, line 31). The House bill refers to a licensed premises "in" which cannabis may be consumed (page 64, line 30).
- On page 80 of the Senate bill, in line 29, there is a comma that does not appear in the House bill (page 82, line 7).
- On page 81 of the Senate bill, in line 4, there is a reference to cannabis-related services. The House bill, on page 82, line 12, refers to "medical" cannabis-related services.
- The Senate bill, on page 96, in line 13, refers to a "cannabis business" whereas the House bill refers to a "cannabis-related business" (page 98, line 1).

[2] The bills rename the Alcoholic Beverages Article as the Alcoholic Beverages and Cannabis Article.

Protection Clause of the U.S. Constitution.[3] When a government program uses race as a consideration, courts evaluate the program under the Equal Protection Clause using a "strict scrutiny" standard, which consists of a two-part test. First, the government must show there is a compelling government interest for establishing the race-conscious program. Second, the program must be narrowly tailored to achieve that compelling government interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485-86 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). To satisfy the first part of the test, the government must set forth an adequate factual predicate to establish a strong basis in evidence that race-based measures are needed to address discrimination in the relevant market. Evidence of general societal discrimination not related to the particular market is not legally sufficient. 91 *Opinions of the Attorney General* 181, 183 (2006) (applying strict scrutiny standard to minority enterprise business programs in government contracting) (citing *Croson*, 488 U.S. at 498).

To satisfy the second part of the test, the government must show that the race-based measures are narrowly tailored to accomplish the goal of remedying the specific discrimination identified in the market. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("The means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."); *Fisher v. University of Texas*, 570 U.S. 297, 312 (2013) ("[n]arrow tailoring also requires that the reviewing court verify that it is 'necessary' for a [government entity] to use race to achieve the" asserted interest.) (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 305 (1978)). Narrow tailoring requires that the government, before implementing any race-based measures, engage in a "good faith consideration of workable race-neutral alternatives" to achieve the government's goals. *Grutter*, 539 U.S. at 339. Moreover, the government must subject the program to a periodic review to evaluate if any considerations based on race are still necessary. *Id.* at 341-342. Courts also will look at whether a program provides flexibility in the application of race-conscious measures, such as a wavier provision, the impact of the remedial measures on third parties, and the over-inclusiveness or under-inclusiveness of the remedial measures. *Croson*, 488 U.S. at 507-511.

When a government program uses gender as a consideration, courts apply a less stringent "intermediate scrutiny" standard of review. *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 242 (4th Cir. 2010). To satisfy intermediate scrutiny, the government must show that the consideration of gender "serves important governmental objectives" and that the use of such measures is "substantially related to the achievement of those objectives." *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

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[3] The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

It is our view that the bill's licensing provisions incorporate race- and gender-conscious measures in a way that complies with constitutional requirements. The State must first establish a compelling interest for any race- or gender-conscious measures, through a disparity study that demonstrates a strong basis in evidence of discrimination against firms owned by minorities and women in the cannabis market. Further, any remedial measures employed by the Cannabis Administration must be consistent with the constitutional requirement that they be narrowly tailored, and the bills provide for the implementation of certain race- and gender-neutral measures, including an initial round of licensing for "social equity applicants," before the Administration may consider race or gender in the licensing process.

We also have considered the constitutionality of a separate provision of the bill (Section 11) that directs the Administration to establish a process for issuing up to five cannabis grower licenses to recognized class members of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) or *In re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), which were class action lawsuits brought by African-American farmers alleging race discrimination by the United States Department of Agriculture. Section 11 was amended by the General Assembly to further require that recognized class members provide evidence that they (1) were awarded damages pursuant to the claims processes established as a result of those class action suits, (2) have not been fully compensated for the discrimination they endured and have experienced ongoing discrimination or the continued effects of past discrimination, and (3) have satisfied any other criteria established by the Administration. It is our view that this provision, as amended, is facially constitutional.

