



December 12, 2023

Re: Please amend HB 354 to avoid re-criminalizing sharing & increasing taxes

Dear Chair Edwards, Vice Chair LaRe, and distinguished members of the Finance 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. MPP has played a leading role in most of the major cannabis policy reforms over the past two decades, including 15 medical cannabis laws and a dozen adult-use legalization laws. I live in Michigan, where voters legalized cannabis five years ago, and which stands to benefit financially if Ohio’s legalization law creates an uncompetitive market or tax rates.

MPP was thrilled, but not surprised, to see 57% of voters in Ohio approve Issue 2, including a majority in 76 of the 100 House districts.¹

Following Issue 2’s passage, the Senate proposed a substitute to HB 86, which would have gutted the voter-enacted law. Rep. Jamie Callender introduced HB 354, which tracked closer to Issue 2. HB 354 fixes typos, makes some harmonizing amendments between Issue 2 and the terminology for medical cannabis regulation, and strengthens advertising restrictions. The Senate ultimately backed down on some of the most outrageous aspects of its initial proposal, including re-criminalizing home cultivation and reducing possession limits, and added two positive changes —expungement and earlier sales. But HB 86 still includes numerous unreasonable provisions that the House should reject.

If you advance HB 354, we strongly urge you to amend it to:

- remove the language re-criminalizing the sharing of cannabis,
- avoid raising taxes, and
- revise the language to reallocate social equity funding to counties.

Either as part of HB 354 or a standalone bill, please also:

- move up the start date for legal sales, while prioritizing medical cannabis,
- provide for automatic expungement and resentencing, and
- eliminate Ohio’s unscientific per se law.

¹ See: <https://twitter.com/opoliticsguru/status/1727362709728182372?s=46&t=V97BXPxOHwQWw50VLAbug>

And please reject the other provisions from HB 86, which would add significant re-criminalization, eliminate protections for cannabis consumers, increase taxes, remove funding from social equity, and hamstring the legal industry.

Reject HB 354's Outrageous Re-criminalizing of Sharing

It is imperative that HB 354 be revised to remove its re-criminalization of sharing.

Ohio voters approved treating cannabis like alcohol. Spouses, roommates, dates, and friends can and very often do share a bottle of wine. Homes don't have "his" and "her" liquor cabinets, nor would it make any sense to require them. All 50 states allow home brewing of beer, and allow that home brewed alcohol to be shared. Ohio Revised Code 4301.201 (C) provides:

A homebrewer may serve homemade beer or wine the homebrewer brews or ferments without a permit issued under Chapter 4303. of the Revised Code as follows:

(1) For personal consumption on private property or to the homebrewer's family, neighbors, co-workers, and friends on private property.

(2) At an event, if the event is held on private property, the premises of a fraternal organization, or on the premises for which an A-1-A, A-1c, A-2, A-2f, A-3a, or D-4 permit is issued.

In contrast, HB 354 removes Issue 2's language legalizing sharing cannabis for no remuneration² and imposes felony penalties for sharing home-cultivated cannabis.³ If a senior citizen shared home-cultivated cannabis with their spouse, fellow member of a cancer support group, friend, or elderly parent, they'd be a felon.

Please restore Issue 2's language and remove the outrageous penalty for sharing cannabis.

No New Taxes

Please reject HB 354's new 10% tax on cultivators (Sec. 5755.02).

Under Issue 2, Ohio's tax burden is on par with Michigan's, with a total tax burden of around 16-18% counting standard local and state sales taxes. Increasing taxes by 10% would make Ohio's stores uncompetitive with both the illicit market and with sales across the border in Michigan.

While several early legalization states had high cannabis taxes, all four of the other laws passed since 2022 are in line with Issue 2's or lower.⁴ States have seen that many cannabis

² Line 2054, 2068-2077

³ Lines 1730-1734

⁴ Maryland's rate is 9%, Delaware's is 15%, Missouri's total 16%, and Minnesota's start at 17-19%.

businesses struggle to break even given regulatory burdens, federal law impacts, and high taxes. The last several years have shown that too-high taxes fuel the illicit market.

Wholesale taxes are also problematic for several reasons. First, many businesses are vertically-integrated so there is no actual sale from a cultivator to tax. The state or grower would have to make up a price, which is inefficient and laden with problems. Second, taxing at the cultivation level would either require imposing excise taxes on medical cannabis, which is morally wrong, or it would require separating out medical and adult-use products at the point of cultivation. It is hard to predict exactly how much cannabis of various strains will be needed for the two markets and this can lead to shortages and market inefficiencies. Finally, at some point, cannabis will be federally legal, as will interstate sales. A court could even mandate interstate sales before federal legalization. Any state with a wholesale tax will be at a significant disadvantage. No retailer in another state would want to buy cannabis products that included a built-in excise tax.

