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August 5, 2021

Via regular U.S. Mail and E-mail

Mr. John P. Gilligan
Ice Miller LLC
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John.Gilligan@icemiller.com

Re: Submitted Petition for a new Chapter 3780 to be added to the Ohio Revised Code—"An Act to Control and Regulate Adult Use Cannabis"

Dear Mr. Gilligan,

On July 27, 2021 in accordance with the provisions of the Ohio Revised Code ("ORC") Section 3519.01(A), I received a written petition containing (1) a copy of the proposed chapter, and (2) a summary of the same measure. One of my statutory duties as Attorney General is to send all of the part-petitions to the appropriate county boards of elections for signature verification. With all of the county boards of elections reporting back, at least 1,000 signatures have been verified.

It is also my statutory duty to determine whether the submitted summary is a "fair and truthful statement of the proposed law or constitutional amendment." ORC Section 3519.01(A). If I conclude that the summary is fair and truthful, I am to certify it as such within ten days of receipt of the petition. In this instance, the tenth day falls on Thursday, August 5, 2021.

The Ohio Supreme Court has defined "summary" relative to an initiated petition as "a short, concise summing up," which properly advises potential signers of a proposed measure's character "without the necessity of perusing [it] at length." *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24 (1931). Having reviewed the submission, I am unable to certify the proposed summary as a fair and truthful summing up of the proposed chapter.

I note that your Petition does not seek to enact a single law, rather, it seeks to add an entire chapter to the Ohio Revised Code. As explained above, my only obligation is to determine whether the submitted summary is a "fair and truthful statement of the proposed law or constitutional amendment." ORC 3519.01(A). That being said, a petitioner who opts to submit an entire chapter of proposed laws must still submit a summary that complies with ORC 3519.01(A).

During our review we identified the following material provisions in the proposed Chapter which were omitted from the summary. Because these material provisions are not summarized, a potential signer would have to peruse at length the chapter to discern its character.

First, the summary fails to explain the extent of the Division of Cannabis Control’s (“Division”) rule-making authority. The summary states that “[t]he Act further requires the Division to adopt rules on twenty-two topics.” Summary ¶ 3. While the summary generally establishes the Division’s authority to license, regulate, investigate, and penalize adult use cannabis operators, adult use testing laboratories, and individuals required to be licensed; it fails to further explain the twenty-two topics over which the Division has rule-making authority. As a result, a signer who reads the summary would have to peruse the entire chapter at length to understand or be on notice of these twenty-two topics.

Second, the summary fails to explain the purposes of the cannabis social equity and jobs program. Although an entire statute with eight sub-sections is dedicated to the purposes of the “cannabis social equity and jobs program,” the summary omits any meaningful explanation of any of the purposes of the program as are expressly laid out in the statute. Summary ¶ 18. The summary’s failure to explain the statutory purposes of the program is a material omission of the proposed statute.

Third, the summary fails to explain the “additional procedures and requirements the Division must follow in exercising its authority [regarding licensure].” Summary ¶ 25. Although the summary states that the Division is authorized to take action against a licensee or license applicant—e.g., refusing to issue or suspending a license, inspecting the premises of a license holder, or imposing civil penalties on a license holder—it does not offer any explanation about the “additional procedures and requirements” the Division must follow. For example, the summary does not disclose that the Division may “place under seal all adult use cannabis owned by” an affected license holder under certain circumstances, or that a court may order the Division “to sell cannabis that is perishable” during the pendency of a license holder’s appeal; and a reasonable person may feel misled by the summary’s failure to disclose that the Division may confiscate and sell cannabis under certain circumstances. This is another material omission of the proposed statute.

Fourth, the summary states that adult use consumers are authorized to “cultivate not more than six cannabis plants at the individual’s primary residence[.]” Summary ¶ 28. However, the proposed statute states that an adult use consumer can “[c]ultivat[e], grow[,] and possess[] not more than six cannabis plants at the individual’s primary residence[.]” The summary only indicates that the consumer’s cultivation of cannabis plants is limited; it makes no indication that an adult use consumer’s possession of cannabis plants is also limited. Because the cultivation of cannabis and the possession of cannabis are two different things, the summary of the proposed section is a mischaracterization of the proposed statute. A reasonable person would not know, based on the summary, that they can legally cultivate *and* possess not more than six cannabis plants in total.

Fifth, the summary fails to identify “additional protections for individuals who engage in conduct permitted under the Act.” Summary ¶ 32. Even though these protections are statutorily created, the summary merely lists, but does not meaningfully explain, what any of them are. Thus, a potential signer would not know without going through the chapter and finding the specific statute that provides these protections. These material omissions of the summary prevent the summary from being fair and truthful.

Sixth, the summary fails to disclose that the Division is required to provide specific information to financial institutions. Summary ¶ 33. The statute states that notwithstanding public records law to the contrary, “upon the request of a financial institution providing services to an adult use cannabis operator or adult use testing laboratory, the division of cannabis shall provide to the financial institution” six delineated categories of information. The summary’s failure to disclose the foregoing is yet another material omission that affects its fair and truthful evaluation.

Seventh, the summary fails to explain the specific protections of an employer to establish hiring and employment policies. The summary states: “Specifically, among other protections, nothing in the Act requires an employer to permit or accommodate an employee’s use, possession, or distribution of adult use cannabis otherwise in compliance with the Act.” Summary ¶ 34. The summary does not further explain that the statute does not prohibit an employer from: “discriminating” against, “retaliating,” “discharging,” “refusing to hire,” “disciplining,” or otherwise taking “adverse employment action” against an individual because of that individual’s use, possession, or distribution of cannabis in compliance with the chapter. The summary also fails to acknowledge that the statute does not prohibit an employer from establishing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy. In short, although the summary states that an employer is not required to accommodate an employee’s cannabis use, it fails to indicate that the proposed law does not prohibit an employer from retaliating or discriminating against an employee for their legal cannabis use. This failure is a material omission of the summary. Similarly, the summary fails to acknowledge that the statute does not permit an individual to commence a cause of action against an employer for discriminating, retaliating, disciplining, refusing to hire, or otherwise taking an adverse employment action against an individual because of the individual’s use of cannabis. Summary ¶ 34. The summary also fails to acknowledge that an individual who is discharged from employment because of the individual’s violation of the employer’s cannabis policy “shall be considered to have been discharged for just cause for purposes of [unemployment benefits eligibility].”

In total, the summary does not properly advise a potential signer of a proposed measure’s character and limitations. For these reasons, I am unable to certify the summary as a fair and truthful statement of the proposed chapter. However, I must caution that this is not intended to be an exhaustive list of all defects in the submitted summary. Finally, I recommend that the Petitioners carefully review and scrutinize the remainder of the summary to ensure that it accurately captures the proposed chapter’s definitions, contents and purport before it is resubmitted to this Office.

Very respectfully yours,

/s/ Dave Yost

Dave Yost
Ohio Attorney General

Mr. John P. Gilligan
Re: “An Act to Control and Regulate Adult Use Cannabis”

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