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ACLU OF RI POSITION: SUPPORT AND AMEND

TESTIMONY ON 22-H 7123, ARTICLE 11 – MARIJUANA
March 22, 2022

The ACLU of Rhode Island has long been a supporter of the state's medical marijuana law and program. Similarly, we are also a strong proponent of the legalization of recreational marijuana, and thus we fully support the goal of this Article in decriminalizing its use for that purpose. We also believe that, in the implementation of both programs, it is important that basic civil liberties principles be followed. It is through this lens that we have examined Article 11.

We recognize that this budget article is long, complex, and covers a lot of ground, and we realize that it will likely be subject to a fair amount of revision before moving forward. We cannot list all of the questions and comments that we have about Article 11, so the following testimony should not be considered a complete analysis of the bill. Instead, we wish to highlight some of the issues that have prompted our attention and warrant heightened review.

While the FY 2023 budget proposal focuses mostly on recreational marijuana, we believe that in legalizing recreational marijuana, there should additionally be revisions made to our current medical marijuana laws to ensure that undue burdens are not placed on patients following legalization. Suggestions to this effect are included at the end of this testimony.

Finally, as advocacy groups across the country have noted, it is critical that passage of recreational marijuana legalization be accompanied by social justice initiatives which acknowledge the effect that criminalization has had on communities. Overall, we appreciate provisions that address the granting of licenses to MBEs and the proportion of licenses to be set aside for MBEs. However, we find that this legislation should also provide more robust criminal record check protections for justice-involved individuals, particularly for those individuals who have marijuana-related offenses on their record; include more substantive and inclusive social justice provisions; and include protections of marijuana users from discrimination. We hope changes addressing these issues, as delineated in the following pages of our testimony, will be favorably considered.

Our specific comments about the bill follow, with some of our more significant recommendations or comments highlighted in italics:

Commentary on Specific Provisions

1. ***2-26-5(c)(7)(iv); 21-28.6-6(g)(5)*** *(Article 11, p. 2 & p. 13, lines 30-31 & lines 3-4, respectively; H 7123, pages 195 & 205, lines 28-29 & lines 33-34, respectively): These two sections amend current criminal record check licensing provisions for those dealing with hemp products and medical marijuana patient caregivers. We appreciate the fact that the amendments reference the recently enacted state statute addressing "fair chance licensing," which ensures that no individual may be unfairly denied an occupational license solely due to their criminal record. However, these sections are slightly confusing in the way they are being amended. The language in both of these sections currently specifies a series of criminal offenses – including drug felony offenses, but also ranging from murder to breaking and entering – that automatically disqualify a person from being licensed. The amendments provide that any disqualification will be subject to the fair chance licensing statute, but that statute explicitly eschews designating any particular offense as automatically disqualifying. Instead, agencies must first determine whether the criminal record "substantially relates" to the occupational license, and then must consider a variety of factors in deciding whether the crime should nonetheless still disqualify the person. In adding the sentence referencing the fair chance licensing statute, the bill should, to avoid any confusion about implementation, delete the rest of those paragraphs currently listing "disqualifying" offenses. Further, the paragraphs should exempt drug related offenses entirely as a potentially disqualifying offense since by definition they will be deemed "substantially related" to the license, a restriction that doesn't make sense in this particular context where the offense is essentially being decriminalized.*

2. **21-28.11-4(1)(ii)** (Article 11, page 21, lines 1-7; H-7123, page 213-214, lines 32-34 & 1-4): The ACLU understands the goal of child safety in requiring that all marijuana in a private residence be kept in a locked and secure area. However, there are no laws that mandate similar precautions for the possession of other substances in a primary residence, such as alcohol or prescription drugs, that can be much more dangerous to ingest. Given the potentially steep consequences of violating this provision (which could include arrest, per 21-28.12-10(b)), and the absence of equivalent regulations for other controlled substances, we urge that this provision be removed or else significantly revised.

3. **21-28.11-4(1)(iii)** (Article 11, page 21, lines 8-12; H 7123, page 214, lines 5-9): This section exempts a person from prosecution for possessing marijuana products in a motor vehicle, but only if the product is "sealed, unused, and in their original unopened packaging." The corresponding law addressing the presence of alcoholic beverages in a motor vehicle requires only that the container be sealed. Further, the penalty for alcohol possession is a $200 fine and possible loss of driver's license for six months. We believe the violation and penalties for the presence of marijuana in a motor vehicle should be the same.

