

July 25, 2022

The Honorable Gabrielle Bérubé Pierce
Office of Cannabis Policy
162 State House Station
Augusta, ME 04333
Gabi.Pierce@Maine.gov

RE: Proposed Adult Use Cannabis Rule, 18-691 C.M.R., Chapter 1

Dear Director Pierce:

The American Civil Liberties Union of Maine (the “ACLU of Maine”) is a statewide organization committed to advancing and preserving civil liberties for all people in Maine. The ACLU of Maine submits these comments to the Maine Office of Cannabis Policy (“OCP”) to express our strong concerns about the proposed rule governing the adult use cannabis industry.

Section 3.3.1(D) of the proposed rule would require facial surveillance at all cultivation facilities, testing facilities, products manufacturing facilities, and cannabis stores (collectively, “cannabis establishments”). These rules would needlessly expose customers and workers in the cannabis industry to privacy-violating tracking and data collection. More importantly, they would violate Maine’s – the nation’s strongest – facial surveillance ban.

Section 3.9.2(D) of the proposed rule would require cannabis establishments to report to law enforcement the identity of persons who communicate their intent to sell cannabis without a license, transfer cannabis to persons under 21, or transport cannabis across state lines. This rule would enlist cannabis establishments in the enforcement of failed drug prohibition laws. Similarly, Section 2.8.2(D) of the proposed rule would require the Department of Administrative and Financial Services (the “Department”) to deny cannabis license applications to people with disqualifying drug offenses. Even though this section mirrors statute, it would give the failed and deeply harmful War on Drugs an undue life extension.

These objections are explained in greater detail below. The ACLU of Maine urges OCP to reject these rules.

A. The Proposed Rule’s Surveillance Requirements for Cannabis Establishments Would Violate Maine’s Facial Surveillance Ban

If enacted, Section 3.3.1(D) of the proposed rule would violate Maine’s facial surveillance ban (hereinafter “the ban”) by authorizing OCP to license private third parties to use prohibited facial surveillance, and by giving public employees access to facial surveillance data.¹ The ban defines

¹ See 14 MRS §6001 *et seq.*

facial surveillance as “an automated or semi-automated process that assists in identifying or verifying an individual, or in capturing information about an individual, based on the physical characteristics of an individual’s face.”² It is illegal for any public employee or public official to:

- (1) Obtain, retain, possess, access, request or use a facial surveillance system or information derived from a search of a facial surveillance system;
- (2) Enter into an agreement with a 3rd party for the purpose of obtaining, retaining, possessing, accessing or using, by or on behalf of a department, public employee or public official, a facial surveillance system or information derived from a search of a facial surveillance system; or
- (3) Issue a permit or enter into any other agreement that authorizes a 3rd party to obtain, retain, possess, access or use a facial surveillance system or information derived from a search of a facial surveillance system.³

There are four exceptions to this rule, none of which are applicable to the transaction of business at a cannabis establishment.⁴ The exceptions are: investigating a serious crime, identifying persons believed to be deceased, missing, or endangered, and requesting that the Bureau of Motor Vehicles perform a facial surveillance search for specified reasons.⁵

The proposed rule would require cannabis establishments to place cameras inside *and* outside every entrance and exit; in every area where cannabis products are handled or stored; and in a place where every cannabis customer’s face can be recorded and identified, including customers who opt for curbside pickup.⁶ The proposed rule twice explains that the reason for its facial surveillance system is “to monitor the identity of the purchaser and ensure facial identity.”⁷ The only feasible way to identify faces in surveillance footage is through “an automated or semi-automated process that assists in identifying or verifying an individual, or in capturing information about an individual, based on the physical characteristics of an individual’s face.”⁸ In other words, the proposed rule’s surveillance requirement meets the ban’s definition of facial surveillance.⁹

In violation of the ban’s clear limitation of the state’s permitting authority, the proposed rule would allow the Department to “[i]ssue a permit . . . that authorizes a 3rd party” – here, cannabis establishments – “to obtain, retain, possess, access or use a facial surveillance system.”¹⁰ Under

² *Id.* §6001(1)(D).

³ *Id.* §6001(2)(A)(1)-(3).

⁴ *See id.* §6001(2)(B), (D).

⁵ *See id.*

⁶ Proposed Adult Use Cannabis Rule, 18-691 C.M.R., Chapter 1, Sec. 3.3.1(D)(1)(a)-(h) [hereinafter “Prop. Rule”].

⁷ *See* Prop. Rule Sec. 3.3.1(D)(1)(e), (h).

⁸ *See* 14 MRS §6001(1)(D).

