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# State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs

MATHEW SWINBURNE & KATHLEEN HOKE\*<sup>©</sup>

## INTRODUCTION

Even though marijuana<sup>1</sup> is illegal under federal law, state legislative efforts have created a booming legal marijuana industry. California was the first state to legalize marijuana for medical purposes in 1996.<sup>2</sup> Now 33 states and the District of Columbia have medical marijuana programs and 11 states and the District of Columbia have legalized recreational use of marijuana for adults.<sup>3</sup> This legal marijuana industry was valued at \$10.4 billion dollars in 2018 and is expected to grow to \$30 billion by 2025.<sup>4</sup> The economic power of this industry is also reflected in the jobs it has created. The legal marijuana industry directly employs around 211,000 Americans.<sup>5</sup>

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1. We have chosen to use the term marijuana for this article because of the general familiarity with this term. However, federal and state regulations utilize a variety of terms for this plant including marihuana and cannabis. We will only use these terms if they are in a quote or are part of the title of a statute or regulation title.

2. Compassionate Use Act of 1996, 1996 Cal Legis. Serv. Prop. 215 (codified as amended at CAL. HEALTH & SAFETY CODE § 11362.5).

3. See *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (providing a national survey of state medical marijuana programs); see also *Marijuana Overview, Laws*, NAT'L CONF. OF ST. LEGISLATURE (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (providing a national survey of state adult use/recreational marijuana programs).

4. See Gillian Flaccus, *Legal Marijuana Industry Toasts Banner Year*, ASSOCIATED PRESS (Dec. 27, 2018), <https://apnews.com/0bd3cdbae26c4f99be359d6fe32f0d49> (indicating that the legal cannabis industry was valued at \$10.4 billion in 2018); see also Iris Dorbian, *New Cannabis Report Predicts Legal Sales to Reach Nearly \$30 Billion by 2025*, FORBES (Sept. 24, 2019), <https://www.forbes.com/sites/irisdorbian/2019/09/24/new-cannabis-report-predicts-legal-sales-to-reach-nearly-30-billion-by-2025/#18fb65aa1121> (reporting projections for legal cannabis sales for 2025).

5. Bruce Barcott & Beau Whitney, *Special Report: Cannabis Jobs Count*, LEAFLY (Mar. 2019), <https://d3atagt0rnqk7k.cloudfront.net/wp-content/uploads/2019/03/01141121/CANNABIS-JOBS-REPORT-FINAL-2.27.191.pdf>.

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However, when the ancillary jobs (marketing firms, accountants, lawyers, etc.) that support the legal cannabis industry are accounted for the estimate rises to 296,000.<sup>6</sup>

While the legalization of marijuana is creating financial opportunities, these opportunities are not equitably enjoyed. A 2017 survey of the industry revealed that 81% of marijuana business owners are white while only 4.3% of marijuana business owners are African-American, 5.7% are Hispanic/Latino, 2.4% Asian, and 6.7% identify as other.<sup>7</sup> These disparities are magnified when juxtaposed to the damage done to communities of color as part of America's War on Drugs.<sup>8</sup> Emblematic of the harm created by the inequitable enforcement of our nation's drug laws, one report revealed that despite comparable rates of marijuana use, Black Americans were almost four times as likely to be arrested for marijuana possession as their white counterparts.<sup>9</sup> State governments have recognized the disjointed relationship between the financial opportunity of legalized marijuana and the damages of the war on drugs. This recognition has resulted in the enactment of policies aimed at addressing this social justice issue.

Part I of this article discusses the evolution of marijuana regulation. Part II explores the impacts of disparate enforcement of drug laws as a social justice issue. Part III examines state policies focused on creating equitable access to the financial opportunities created by the legal cannabis industry. Part IV of the article examines state efforts to utilize tax revenue from the legal cannabis industry to reinvest in communities that were disproportionately impacted by previous drug policies, efforts that hold promise for restoring impacted communities through economic development and violence prevention.

### I. THE EVOLUTION OF CANNABIS LAWS AND THEIR ENFORCEMENT

#### A. Federal Regulation of Marijuana

Early in our nation's history cannabis was a valued commodity used to create a broad spectrum of products including rope, sails for ships, material for clothing, and

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6. *Id.*

7. *Women & Minorities in the Marijuana Industry: 10 Charts*, MARIJUANA BUS. DAILY at 10 (2017), <https://mjbizdaily.com/wp-content/uploads/2017/10/Women-and-Minorities-Report.pdf>.