4. **21-28.11-6** (Article 11, page 24, lines 33-34; H 7123, page 217, lines 30-31): The penalties for violations under this section dealing with the possession of excessive amounts of

marijuana seem particularly steep and harsh. A $2,000 fine for possession of every ounce over the limit should be reduced.

5. **21-28.11-8(a)** (Article 11, page 25, lines 16-19; H 7123, Page 218, lines 13-16): This section prohibits the smoking or consumption of marijuana in a public environment but places the responsibility for determining the penalty for violations of this section to municipalities. In order to avoid disparately punitive enforcement of these penalties solely dependent on the community in which this conduct occurs, we would urge that the bill specify that the conduct cannot be designated a criminal offense and also set a limit on the amount of the fine that can be imposed.

6. ***21-28.11-8(b) and (c)*** *(Article 11, page 25, lines 20-34; H 7123, Page 218, lines 17-31): These sections allow for the eviction of an individual from housing for a one-time offense of smoking or vaping marijuana. This too seems like an unduly harsh penalty and should be limited to repeated violations. We also question the provision's inclusion of vaping, which, to our knowledge, does not raise the public health concerns that smoking might.*

7. **21-28.11-8(d)** (Article 11, page 26, lines 1-10; H 7123, Page 218-219, lines 32-34 and 1-7): This section broadly bars the use of marijuana "on or about the premises of any" business or establishment or other "commercial property" without a "social use permit." Just as two people should be able to smoke marijuana in their home, a "social use permit" should not be required for the people in a two-person business who smoke in their office at the end of a business day.

8. ***21-28.11-9*** *(Article 11, page 26; H 7123, page 219): While it appears that this section is designed to limit discrimination against employees and only allow employers to take action against them for marijuana usage at the workplace, we encourage a clearer provision which explicitly protects employees from disciplinary action based solely on their lawful use of marijuana while off-the-clock that does not impair their job performance. While employers have every right to ensure that their employees are not impaired while on the job – whether it is from alcohol, marijuana, or prescription drugs – it makes no sense to legalize marijuana and then punish users if their recreational use has no effect on their work. A state court opinion (Callaghan v. Darlington Plastics Corporation, C.A. No. PC-2014-5680) has recognized that the medical marijuana law provides similar protections, but, as we note on Page 6 of this testimony, the language in that law should be strengthened to avoid any continued disputes over that protection.*

   Subsection (e) is particularly unfair and onerous. The state's current drug testing law appropriately provides for progressive discipline for drug use in the workplace, but under this section, the use of marijuana could result in immediate termination, meaning that marijuana use is treated more severely than much more dangerous drugs. This subsection further suggests that the drug test result need only show a "positive result for active THC," but due to the nature of how marijuana metabolites remain within a person's system for a very lengthy period of time – even weeks – that result would not in any way indicate that the person was in fact impaired on the job.

9. **21-28.11-12(b)** (Article 11, page 27, lines 19-23; H 7123, page 220, lines 16-20): The imposition of up to a $10,000 fine for transporting or furnishing marijuana to an underage individual, especially because the section does not contain a scienter requirement, is unreasonably high. For a similar violation of furnishing alcohol to a minor, the maximum fine for a first-time violation is $500.

10. ***21-28.11-12(c)*** *(Article 11, page 27, lines 24-27; H 7123, page 220, lines 21-24): Not only would violators of this section be subjected to a fine of $10,000 per violation but they would additionally be guilty of a felony for furnishing marijuana to a person under the age of 21. For a 21-year-old who gives their 20-year-old friend or brother one hit of a joint, this is a disproportionate and inappropriate punishment.*

11. **21-28.12-4(c)** (Article 11, page 32, lines 14-27; H 7123, page 225, lines 10-23): This section would establish the Governor's Cannabis Reinvestment Task Force. Though the task force would be given the responsibility of recommending long-term reinvestment of recreational marijuana revenues, including recommendations which relate to "health equity" and "neighborhood and community development" with a specific focus on "racial equity" and the "disproportionate impact of cannabis-related law enforcement policies and procedures," there are no requirements that the appointed individuals have any expertise in racial equity or social justice. Given the stated intent of the task force, we believe that a majority of the members should have established qualifications in these areas.

