March 2, 2020 via email to juttestimony @ega.ct.gov

Testimony of Attorney Michael D. Cutler of Northampton, Massachusetts
to the Joint Committee of the Judiciary, Connecticut General Assembly
Hartford, Connecticut

In support of Governor Bill No. 16 (LCO no. 724) to legalize adult-use of cannabis.

I offer my observations on this bill from my four decades as a practicing Massachusetts attorney, including my work;
    as a member of the team that drafted 2016's Question 4 (St. 2016, c. 334), the
Massachusetts ballot initiative that legalized non-medical (adult use) cannabis commerce on your
northern border, after state voters decriminalized cannabis in 2008 and legalized medical
Cannabis in 2012 (for which campaigns I served on volunteer steering committees);
    as a volunteer consultant to the state Senate conference, who joined the House conferees
and Governor to enact an amendment (St. 2017, c. 55) to Q4 that included Mass. G.L. c. 94G,
our current adult use legalization law;
    as counsel to entities that sought and obtained municipal and state licenses to engage in
medical and adult use cannabis commerce from 2012 to the present; and,
    as the proud father of a successful UConn. Class of 2010 graduate.

In ending criminal marijuana prohibition, adult use legalization bills such as the Governor's serve
the public interest far better than prohibition, as this reform:
    Better protects public health and safety by reducing the illicit market with its violence,
access by under age users and impure products;
    Reduces racially discriminatory criminal policing, prosecuting and sentancing;
    Diverts funds from the illicit market to state and municipal revenue collectors and
entrepreneurs committed to health and safety as a condition of licensure;
    Begins repairing communities disproportionately harmed by criminal cannabis
prohibition, by enhancing harmed community members' access to this new industry; and,
    Protects patient access to medicine under Connecticut's existing medical cannabis law.

The eleven states (and the District of Columbia) with adult use laws – where nearly 30% of the
Americans reside, endorsing a reform already adopted by Canada and on the cusp of
implementation in Mexico – demonstrate the growing preference of this policy over prohibition.
I encourage Connecticut to embrace reform and enact the Governor's bill.
A Massachusetts Perspective on the Connecticut Governor's Legalization Bill (the Bill)

Cannabis law reform in Massachusetts has produced mostly good and some not as good results. Primarily the good news is a dramatic reduction in the racial injustice of cannabis distribution and cultivation prosecutions, which discriminatory enforcement had increased from the adoption of decriminalization in 2009 until 2017; and more than $75 million in state tax revenue in 2019, with additional millions paid in municipal taxes and fees.

The not as good news includes the delay in processing state cannabis commerce license applications – since 2016 only 47 adult use retailers are open in Massachusetts, with 417 pending applications – depressing state and municipal cannabis revenues, and bankrupting many lower capitalized applicants; and despite the new cannabis law's express intent to promote access to the new industry for people from communities disproportionately harmed by criminal prohibition enforcement (equity applicants), only 11 of the 309 provisionally licensed applicants are equity applicants.

The Massachusetts Medical Cannabis Experience

Under the Massachusetts medical regime, state licensing authority was vested in the Department of Public Health (DPH), which previously treated cannabis only as a drug of inevitable abuse. DPH imposed security and production requirements grossly disproportionate to public health or safety concerns for an agricultural product. The medical law also required each applicant to cultivate, process (manufacture extracts and edibles) and retail its own products, imposing significant capital requirements on applicants. As the medical law only allowed 35 licensees statewide, DPH adopted an application scoring system intending to promote objective decision-making. All applications were filed within a two-week window, with decisions six months later.

The cost of such regulatory obstacles ensured that only applicants with access to $2 million or more in liquid assets – institutional lenders remain unavailable to cannabis entrepreneurs – could survive the medical application process. Despite its posturing objective licensing decisions, DPH granted priority to applicants with politically connected lobbyists. DPH also disqualified any applicant having a controlling member with a drug prohibition law violation, obviously excluding equity applicants disproportionately and continuing the racially discriminatory impact of prohibition.