8. See Altaf Rahamatulla, *The War on Drugs has Failed. What's Next?*, FORD FOUND. (Mar. 23, 2017), <https://www.fordfoundation.org/ideas/equals-change-blog/posts/the-war-on-drugs-has-failed-what-s-next/> (discussing disparate impact of the war on drugs on black and Latino communities); *Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782, 782 (May 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2374804/> (discussing the enforcement of drug laws and the public health impact on minority communities).

9. *The War on Marijuana in Black and White*, AM. C.L. UNION at 12 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf).

medicine.<sup>10</sup> Regulating marijuana as an intoxicant did not occur until the end of the 19th century and start of the 20th century.<sup>11</sup> Early criminalization efforts were linked to racist campaigns that appallingly asserted that marijuana incited minorities to violence and corrupted the moral purity of White Americans.<sup>12</sup> By 1937, the majority of states had banned marijuana and the first federal legislation was passed to outlaw marijuana – The Marihuana Tax Act of 1937.<sup>13</sup>

The Marihuana Tax Act of 1937 did not serve as a direct prohibition of marijuana, instead the act created two major tax provisions: an annual occupational tax on those dealt with the drug and a tax on transfers of marijuana.<sup>14</sup> For the annual occupational tax, the rate of taxation varied based on the occupation of the individual.<sup>15</sup> For example, marijuana importers were taxed \$24 a year while physicians who prescribed marijuana were taxed at \$1 per year.<sup>16</sup> The occupational tax also required that individuals subject to this tax register with the Internal Revenue Service (“IRS”).<sup>17</sup> The transfer tax imposed a one dollar per ounce marijuana tax on transfers involving individuals who had registered with the IRS under the occupational tax provision.<sup>18</sup> If the transferee was not registered with the IRS, the tax rate was \$100 per ounce of marijuana.<sup>19</sup> The federal government issued tax stamps to verify payment of the taxes required by this act.<sup>20</sup> Transfer of marijuana without the tax stamp was illegal and violations of the Marihuana Tax Act could result in fines up to \$2,000 and/or imprisonment for up to five years.<sup>21</sup> Over time it became clear that the Marihuana Tax Act was not created for revenue generation but was really an instrument for imposing criminal penalties on the transfer or possession of marijuana.<sup>22</sup>

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10. Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791–92 (2019).

11. *Id.* at 797.

12. *See id.* at 797–800 (discussing racist rhetoric surrounding early efforts to outlaw cannabis); *see also* Matt Thompson, *The Mysterious History of ‘Marijuana’*, NAT’L PUB. RADIO (July 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana> (discussing the public dialog during the early 20th century that linked marijuana use to racist fears of immigrants from Mexico and India).

13. Vitiello, *supra* note 10, at 800.

14. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970).

15. *Id.* at § 2.

16. *Id.*

17. *Id.*

18. *Id.* at § 7.

19. *Id.*

20. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, §7 (1937) (repealed 1970).

21. *Id.* at §§ 8, 12.

22. PRESIDENT’S COMMISSION ON L. ENFORCEMENT AND ADMIN. OF JUST., 13, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE (1967), (stating that the Marihuana Tax Act “raises an insignificant amount of

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The criminalization of marijuana continued to intensify and in 1951 Congress passed the Boggs Act, named for the bill sponsor Louisiana Congressman Thomas Boggs, Sr.<sup>23</sup> The Boggs Act created mandatory minimum sentences for a broad spectrum of drug offenses including violation of the Marihuana Tax Act.<sup>24</sup> In addition, it increased penalties for repeat offenders.<sup>25</sup> For example, a first time offender of the Marihuana Tax Act was subject to a fine up to \$2,000 and imprisoned for not less than 2 years or more than 5 years.<sup>26</sup> In contrast, the penalties for a third offense included a fine up to \$2,000 and imprisonment for not less than 10 years or more than 20 years.<sup>27</sup> After the passage of the Boggs Act, the federal government urged states to modify their marijuana legislation so that state penalties would conform to the new federal penalties.<sup>28</sup> By 1953, 17 states had passed legislation, referred to as “little Boggs Acts,” to align their penalty structures with the new federal system and by 1956, 11 additional states had enacted stricter penalties.<sup>29</sup>