Taxes should not be increased beyond the rate approved by voters, totaling 16-18%, and there should be no wholesale tax.

Preserve Funding for Social Equity

Issue 2 allocates 36% of excise tax revenue to a social equity and jobs program. This is a core aspect of the law. Cannabis prohibition was borne of racism and has been enforced in an extremely unequal manner.⁵ In Ohio, Black individuals are 3.4 times as likely to be arrested for cannabis possession as white individuals despite similar use rates.⁶ Alarming disparities are also seen in stops, searches, and sentencing.⁷ Most recent legalization laws acknowledge this disproportionate harm and seek to provide some redress.

Issue 2's social equity and jobs program would do just that, providing assistance for certified participants wanting to enter the cannabis industry. The program also invests in disproportionately impacted communities with education, entrepreneurship, legal aid, youth development, violence prevention, arts, and criminal justice reforms, including expungement.

HB 354 would move the administration of the social equity program from the state Department of Development to each of the 88 counties. Counties could either administer social equity grants or use the funds "for any other purpose that involves community engagement, economic development, or social programming."⁸ Moving funding to counties

⁵ See: Tom LoBianco, "Report: Aide says Nixon's war on drugs targeted blacks, hippies," CNN, March 24, 2016; A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform," ACLU, April 16, 2020.

⁶ "A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform," ACLU, April 16, 2020.

⁷ Frank R. Baumgartner, et al. *Suspect Citizen: What 20 Million Traffic Stops Tells Us About Policing And Race and Policing*, Cambridge University Press (2018) (which analyzed North Carolina traffic stop data and found that Black people and Latinos were more likely to be searched than white people, even though searches of people were more likely to turn up contraband); and Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, The New Press (2012).

⁸ lines 1262-1268

would dramatically weaken Ohio's commitment to the purposes of the fund, as the money would not be tied to those areas of individuals hardest hit by prohibition.

Please reject this reallocation.

The House Should Embrace Earlier Sales

The Senate-passed HB 86 includes numerous provisions that erode Issue 2, and it should be rejected. However, the House should provide for earlier sales from existing medical cannabis businesses, as the Senate's HB 86 does.

Adults in Ohio can now legally possess cannabis. Allowing medical cannabis businesses to serve adult-use consumers will speed up the benefits of legal regulation and allow the state to generate revenue sooner.

However, if early sales are allowed, the Division should ensure medical access is prioritized during that time.

The House Should Adopt Automatic Expungement and Re-Sentencing

The Senate-passed HB 86 includes limited expungement, which is a step forward. But we urge the House to do better.

HB 86's expungement process only applies to up to possession of 2.5 ounces of cannabis, and it is petition-based, not automatic. Only a small percent of those with convictions avail themselves of petition-based expungement. Ohio should provide for *automatic*, state-initiated expungement, as Michigan and several other states have done. Expungement should apply not only to simple possession, but also to other cannabis offenses.

Ohio has some obstacles to automatic expungement, but funding from cannabis tax revenues can and should be used for the leg work. If there are barriers or delays to automatic expungement, the state should explore what it can do to move as close as possible to the impact of automatic expungement — such as prohibiting employers from considering past convictions, and prohibiting updates on criminal background check services from including past cannabis convictions.

Ohio should also create an automatic process to reconsider sentences, as Minnesota is doing. With cannabis possession and sales now legal, individuals should not have the door of opportunity shut on them for having engaged in the same behavior pre-legalization, and people should not be incarcerated or on supervision for years on end for now-legal conduct.

Please Fix Ohio's Unscientific Per Se "DUI" Law

If the legislature is going to revise Ohio's cannabis laws, it should remove Ohio's unscientific "per se" law that criminalizes cannabis consumers months after impairment wears off.⁹

Ohio Rev. St. § 4511.19 makes it a crime to drive with two nanograms of marijuana per milliliter in blood, or 10 nanograms of marijuana per milliliter of urine. It also criminalizes driving with metabolites — which last even longer — at levels of 15 nanograms/milliliter in urine or 5 nanograms/milliliter of whole blood.

Studies have shown blood levels above two nanograms per milliliter after six days of abstinence.¹⁰ Another study found that "under very strictly supervised abstinence, chronic users can have positive results for cannabinoids in urine at 20 ng/ml or above ... for as many as 46 consecutive days from admission, and can take as many as 77 days to drop below the cutoff calibrator for 10 consecutive days."¹¹

As a study by AAA Foundation for Traffic found, "a quantitative threshold for per se laws for THC following cannabis use cannot be scientifically supported."¹² It noted "[a]ll of the candidate THC concentration thresholds examined would have misclassified a substantial number of driver as impaired who did not demonstrate impairment on the SFST, and would have misclassified a substantial number of drivers as unimpaired who did demonstrate impairment on the SFST."

