



April 14, 2022

Re: Please amend HB 1598, including to at least create a “Plan B” in case state-run stores aren’t implemented due to federal law

Dear Senate Ways and Means Committee:

My name is Karen O’Keefe. I am the director of state policies for the Marijuana Policy Project (MPP), the largest cannabis policy reform organization in the United States. I am an attorney who has worked on cannabis policy at MPP since 2003, and I’ve had a firsthand view of what has worked and what has not, along with the opportunity to work with an array of legal and policy experts.

MPP has played a leading role in most of the major cannabis policy reforms over the past two decades, 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.

MPP strongly supports legalizing and regulating cannabis for adults 21 and older and doing so in a way that repairs the damage inflicted by criminalization. Cannabis is safer than alcohol, and adults should not be penalized for using it. Like alcohol prohibition a century ago, cannabis prohibition has been a harmful failure. Only legalization allows for control to foster public health and safety, including by ensuring cannabis is lab-tested and sold at regulated establishments.

While we strongly support legalizing cannabis under state law, we are concerned that HB 1598 will prove a costly boondoggle due to federal law, which imposes felony penalties for the sale of marijuana. This approach could waste millions of public and private dollars without actually creating legal sales. **We strongly urge the committee to avoid this major misstep by allowing private retail sales — or, at a minimum, allowing for private sales *in the event that the Liquor Commission does not actually operate stores in a timely manner.***

We have several additional recommendations, including to legalize non-edible cannabis infused products (such as lotions) for adults; allowing regulated sales of infused products to adults; fostering small businesses — including ensuring fees are reasonable and the application process does not favor those with extremely deep pockets; selecting a separate regulatory agency for other businesses if the Liquor Commission is going to run stores; allowing (or at least decriminalizing) home cultivation; making criminal justice reforms including release of cannabis prisoners and expungement of records; including community

reinvestment and provisions to create an equitable industry; and making some technical changes.

Here is a more in-depth explanation of our recommendations and the rationale behind them:

1. A state-run monopoly of cannabis stores is a boondoggle due to federal law.

A monopoly of state-run cannabis stores will probably result in the program never becoming operational — at least until federal law changes, which could take many years.

Since 18 states have legalized and regulated private cannabis sales, policymakers might assume that federal law is no longer an impediment to states operating cannabis retail stores. But there is a clear legal distinction between a state licensing private businesses and a state seeking to operate its own retail stores. Selling cannabis is a felony under federal law¹ — even though it is not currently being enforced against those complying with state cannabis regulation laws.

Dozens of states license private businesses that sell cannabis, for medical or adult use, or both. None of those laws have been found to be preempted. Under the non-commandeering principle, which is grounded in the 10th Amendment, states can remove criminal penalties from anything.² As an Arizona court ruled,³ as it rejected a preemption challenge to a state law that involved licensing private businesses to sell medical cannabis:

It is of considerable consequence that it is Arizona's attempt at partial decriminalization with strict regulation that makes the AMMA vulnerable ... This view, if successful, highjacks Arizona drug laws and obligates Arizonans to enforce federal prescriptions that categorically prohibit the use of all marijuana. The Tenth Amendment's "anti-commandeering rule" prohibits Congress from charting that course.

However, Arizona's — and New Hampshire's — licensure of private cannabis businesses is very different from the state itself selling cannabis. As Vanderbilt Law Professor Robert Mikos explained in "Preemption Under the Controlled Substances Act," one type of preemption is "conflict" or "impossibility" preemption. Under this type of preemption, Mikos explains, a "conflict arises when it is physically impossible to comply with both state and federal law. This would happen, say, if state law orders an individual to distribute marijuana to all qualified medical marijuana patients, because it would be impossible for

¹ 21 U.S. Code § 841

² See: *Murphy v. NCAA*, No. 16-476, U.S. (2018) ("The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. ... [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

³ *White Mountain Health Center, Inc. v. Maricopa County*, CV 2012-053585 (Arizona Superior Court, Maricopa County, 2012).

this person to fulfill his obligation under state law and simultaneously heed the federal ban on distributing marijuana.”⁴

This hypothetical is almost precisely what HB 1598 envisions, except that state workers would be directed to sell to adult consumers (rather than patients), in violation of federal law. As Mikos cautioned, “it would be impossible for this person to fulfill his obligation under state law and simultaneously heed the federal ban on distributing marijuana.” In other words, HB 1598 would be preempted.

