

STATEMENT BY
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SUBMITTED TO
THE MARYLAND HOUSE OF DELEGATES
JUDICIARY COMMITTEE
HON. LUKE CLIPPINGER, CHAIR
HON. VANESSA E. ATTERBEARY, VICE CHAIR
MARCH 6, 2020

**IN SUPPORT OF
HB 1400
Concerning
Cannabis – Legalization, Taxation, and Regulation**

Chair Clippinger, Vice-Chair Atterbeary, Honorable Delegates, thank you for the opportunity to submit a statement in support of HB 1400, with amendments. I am Eric E. Sterling, testifying on my own behalf. In 1976, as a third-year law student, I first testified for marijuana decriminalization when it was a plank of Jimmy Carter’s presidential campaign. During the 1980s, I helped the U.S. Congress, as assistant counsel to the House Judiciary Committee, write very harsh marijuana laws – laws written in haste and based on historic ignorance. From 2013 to 2017, I was a Maryland Medical Cannabis Commissioner. I do not now and never have had any stake or investment of any kind in any cannabis enterprise, (nor does anyone in my family) and I have never received any fee or remuneration for consulting with any cannabis enterprise.

Cannabis legalization presents five major areas of concern:

- (1) Revenue for the state of Maryland;
- (2) Liberty for Marylanders who are cannabis patients and cannabis consumers;
- (3) Public safety and public health for the general public and cannabis consumers;
- (4) Reparations for a century of racial discrimination in the enforcement of cannabis laws; and
- (5) Regulation of the cannabis industry.

One key take-away is that there are tensions among these policy objectives and finding the right balance is not obvious. Maryland’s current approach of decriminalization of small amounts is a huge improvement over prohibition but is inadequate to meet the needs of Marylanders. One goal should be to prevent the growth of politically powerful cannabis industry which is unlikely to be committed to the public interest as opposed to its profit maximization. The District of Columbia approach that allows home cultivation and an informal market of primarily craft growers and processors has the benefit of limiting the advertising and promotion of cannabis. Its informality has the benefit of enabling ex-offenders and others to operate in the marketplace. But this approach severely limits revenue. It also lacks required or standardized quality testing.

(1) Revenue.

Last month, the Vice Chair of the House Economic Matters Committee addressed the Maryland Cannabis Policy Summit in Annapolis. She noted that implementing the Kirwan Commission recommendations would require \$4 billion (\$3.8 billion over 10 years, according to the Kirwan Commission Jan. 2019 Interim Report). She reported an estimate that cannabis legalization would generate state revenue of about \$100 million annually. **Over 10 years, that is \$1 billion – more than one-quarter of the revenue needed to implement the Kirwan recommendations.** As of March 5, no Fiscal and Policy Note for HB 1400 had been posted on the General Assembly website. The Fiscal and Policy Note for one of last year’s cannabis legalization bills, HB 656, suggested that if participation in the legal cannabis market were “robust,” then “**general fund revenues increase, likely significantly,**” but provided no dollar amount (Fiscal and Policy Note to accompany HB 656 (Del. Luedtke, 2019)). The Fiscal and Policy Note for HB 1185 (Del. Anderson) in 2017 projected **\$49 million in state sales tax revenue for the first year of legalization – exclusive of excise taxes on cannabis sales and other fees.**

The longer the General Assembly delays legalizing and taxing the commercial production and sale of cannabis for adult use, the longer it defers collecting revenue on the order of \$100 million per year – revenue that is vitally needed.

The revenue goal must be balanced against the goal of eliminating the criminal market. Too high a tax (or a market that is inconvenient to consumers) will keep the criminal market attractive and profitable (and lose revenue). But pricing needs to be balanced against the risk of encouraging excessive use that could be harmful to some users. Maximizing revenue cannot be the primary goal.

(2) Liberty for Marylanders.

This morning, when Maryland school children pledged allegiance to the flag of the United States, they pledged allegiance to a Republic “with liberty and justice **for all.**” Not liberty for some.