The monetary penalties and prison sentences for violations of the Marihuana Tax Act were increased again in 1956 when Congress passed the Narcotics Control Act of 1956.<sup>30</sup> For example, a first time offender for possession of marijuana in violation of the Marihuana Tax Act was now subject to a fine up to \$20,000 and a mandatory prison sentence not less than 2 years or more than 10 years.<sup>31</sup> The Narcotics Control Act of 1956 also differentiated between possession and distribution marijuana crimes, with distribution crimes subject to higher minimum and maximum prison sentences.<sup>32</sup>

The escalation of criminalization appeared to falter in 1969 when the Supreme Court issued its opinion in *Leary v. United States*.<sup>33</sup> In this case, Timothy Leary was stopped at the U.S-Mexico border and marijuana was found in his car by a U.S. customs inspector.<sup>34</sup> One of the charges brought against Mr. Leary was transportation and transfer of marijuana without having paid the required transfer

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revenue and exposes an insignificant number of marihuana transactions to public view....It has become, in effect, solely a criminal law imposing sanctions upon persons who sell, acquire, or possess marihuana.”).

23. MARK A.R. KLEINMAN AND JAMES HAWDON, ENCYCLOPEDIA OF DRUG POLICY 95–96 (Sage Publication) (2011).

24. An Act to amend the penalty provisions applicable to persons convicted of violating certain narcotic laws, and for other purposes, Pub. L. No. 82-225, 65 Stat. 767 (1951).

25. *Id.*

26. *Id.* at § 2.

27. *Id.*

28. MARK A.R. KLEINMAN AND JAMES HAWDON, ENCYCLOPEDIA OF DRUG POLICY 95–96 (Sage Publication) (2011).

29. *Id.*

30. Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567.

31. *Id.* at § 103.

32. *Id.*

33. *Leary v. United States*, 395 U.S. 6, 12 (1969).

34. *Id.* at 10.

taxes imposed by the Marihuana Tax Act.<sup>35</sup> The Supreme Court struck down this conviction because compliance with the Marihuana Tax Act violated Mr. Leary's 5th Amendment privilege against self-incrimination.<sup>36</sup> The court reasoned that if Mr. Leary had complied with the transfer tax provisions of the Marihuana Tax Act, he would have exposed himself to 'real and appreciable' risk of self-incrimination because possession of any marijuana was a crime in all 50 states.<sup>37</sup> This opinion undercut the effectiveness of the Marihuana Tax Act as a tool for marijuana criminalization by identifying the 5th Amendment as a full defense to its transfer tax provisions.

However, the regulatory gap left by this decision was quickly filled by Congress with the passage of the Controlled Substances Act of 1970 ("CSA") which repealed and replaced the Marihuana Tax Act.<sup>38</sup> The CSA provides the current federal framework for regulating marijuana and most states have legislation modeled after it.<sup>39</sup> The CSA regulates the lawful "manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes," while preventing the illegal trade in these same substances.<sup>40</sup> The statute categorizes various plants, drugs and chemicals into one of five schedules based on medical use, potential for abuse, and safety.<sup>41</sup> Marijuana is a Schedule I substance, the most restricted category of substances.<sup>42</sup> This means the federal government has determined that marijuana has a high potential for abuse, no currently acceptable medical use in the United States, and there is a lack of accepted safety for the use marijuana even under medical supervision.<sup>43</sup>

As a result of its Schedule I status, the unauthorized cultivation, distribution, and possession of marijuana is a federal crime.<sup>44</sup> The criminal penalties associated with the CSA depend on a variety of factors.<sup>45</sup> However, a first time marijuana possession offense is subject to a minimum \$1,000 fine and up to 1 year in prison.<sup>46</sup>

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35. *Id.* at 11.

36. *Id.* at 12, 29.

37. *Id.* at 16.

38. Pub. L. No. 91-513, 84 Stat.1236 (1970) (repealing the provisions of the Marijuana Tax Act).

39. Todd Garvey et. al., *Marijuana: Medical and Retail – Selected Legal Issues*, CONG. RESEARCH SERV. at 7 (Apr. 8, 2015), <https://fas.org/sgp/crs/misc/R43435.pdf> (identifying the states that have modeled their legislation after the federal Controlled Substances Act).

