

April 11, 2019

The House Committee on Government Operations
Vermont State House
115 State Street
Room 49
Montpelier, VT 05633

Re: S.54 – Promoting Economic Equity and Preventing Monopolization

Dear Representatives:

Nearly one in four Americans (and 100% of Canadians) now live in jurisdictions which have regulated the commercial cultivation and sale of cannabis for non-medical adult use. The expansion of the regulated adult-use cannabis market has, predictably, been followed by the expansion of legitimate cannabis-based businesses, which largely benefits public health and safety by replacing illicit sellers who are often connected to organized crime cartels.

As the regulated cannabis industry has grown, some advocates have raised concerns about the potential for consolidation to adversely impact Vermont's small-scale cannabis producers, as well as cannabis consumers. Vermonters want and deserve a legal cannabis marketplace that is equitable, democratic, and pro-consumer – one that empowers entrepreneurs and small, locally-owned businesses, rather than a small handful of well-connected, wealthy investors or out-of-state hedge funds. A cannabis market dominated by the wealthy and powerful, to the exclusion of those disproportionately harmed by prohibition, is anathema to the goal of reforming our drug laws.

As passed by the Senate, S.54 makes laudable efforts towards encouraging economic and social equity in the nascent cannabis market. After years of study and policy refinement, both S.54 and the concurrent House regulation bill (H.196) contain strict limits on horizontal consolidation, and create application preferences for small- and locally-owned businesses. In this letter, I lay out three discrete areas for improving upon the solid foundation already built by thoughtful legislators in both chambers.

1. Limiting Monopolistic Control of the Cannabis Market

S.54 contains several provisions smartly aiming to limit the ability of a small number of individuals to dominate Vermont's cannabis market. For example, applicants may only obtain one of each type of license¹, such that a person may only directly or indirectly own one cannabis store, one grow operation, and so forth — and must limit her interests in any additional licensed businesses to a non-controlling stake (< 10%)². Importantly, when assessing ownership of an applicant, S.54 specifies that the Cannabis Control Board look towards *beneficial* ownership³, such that individuals could not hide their true ownership behind a complex web of shell companies. [We] encourage you to tighten these provisions further, to avoid potential loopholes that could, under certain circumstances, allow evasion of the one-license limit.

¹ Proposed as 7 V.S.A. §901(d)(3), page 28.

² Proposed as 7 V.S.A. §861(13), page 15: "A person who...owns 10 percent or more [of a business]...shall be deemed to control [that business]".

³ *Ibid.*

First, I urge you to address the concept of “group” control: where two or more individuals act in concert to control a cannabis business, even while each one alone may not necessarily “control” that business within the four corners of S.54. By treating each member of a controlling “group” as individually controlling the subject cannabis licensee for purposes of determining eligibility, you would close this potential loophole and prevent gaming of the system by, for example, making slight adjustments to ownership percentages as between group members.

Second, I urge you to prevent Vermont’s cannabis industry from being overtaken by franchised businesses. You may have heard jokes about a future of “McWeed”, but this is actually happening: Colorado currently has 12 outlets of a chain called *Starbuds*, which also operates one medical dispensary in Oklahoma, with a 2nd Oklahoma outlet (for a total of 14 stores) opening soon⁴. Preventing franchised chains from dominating Vermont’s cannabis landscape would require only a minor tweak to S.54, by stating⁵ that a franchisor is deemed to control each of its franchisees — as already proposed in H.196.

2. Empowering Local Control

Local control of cannabis businesses serves important state interests. Local ownership helps ensure that the lion’s share of the benefits of regulation are enjoyed by Vermonters who reinvest in their communities, rather than far-flung investors. Local control also helps ensure socially responsible business practices, by requiring that the people who sell cannabis in our communities actually be members of those communities, with personal accountability to the community, and interests beyond the narrow profit motive.

Currently, S.54 does not require *any* level of in-state ownership or control of cannabis licensees, allowing as much as 100% out-of-state ownership. S.54 does, however, direct the Cannabis Control Board to consider local ownership and control as one factor, among several, in determining license prioritization⁶.

[We] urge you to place greater emphasis on local ownership and control of Vermont’s cannabis industry, by requiring that a majority of each cannabis business’ equity be owned by Vermont residents, that a majority of each cannabis business’ board of directors be comprised of Vermont residents, and that each cannabis business’ chief executive and financial officers be Vermont residents – as was proposed in the 2017-2018 session’s regulation bill, H.490.

Some have argued that Vermont should ban out-of-state investors entirely from our cannabis industry – and, in fact, the 2016 Senate legalization bill (S.241) would have done precisely that. [We] believe that such a complete prohibition would be unwise, for two principal reasons. First, prohibiting outside investors would make it more difficult for entrepreneurs to obtain necessary startup capital, and give Vermont investors undue negotiating leverage by insulating them from competitive pressure on investment terms. Additionally, banning outside investors would likely violate the United States Constitution’s “dormant” Commerce Clause, which limits a state’s ability to discriminate against out-of-state interests to the minimum extent necessary to further compelling state interests. As described

⁴ See <https://www.starbuds.us/locations>

⁵ Within the definition of “Control” as proposed in 7 V.S.A. §861(13), page 15.

⁶ Proposed as 7 V.S.A. §903(a)(1), page 30.

above, Vermont could further its compelling interests by requiring majority local control, rather than a complete ban.

3. Encouraging a Craft Cannabis Industry

As passed by the Senate, S.54 encourages a “craft” cannabis industry similar to Vermont’s successful craft beer and spirits industries by requiring the Cannabis Control Board to provide small-scale cultivators⁷ with appropriate regulatory exceptions and accommodations, recognizing that small-scale cultivators present less risk than their commercial-scale counterparts, and are less likely to be able to comply with onerous requirements.⁸

[We] encourage you to build upon this important foundation by strengthening the preferences for small-scale cultivation applicants, and ensuring that fees for these “craft” licenses remain highly affordable, as is already done with hemp cultivation licenses. Specifically, I urge you to create a subclass of “craft” cultivation licenses allowing no more than 500 square feet of plant canopy, and fixing the fees for such licenses at \$500 per year for outdoor-only cultivation⁹. Additionally, “craft” cultivators should be granted an express statutory application preference over commercial-scale cultivators.

[We] also encourage you to expressly permit “craft” cultivators to allocate, by contract, responsibility for compliance with the bill’s requirements for cannabis packaging and labeling¹⁰ to the licensed retailers, wholesalers, and manufacturers to whom those craft cultivators sell their cannabis. Those “upstream” licensees would inherently be well positioned to comply with those requirements in a manner that protects consumer and public safety, and such a carve-out would be consistent with the existing “exceptions and accommodations” provision described above.

Thank you for your leadership on these important matters.

A handwritten signature in black ink, appearing to read 'DS', enclosed within a circular scribble.

Dave Silberman, Esq.
Middlebury, Vt.

⁷ Those with total plant canopies of less than 500 square feet.

⁸ Proposed as 7 V.S.A. §881(a)(2)(B), page 23.

⁹ Because indoor cultivation will yield approximately 3 times as much sellable cannabis as outdoor cultivation, and creates negative environmental externalities through intensive energy usage, fees for indoor “craft” licenses should be higher, I suggest \$1,500.

¹⁰ Proposed as 7 V.S.A. 904(d), page 31.