Every day in Annapolis, we think about the role of government in improving our lives. In the Judiciary Committee, we also think regularly about restricting how we live our lives. Two fundamental and complex questions we confront are, “What circumstances justify the restriction of our individual liberty?” And, “What is the burden of proof that supports the restriction?”

If you get joy and pleasure from an activity, intrinsic to the idea of liberty is “you get to do that” – in our national shorthand: “life, liberty and the pursuit of happiness.” But pursuing other feelings – sadness, empathy with others or excitement – is also intrinsic to liberty. One might attend an opera, read poetry, history or a novel, or consider works of art and be saddened or angered. That might not sound like “pursuit of happiness,” but to do so is protected liberty of the same character. Isn’t your control of your perceptions and feelings a fundamental component of your conception of your liberty, of your right to be free?

Well, what is the purpose of using marijuana? It is to change one’s mood and perception, commonly called, “getting high.” There are many types of highs and different

objectives to do so. A person might want to “get high” to listen to music or to dance, or to be at a party and talk with people, or to hike in the woods, or watch a movie, or read poetry, or to increase the pleasure of eating or of physical intimacy. Other reasons to get high might be to feel less anxiety, to relax, to sleep, to daydream. I am arguing, therefore, that “getting high” is a fundamental liberty.

What are the proper criteria for the government to restrict liberty? One could study music, opera or poetry as an intellectual pursuit but the reason most of us choose to engage these art forms is to experience the feelings. The First Amendment of our Constitution is not merely about protecting the authors or composers, it is to protect us the listeners and our ability to have feelings from whatever source. The speech or opera can only be outlawed if the government can prove a “clear and present danger” in such expression. *Schenck v. United States*, 249 U.S. 47 (1919). Getting high with marijuana does not create a “clear and present danger.”

In another example, if the federal government has some project or objective that will have the effect of restricting religious liberty it must have a “compelling state interest” and if challenged, the government must demonstrate this compelling interest. In a case in which the U.S. government seized the sacrament imported by the American branch of a Brazilian church because the sacrament was a controlled substance, the Supreme Court ruled unanimously that the government had no compelling interest in doing so and had to return the sacrament and permit its importation and use. *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

The use of cannabis by an adult to change his or her perceptions and feelings needs to be understood as fundamental liberty – like listening to music or reading a book, and laws that threaten to imprison a person who does so are an enormous invasion of liberty. To continue to forbid adult Marylanders from consuming cannabis should require the articulation of a compelling interest and a demonstration that that interest can only be carried out by criminal prosecutions of those who possess, cultivate and use cannabis.

Marylanders not only have the right to use cannabis to get high, they have the right to grow their own cannabis. Just as hunting to eat is a protected liberty, growing one’s garden for the produce is a protected liberty. It is inconceivable that the General Assembly could imagine that home cultivation of fruit and vegetables and herbs for medicine could be prohibited. There is no way to comprehend that the liberty to cultivate for oneself excludes noncommercial cultivation of cannabis. We have no trouble allowing households to brew their own beer and produce their own wine, and sharing it without remuneration.

(3) Public Safety and Health.

These concerns center on:

- (A) Driving while impaired by cannabis use;
- (B) Adverse consequences from cannabis use on physical and mental health; and
- (C) Minimizing the illegal cannabis market, and minimizing the role of cash in the market, the need for firearms to protect cash, money laundering and tax evasion, and minimizing the role of violence in resolving conflict and enforcing employee discipline.

(A) Driving:

Maryland Transportation Code (section 21-902(d)) provides for imprisonment of up to one year and a fine of \$1000 for driving under the influence of a controlled dangerous substance, such as marijuana.

We need to appreciate that the scientific studies consistently find that marijuana-positive drivers possess a comparatively low accident risk, particularly when compared with alcohol-positive drivers. No doubt it is surprising to many, but the largest ever controlled trial assessing marijuana use and motor vehicle accidents, published in 2015 by the U.S. National Highway Traffic Safety Administration (NHTSA), reports that marijuana positive drivers possess virtually no statistically significant crash risk compared to drug-free drivers after controlling for age and gender.

<https://trid.trb.org/view.aspx?id=1343066> We have to target the high-risk populations with much more extensive education about the risks of driving after consuming THC.