Most states punish driving under the influence of cannabis based on the totality of the circumstances. Under that approach, a driver's THC levels can be submitted as one piece of evidence, but they are not considered dispositive as a matter of law. THC levels are considered alongside results of a field sobriety test and all other evidence — such as the driver's behavior and officer's observations. If the level of THC was so high it is nearly conclusively correlated with impairment, then it would be very easy to get a conviction with that alone.

People who have not used cannabis in days, weeks, or months should not be deemed — as a matter of law — "driving under the influence." Please fix this injustice.

Please Reject Other Elements of the Senate's HB 86

In many ways, HB 86 creates prohibition 2.0. It erodes freedoms and protections enacted by voters. HB 86 penalizes innocuous conduct, ramps up criminalization, creates new mandatory minimums, and removes legal protections. HB 86 also guts social equity, raises

⁹ ORS § 4511.19.

¹⁰ Peng YW, Desapriya E, Chan H, R Brubacher J. "Residual blood THC levels in frequent cannabis users after over four hours of abstinence: A systematic review." *Drug Alcohol Depend.* 2020 Nov 1;216:108177. doi: 10.1016/j.drugalcdep.2020.108177. Epub 2020 Jul 10. PMID: 32841811. —

¹¹ Ellis GM Jr, Mann MA, Judson BA, Schramm NT, Tashchian A. Excretion patterns of cannabinoid metabolites after last use in a group of chronic users. *Clin Pharmacol Ther.* 1985 Nov;38(5):572-8. doi: 10.1038/clpt.1985.226. PMID: 3902318.

¹² Logan, B., Kacinko, S.L. & Beirness, D.J. (2016). *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per se Limits for Cannabis (Technical Report)*. Washington, D.C.: AAA Foundation for Traffic Safety.

taxes, and makes legal sales non-competitive with the illicit market. The House should resist these changes.

Here are some of the ways HB 86 erodes the freedoms approved by voters, and hamstring the legal market:

- **Banning smoking or vaping adult-use cannabis anywhere except in some private homes.** HB 86 imposes a minor misdemeanor for vaping or smoking anywhere but some private homes (the penalty applies even at one's home if one's landlord bans inhalation). Under Issue 2, using cannabis in public areas was forbidden, but private property owners could allow cannabis use in locations such as hotel rooms, B&B patios, and other private properties. HB 86 goes too far and makes it impossible for visitors and some renters to use cannabis anywhere.
- **Prohibiting adults from sharing cannabis.** Like HB 354, HB 86 outrageously removes the provisions of Issue 2 to allow cannabis sharing.
- **Requiring cannabis to be stored in original packaging at all times.** Adults can put alcohol in flasks or decanters. Under HB 86, they could not store their in a lockable stash jar, or they would be criminals once again.
- **Imposing a three-day mandatory minimum for vaping on a boat.** HB 86 imposes at least three days in jail, plus a fine of at least \$375, for passengers smoking or vaping cannabis in a vehicle or boat. It imposes longer mandatory minimums for subsequent offenses, with a fourth offense being a felony. Issue 2's penalty was a \$150 fine.
- **Limiting extracts to 50%.** HB 86 caps extracts at 50% THC. This will surely lead to additives, which are dangerous to inhale. It will also push the production of butane hash oil underground, which poses serious risks of explosions and of residual solvents to consumers.
- **Banning flower sales.** HB 86 caps sales of packages of cannabis at 100 mg of THC, with the exception of vape products. This would ban sales of flower.
- **Removing legal protections.** Issue 2 provides protections from the state ruining the lives of responsible cannabis consumers. Under Issue 2, one's children cannot be taken away solely for responsible cannabis use, and a person cannot be denied medical care — including organ transplants. HB 86 eliminates these protections.

There are other problematic provisions in HB 86, including a complete gutting of social equity, higher taxes, and a requirement that dispensaries be at least ½ mile from one another.

Please do not incorporate these provisions in HB 354 or any other House vehicle. They fly in the face of the purpose and heart of Issue 2.

Closing Comments

On November 7, Ohio voters overwhelmingly decided to legalize cannabis like alcohol. While there are some reforms the legislature can take to harmonize laws, expand justice,

and otherwise preserve voters' intent, the legislature should reject any effort to re-criminalize innocuous behavior or to hamstring the legal industry.

Please let me know if you would like draft language for any of my suggestions.

Sincerely,

A handwritten signature in black ink that reads "Karen O'Keefe". The signature is written in a cursive, flowing style.

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