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April 24, 2023

The Senate Committee on Economic Development  
Hon. Kesha Ram Hinsdale, Chair  
Vermont General Assembly  
115 State Street  
Montpelier, VT 05633

Re: H.270 (Cannabis Amendments)

Honorable Members of the Senate Committee on Economic Development:

I am an attorney who represents dozens of licensed cannabis establishment, and entrepreneurs seeking additional licenses, across all segments of Vermont's cannabis industry<sup>1</sup>. I am also Co-Founder of FLORA Cannabis, Vermont's first licensed retailer, located in beautiful downtown Middlebury. This combination of roles, and my history of advocating in the Statehouse for cannabis law reform since 2015, has afforded me a unique perspective on the regulated market's initial roll-out, what's working well, and what needs to be fixed.

While I strongly support H.270, which would make important improvements in areas such as packaging and inter-licensee supply chain, I wish to raise for your consideration two additional issues which are currently presenting unnecessary barriers to the nascent cannabis industry's success.

### **Advertising**

Current law requires a licensed cannabis establishment to seek the CCB's prior approval of "advertisements", a term that is defined extremely broadly to include not only what is traditionally considered advertising (television, radio, newspaper, etc.) but also *non-paid* speech such as social media posts, licensees' own websites, in-store signage, and even *in-person verbal communication between customers and retail staff*. The CCB requires two to four weeks to review submitted advertisements.

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<sup>1</sup> I represent my clients as an attorney, not as a lobbyist. My testimony represents my own views, and is submitted solely on my own behalf. I have not accepted any compensation from any person or entity with respect to this testimony, or any political advocacy work.

This broad *prior restraint* on commercial speech, and the *content-based* approval process, likely violates licensees' First Amendment free speech rights. And because the CCB is unable to quickly review submissions, it is a *de facto* gag rule. No such pre-approval system exists, in Vermont or any other state, for any other industry, including legal vice industries such as tobacco and alcohol.

I urge the committee to eliminate prior approval of advertisements. Instead, the CCB should continue offering clear advertising guidance, review advertisements once made, and, where violations are found (e.g., ads are especially appealing to teenagers, or make false claims about supposed curative effects of cannabis), it use its existing enforcement authority to take appropriate action including fines and even revoking licenses, while continuing to educate licensees who make inadvertent errors while attempting to comply in good faith.

### **Unintended Paraphernalia Tax**

The Department of Taxes has determined that battery-powered cannabis consumption devices are subject to the 92% tobacco substitute tax. This tax, intended to put nicotine vaping liquids at tax parity with tobacco cigarettes, was never envisioned as applying to cannabis paraphernalia.

Applied at the wholesale transfer, this tax makes it impossible for Vermont's cannabis retailers to sell many of the most popular battery-powered consumption devices, as their after-tax wholesale cost exceeds the prevailing retail price available online, and the tax is not applicable to online sales by out-of-state retailers. I ask that you put Vermont's cannabis retailers on equal footing with their e-commerce competitors, and either exclude devices that do not contain tobacco and that are sold by licensed cannabis retailers from the definition of "other tobacco products" in 32 VSA Sec. 7702(15), or from the definition of "tobacco substitutes" in 7 V.S.A. §1001(8).

For example, a Pax Mini "herbal vaporizer" carries a retail list price of \$150. FLÖRA is able to purchase these devices from an authorized Pax wholesaler for approximately \$88. The 92% tax would push FLÖRA's cost to \$169, meaning that we would have to sell the product at a loss to match the prevailing online price.

These devices essentially work like traditional cannabis pipes (which are *not* subject to the tobacco substitute tax), in that you load them with flower, heat the flower, and inhale. The difference is that a traditional pipe is used with a flame, and the flower is burned to its smoke point, whereas these devices use electricity to heat the flower below its smoke point, releasing a vapor containing THC and other cannabinoids, and instead of a small mound of ash, the user is left with a larger amount of browned plant waste material. From a health perspective, this is preferable to smoking flower with a flame, as the user does not inhale harsh smoke containing miscellaneous plant matter.

Thank you for your efforts to ensure a an equitable, well-regulated, and safe cannabis market for our state.

Very truly yours,

A handwritten signature in black ink, appearing to be 'DS' or similar initials, enclosed within a circular scribble.

Dave Silberman