By contrast, drivers with levels of alcohol in their blood at legal limits possess nearly a four-fold risk of accident, even after adjusting for age and gender.

This finding is consistent with prior meta-analyses of crash risk data. For example, a 2013 review of 66 separate crash culpability studies, published in the journal *Accident Analysis and Prevention*, reported that THC-positive drivers possessed a crash risk on par with drivers testing positive for penicillin (Odds Ratio (OR): 1.10 for cannabis versus Odds Ratio: 1.12 for penicillin).

<https://www.sciencedirect.com/science/article/abs/pii/S0001457512002412?via%3Dihub>

This risk is far below that associated with driving with two or more passengers (OR=2.2)

<https://www.sciencedirect.com/science/article/abs/pii/S000145750700036X> and is comparable to the difference between driving during the day versus driving at night.

<https://www.themarshallproject.org/2017/01/16/when-are-you-too-stoned-to-drive?ref=hp-1-112#.RqH3A0BVm>

(B) Adverse consequences from cannabis use on physical and mental health.

Use of marijuana by adults and children is not harmless nor risk free. There are different risks of course. There does not appear to be the risk of death and disease such as those that result from heavy or long-term alcohol and tobacco use. Marijuana does not cause death in the short-term such as overdose, nor the long-term such as cancer or heart disease. (There is some evidence that those with heart disease are at greater risk of heart attack after smoking marijuana).

In 2019, there were reports that vaping black market THC extracts presents a risk of severe, even fatal lung damage. The cause is not yet completely clear. There is suspicion this illness is due either to defects in the vape pens or adulterants added to the extracts such as Vitamin E acetate. But extensive smoking of whole cannabis does not cause lung cancer, according to a large 2006 study.

<https://www.scientificamerican.com/article/large-study-finds-no-link/>

There seem to be some psychological risks. Marijuana use can create dependency. A 2016 study reported that 13.2 percent of adult regular (current) users (and very disturbingly, 23.4 percent of users under age 21) meet the DSM-IV criteria for a Cannabis use disorder.

<https://www.tandfonline.com/doi/abs/10.3109/00952990.2016.1164711> Some studies suggest that some young teenagers who heavily use very strong marijuana are at greater risk of psychosis. Other studies suggest that young teenagers who play tackle football are at greater risk of permanent brain damage. Quantifying these risks is challenging.

The key risks were summarized in this important 2005 meta-analysis, “Long-term effects of exposure to cannabis” by Leslie Iversen, Oxford University:

<http://cannabiscoalition.ca/info/IversenCannabisEffects.pdf>

- Decline in cognition to long-term heavy users of cannabis – which are reversed upon cessation of use. There is no evidence of long-term degeneration of higher brain function.
- Acute schizophrenia-like psychosis may occur in response to high dose use of cannabis, and a study in Australia showed that heavy use before age 15 is linked to a four-fold increase in schizophrenia-like illness by age 26 (but this was found in 3 subjects out of 26 15-year old users, a statistically weak study). A study comparing the dramatic increase in cannabis use in Australia over 30 years found no evidence of a significant increase in schizophrenia over the same period.
- There seems to be a dose-dependent association between marijuana use and reduced educational achievement, an association with use of other drugs, and inconsistent evidence regarding other psychological problems or disorders or problematic behaviors.

“When asked to rate the subjective effects of cannabis on cognition, memory, career, social life, physical and mental health and various quality-of-life measures, a large majority of heavy-use cannabis smokers reported negative effects of their drug use.”

- Data on human beings does not show adverse effects from use while pregnant, but in a study of rats administered high doses of THC showed suppression of a key protein for brain development. Dr. Iversen concluded:

“A review of the literature suggests that the majority of cannabis users, who use the drug occasionally rather than on a daily basis, will not suffer any lasting physical or mental harm. Conversely, as with other ‘recreational’ drugs, there will be some who suffer adverse consequences from their use of cannabis. Some individuals who have psychotic thought tendencies might risk precipitating psychotic illness. Those who consume large doses of the drug on a regular basis are likely to have lower educational achievement and lower income, and may suffer physical damage to the airways. They also run a significant risk of becoming dependent upon continuing use of the drug. There is little evidence, however, that these adverse effects persist after drug use stops or that any direct cause and effect relationships are involved.”