40. *Id.* at 3 (describing the function of the Controlled Substances Act).

41. See 21 U.S.C. § 812(a)–(b) (2020) (describing the five classification schedules and the three key variables for placement into a schedule).

42. See *id.* § 812(c) (2018) (listing marijuana as a Schedule I substance).

43. See *id.* § 812(b) (defining the qualifying characteristics of a Schedule I substance).

44. *Id.* § 841(a)(1)–(2).

45. See generally BRIAN YEH, CONG. RESEARCH SERV., RL 30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS (2015) (providing an in depth of the criminal penalties associated with violations of the Controlled Substances Act).

46. 21 U.S.C. § 844(a) (2018).

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When an individual has at least three possession offenses, these penalties escalate to a minimum fine of \$5,000 and a prison sentence no less than 90 days and no more than 3 years. The CSA's penalties for marijuana possession are far less severe than the prison terms mandated under the Narcotic Control Act of 1956, which imposed a mandatory prison sentence not less than 2 years or more than 10 years for first time marijuana possession offenses.<sup>47</sup>

The CSA has escalating criminal repercussions for marijuana cultivation, distribution, or possession with intent to distribute. These penalties are dependent on the amount of marijuana involved as measured by weight or number of plants.<sup>48</sup> The most severe individual penalty for this category of offense includes a fine of up to \$10 million and at least 10 years and up to life in prison.<sup>49</sup>

### *B. The Strained Relationship between Federal and State Marijuana Laws*

Despite the criminalization of marijuana under federal law, there is a growing movement at the state level to decriminalize possession of small amounts of marijuana and/or to legalize marijuana for either medical use or adult-recreational use. Currently, twenty-six states and the District of Columbia have decriminalized possession of small amounts of marijuana.<sup>50</sup> Decriminalization removes the threat of jail, with many states treating the possession of a small amount of marijuana as a civil infraction.<sup>51</sup> For example, in Maryland, possession of less than 10 grams of marijuana will result in a civil fine of \$100 for the first offense.<sup>52</sup>

The trend of legalizing marijuana for medical use began in California with Proposition 215, the Compassionate Use Act of 1996.<sup>53</sup> Now thirty-three states and the District of Columbia have highly regulated medical cannabis programs.<sup>54</sup> As a result, almost “two-thirds of the United States population – 210 million people – live in a jurisdiction where medical cannabis use is legal.”<sup>55</sup> The legalization of marijuana for adult-recreational use is a more recent development that started in

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47. Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567, (1956).

48. See 21 U.S.C. § 841(b) (2018) (2018) (explaining the different penalties for possession of different amounts of marijuana).

49. See *id.* § 841(b)(1)(A) (providing these penalties for crimes involving 1000 kilograms or more of marijuana, or 1,000 or more marijuana plants regardless of weight).

50. See MARIJUANA OVERVIEW, NAT'L CONF. OF STATE LEGISLATURES, MARIJUANA OVERVIEW (2019) (discussing the state trend of decriminalize small amounts of marijuana).

51. *Id.*

52. MD. CODE ANN., CRIM. LAW § 5-601(c)(1)(ii) (West 2017).

53. See CAL. HEALTH & SAFETY CODE § 11362.5 (West 2003) (legalizing the medical use of marijuana).

54. See STATE MEDICAL MARIJUANA LAWS, NAT'L CONF. OF STATE LEGISLATURES (providing a national survey of state medical marijuana programs).

55. W.C. Tilburg et al., *Emerging Public Health Law and Policy Issues Concerning State Medical Cannabis Programs*, THE J. OF LAW, MED. & ETHICS 108–11 (citing U.S. Census Bureau, State Population Totals and Components of Change: 2010–2017 (2018) as basis for population data).

2012 with two successful ballot initiatives in Colorado and Washington.<sup>56</sup> Today, eleven states and the District of Columbia have legalized recreational use of marijuana for adults.<sup>57</sup>

How can the majority of states have legal marijuana industries when it is illegal under federal law? Why isn't the Department of Justice shutting down marijuana dispensaries? The uneasy truce between federal and state cannabis laws is a complex issue that involves the interplay of four major legal concepts: (1) preemption, (2) the anti-commandeering doctrine, (3) enforcement discretion, and (4) appropriations riders.

