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SENT VIA OLIS

February 20, 2022

House Committee on Economic Recovery and Prosperity
ATTN: Rep. John Lively, Chair
900 Court St. NE
Salem, OR 97301

Re: Senate Bill 1564

Dear Chair Lively and members of the HERP Committee:

I am an attorney living in Salem, Oregon (SD 11, HD 21) and a partner with Green Light Law Group. I have been an Oregonian for over 20 years and an Oregon attorney for over 15 years. The bulk of my practice is devoted to helping small businesses navigate Oregon's administrative state, with my recent practice servicing Oregon's legal marijuana and hemp markets. I am writing for myself and not on behalf of any client or my employer. I urge you to vote NO on SB 1564.

Late last week I published a blog post outlining my objections to SB 1564, which can be found here: https://greenlightlawgroup.com/blog/oregon-hemp-license-moratorium-bill-passes-first-committee. I would like to drill down on one point I raised in this post.

In the aftermath of HB 3000 and OLCC/ODA's presumptive testing program, much has been made by OLCC and law enforcement regarding the supposed 58% of registered hemp grows who were actually growing marijuana. Over the past summer and fall I had the opportunity to represent several hemp growers who were caught up in that presumptive testing regime, including by representing two in contested case proceedings to challenge the presumptive testing regime. One of those cases is currently on appeal before the Oregon Court of Appeals. In the course of my representation, I gained insight into how OLCC formulated its presumptive testing rules and how they actually utilized and enforced the presumptive testing rules.

By "presumptive testing", I am referring to the temporary rules OLCC adopted immediately upon HB 3000 becoming law. Section 41a of HB 3000 directed OLCC to "develop by rule a methodology to distinguish whether a cannabis plant is marijuana or industrial hemp…" Section 42 of HB 3000 also permitted OLCC to enter into an interagency agreement with ODA for purposes of carrying out inspections of crop for purposes of presumptive testing, but pointed directly to ORS 571.281(7), ODA's existing legal authority for inspecting a crop during its growth phase and "tak[ing] a representative composite sample for field analysis." OLCC's presumptive

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testing rule, however, provides expressly that presumptive testing "[s]ampling is not required to be representative of the crop, grow site, or production area." OAR 845-026-4100(5)(c). It seemed incongruous to me that OLCC would expressly state in their presumptive testing rule that the sampling they performed would not have to be representative when the Legislature expressly pointed them to existing legal authority for collecting a "representative composite sample for field testing."

During the course of the contested case proceedings, I questioned several OLCC and ODA witnesses regarding their sampling and testing procedures – the same procedures which were used to generate this 58% statistic (and which Jackson County Sheriff Nathan Sickler testified before the Senate committee was "anecdotally" closer to 75%) – and learned that not only did they not believe they needed to take a representative sample for presumptive testing, they intentionally cherry-picked the *least* representative plants. In fact, OLCC employee Kelley Valentine testified under oath that she was instructed to sample from the healthiest looking plants and sampled only the most robust-looking flowers when conducting her sampling for Operation Table Rock.

The non-representativeness of the sampling taken during Operation Table Rock was further underscored by discovery we received from ODA that indicated that, as of October 13, 2021, ODA was aware of at least 13 cases where preharvest testing returned results that were below the presumptive testing result supplied by OLCC. Preharvest testing requires the sampling of a minimum of four ounces per harvest lot, whereas presumptive sampling under OLCC's rule requires only cuttings from "at least" five plants from each production area, regardless of how many plants were present in the production area. ODA employee Emily Roque testified that the only time taking samples from only five plants in a production area would be considered "representative" for ODA's standards would be when the entire production area consisted of only five plants. Recall also that OLCC employee Kelly Valentine was instructed to sample from the plants that were the healthiest and most developed, and it becomes clear that OLCC's presumptive testing regime was more concerned about disqualifying as many fields as possible and less about ensuring their results were accurate or representative.

Additionally, testimony at the contested case hearings I was involved in revealed that early into Operation Table Rock, OLCC instructed its employees to deviate from their official procedural manual in a way that the testing equipment's manufacturer noted would reduce the reliability of its results. While the Operation Table Rock procedural manual directed OLCC employees to dry the samples collected in a food dehydrator and test the material using the testing equipment's dry plant settings, OLCC's evidence technician, Scott Boussuet, testified that he was ordered to stop drying the samples and to only test the samples using the wet plant settings about a week or two into Operation Table Rock. The testing equipment manufacturer's founder, Dylan Wilks, also testified at the contested case hearings, and he stated that by choosing not to conduct the

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tests using dried samples, OLCC introduced a potential for error that can prove to be material. Wilks stated that the Orange Photonics LightLab equipment OLCC utilized does have a setting for wet material, but this setting assumes a moisture content of 70% which would be acceptable for testing a wet sample within the same hour that the sample was collected. However, during Operation Table Rock, the samples were collected, placed in paper bags (which are known to rapidly reduce moisture content as paper is a desiccant), and then placed into a covered pickup truck bed for several hours in 90+ degree Southern Oregon late summer/early fall weather. When confronted with this information, Wilks testified under oath that a 70% assumption for moisture content under those conditions would not be reasonable, and could skew the result by as much as 30% (i.e., the difference between having fully compliant hemp and having marijuana with THC content at or above 5%).

With all of this material information only having been exposed as a result of vigorous cross-examination during the only two contested cases I am aware of that arose from Operation Table Rock, it troubles me that the 58% statistic is being cited repeatedly in sworn testimony to the Legislature without any hint towards the troubling circumstances as to how that statistic came about. Indeed, it appears to me that the presumptive testing regime that HB 3000 authorized, how it was implemented by OLCC, and how OLCC and its law enforcement allies have used the misleading statistic that it generated, is nothing more than taxpayer-funded propaganda.

Additionally, the 58% statistic (which was gathered during the 2021 hemp growing season) is inconsistent with more reliable data from Oregon State University from the prior year, which found that 93% of Oregon's hemp harvest lots tested below 0.349% THC and were therefore compliant. To take the 58% statistic on face value, you would have to believe that more than half of the industrial hemp industry decided to use hemp as a cover to grow illegal marijuana only in 2021 – I, for one, don't believe that to be the case. The more reliable statistic comes from OSU, because it is based on preharvest testing data, which in turn requires more sampling. In other words, the smaller the sample, the more opportunity for the results to be manipulated to serve an agenda.

I urge you to take a strong look at the facts and question the statistics that seem incongruent with past practice and common sense. At a time when Oregon is dealing with a growing illicit marijuana market, cutting off legal avenues for cannabis cultivation will only drive demand for illicit grows upward. Again, I urge you to vote NO on SB 1564.

Sincerely,

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