

January 30, 2020

Via E-Mail

Terri D. Stroud, Esq
General Counsel
District of Columbia Board of Elections
1015 Half Street, S.E. Suite 750
Washington, D.C. 20003

**Re: Entheogenic Plant and Fungus Policy Act of 2020
Notice of Public Hearing—Receipt and Intent to Review Initiative**

Dear Ms. Stroud:

This letter is submitted on behalf of our clients, Melissa Lavasani, the proposer of the above-referenced initiative measure, and the Campaign to Decriminalize Nature DC, the committee supporting the proposed measure (the “Committee”).

In her testimony before the Board, Ms. Lavasani will address the reasons for and importance of this proposed initiative, and a number of organizations representing veterans, and law enforcement personnel, and others, are submitting written comments or will be appearing to testify about the compelling and powerful policy reasons for advancing this proposed initiative. These comments are limited to the issue of whether the proposed initiative is a proper subject for initiative.

The Board should determine that the proposed initiative is a proper subject for initiative, pursuant to D.C. Official Code §1-1001.16(b)(1) and the Board’s regulations, 3 DCMR §1000.5, for the following reasons.

First, the proposed measure would not in any way conflict with, and does not seek to amend, Title IV of the Home Rule Act as amended by the Initiative, Referendum and Recall Procedures Act of 1979. In particular, although the ultimate effect of the proposed measure would be to establish a policy to be followed by the Metropolitan Police Department, the measure itself is clearly legislative in nature. To be sure, “non-legislative matters cannot properly be submitted for the initiative....” *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, 441 A.2d 871, 875 (D.C. 1980). As the Court of Appeals explained in that case, “The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas it is administrative in its nature if it

merely pursues a plan already adopted by the legislative body itself...” *Id.* at 874 (quoting 5 E. McQuillin, *Municipal Corporations* §16.55 at 213-14 (ed re. ed. 1969)).

In this case, the proposed initiative clearly “prescribes a new policy” of making the enforcement of laws prohibiting the non-commercial cultivation, transporting, distribution and of entheogenic plants and fungi, among the lowest enforcement priorities for the Metropolitan Police Department. Significantly, the initiative does not dictate how the agency should make purely administrative decisions to carry out a “previously adopted legislative policy” *Convention Center Referendum*, 441 A.2d at 875. Rather, the initiative would adopt a *new* law—one that could only be adopted by the Council--requiring the MPD to exercise, in a certain specified way, authority previously delegated by the Council.

The “power of the electorate to propose laws through the initiative is co-extensive with the power of the legislative branch of government to pass legislative acts, ordinances and resolutions.” *Brizill v. D.C. Board of Elections and Ethics*, 911 A.2d 1212, 1214 (D.C. 2006) (quoting *Convention Center Referendum*, 441 A.2d at 897). As only the Council could enact a binding policy dictating enforcement priorities for the MPD, the new statutory language the initiative would enact is a legislative matter that is a proper subject for an initiative.

The proposed initiative would also call upon the Attorney General of D.C. to cease prosecution of resident for non-commercial planting, distribution and use of entheogenic plants, but that expression of views does not purport to be, and would not be, legally binding on the Attorney General.

Second, the proposed initiative in no way conflicts with the U.S. Constitution. With respect to federal law, the proposer and Committee are well aware of the provisions of section 809(b) of Public Law 115-141, the so-called Harris Amendment, prohibiting the expenditure of funds by the District to “enact any law, rule or regulation to legalize or otherwise reduce penalties associated with the possession, use or distribution of any schedule I substance under the Controlled Substances Act...” The proposed initiative would not in any way legalize, or reduce any penalty for possession, use or distribution, of entheogenic plants. It would simply enact new statutory language establishing a new policy to be implemented by the MPD with respect to the enforcement priority given to investigation and arrest of persons for such actions to the extent they are prohibited by District law.

Third, the measure would not negate or limit a budgetary act of the DC Council within the meaning of D.C. Code §-1001.16(b)(1), or appropriate funds within the meaning of D.C. Code. §1-204.101(a). In *D.C. Board of Elections and Ethics v. District of Columbia*, 866 A.2d 788 (D.C. 2005), the Court specifically identified the types of initiatives that will be deemed unlawful as “laws appropriating funds” or “negating or limiting” the budget enacted by the Council. As the Court explained, these include any initiative that: “1) ‘block[s] the expenditure of funds requested or appropriated,’ 2) directly appropriates funds, 3) requires the allocation of revenues to new or existing purposes, 4) establishes a special

fund, 5) creates an entitlement, enforceable by private right of action, or 6) directly addresses and eliminates a source of revenue.” *Id.* at 794-95 (internal citations omitted).

The proposed initiative would certainly not block any expenditure of appropriated funds or require the allocation of revenue to any specific purpose. It would not affect the amounts appropriated to the MPD or the purposes for which those funds can be spent. There is no specific appropriation for enforcing laws prohibiting the possession, distribution or use of specific substances listed in Schedule I. Requiring MPD to give enforcement of laws prohibiting possession, distribution or use of entheogenic plants the lowest priority would not change the amount of overall funds expended by MPD or the purposes for which those funds are appropriated.

To the extent implementation of the policy would result in expenditure of less resources on such enforcement, presumably more funds would be spent on enforcement of other laws. That was presumably true of Initiative 71, the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014, which would preclude the MPD from enforcing the laws banning personal use of certain amounts of cannabis and was found by the Board to be a proper subject for initiative.

Fourth, the proposed initiative clearly would not authorize any discrimination in violation of the Human Rights Act.

Finally, the proposed initiative has been properly filed and the verified statement of contributions has been timely filed.

For these reasons, the proposer and the Committee respectfully request that the Board find the proposed Entheogenic Plant and Fungus Policy Act of 2020 to be a proper subject for initiative.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J E Sandler', written in a cursive style.

Joseph E. Sandler

Counsel for Melissa Lavasani and
Campaign to Decriminalize Nature DC