⁹ *See id.*

¹⁰ *See* 14 MRS §6001(1)(C) (defining a “department”), (2)(A)(3); Prop. Rule 3.3.1(D)(2)(e).

the proposed rule, video surveillance data would be stored on a third-party server, ostensibly “to protect [data] from employee tampering or criminal theft.”¹¹ “All videos [would be] subject to inspection *by any Department employee* and [would have to] be copied and provided to the Department upon request.”¹² Both of these rules would violate the ban’s prohibition of public employees accessing facial surveillance data, and the ban’s prohibition of the licensing of third parties to engage in facial surveillance or to store facial surveillance data.¹³

In sum, the proposed rule is at odds with Maine’s facial surveillance ban by licensing third parties – cannabis establishments – to use illegal facial surveillance technology, and by giving public employees access to facial surveillance data. Maine adopted this ban, and other landmark privacy laws (such as laws governing cell-phone location information and ISP customer information), because Maine people are deeply and strongly committed to individual privacy, regardless of geography or party-affiliation. Maine people expect that, when they are going about their lives, who they meet with, where they travel, and what legal products they buy will not subject them to tracking and monitoring by the government or the government’s agents.

There is no persuasive rationale for ubiquitous video monitoring of cannabis establishments. Indeed, nothing in the Marijuana Legalization Act requires video surveillance – much less facial identification technology – to be part of how the state regulates cannabis establishments.¹⁴ Nor is it immediately clear why these proposed rules require *more* video surveillance than the rules promulgated to govern medical cannabis dispensaries.¹⁵ Maine’s adult use program is less restrictive than its medical use program was; it stands to reason that the adult use program should also be less *restricted* than the medical use program was.

B. The Proposed Rule’s Disqualifying Drug Offense Section and Requirement that Cannabis Establishments Report Some Customer Behavior to Law Enforcement Gives the Failed War on Drugs an Undue Life Extension

At a time when governments across the country are beginning the process of unwinding the failed and racist “War on Drugs,” Sections 2.8.2(D)¹⁶ and 3.9.2(D) of the proposed rule take Maine in the wrong direction. It is almost impossible to overstate the social and economic harms of this war. Rather than reduce drug use, this century-old war by a government on its own people has

¹¹ Prop. Rule Sec. 3.3.1(D)(2)(e).

¹² Prop. Rule Sec. 3.3.1 (D)(4) (emphasis added); *see* 14 MRS §6001(2)(A)(3) (prohibiting public employees from “access[ing]” a facial surveillance system).

¹³ *See* 25 MRS §6001(2)(A)(1)- (3)(quoted above).

¹⁴ *See* 28-B MRS §§104, 201-340, 606, 703-704, 804 (enabling rulemaking to govern cannabis establishments, and describing some licensing requirements).

¹⁵ *Compare* Prop. Rule 3.3.1(D) *with* 18-691 C.M.R. ch. 2, sec. 7(N)(4) (requiring licensed dispensaries to maintain “[e]lectronic monitoring and video camera recording records for at least 14 days”).

¹⁶ The ACLU of Maine’s objections to this section also extend to Sections 2.3.1(E)(1), 2.6.5(A), 2.11.2(A), 10.2.1(B)(5), and any other sections of the rules that implicate disqualifying drug offenses.

exacerbated drug-related violence and deaths.¹⁷ It has driven the drug market underground, causing sellers to violently compete for territory and customers.¹⁸ It has left drug users with no guarantee of the safety or purity of drugs, leading to an epidemic of overdose deaths.¹⁹ Those experiencing poverty, especially poor people of color, have been much likelier than the rest of the population to be arrested and convicted for drug use, possession, and sale. As a consequence, people of color shoulder a vastly disproportionate burden of records for drug crimes. In Maine, Black people make up 1.6 percent of our population, but 21 percent of the people arrested for Class A drug trafficking and 15 percent of those arrested for Class B drug trafficking.²⁰ A 2020 ACLU study found that Black people in Maine were four times more likely than white people to be arrested for cannabis possession in 2018.²¹ In York County, Black people are more than twelve times more likely than white people to be arrested for cannabis possession.²²

Section 3.9.2(D) would require cannabis establishments to report to law enforcement the identity of persons who communicate their intent to sell cannabis without a license, transfer cannabis to persons under 21, or transport cannabis across state lines. OCP should reject this rule because it would coerce cannabis establishments to act as drug enforcement agents against their own customers. Additionally, the rule should also be rejected because it is completely impractical to enforce. Maine attracts more than 8 million tourists every year.²³ In 2019, tourists to Maine spent over \$1.45 billion on shopping alone.²⁴ Requiring cannabis stores to notify the police whenever a customer from out-of-state talks about their intent to leave Maine would overburden cannabis establishments in the service of a cannabis-criminalization system that Maine has already rejected. We urge OCP to reject this rule.