Even absent a preemption lawsuit, the state may realize it is inadvisable to require state workers to commit multiple felonies every day — even if federal criminal laws aren’t being enforced at the time. Policymakers in several states have explored the idea of state distribution, but in every case, they have ultimately opted to regulate private distribution instead. In Utah, a medical cannabis law was initially crafted to allow both private distribution and state- and county-run distribution. However, county attorneys advised about the legal issues, and the law was rewritten to remove the state and local governments’ active role in distribution.⁵

There are myriad legal issues beyond criminal prosecution that could cause hardship for state workers and the government that is directing them to commit federal crimes. Legal residents have been denied citizenship and re-entry into the U.S. for working in the legal cannabis industry.⁶ State-legal cannabis industry workers are often denied mortgages because their work entails committing federal crimes and their salaries come from the proceeds of those crimes.⁷

RICO suits have also been filed against legal cannabis stores and could target Liquor Commission-run stores.⁸ Presumably at least one Liquor Commission worker will need to use cannabis as part of their job — to sample the products when deciding which ones to sell. Using cannabis makes it illegal for a person to own, possess, or buy guns or ammunition.⁹ And on and on. These issues could cause the Liquor Commission to back out, potentially after expending millions in taxpayer funds.

⁴ Robert Mikos, “Preemption Under the Controlled Substances Act,” *Vanderbilt University Law School Public Law and Legal Theory*, 2013.

⁵ See “Utah Reworking Medical Marijuana Distribution Plans,” *Associated Press*, July 31, 2019. (“Several county attorneys are pressuring Utah to scrap its plans for a state-run medical marijuana dispensary system, arguing the system would put public employees at risk of being prosecuted under federal drug laws.”)

⁶ See Ana Campoy and Justin Rohrlich, “Immigrants are being denied US citizenship for smoking legal pot,” *Quartz*, April 20, 2019; Michelle A. Kain, “The Impact of Marijuana Decriminalization on Legal Permanent Residents: Why Descheduling Marijuana at the Federal Level Should Be a High Priority,” *62 B.C. L. Rev.* 2057 (2021), <https://lawdigitalcommons.bc.edu/bclr/vol62/iss6/7>.

⁷ See “Federal Prohibition of Marijuana Restricts Lenders Ability to Issue Loans to Borrowers Employed in Marijuana Industry,” *JD Supra*, April 10, 2018.

⁸ Hayley N. Sipes, “Weeding out Marijuana Businesses with RICO,” *57 Washburn L.J. Online* 21 (2018), <http://washburnlaw.edu/wljonline/sipes-marijuanaandrico>.

⁹ See “Fact Check: Marijuana or guns, you can't have both!,” *News10*, April 15, 2021, <https://www.whec.com/news/fact-check-marijuana-or-guns-you-cant-have-both/6075948/>.

And of course, we could have a new president in 2024, who could begin enforcing criminal laws related to cannabis.

Giving the state Liquor Commission a monopoly on all cannabis sales to consumers will likely lead to ruin for some small growers and manufacturers who might have been able to thrive in a free-market system. If the Liquor Commission fails to follow through on opening stores after licensing those private cannabis businesses, the licensees will have wasted hundreds of thousands to millions of dollars each to apply and begin operations. Bank loans aren't available to cannabis businesses, and many applicants invest their life savings (and sometimes that of friends and family) to get up and running.

We also have other legal and practical concerns about the state monopoly. The state Liquor Commission would be the *only* market for the products created by the private growers and manufacturers it licenses. It might choose not to buy from a particular grower or manufacturer, or it may not want to buy a particular product. In those cases (and if the Liquor Commission doesn't follow through with opening its stores), the private licensees would have a huge incentive to sue and go to the press to make the case for bias and favoritism. (In contrast, alcohol is sold across state and international borders and to restaurants and bars within New Hampshire. New Hampshire's state-run liquor stores are not the *only* market for the products they sell.)