12. ***21-28.12-4(c)*** *(Article 11, page 32, lines 14-27; H 7123, page 225, lines 10-23): One of the principal proposed responsibilities of this task force is to contemplate "an overall proportion of cannabis revenues to be reinvested" in the targeted areas as listed above. While the Article delineates the disbursement of funds from marijuana revenue (21-28.12-16), it does not include a pocket of funding specifically for social justice initiatives. The Article should require that funding be set aside so that such initiatives prioritized by the council already have dedicated funding streams for their implementation.*

13. **21-28.12-5(c) & (d)** (Article 11, page 33; H 7123, page 226): The ACLU supports these provisions containing thresholds for the proportion of recreational marijuana business licenses which must be issued to minority business enterprises. We appreciate that this legislation explicitly would provide for such opportunities for MBEs and would provide for a future survey of the impact of this provision.

14. **21-28.12-5(n)** (Article 11, page 36, lines 9-10; H 7123, page 229, lines 5-6): This provision would require all recreational marijuana retailers to abide by all local ordinances. Such vague and open-ended language could hold retailers accountable to a patchwork of arbitrary rules. At the very least, this section should make reference to 21-28.12-12(a), which generally bars municipalities from adopting ordinances "which make any type of marijuana establishments' operation impracticable."

15. **21-28.12-5(p) & (p)(2)** (Article 11, page 36, lines 14-25 & 30-33; H 7123, page 229, lines 10-21 & 26-29): While language earlier in this Article in other contexts explicitly references "fair chance licensing," this provision would disqualify adult use marijuana

retailer applicants based on any conviction or plea of nolo contendere for a felony drug offense. Not only does this conflict with the social justice initiatives contained in this Article and unjustly prevent many members of impacted communities from entering this profession, but it is not in line with the important protections contained within the fair chance licensing statute. This language would further require the applicant to pay for their own criminal record check, which we have long opposed in light of the recognition elsewhere in state law that protects individuals from paying fees for job applications. See R.I.G.L. § 28-6.3-1.

16. **21-28.12-5(q)(4)** (Article 11, page 37, lines 19-22; H 7123, page 230, lines 15-18): See commentary for #15 above.

17. **21-28.12-6(b)** (Article 11, page 38, lines 4-15; H 7123, page 230-231, lines 34 & 1-11): This language appropriately and rightly recognizes the need for recreational marijuana retailers to have no adverse effect on medical marijuana and the ability for patients to continue accessing needed medication easily and readily.

18. **21-28.12-6(j)** (Article 11, page 40, lines 7-8; H 7123, page 233, lines 3-4): See commentary for #14 above.

19. **21-28.12-6(l)**, **21-28.12-6(l)(2)** (Article 11, page 40, lines 12-23 & 28-31; H 7123, page 233, lines 8-19 & 24-27): See commentary for #15 above.

20. **21-28.12-7(b)** (Article 11, pages 42, lines 3-10; H 7123, pages 234-235, lines 32-34 & 1-5): We are supportive of this provision which would require that for all new licenses created relating to marijuana establishment licenses, no less than 50% be issued to MBEs.

21. **21-28.12-7(c)(8)** (Article 11, page 42, lines 29-30; H 7123, page 235, lines 24-25): See commentary for #26 below.

22. **21-28.12-7(e),(f),(g)** (Article 11, page 43-44; H 7123, page 235-237): See commentary for #15 above.

23. **21-28.12-10(a)(2)** (Article 11, page 46, lines 29-30; H 7123, page 239, lines 22-23): We are concerned about language in this provision which would require proceedings for certain revocations of licensure to be "promptly instituted" after a license has been summarily suspended. This vague language does not appropriately ensure due process for individuals or businesses subjected to adverse action on a summary basis.

24. **21-28.12-10(d)** (Article 11, page 47, lines 7-13; H 7123, page 240, lines 1-7): We are concerned about the allowance for seizure of contraband without a warrant. There simply should not be authorization for entering a private home to retrieve legally obtained material, whether or not it violates another statute or exceeds possession limits, without critical elements of due process in place.