Under the medical law, DPH issued regulations requiring municipalities to issue statements of support or “non-opposition” for applicants seeking to locate locally as a pre-condition to state licensing. Besides giving municipalities a veto over applicants, municipal review evolved into a practice of requiring an applicant to execute a “host community agreement” (HCA); nominally intended to specify operating hours and other operational conditions unique to the licensed commerce site, HCAs instituted “impact fees” to “reimburse” municipalities for the “costs” of cannabis commerce operations. These impact fees became extortionate as municipalities demanded “voluntary contributions” to local law enforcement and charities, leading to HCA
bidding wars among competing applicants for law-limited licensees in each of the state's 15 counties.

The Massachusetts Non-medical Cannabis Experience

Under the new adult use law (Mass. G.L. c. 94G), several provisions sought to improve non-medical licensing over medical licensing. Among the changes, state licensing power – for medical and adult use – was moved from DPH to a new agency, the Cannabis Control Commission (CCC), intended to promote rather than frustrate applicants. The law also allows adults to cultivate 6-12 plants at a residence in secure areas not visible to the public, and product (up to an ounce) may be given to adults. Illicit cultivation always occurred, but since adult use enactment, diversion and under age access have not worsened.

To stimulate racial and economic diversity among applicants, c. 94G, sec. 4(a-1/2)(iv) requires the CCC to enact "procedures and policies to promote and encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities;" sec. 4(a-1/2)(iii) provides that "a prior conviction solely for a marijuana-related offense ... shall not disqualify an individual ... for employment or licensure ... unless the offense involved the distribution of a controlled substance, including marijuana, to a minor[;]" also, see sec. 5(b)(4) on qualifications to be a "controlling" (managing) member of an applicant. Unlike the medical law's requirement of vertical integration, the adult use law separately licenses cultivation, processing and retail, enabling lower capitalized applicants to seek less expensive to operate retail and delivery-only licenses.

The adult use law imposes no limits on the number of licenses statewide, although there is a three-license per category limit for applicants; vertical integration remains possible but not required. Decisions are made on a "rolling" (as filed) basis with no competition among applicants at the state level. At the municipal level, many cities and towns imposed limits on total licenses or retail licenses, with buffer zones between licensees, creating applicant competition for licenses. Note even where zoning permitted licensees to operate, commercial building owners with institutional mortgages found their lenders prohibited leasing to cannabis commerce tenants. This lender limit on license siting likely obstructs Connecticut applicants.

To promote quicker action on applications, once the CCC deems an application "complete" the new law – c. 94G, sec. 5(a) – requires the agency to act within 90 days to grant a license, or issue a statement of reasons for denial. Applications can languish while the CCC evaluates their content, but they are not denied for being incomplete, as the agency issues "requests for information" (RFIs) enabling the supplementation of applications. Also, applicants must execute HCAs before being permitted to file a state license application. As HCAs indicate local approval of the applicant, and applicants' RF1 replies improve the content of applications, the CCC has denied very few license applications.
In an effort to prevent municipal HCA shakedowns of applicants, sec. 3(d) requires “that the HCA’s community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the [medical or non-medical] marijuana establishment ... and shall not amount to more than 3 per cent of the gross sales ... or be effective for longer than 5 years.” I have discussed HCA “impact costs” with numerous town officials over the past two years, and none ever described an impact or cost other than the ordinary time and expense to consider a zoning or business permit request from an ordinary business applicant; and no municipality has identified a special operating impact for cannabis commerce beyond ordinary inspections and annual reviews.

Despite the intentions of the new adult use law to improve licensing decisions over the medical law experience, these provisions have not had better outcomes on equity or impact fee exploitation. As the data above shows, with more than 400 applications now pending since being accepted by the CCC in 2018, only 47 adult use retailers have been opened and only 11 equity applicants are among the 309 provisional licensees. The CCC declined to enforce the statutory cap on HCA impact fees, enabling municipalities to continue to encourage the HCA bidding wars. Between the delays in license consideration and unlimited HCA impact fees, low capital applicants – including nearly all equity applicants – encounter financial barriers to the new industry. The Massachusetts U.S. Attorney is investigating municipal HCA practices – two-thirds of HCAs explicitly require fees beyond “impact costs” – and the federal prosecutor has indicted one mayor (in Fall River) over impact fee demands.