Private growers and manufacturers might also sue if they believe another vendor is getting better compensation, if they are not satisfied with their shelf space or product placement, or for any number of perceived slights. Competitive state licensing has often been mired in litigation, delays, and allegations of corruption.¹⁰ A state-run monopoly — which would be the *only* place to sell cannabis by private growers — brings a significant risk for allegations of favoritism and related scandals and loss of faith in state government.

Also of note, most adult-use consumers use cannabis as an over-the-counter pain reliever and/or sleep-aid.¹¹ A state monopoly will not provide the kind of robust, competitive free market that allows everyone to find the products they respond best to.

2. Alternatively, HB 1598 should at least include a Plan B with private stores.

If HB 1598 is not amended to allow privately run stores at the outset, it should at least have a fallback in case the Liquor Commission proves unwilling or unable to follow through. For example, it could provide that if state-run stores haven't begun selling cannabis within two months of cultivators and manufacturers certifying that they have product ready for sale, regulators must open an application process at that time and issue private retail licenses within 90 days. It could also allow ATCs to sell to adult-use consumers at that time,

¹⁰ See <https://www.quinnemanuel.com/media/1419562/challenging-state-and-local-cannabis-license-denials-current-trends-and-issues.pdf>.

¹¹ See Bachhuber M, Arnsten JH, Wurm G. "Use of Cannabis to Relieve Pain and Promote Sleep by Customers at an Adult Use Dispensary." *J Psychoactive Drugs*. 2019 Nov-Dec;51(5):400-404. doi: 10.1080/02791072.2019.1626953. Epub 2019 Jul 2. PMID: 31264536; PMCID: PMC6823130.

provided they abide by rules to preserve the medical supply and ensure pricing doesn't increase and product choices don't decrease for patients.

A tax could be levied on these private sales. (While New Hampshire does not have a sales tax, it does levy tobacco taxes, currently at a rate of \$1.78 per package of 20 cigarettes.)

3. Adult consumers should not be criminalized for using cannabis-lotions.

HB 1598 was amended on the House floor so that it no longer re-criminalizes cannabis-infused *edibles and drinkables* for adults who are 21 or older. (318-F:1 (XVI)) Edible and drinkable cannabis products that contain up to 300 milligrams of THC are now included in adult consumers' possession limits. However, under the bill, only medical patients are allowed to possess cannabis-infused lotions, salves, and other non-edible/drinkable cannabis products. (318-F:1 (XVI)) That should be revised so that adult-use consumers are not criminalized for cannabis-infused lotions.

4. Adult consumers should be able to buy infused products in-state.

HB 1598 would license an unlimited number of product manufacturers — every qualified applicant would be approved, unless an applicant's licensure would conflict with a local cap on local licenses. But it appears product manufacturers could *only* make concentrates (dabs and waxes) and products sold to registered medical patients.

New Hampshire residents should be allowed to purchase cannabis products in-state, and product manufacturers should also be allowed to meet that demand. New Hampshire residents can already purchase infused products in Canada, Maine, and Massachusetts, and sales are expected in Vermont by the year's end. There is no sound reason to prohibit in-state small businesses from meeting this demand, or for forcing New Hampshire residents to drive out of state for a legal product. (Forcing cannabis consumers to drive out of state also forces them to pay for more gas, increases the risk of accidents due to more vehicle miles traveled, causes more air pollution, contributes to climate change, and results in more wear-and-tear on roads.)

In addition, by authorizing in-state production of infused products for adult-use consumers, New Hampshire can set health and safety requirements. The state could craft regulations mandating child-resistant packaging, warning labels (perhaps even with a help line), restrictions on packaging and shapes to avoid appealing to minors, and other sensible health and safety regulations. It could even require state approval of flavors to ensure they do not appeal to minors. None of that type of control is possible if the state drives demand underground and across borders.