In 1999, the Institute of Medicine of the National Academy of Sciences reported in a study commissioned by the White House Office of National Drug Control Policy, “Except for the harms associated with smoking, the adverse effects of marijuana use are within the range of effects tolerated for other medications.”

(C) Minimizing the illegal cannabis market.

The creation of a legal, regulated cannabis market will not automatically eliminate the criminal market. The criminal market will continue to rely on cash transactions, and thus rely upon firearms for protection of cash and inventory. The cash will be subject to money laundering and tax evasion. The criminal market – without access to the courts – may continue to use violence or the threat of violence to resolve conflict and enforce employee discipline.

How the legal market is designed will help determine how effective it is in absorbing and minimizing the criminal market. Instead of creating an environment in which illegal growers and sellers can operate in the shadow of the legal market, construct it so that they are easily brought into the legal market. The most important features are amnesty for prior illegal growing and selling by those who enter the legal business, and preferences in the awarding of licenses to those currently or formerly in the illegal cannabis business. The issue is not “rewarding” them for their illegality, but to eliminate any barriers that keep them and their customers outside the legal system. Fundamental to the success of a legal cannabis regime is the transition of the well-entrenched illegal cannabis distribution economy into the legal system. Our current zealous enforcement program has been ineffective at stamping out this criminality. Post-legalization will require enforcement to assure compliance and payment of revenues, but this is much easier if the incentives to operate illegally have been minimize.

The 5-year term of imprisonment for the diversion of medical cannabis (new Health Gen. Art. Sec. 23-701(b)) is wholly unnecessary and excessive once legal adult sales have started. If legal adult sales exist, what is the purpose of punishing diversion severely, if at all?

However, criminal penalties should be provided for making false statements to the commission, selling adulterated or misbranded cannabis, and selling CBD that is not produced under the authority of the Commission.

(4) Reparations for a century of racial discrimination in the enforcement of cannabis laws.

Selection of applicants for state cannabis licenses

As the State of Maryland is establishing a new industry by issuing licenses, it is just and equitable that the owners of the licenses reflect the population of the state. In 2013, the General Assembly created a medical cannabis industry in which licenses would be awarded to the applicants that were ranked most highly. An unfortunate consequence of such an approach is that the best financed applicants commissioned expert consultants to assist them in preparing their applications. The Maryland Medical Cannabis Commission, of which I was a member at the time, delegated to our contractor the design of the application. We failed to appreciate that we were creating a needlessly complicated application. Taking advantage of that complexity, I believe that the top consultants generally produced applications that expertly answered the many, often repetitive, questions in ways that were subtle, but substantively unimportant, improvements over the majority of applications. I believe that many such applicants who hired such consultants won the top rankings and won pre-approval of licenses.

The best mechanism to assure fairness in the issuance of the licenses is **to hold a lottery**. Make sure that people of color and women are fully informed about the opportunity to enter the lottery, and have assistance in preparing the minimal

requirements for entering the lottery. Once an applicant has won a license in the lottery, the applicant need only demonstrate that it has the capacity to meet the stringent requirements set forth in the regulations “to ensure public safety and safe access to cannabis,” (new Health Gen. Art. Sec. 23-304(a)(3)). The Commission can provide technical assistance to all lottery winners to assist them in meeting the minimum standards necessary to operate the facility they have won a license for.