25. 21-28.12-10(e) (Article 11, page 47, lines 14-20; H 7123, page 240, lines 8-14): We strongly encourage the inclusion of specific language that sets meaningful limits on the information or records that the office of cannabis regulation can make available to the police.

26. 21-28.12-12(a)(i) (Article 11, pages 52, lines 3-7; H 7123, page 244-245, lines 31-33 & 1-2): While this section generally prohibits municipalities from restricting the presence of marijuana establishments, this seems to be in conflict with language in 21-28.12-8(2) and (3), which appears to allow municipalities to ban marijuana retailers.

27. 21-28.12-16(a) *(Article 11, page 54, lines 25-31; H 7123, page 247, lines 21-27): There are several provisions of concern to us within this section. While specifying that the state share of the marijuana sales revenue is 85% of revenue, this section notes that 25% of that revenue will be housed within budgets for multiple departments, including health and public safety, but the section does not limit, as we believe it should, how much can be disbursed to "public safety" as opposed to health. Further, this revenue could also be used – to an unspecifying degree – for "law enforcement training and technology improvements including grants to local law enforcement." Social justice measures must be central to the implementation of recreational marijuana, which means a critical understanding of the impact that policing practices during the criminalization of the substance have disproportionally had on lower-income and BIPOC individuals and communities. This funding should be going towards programs to address this disparate impact, not to further fund law enforcement agencies.*

28. 31-27-2(b)(1) (Article 11, page 56, lines 18-20; H 7123, page 249, lines 13-15): This language references the testimony of certified "drug recognition expert[s] or evaluator[s]" in determining whether an individual was driving under the influence. However, many questions still remain about the scientific validity of DREs in determining whether a person is under the influence of drugs, so this should not be an acceptable way of detecting impairment. Police continue to have a variety of ways of charging marijuana-impaired people with DUI without relying on this current pseudo-science.

29. On the same subject, we would urge the addition of language similar to that contained in the laws recently passed by New York and Connecticut which would bar police from intrusively searching motor vehicles or their occupants based solely the presence of the odor of marijuana. Otherwise, the issue will only result in extensive and unnecessary litigation.

30. We would encourage that this Article include some of the provisions contained in the separate comprehensive marijuana legalization bill (H-8593) introduced on behalf of the House leadership that are designed to protect the civil liberties of residents. This includes provisions in that bill which ban any adverse action against parents through their children unless their use of cannabis creates "an unreasonable danger to the safety of a minor child."

31. Finally, we wish to express our general and strong support for the provisions in this Article (Article 11, Page 3, line 25 to Page 4, line 14) providing for automatic expungement of

past criminal records for marijuana possession crimes. However, we urge some amendments to this section, including clarifying the definition of "conviction" to ensure that it encompasses dispositions such as nolo pleas; specifying more clearly that no fees will be charged for expunging these records; and adding language to ensure that the expungement is applicable to immigration proceedings.

Proposed Revisions to Medical Marijuana Laws

As noted in our introduction, it is important to ensure that, in legalizing marijuana, users of medical marijuana not be left behind. We would therefore emphasize the point we have made in #1 in our testimony about revising criminal record check qualifications in the medical marijuana statutes. We would also stress the importance of strengthening the provision in the medical marijuana law that prohibits employment discrimination based upon a medical marijuana patient's status as a cardholder. Some employers have claimed that they can fire or not hire a cardholder who tests positive for marijuana on a drug test. The ACLU of RI filed a successful lawsuit on behalf of a Rhode Island resident facing this exact issue, but some employers still take this discredited position. It is therefore critical to clarify the law to ensure that a positive drug test cannot become a roundabout way of firing or refusing to employee a patient who is lawfully using medical marijuana. See also our comments in #8 above regarding Section 21-28.11-9.

In addition, provisions in the medical marijuana law relating to criminal record checks for both caregivers and participants in the medical marijuana industry should be revised and updated to ensure that individuals are not subjected to stricter terms of disqualification than they would be under the legalization standard for criminal record checks.

Once again, the ACLU of RI appreciates this budget article's goal and welcome Rhode Island joining the 18 states that have already taken this route. We hope that the suggestions contained in our testimony will be utilized to better implement that goal.