

October 4, 2021

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Marijuana Advisory Commission  
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*Submitted Electronically*

RE: Solicitation of Public Comment Regarding Law Enforcement Contacts With  
Citizens, Pursuant to 28-B M.R.S. § 903(2).

Dear Mr. Tartakoff and Mr. Praver:

The American Civil Liberties Union of Maine (the “ACLU of Maine”) advocates for the civil rights and liberties of people in Maine. In particular, we have long advocated for the legalization of drugs, due to the serious civil liberties violations that criminalization creates. We supported the referendum in 2016 that allowed for legal recreational cannabis in Maine. That support was based in part on the fact that criminalizing cannabis leads to the disproportionate arrest and incarceration of Black people, as well as concern over the myriad civil liberties violations that have accompanied drug interdiction efforts for the past half century.

Now, we submit these comments to the Marijuana Advisory Commission to identify two areas of concern regarding contacts between law enforcement and citizens involving adult use of cannabis. We are concerned that such contacts, first, disproportionately subject Black citizens to arrest; and second, demonstrate that law enforcement continues to use “smelling marijuana” as a pretext to search vehicles.

*Disproportionate arrests of Black people for possessing cannabis*

Black and white citizens report smoking cannabis at similar rates—this has been demonstrated through multiple nationwide surveys over the past twenty years.<sup>1</sup> Despite the

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<sup>1</sup> *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*, U.S. Dep’t of Health and Human Services 21, 74 (Sept. 2011), <https://www.samhsa.gov/data/sites/default/files/NSDUHresults2010/NSDUHresults2010.pdf>; *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; *Facts about Marijuana Use*, PsychCentral (Jul. 28, 2020), <https://psychcentral.com/lib/facts-about-marijuana-use#1>;

similarities in usage, across the country Black people are at a significantly higher risk of being arrested for possession of cannabis.<sup>2</sup>

Maine is no exception to this general rule. As recently as 2018, Black people in Maine were four times as likely to be arrested for possession of cannabis than white people, an increase since 2017.<sup>3</sup> This incredibly disproportionate arrest rate, with no data to show that Black people are consuming or transporting cannabis at four times the rate of white people, demonstrates that law enforcement is still using cannabis possession as a tool to disproportionately search and arrest Black people.

This is particularly troubling because even arrests that do not result in prosecution can have a tremendously damaging impact on the arrestee. For example, an arrest (even with no resulting conviction) will appear in a person's criminal history record information, and therefore appear if a potential employer, landlord, or lender conducts a background check.<sup>4</sup> A wrongful arrest leaves a person with trauma and anger for having been targeted.<sup>5</sup> Arrests with no following conviction are also correlated with, and likely cause, lower incomes and an increased likelihood of dropping out of school.<sup>6</sup> Pre-trial detention (in the event that a person is unable to post bail) can also result in a loss of child custody.<sup>7</sup> Thus, every arrest is concerning and that Black people are disproportionately subject to arrest for cannabis possession means they are also disproportionately subject to myriad other difficulties.

### *Maine law enforcement continues to use smelling cannabis to justify vehicle searches*

Despite legal cannabis consumption and transportation, Maine law enforcement at both the local and state level continues to use having smelled cannabis as justification to search vehicles, and to prolong traffic stops.<sup>8</sup> Notably, on one occasion where the person stopped

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<sup>2</sup> *Every 25 Seconds*, Human Rights Watch (Oct. 12, 2016), [https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states#\\_ftn2](https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states#_ftn2); *Marijuana's racist history shows the need for comprehensive drug reform*, Brookings Inst. (June 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/23/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform/>.

<sup>3</sup> *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, American Civil Liberties Union 32, 35 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf).

<sup>4</sup> *FAQ (Frequently Asked Questions)*, Maine Criminal History Record & Juvenile Crime Information Request Service (2015), <https://apps1.web.maine.gov/online/pcr/faq.htm>; 16 M.R.S. § 703(3).

<sup>5</sup> Human Rights Watch, note 2 *supra*.

<sup>6</sup> *The Impacts of Arrest*, IACP/UC Center for Policy and Research (2020), [https://www.theiacp.org/sites/default/files/Research%20Center/Impacts%20of%20Arrest%20\(infographic\).pdf](https://www.theiacp.org/sites/default/files/Research%20Center/Impacts%20of%20Arrest%20(infographic).pdf);

<sup>7</sup> Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, U of Penn. Law School Public Law Research Paper No. 17-18 (2013), [https://law.asu.edu/sites/default/files/pdf/academy\\_for\\_justice/2\\_Reforming-Criminal-Justice\\_Vol\\_3\\_Pretrial-Detention-and-Bail.pdf](https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf).

<sup>8</sup> *Maine State Police Troop F Report*, Fiddlehead Focus, Sept. 6, 2021, [https://fiddleheadfocus.com/2021/09/06/news/police\\_fire/maine-state-police-troop-f-report-aug-2-8-2021/](https://fiddleheadfocus.com/2021/09/06/news/police_fire/maine-state-police-troop-f-report-aug-2-8-2021/); Lynn Storen, *October 2019*, Dep't of Pub. Safety Maine State Police, Oct. 7, 2019, <https://www.maine.gov/dps/msp/archive/201910>; Michael Rubinkam, *In era of legal pot, can police still search cars based on odor?*, PBS, Sept. 13, 2019, <https://www.pbs.org/newshour/nation/in-era-of-legal-pot-can-police-still-search-cars-based-on-odor> (detailing stop experienced by David Boyer).

was highly knowledgeable about cannabis laws in Maine and able to self-advocate, no search resulted—this does not appear to have been the case when the person stopped was less aware.<sup>9</sup>