¹⁷ See generally, Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, Cato Inst., Policy Analysis No. 811, Apr. 12, 2017, available at <https://www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs>.

¹⁸ See Hannah LF Cooper, *War on Drugs Policing and Police Brutality*, 50 (8-9):1188-94 *Subst Use Misuse* (2015) doi: 10.3109/10826084.2015.1007669. PMID: 25775311, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4800748/>.

¹⁹ Glen Olives Thompson, *Slowly Learning the Hard Way: U.S. America's War on Drugs And Implications for Mexico*, 9:2, 59-83 *Norteamérica*, Dec. 2014, <https://doi.org/10.20999/nam.2014.b003>, available at <https://www.sciencedirect.com/science/article/pii/S1870355016300039> (arguing that legalizing drugs would increase drug safety).

²⁰ Ben Shelor, Jessica Gonzalez-Bricker, and Carl Reynolds, *Justice Reinvestment in Maine: Second Presentation to the Maine Commission to Improve the Sentencing, Supervision, Incarceration and Management of Prisoners*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, at 23 (Nov 19, 2019), available at <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Maine-second-presentation1.pdf>.

²¹ *A Tale of Two Countries Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU, July 1, 2020, at 68, https://www.aclu.org/sites/default/files/field_document/tale_of_two_countries_racially_targeted_arrests_in_the_era_of_marijuana_reform_revised_7.1.20_0.pdf.

²² *Id.*

²³ 2020 Maine Office of Tourism Highlights, available at https://motpartners.com/wp-content/uploads/2021/05/2020_Maine_Tourism_Highlight.pdf.

²⁴ *Id.*

Section 2.8.2(D) of the proposed rule would require the Department to deny cannabis license applications to people with disqualifying drug offenses. This proposed rule mirrors enacted statute.²⁵ Regardless of where it is codified, the disqualifying drug offense policy is an inherently harmful rule that regulators need not replicate. People with disqualifying drug offenses are among those who stand to benefit the most from cannabis legalization, since it was they whom drug prohibition drove into the desperate act of selling an illegal substance. It also violates principles of double-jeopardy to continue to punish people with criminal convictions from entering a now-legal trade. Most importantly, because of the racial disparities in drug arrests, the disqualifying drug offense rule has a profoundly inequitable effect of placing a lucrative, legal trade out of the reach of predominantly people of color, especially Black people. As the state agency with most interaction with cannabis establishments, OCP regulators are well positioned to advocate for improvements in state cannabis policy. We therefore urge OCP to reject this rule, and to encourage the legislature to rescind the harmful statute the rule mirrors.

Conclusion

We urge OCP to reject rules that violate Maine law, reinforce failed drug policies, and punish people with drug convictions. Maine's facial surveillance ban is not only the strongest in the nation, but passed unanimously in both of our legislative chambers.²⁶ Regulations that are at odds with clear statutory directives are ultra vires. We urge OCP to guard against this. Maine has been a leader in breaking with the War on Drugs, both by legalizing cannabis and by enacting certain protections for victims of the war. We urge OCP not to reverse course, and to fight efforts to return Maine's cannabis regime to failed policies.²⁷ Coercing businesses to act as agents of the state in a dangerous and discredited law enforcement project echoes the worst abuses of authoritarian regimes around the world. Rather than further punishing the victims of the war on drugs, the state should be looking for ways to provide reparations to communities who have experienced the most hardship from this endeavor. Enlisting police in the enforcement of cannabis laws and doubling down on dystopian surveillance methods would take us backwards. OCP should remove Sections 2.8.2(D), 3.3.1(D), and 3.9.2(D) from the proposed rules.

Sincerely,

/s/Michael Kebede
Policy Counsel

²⁵ See 28-B MRS §§ 102(15) (defining "disqualifying drug offense"), 202(4) (barring people with disqualifying drug offenses from obtaining a license to operate a cannabis establishment).

²⁶ See Roll-calls for LD 1585, "An Act To Increase Privacy and Security by Prohibiting the Use of Facial Surveillance by Certain Government Employees and Officials", available at <https://legislature.maine.gov/LawMakerWeb/rollcalls.asp?ID=280080608>.

²⁷ See Alex Norcia, *Maine Set to Make Its Good Samaritan Law the "Strongest in the Nation"*, Filter, Apr. 21, 2022, available at <https://filtermag.org/maine-good-samaritan-expansion/>.