### 1. Preemption

The preemption doctrine is based on the Supremacy Clause of Article VI, cl.2 of the U.S. Constitution. This provision states that the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . ."<sup>58</sup> As a result of this provision, when federal law and state law conflict, the federal standard prevails or preempts the state law.<sup>59</sup>

However, preemption of state law requires Congressional intent to supersede the laws of state.<sup>60</sup> This intent can be derived from the express language of a federal law or it can be implied when compliance with federal and state law is impossible or when state law stands as an obstacle to the accomplishing the objectives of Congress.<sup>61</sup> The CSA contains express preemption language that states:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>62</sup>

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56. See DEEP DIVE MARIJUANA, NAT'L CONF. OF STATE LEGISLATURES (discussing changing legal status of recreational marijuana).

57. See *supra* note 50.

58. U.S. CONST., art. VI, cl.2.

59. See *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (quoting *Gade v. Nat'l Solid Waste Management Assn.*, 505 U.S. 88, 108 (1992)) ("Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

60. See *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (explaining when preemption of state law occurs).

61. *Id.*

62. 21 U.S.C. § 903 (2012).



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This language clarifies that Congress wanted states to retain regulatory authority over marijuana and that federal law would only preempt state authority when there is a “positive conflict.”

State courts have examined whether a “positive conflict” exists between the CSA and state medical marijuana laws that would invalidate legalization efforts. The existing case law largely protects state medical marijuana programs from federal preemption.<sup>63</sup> In the preemption analysis, courts generally look to see if the state’s medical marijuana legislation makes it impossible to comply with the CSA or serves as an obstacle to the federal government’s objectives under the CSA.<sup>64</sup> For example, in *Ter Beek v. City of Wyoming*, the City, in an effort to prevent its residents from cultivating medical marijuana in compliance with state law, argued that Michigan’s medical marijuana legislation was preempted by the CSA.<sup>65</sup> However, the court held that Michigan’s medical marijuana statute was not preempted. First, the court reasoned that that it was possible to comply with both statutory schemes because Michigan’s law was permissive of marijuana use but did not require behavior that was prohibited by federal law and it did not prohibit the federal government from enforcing the CSA.<sup>66</sup> Second, the court held that Michigan’s medical marijuana program was not an obstacle to the CSA’s goals because the “limited state-law immunity for [medical marijuana use] does not frustrate the CSA’s operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished. . . . [T]his immunity does not purport to alter the CSA’s federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition.”<sup>67</sup>

However, the Supreme Court of Colorado found that a provision of state law that required law enforcement officers to return seized medical marijuana to a patient was preempted by the CSA.<sup>68</sup> The court reasoned that returning the seized cannabis would be a violation the CSA’s prohibition on the distribution of marijuana.<sup>69</sup> This legal dynamic created a positive conflict necessitating a preemption of the state law

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63. See e.g., *White Mtn. Health Ctr. v. City Of Maricopa*, 241 Ariz. 230 (Ariz. Ct. App. 2016) (legalizing medical marijuana despite contrary provisions in the Controlled Substances Act); *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 480–81 (Cal. Ct. App. 2008) (holding that Congress only intended positive conflict preemption when the two laws could not “consistently stand together” and that the challenged medical marijuana identification provision did not create this type of conflict because it did not relieve an individual from federal prosecution); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 537–39 (Mich. 2014) (finding Michigan’s medical marijuana program was not preempted by federal law because it did not prevent the federal government from enforcing the Controlled Substances Act and the limited immunity provided under state law did not frustrate federal efforts to address drug abuse and control the trafficking of controlled substances.).

64. *Ter Beek*, 846 N.W.2d at 537–39.

65. *Id.*

66. *Id.* at 537–38.

67. *Id.* at 538–40.

68. *People v. Crouse*, 388 P.3d 39, 42–43 (Colo. 2017).