Of the nineteen states that have legalized recreational cannabis, courts in seven of them (California,<sup>10</sup> Colorado,<sup>11</sup> Delaware,<sup>12</sup> Massachusetts,<sup>13</sup> Oregon,<sup>14</sup> Vermont,<sup>15</sup> and Virginia<sup>16</sup>) have found that the smell of cannabis no longer justifies a finding of probable cause to search a vehicle. In Connecticut, the recently passed bill allowing for recreational cannabis explicitly disallowed “evidence collected” in violation of the bill to be admitted in court, and law enforcement there has already enacted a policy of not using the odor of cannabis to create probable cause or reasonable suspicion to support any stop or search of a vehicle.<sup>17</sup> New Jersey and New York have taken similar approaches.<sup>18 19</sup>

Notably, in the remaining states that have allowed for recreational cannabis (Arizona, Alaska, Montana, Nevada, South Dakota, and Maine), we are unable to find any record that those state courts or legislatures have explicitly *allowed* the smell of cannabis to create probable cause post-legalization. In other words, all states actually faced with the question have determined that legal recreational cannabis means the smell of cannabis does not create probable cause.

These legislative and judicial findings serve to enforce the major demonstrable benefit of legalizing recreational cannabis—namely that it increases state revenue by lowering law enforcement expenditures and increasing state tax revenue.<sup>20</sup> When law enforcement remains able to search a vehicle based on the smell of cannabis, those searches and traffic stops create expenses that undercut the law enforcement savings of legalized recreational

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<sup>9</sup> Rubinkam, note 8 *supra*.

<sup>10</sup> *U.S. v. Martinez*, 811 Fed. App’x. 396 (9th Cir. 2020); *U.S. v. Maffei*, 827 Fed. App’x. 760 (9th Cir. 2020).

<sup>11</sup> *People v. McKnight*, 2019 CO 36 (Colo. 2019).

<sup>12</sup> *Juliano v. Delaware*, Case No. 320, 2019 (Del. 2021).

<sup>13</sup> *Commonwealth v. Overmyer*, 496 Mass. 16 (Mass. 2014).

<sup>14</sup> *Oregon v. Bowen*, No. 14 2021 505 (Ore. 2021).

<sup>15</sup> *Zullo v. Vermont*, 2019 VT 1 (Vt. 2019).

<sup>16</sup> Virginia HB 5058; <https://lis.virginia.gov/cgi-bin/legp604.exe?202+sum+HB5058>.

<sup>17</sup> Christopher Keating, *Connecticut state and local police prepare to enforce new law on legal weed on July 1.*, The Hartford Courant, Jun. 29, 2021, <https://www.courant.com/politics/hc-pol-cops-enforcing-new-pot-law-20210629-z6w5xojgijevjniqflgouwy5u-story.html>.

<sup>18</sup> *Frequently Asked Questions Marijuana Decriminalization and Legalized Cannabis*, N.J. Office of the Att’y General, Mar. 8, 2021, [https://www.nj.gov/oag/marijuana/docs/FAQs\\_Updated\\_3.8.21.pdf](https://www.nj.gov/oag/marijuana/docs/FAQs_Updated_3.8.21.pdf).

<sup>19</sup> Thomas Tracy & John Annese, *Now that pot is legal, NYPD tells its cops the smell of weed alone is no longer enough to justify a car search*, NY Daily News, Apr. 1, 2021, <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-new-rules-legal-marijuana-20210401-xr4kdxxffzg6nmxbvomioe2te-story.html>; Eric Tichy, *Law will prevent searches based on marijuana smell*, Observer, Apr. 6, 2021, <https://www.observertoday.com/news/page-one/2021/04/law-will-prevent-searches-based-on-marijuana-smell/>; S854A § 2205(3)(A), (B).

<sup>20</sup> Cato Inst., *The Effect of State Marijuana Legalizations: A 2021 Update*, Feb. 2, 2021, <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update> (assessing impacts of legalization in eight states with regards to crime and economy and finding a significant impact only as to economy).

cannabis.<sup>21</sup> Furthermore, because Black people are disproportionately targeted for traffic stops and vehicle searches, disallowing searches based on the smell of cannabis can address that form of harassment.<sup>22</sup> That Maine continues to permit the smell of cannabis to justify a finding of probable cause has a disproportionate impact on Black citizens and undercuts the benefits of legalizing recreational cannabis. The Commission should, therefore, recommend to the legislature that the legislature adopt a law stating that the smell of cannabis does not create probable cause.

Sincerely,

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<sup>21</sup> Frank Mazo IV et al, *The Financial Impact of Legalizing Marijuana in Illinois*, Ill. Econ. Pol’y. Inst. Nov. 9, 2018, <https://illinoisepi.files.wordpress.com/2018/11/ilepi-pmcr-financial-impact-of-legalizing-marijuana-in-illinois-final.pdf> (noting significant savings associated with reducing police spending in relation to marijuana)

<sup>22</sup> Andrew Ringle, *Bill to end police stops for marijuana smell passes Va. Senate*, WHSV3, Aug. 28, 2020, <https://www.wHSV.com/2020/08/28/bill-to-end-police-stops-for-marijuana-smell-passes-va-senate/>; Shane Sanderson, *Black drivers’ cars searched more frequently on basis of drug, alcohol odor*, Columbia Missourian, Dec. 6, 2016, [https://www.columbiamissourian.com/news/local/black-drivers-cars-searched-more-frequently-on-basis-of-drug-alcohol-odor/article\\_76c6279a-b63f-11e6-9c89-0ff7ad37d769.html](https://www.columbiamissourian.com/news/local/black-drivers-cars-searched-more-frequently-on-basis-of-drug-alcohol-odor/article_76c6279a-b63f-11e6-9c89-0ff7ad37d769.html).