The approach to rank the applicants was originally dictated by the General Assembly in 2013, but the Commission failed to identify the problem, and thus failed in 2014 or 2015 to encourage the General Assembly to move to the much fairer and less expensive lottery approach. Attempting to “review, evaluate and rank” all the applications in order to award another 60 or 70 growing licenses (up to the 88 authorized by new Health Gen. Art. Sec. 23-304(a)(2), all the dispensary licenses, and up to 112 processor licenses is a pointless and terribly wasteful effort and expense. **Future licenses should be awarded on the basis of a lottery.**

Permitting persons with felony drug convictions to own licenses or work in the legal cannabis industry

There is no reason to deny those with felony drug convictions the opportunity to work in the legal cannabis industry except spite. The belief that such persons would break the legal cannabis laws and regulations again – simply because they are in the cannabis industry – is no more plausible than the belief that gratitude for the opportunity to work in the legal drug industry coupled with its close supervision and inspection would be a powerful inducement to fully comply with the law and make negligible the risk that such persons would endanger the public safety. A seven-year delay after the completion of a sentence of probation, etc. has no empirical basis.

The data on drug enforcement in Maryland and throughout the United States has demonstrated a pattern of racially and ethnically disproportionate arrests, prosecutions and convictions. Thus, maintaining this kind of bar is on its face is racially discriminatory.

If the General Assembly is committed to social and racial equity, instead of continuing to mandate that a recent felony drug conviction is a barrier to licensure or employment in the industry, a recent felony drug conviction should be a criterion for preference in the issuance of a license or employment in the industry. This is a major way to end recidivism.

A major problem faced by Washington State and other states with their licensed cannabis industry is that a large fraction of sales have remained outside the legal system. Many cannabis consumers prefer to buy cannabis from an individual they know and trust, who will deliver to them – even if the sale is technically illegal. A low-cost and efficient way to bring these transactions into the legal system is to allow persons who are engaged in illegal cannabis sales to obtain licenses, or give a person who can demonstrate their illegal sales for some period of time both a pardon and a preference for a license. This might be time-limited. At some point after a transition period, it might make sense that unlicensed importation or sale would be an offense that does not lead to employment or licensure.

Cannabis profits and revenues will be inadequate for meaningful reparations.

Many persons exaggerate the scale of the legal cannabis industry and have imagined that because the criminal market has been lucrative, the legal market will be equally lucrative. There is a fantasy that legal cannabis will generate enormous

employment, profits and sums of tax revenue. This is naïve. Cannabis once it is legal and can be produced at large scale will decline in value, and the profits will shrink in the face of competition. Interstate or international competition, if allowed in a national legalization regime, is likely to devastate Maryland’s cannabis industry except for craft and artisan production of cannabis and cannabis products.

Envisioning an enormous legal cannabis industry, some persons imagine that assuring that historically disadvantaged groups – particularly African American persons – have preferential access to cannabis licenses will create a fountain of economic opportunity, employment and redevelopment. I doubt this will come to pass. Those who can succeed in a highly competitive market will make a good living, but cannabis will be one modest industry in the state. Even if all the profit and employment in the industry were reserved for people of color and women, I fear it would not address the unmet needs for employment, education, investment, housing, etc. those in Maryland who have suffered from white supremacy and sexism.

Respectfully, I suggest that the most constructive benefit to members of historically disadvantaged groups is widespread, if not universal access to the highest quality schools, followed by university scholarship assistance, followed by eased access to capital for investment and home ownership – not mere seats at the table of the cannabis industry” banquet.” Creating a vision of reparations for four centuries of enslavement, Jim Crow and discrimination focused on the economic opportunities of a fancifully large legal cannabis industry betrays what it is needed for genuine reparations. Certainly, marijuana enforcement (and drug enforcement) has been based on explicit and implicit racial bias. Assuring ownership and profitable opportunities in a newly legal cannabis industry is just. But adequate reparations can never be financed from such a small industry, and the expenditures should not be limited to paying application fees for members of historically discriminated against minorities. Any social equity program that attempts to provide meaningful reparations for the decades of injustice due to the marijuana laws and Jim Crow justice that is exclusively funded by cannabis industry revenues will amount to a pittance of what is necessary.