5. The excessive fine for public smoking and vaping is a step backwards.

HB 1598 would increase the penalty for smoking cannabis in public. The current penalty is the penalty for possession — a \$100 civil fine. HB 1598 would levy a much higher fine —

up to \$500 — for smoking or vaporizing in public, which could cause individuals to miss rent and lead to a devastating downward spiral.

In contrast, there is no statewide penalty for drinking in public in New Hampshire or for smoking cigarettes outdoors. This, despite the fact that secondhand cigarette smoke has been linked to serious health effects, whereas even *firsthand* cannabis smoking isn't associated with increased mortality or lung cancer.

A first offense should carry no more than a \$50 civil fine (with a community service alternative for those who cannot afford it), with a maximum \$100 fine after that.

6. Legalization should include erasure, release, and related reforms.

Newer legalization states are increasingly recognizing the moral imperative to include expungement, retroactivity, and related reforms.¹² As New Hampshire legalizes cannabis and gets into the business of selling it, it should also release and clear the records of individuals who have been convicted of the same conduct. All cannabis convictions should be expunged or erased, all cannabis prisoners should be released, and all cannabis-related parole and probation should be terminated. This should be done automatically and at no cost to the individual with the cannabis charge.

In the case of an ongoing sentence where there were other non-cannabis charges, a judge could evaluate whether release would be in the interests of justice in light of legalization and racial disparities in cannabis arrests, along with the seriousness and nature of the other non-cannabis charge(s).

In addition, HB 1598 should provide that there cannot be a general condition of parole, probation, or pre-trial release that requires revocation for using or possessing cannabis or testing positive for it, absent an individualized finding that allowing the defendant to use cannabis could pose a danger. Other states, including Connecticut and New Jersey, have included similar provisions.

7. Legalize (or at least decriminalize) home cultivation.

Unlike almost all legalization states,¹³ HB 1598 would in no way change the penalties for personal cultivation, which would remain a jailable offense. The bill should legalize the secure, discreet cultivation of cannabis. Adults are allowed to brew their own beer, so why should they be prohibited from growing a safer, state-legal plant?

Absent legalization of home cultivation, New Hampshire should at least make cultivation of up to six plants legal for registered patients, with a civil, fine-only offense for adults.

¹² See <https://www.mpp.org/assets/pdf/issues/legalization/Review-of-State-Legalization-Laws.pdf>.

¹³ For details, see <https://www.mpp.org/issues/legalization/the-case-for-allowing-home-cultivation/>.

8. Criminal protections are needed for staff of cannabis businesses.

Although HB 1598 creates a general exception to RSA 318-B:26 for activities “authorized by law,” it should include clear language to explicitly provide that cannabis businesses and their staff are not in violation of the state’s criminal code for their cannabis-related activities. The licensing piece does not even explicitly say licensees and their staff are “authorized” to possess, manufacture, sell, transport, and purchase cannabis, which it should if the bill will not be amended to include more explicit protections.

9. HB 1598 should limit the state monopoly’s mark-up while ensuring fair payment to licensees.

While cannabis would not be taxed under HB 1598, the only seller of adult-use cannabis would be the state Liquor Commission. HB 1598 gives the Commission unfettered authority to set prices. There is nothing in the bill prohibiting the Liquor Commission from charging \$1,000 a gram. If the Commission charges more than the cost of cannabis in neighboring states, and more than the illicit market, it could cause significant losses for private growers and manufacturers. And it could deprive residents of safe, convenient access to lab-tested cannabis.

To ensure the mark-up doesn’t essentially serve as an excessive tax, there should be a provision to ensure the total price at retail is no more than the post-tax prices in neighboring states.

At the same time, HB 1598 licenses numerous small businesses to grow and produce cannabis products, but it creates an absolute, state-run monopoly at retail. There is also nothing in the bill to ensure the Liquor Commission pays a fair price for cannabis and cannabis products to avoid bankrupting small businesses. There should be.

Of course, these issues could be avoided by simply allowing private retail sales.