To assist equity applicants, the CCC is moving to allow equity entities to be approved for state licensure before securing a location, thus saving such entrants the costs of paying for an empty location while awaiting state and local licensing and zoning permits. While the CCC seeks to promote equity applicants, only a few municipalities also have done so; as municipalities license or permit applicants separately from the CCC, a lack of municipal support for equity applicants remains an obstacle for applicants from impacted communities.

Despite the adult use law Massachusetts fails to protect job applicants and employees from workplace penalties based on failed cannabis metabolite positive drug tests that do not prove test-contemporary or at-work impairment. Medical cannabis patients have such protections under state law banning disability discrimination in employment and housing; bills are pending to extend these rights to non-patient workers and tenants.

In positive news, although adolescent use rates in Massachusetts have increased since 2016, the rate remains at or below the national average; some prohibition states have seen significant increases in youth use rates well above the Massachusetts rate. Nationally:

Using data on 861,082 adolescents (14 to 18+ years; 51% female) drawn from 1999 to 2015 state Youth Risk Behavior Surveys (YRBS), difference-in-differences models assessed how decriminalization and medical marijuana legalization policy enactment were associated with adolescent marijuana use, controlling for tobacco and alcohol policy shifts, adolescent characteristics, and state and year trends. ... Neither policy was significantly associated with heavy marijuana use or the frequency of use. ...
[R]esults assuage concerns over potential detrimental effects of more liberal marijuana policies on youth use."

The incidence of commitment for mental health treatment in Massachusetts has dropped since adult use legalization became law, as have impaired operator-related motor vehicle deaths.

Lessons from Massachusetts for Connecticut.

The Bill wisely follows the Massachusetts example of encouraging access to this new industry for minority communities that endured disproportionate enforcement under criminal prohibition, in authorizing "micro" licensing for retail and delivery applicants, and in monitoring licensing and employment diversity. In supporting equity applicants, Connecticut should consider providing expedited licensing for equity applicants separately from ordinary applicants, including the permitting of equity entities so they may be "pre-qualified" before tying up expensive real estate or commercial tenancies, thus lowering their pre-operation expenses and enabling them to open before more desirable locations are taken by higher-capitalized applicants.

The Bill improves on the Massachusetts experience by excluding municipal permit fee "competitive bidding," and by centralizing notice of local zoning changes with the state Secretary of the Office of Policy and Management. The Bill follows the Massachusetts lead of protecting possession and transport even in towns that ban the siting of cannabis licenses; and promoting cannabis health research.

The Bill also serves employees better than Massachusetts adult use law by preventing employment disqualification for cannabis use outside the workplace, with exceptions for federal requirements, and public safety, health and childcare workers. The Bill usefully seeks to protect adult cannabis users from discrimination in higher education and public housing. Massachusetts protects professional licensees from penalty for cannabis use – see G.L. c. 94G, sec. 11 – Connecticut also should enact such protections.

The Bill commendably commits to "maintain and prioritize access to" medical cannabis, hopefully protecting medical strain supply and price supports for low income patients. The Bill also avoids the local impact fee bidding wars that have infested Massachusetts HCA negotiations, while still allowing municipal control over locations – including local bans on operations, but not possession, use or transport – hours and other conditions of operation.

The Bill serves the public interest in facilitating the expungement of criminal records for offenses to be legalized under the Bill; Massachusetts adopted similar relief separately from its adult use law, see G.L. c. 276, sec. 100G-100K. The Bill improves criminal justice fairness and efficiency by ending the criminalization of "paraphernalia" (consumption devices).

Some differences from the Massachusetts adult use law flaw the Bill. The Bill’s consideration of THC limits on products, or ban on any home cultivation, only serve to perpetuate the illicit
market. Similarly, unless carefully monitored exorbitant tax rates will provide the illicit market a competitive pricing advantage. Connecticut should review surrounding states and national trends on cannabis taxation, seeking tax rates that enable the legal market to better compete on product pricing with the illicit market.

I welcome further inquiries from legislators about the foregoing observations or any other cannabis regulation. The Governor deserves praise for promoting the Bill, embracing a reform policy that a growing majority of Americans and Connecticut residents support.