HB 1400 and Racial and Gender Equity in the Cannabis Industry

New Health Gen. Art. Section 23-106 purports to create a basis for commission action to “assist minorities and women in the cannabis industry” by “evaluat[ing] a study of the cannabis industry and market to determine whether there is a compelling interest to implement remedial measures.” I believe this is inadequate. The General Assembly needs to endorse the conclusions of Jon Wainwright, author of the 2018 Medical Cannabis Disparity Analysis,

“I conclude, based upon the information available to me at this time, that the 2017 Disparity Study provides a strong basis in evidence, consisting of both quantitative and qualitative findings, that **supports the use of race- and gender-based measures to remediate discrimination affecting minority- and women-owned businesses in the types of industries relevant to the medical cannabis business.**”

The General Assembly should consider declaring that there is a history of discrimination regarding race, ethnicity and gender in the cannabis industry including the illegal cannabis industry; that race neutral remedies are inadequate to restore equity in the industry; and thus there is a compelling interest in authorizing the issuance of all types of

licenses in the cannabis industry to entities whose ownership is at least 51% of members of racial, ethnic and gender minorities until the number of such licensees are a fraction of the total number of licensees that approximates the fraction of such minorities in the population at large.

(5) The regulation of the cannabis industry.

We do not want a cannabis industry that is powerful like the alcohol and tobacco industries. Home cultivation should be allowed, even though it will have a small impact on the industry and tax revenue. Home growers should be allowed to give away or barter their produce like other gardeners.

Small scale commercial distribution, such as at farmers market, of cannabis flower or homemade edibles, etc., need not be subjected to the product testing of full-scale producers. The hands-on, hand-to-hand character of farmers market sales is likely to be sufficient protection for the consumer against adulteration.

The Commission needs the power to prosecute misrepresentations and willful non-compliance.

Correction of flawed provisions enacted in HB 2

The Natalie M. LaPrade Medical Cannabis Commission's authority was substantially modified two years ago when the General Assembly enacted HB 2 to create racial and gender equity in the medical cannabis industry. Many provisions of HB 2 are confusing, flawed, or inconsistent with law, and should be rewritten.

- (1) The provisions on pages 34 and 35 in proposed Health General Article section 23-103 (e) and (f) that require the Commission to comply with state and federal law should be amended. It is unnecessary and absurd to say in a law that a government agency should comply with federal and state law. It is always the responsibility of an agency to follow the law – all the law and all the time. Such an unnecessary mandate does not guide agency discretion nor mandate compliance with a particular policy.
- (2) The provision on p. 36 (new Health Gen. Art. Section 23-104(b)(2)(ii)) that a commissioner should not have an "**official relationship**" to a person who holds a license **is meaningless**. This should be rewritten to spell out exactly what kinds of commercial relationships, financial relationships and familial relationships with licensees, registrants and applicants are prohibited. This problem also appears on pp. 44-45 (new Health Gen. Art. Section 23-301(b)(2)) relating to constitutional officers and cabinet secretaries not having an official relationship with "a business entity that holds a license under this title;" on p. 47 (new Health Gen. Art. Section 23-303(b)(2)) relating to third-party evaluators "official relationship" to holders of cannabis licenses;

A penalty for concealing or failing to disclose such relationships is necessary and should be added.

- (3) The salary of commissioners should not simply be what is provided for in the budget of the commission. (new Health Gen. Art. Section 23-104(f)(1)(i)). The salaries may be paid from the Commission's fund, but the salary amount should be set by the General Assembly.
- (4) The removal of commissioners by the Governor should not be for ambiguous circumstances that differ from the Maryland Constitution such as "just cause,"

(new Health Gen. Art. Section 23-104(g)). The Maryland Constitution provides that the Governor “may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years.” (Maryland Constitution, Article II, Sec. 15).

- (5) The Executive Director is appointed by the Governor but shall “serve at the pleasure of the Commission.” (new Health Gen. Art. Section 23-104(h)(3)). Does this make sense? Can the Executive Director, appointed by the Governor, be removed by a simple majority, a quorum being present?

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Summary credentials:

Resident and voter, Maryland 18th Senatorial District (1998 to date)

Maryland Medical Cannabis Commission (2013-2017)

Executive Director, Criminal Justice Policy Foundation (1989 to date)

Assistant Counsel, U.S. House Judiciary Committee, 1979 -1989

Montgomery County Alcohol and Other Drug Abuse Advisory Council (AODAAC), 2010-2018 (including 3 terms as Chair)