10. There should be a reasonable cap on application and licensing fees.

Some states have charged excessive non-refundable application fees, ensuring only applicants with the deepest pockets get licensed. New Hampshire should not repeat this mistake. It should ensure small businesses truly have a shot. Application fees should be no more than \$2,500, and licensing fees should be capped at no more than \$5,000.

11. State and local workers deserve employment protections.

Cannabis stays in a person’s system for 30 days. The state should not be firing its workers for choosing a safer alternative to alcohol — which the Liquor Commission itself would be selling. State and local governments should not be allowed to take disciplinary action against workers for failing a drug test for cannabis unless they would be required to do so

by federal law. Of course, state and local employers should still be allowed to take action for employees using cannabis at work or coming to work impaired.

12. There is no provision for how capped licenses will be selected.

HB 1598 allows local caps on all business types, but it does not include any explanation for how applicants will be selected. There should be some guidance, and it should not require an excessive expenditure of funds at the application stage. Applicants should not be required to lease or own property at the time of an initial application (or receive favor for doing so). Otherwise, only those who can afford to gamble very large sums of money will have a shot at a license. The bill could have a conditional licensure that would be final only after the location is secured and built out. Several other states have taken this approach.

13. ATCs should be allowed to buy products from private growers and manufacturers.

There does not seem to be a sound policy reason to prohibit ATCs from buying cannabis from licensed producers and cultivators. Allowing them to do so would provide more product choices for patients and help in the event an ATC experiences a crop failure or shortage. A grower could produce a niche strain that helps with particular symptoms that would not otherwise be available. Allowing ATCs to buy from growers and manufacturers would also make it so the state Liquor Commission is not the only possible buyer of products from these licensees, which presents a host of problems.

14. The regulator should not be the same entity as the state monopoly.

As was noted, we are skeptical that a state-run monopoly will become operational until/unless federal law changes. However, if this approach were to ever become operational (likely after a change in federal law), we are concerned about the prospect of having the sole customer for the private licensees also be their sole regulatory agency.

We suggest having a different entity be responsible for licensing and regulations (including health, safety, and labeling rules) and inspections of the private licensees. It may also be wise to have a neutral agency with some oversight responsibilities to help ensure the Liquor Commission stores follow health, safety, training, and security regulations.

15. Licensing should seek to foster equity.

Most of the recent legalization laws seek to license those who have been most impacted by the war on drugs and help them succeed. This often includes technical assistance, assistance with start-up loans or grants, and lower application fees for certain applicants. It can also include licensing prioritization or a head start for impacted applicants. HB 1598 should include similar provisions.

16. Proceeds should be used for community reinvestment and reparative justice.

Most of the recent legalization laws reinvest much of the proceeds from legalization in communities that were the hardest hit by prohibition and help individuals who were impacted by incarceration with reentry. Several states include funding for reentry services, community organizations, pre-K education, and other community reinvestment.

Vermont's law requires that cannabis tax revenue be used to fund a grant program to start or expand afterschool and summer learning programs, with a focus on increasing access in underserved areas. Half of Alaska's cannabis tax revenue is invested in the Recidivism Reduction Fund and supports reentry programs for currently and formerly incarcerated individuals.

New Hampshire should reinvest the bulk of proceeds in hard-hit communities and/or reentry.

17. The definition of *resident* appears internally contradictory.

Finally, there is a technical inconsistency with the definition of *resident*. The definitions section provides "resident" means a person who "has maintained a place of abode in New Hampshire for at least the past 2 years, unless the individual was homeless and residing in New Hampshire for at least 51 percent of the last 2 years."

However, 318-F:10 provides, "I. Except as provided in this section, any person applying for a cannabis establishment registration shall have been a resident, or shall have at least one director, officer, partner, member, or manager who has been a New Hampshire resident, for at least 3 years immediately preceding the date of application."

This seems to be a mistake — it requires first a two-year, then a three-year residence before an application.

Thank you for your public service and attention to this issue.

It is past time for New Hampshire to stop being an island of prohibition. But it's important that the bill to replace prohibition actually works. I would be most happy to assist with bill language if you would like to make amendments based on any of the above input. Please don't hesitate to reach out if you would like any additional information or sample language.

Sincerely,

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