The bills' restrictions on cannabis advertising raise a free speech issue. Restrictions on commercial speech, including restrictions on the advertising of cannabis products, are analyzed under the Supreme Court's *Central Hudson* test. *See Seattle Events v. State*, 512 P.3d 926, 933-34 (Wash. App. 2022) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)). Under that test, commercial speech is protected only if it concerns lawful activity and is not misleading. Because the sale and possession of cannabis is prohibited under federal law, the threshold issue is whether the advertising of cannabis products even relates to "lawful activity" that is entitled to free speech protections. If the activity is lawful and the advertising is not misleading, a court will consider whether the asserted governmental interest is substantial, whether the regulation directly advances the interest, and whether it is no more extensive than necessary to serve the interest. *Id*. The advertising restrictions must be narrowly tailored, but they need not be the least restrictive means possible. Even if the advertising of cannabis is entitled to free speech protections, the bills' advertising restrictions, in our view, are not clearly

unconstitutional. Moreover, if a court were to find any of the advertising provisions unconstitutional, those provisions would be severable from the rest of the bill.[4]

We also note that a provision requiring the Administration to adopt certain minimum standards for licensed growers (§ 36-402(e)) is preempted by the National Labor Relations Act ("NLRA") to the extent the standards would prohibit employees covered by the NLRA from engaging in protected activities. Section 7 of the NLRA provides that "employees shall have the right to ... join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in bargaining or other mutual aid or protection." 29 U.S.C. § 157. Although "agricultural laborers" are excluded from coverage under the NLRA (29 U.S.C. § 152(3)), not all employees of a licensed cannabis grower would necessarily fall within that exclusion. To the extent the bills require that the Administration's standards prohibit covered employees and their representatives from engaging in protected activities under the NLRA, it is our view that the provision is preempted by federal law and unenforceable.

Finally, it is our view that the five-year residency requirement for Advisory Board members likely runs afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Courts would analyze the provision under a "rational basis" standard, as it does not implicate a suspect classification or infringe on a fundamental right.[5] But even under the less stringent rational basis standard, a five-year residency requirement for appointment to the Advisory Board likely is difficult to defend without indication of the reason for the requirement in the legislative history. As Attorney General Curran noted in 72 *Opinions of the Attorney General* 209, 213 (1987), "durational residency requirements [for local public office] typically fail equal protection review, sometimes even under rational basis review, when … the residency period exceeds one year." *See also* Letter to the Hon. Joseline A. Pena-Melnyk from Asst. Att'y Gen. Jeremy M. McCoy, January 30, 2014 (advising that a three-year residency requirement for

[4] *See* General Provisions Article, § 1-210 (a finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining provisions of a statute unless those remaining provisions are incomplete and incapable of being executed consistent with legislative intent).

[5] As long as a legislative classification does not burden a suspect class (such as race, national origin, or alienage) or infringe on a fundamental right (such as the right to vote, the right to travel, or the right of procreation), courts apply a "rational basis" standard when considering an equal protection challenge. *Blue v. Arrington*, 221 Md. App. 308, 317 (2015). The fundamental right to interstate travel "insur[es] new residents the same right to *vital* government benefits and privileges in the State to which they migrate as are enjoyed by other residents." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974) (emphasis added). Service on the Advisory Board is not a vital government benefit or privilege.

candidates for Mayor or Council of the City of College Park would be constitutionally suspect). That 1987 opinion concluded that a one-year residency requirement for notaries public would withstand rational basis review because of the State's legitimate interests in qualifying only notaries who have had an opportunity to familiarize themselves with the policies, laws, and institutions of the State, ensuring Senators responsible for appointing notaries have the time and opportunity to investigate applicants' moral character and integrity, and having notaries establish a stake in the community. A *five-year* residency requirement for appointment to the Advisory Board, a body that merely operates in an advisory capacity to the State, risks, in our view, failing to satisfy even rational basis review.

Accordingly, although the provision is not clearly unconstitutional, we strongly recommend that the General Assembly amend § 1-309.2(g) at the next legislative session to eliminate the five-year residency requirement. It is our view that a non-durational residency requirement, meaning that an individual must be a resident of the State at the time of application or appointment, would be legally defensible. *See McCarthy v. Philadelphia Civ. Serv. Comm'n*, 424 U.S. 645, 646-647 (1976) (non-durational residency requirement for firefighters does not impair a fundamental right, and there is a rational basis for the restriction); *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 219 (1984) (government employment is not a fundamental right); *Gusewelle v. City of Wood River*, 374 F.3d 569, 578 (7th Cir. 2004) (upholding non-durational residency requirement for a municipal employee employed as a golf course equipment mechanic).

Sincerely,

Anthony G. Brown

AGB/DWS/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber