AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

ACLU OF RI POSITION: AMEND

TESTIMONY ON 22-S 2430,
AN ACT RELATING TO FOOD AND DRUGS – RHODE ISLAND CANNABIS ACT
March 15, 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 legislation 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 S 2430.We recognize that this legislation 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 this bill, so the following testimony should be considered a preliminary analysis of the bill. A subsequent, more detailed testimony will be provided to the committee with suggested language revisions and a more in-depth analysis. However, we wish to highlight some of the issues that have prompted our attention and which warrant heightened review, and that we particularly would like to bring the committee's attention to from the outset. In raising these questions and comments, however, we do not wish to minimize our general support for this important bill or the numerous way it promotes civil rights and social justice.

1. **Parental Rights**. *Page 53, line 34 to page 54, line 6*: One very troubling aspect of the war on marijuana has been the deleterious impact on familial rights. Parents have found themselves subject to unnecessary surveillance by child welfare officials – and even relinquishment of their children – based on their innocuous use of marijuana. The ACLU therefore appreciates the section of this bill that would 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." We commend the inclusion of this protection in the bill.

2. **Expungement**. *Page 89, line 13 to page 91, line 9*: The ACLU strongly urges that the section of the bill relating to the expungement of records for certain cannabis-related offenses be strengthened in a few key respects. On the positive side, there appears to be a general consensus that expungement of these records should be automatic so that individuals do not have to go through a burdensome process of individually having their records expunged. But while the bill refers to an automatic expungement process, details are lacking on exactly how the process would work and how long it would take for the court to address this critical task. The ACLU agrees with others that this process should be

made more specific. The committee could look to language included in the FY-2023 budget proposal (see §12-1.3-5 of 22-H 7123) as a starting point.

At the same time, we believe that there are additional, more specific, revisions that should be made to this section to truly accomplish its goal in expunging criminal records that have an adverse impact on individuals in employment, housing, and other important aspects of their lives.

In that regard:

(a) Subsection (a) provides for expungement of "a prior misdemeanor or felony conviction" for possession offenses that have been decriminalized. However, the term "conviction" does not appear to be defined, and we believe defining it is necessary to ensure that nolo pleas and related dispositions that might not be considered a "conviction" are covered by this section.

(b) Subsection (d) commendably provides for waiver of all court costs in expunging a criminal record, but it is limited to only those individuals who have been incarcerated for the offense. We do not believe that this benefit should be so limited, and that a waiver of costs should apply to all relevant expungements in recognition that the law is essentially acknowledging the non-criminal nature of these offenses.

(c) Subsection (e) provides that the court advise the Attorney General and the relevant police department when records are expunged pursuant to this section "within a reasonable time." We would urge that this section be more specific as to the amount of time for relaying this important information to other agencies.

(d) Subsection (k) provides that applicants for certain areas of employment will still be required to disclose the fact of a marijuana related conviction or civil adjudication relating to possession even if the record has been expunged pursuant to this section. Again, because the purpose of this legislation is to acknowledge the unfairness of the criminalization of possession of small amounts of marijuana, we do not believe individuals should still be required to acknowledge these convictions in applying for employment after the record has been expunged. Even if the committee believes there remains a compelling reason to impose this requirement on applicants for law enforcement positions, we urge the deletion of the requirement for the other occupations set out in subsection (k), including applicants for teaching, coaching, and childcare positions.

(e) Due to the niceties of federal immigration law, the language of this section relating to expungement will not protect immigrants in the state, including lawful permanent residents, from being deported for a marijuana possession conviction, even if it is expunged. Under federal regulations, regrettably, an expunged conviction is not considered "expunged" for immigration purposes unless the underlying conviction has been specifically deemed "legally invalid." By adding some "magic words" regarding "legal invalidity" to this section, the expungement provision will have its intended

effect for this population without in any way affecting the substance of the proposal. In the more detailed testimony we will be submitting, we will share language that will make sure that any enacted expungement provision does not inadvertently leave the immigrant population unprotected from the law's benefits.

3. **Law Enforcement and Motor Vehicles**. The ACLU urges two revisions to the bill to address the topic of law enforcement interaction with individuals in motor vehicle stops.

   First, other states, including Connecticut and New York, have begun addressing the issue of police authority to search motor vehicles based solely on the presence of marijuana odor. In light of the legalization of the possession and use of cannabis, these states have recognized that police should no longer be able to use that odor as the sole basis for engaging 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 marijuana odor to engage in motor vehicle searches. Rather than leave this issue up to time-consuming and onerous litigation, we urge the committee amend the bill to address this issue outright and include language from other states addressing this issue.

   Second, we know that there has been significant discussion of the question as to how to address the problem of marijuana-impaired drivers. This legislation proposes to do so by authorizing DUI convictions based on the testimony of certified "drug recognition experts" (DRE). Unfortunately, the methodology and science behind the DRE approach has simply not reached the stage of acceptability, and we are therefore very concerned about the use of such testimony as the basis for a DUI conviction. Instead, police continue to have many tools at their disposal for charging cannabis-impaired individuals with 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. We therefore urge deletion of the reliance of DREs in this bill. [page 100, lines 14-16].

4. **Employment**. *Page 57, line 28 to page 58, line 18*: The ACLU believes that one of the most important protections that any law legalizing the use of cannabis must provide is an assurance that individuals are not unfairly discriminated against in employment when use of marijuana does not in any way affect their ability to perform their job. It makes little sense to legalize cannabis but allow employers to deny employment to anybody who responsibly uses it. The ACLU has had experience with this issue on the medical marijuana side. Just this year, we favorably settled a lawsuit on behalf of a person whose offer of a paid internship at a fabrics company was rescinded after she advised the employer that she was a medical marijuana patient.[1] Although the court ultimately ruled in this job applicant's favor, it pinpoints the need for clear protections for job applicants and employees in the marijuana legalization context as well.

[1] https://riaclu.org/en/cases/callaghan-v-darlington-fabrics-corporation

This legislation attempts to accommodate both employees and employers, and we are concerned to hear that some employers wish to water down the protections for employees in various ways in the grounds that the bill does not provide them sufficient authority to regulate employees who use marijuana. We strongly urge the committee to reject any efforts to further weaken the protections given to employees under this bill.

Employer demands that they be able to engage in random drug testing, for example, when it is well known that cannabis metabolites stay in a person's system for weeks, simply must be rejected as infeasible and inappropriate. This legislation already contains a number of tools for employers to use to root out workplace cannabis intoxication, including a broadly worded exemption for safety-related occupations, and strong authority to terminate individuals found to be working while under the influence of cannabis in the workplace. While our more detailed testimony will be providing some minor suggestions to clarify and strengthen this section, we again fully urge the committee to take no further action to weaken its protections for employees and job applicants.

5. **Criminal Record Checks**. The legislation 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.

   While some sections provide that a criminal conviction relating solely to a cannabis offense will not automatically result in suspension or revocation of a license, others refer to convictions generally. Some provisions refer to a requirement that the criminal record be "substantially related" to the position for which the criminal record check is being done in order to disqualify a person. While this term appears in the state's "fair chance licensing" law, the context of that term does not seem as applicable here since one of the goals of cannabis legalization is to, through targeted social justice initiatives, employ individuals whose crimes may in fact have been substantially related to marijuana and drugs.

   We further have some concerns about the drafting of the particular section of this bill which generically address criminal record check procedures. [Page 41, line 1 to page 44, lines 4]:

   Subsection (d) of this section provides that certain criminal offenses would lead to automatic disqualification for any business or activity licensed or registered under this law. Any type of automatic disqualification is contrary to the principle of fair chance licensing, which requires individualized consideration of each offender and offense. As noted above, it also undermines the social justice components of this legislation by establishing an automatic disqualification if a past crime "substantially relates" to the occupation to which the license or registration applies. In addition, subsection (d)(2), which authorizes automatic disqualification for "substantially related" offenses, appears to be in conflict with 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 some of the other provisions in this statute dealing with criminal record checks, we urge

the committee to examine this issue in much more depth and promote greater uniformity in the background check process. 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 with the perspective of the express goals of this law.

6. **Medical Marijuana**. In creating a detailed framework for the legalization of cannabis, it is important that medical marijuana patients not be left behind. In at least a few respects, we would urge that the committee in passing this bill also amend certain related provisions in the medical marijuana statute. We wish to mention two in particular at this time.

   One is the section in the medical marijuana statute dealing with employment discrimination. We urge that it be clarified in order to avoid any misunderstandings as occurred within the aforementioned lawsuit that we were forced to handle under that provision in the law. Our more detailed testimony will provide specific language that could be added to address that particular issue.

   Second, we would ask that provisions in the medical marijuana law relating to criminal record checks for both caregivers and participants in the medical marijuana industry be revised and updated such that individuals are not subjected to greater disqualification than they would be under the legalization standard for criminal record checks.

The ACLU of RI appreciates this legislation's goal and welcomes Rhode Island joining the 15 or so states that have already taken this step towards the legalization of recreational marijuana. We hope that the suggestions contained in our testimony will be utilized to better implement that goal, and we look forward to continued discussion with the committee to ensure that the implementation of recreational marijuana is considered and centers important elements of social justice and civil liberties in its policy.

Thank you for your consideration of our views.