69. *Id.*

requiring the return of the seized medical marijuana.<sup>70</sup> In addition, the Oregon Supreme Court has held, that to the extent Oregon’s medical marijuana identification card provision “affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it ‘without effect.’”<sup>71</sup> However, the court made it clear that this holding applied only to the provisions at issue and did not apply to the entire medical marijuana program.<sup>72</sup> Despite a mix in state case law, state courts have never found preemption to invalidate a state’s marijuana legalization efforts entirely.

A federal court has also addressed, although in dicta, the issue of preemption of state marijuana laws in *In re: Rent-Rite Super Kegs West LTD.*<sup>73</sup> In this bankruptcy case, the court indicated that a “positive conflict” did not exist because “Colorado constitutional amendments for both medical marijuana, and the more recent amendment legalizing marijuana possession and usage generally, both make it clear that their provisions apply to state law only. Absent from either enactment is any effort to impede the enforcement of federal law.”<sup>74</sup> In addition, it is important to note that the federal government has never asserted in court that the CSA preempts state legalization efforts, medical or recreational.<sup>75</sup> The Department of Justice has even argued for the dismissal of a lawsuit claiming Arizona’s medical marijuana law was preempted.<sup>76</sup>

## 2. Anti-Commandeering Doctrine

If state marijuana programs are not preempted by the CSA, why hasn’t the federal government compelled state legislatures to pass laws that comply with the prohibitions of the CSA? Why hasn’t the federal government required state police officers to enforce the prohibitions of the CSA? The federal government’s ability to compel these actions is likely prohibited by the 10th Amendment. The 10th Amendment states “powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>77</sup> Courts have interpreted this amendment to provide states protection from federal efforts to commandeer state legislative and executive function.

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70. *Id.*

71. *Emerald Steel Fabricators v. Bureau of Labor and Indus.*, 230 P.3d 518 (Or. 2010).

72. *Id.* at 526–28.

73. *In re Rent-Rite Super Kegs*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012).

74. *Id.* at 804–05.

75. See State Marijuana Regulations Laws Are Not Preempted by Federal Law, MARIJUANA POL’Y PROJECT <https://www.mpp.org/issues/legalization/state-marijuana-regulation-laws-are-not-preempted-by-federal-law/> (last visited Feb. 2, 2020) (asserting that the federal government has never argued for preemption of state cannabis legalization efforts in court).

76. *Arizona v. United States*, No. CV 11-1072-PHX-SRB, 2012 WL 13059795 at \*2 (D. Ariz. Jan 4, 2012).

77. U.S. CONST. amend. X.

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In *New York v. United States*, the Supreme Court invalidated a portion of the Low-Level Radioactive Waste Policy Amendment Act of 1985 that required states to develop legislation for the disposal of all low-level radioactive waste within their borders or be forced to take title of the waste.<sup>78</sup> The Court reasoned that the 10th Amendment protects the sovereignty of state governments and that “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>79</sup> The Court expounded further by explaining:

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.<sup>80</sup>

The Court found that either option, legislate pursuant to federal mandate or be forced to assume title of toxic waste, would “‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”<sup>81</sup> This precedent likely extends to any federal effort aimed at forcing state legislatures to pass marijuana policies that are more in line with the CSA.

More recently, in *Murphy v. National Collegiate Athletic Association*, the Supreme Court invalidated the Professional Amateur Sports Protection Act of 1992 which prohibited states from legalizing sports betting if the practice was banned in their state at the time of the legislation’s enactment.<sup>82</sup> The Court reasoned that the “provision at issue here—prohibiting state authorization of sports gambling—violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”<sup>83</sup> This holding bolsters the protections offered by the 10th Amendment and is especially relevant to states that have yet to legalize medical or recreational marijuana, but are considering authorizing these policies in the future.

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78. *New York v. United States*, 505 U.S. 144 (1992).

79. *Id.* at 161 (citing *Hodel v. Virginia Surface Mining*, 452 U.S. 264, 288 (1981)).

80. *Id.* at 178.

81. *Id.* at 175.

82. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

83. *Id.* at 1478.

*Murphy* appears to proscribe efforts from the federal government to prohibit these legalization efforts.

State executive resources are also protected under the 10th Amendment. In *Printz v. United States*, the Court ruled provisions in the Brady Handgun Violence Prevention Act that required state and local law enforcement to conduct background checks on prospective purchasers violated anti-commandeering protections.<sup>84</sup> The Court admonished the federal government's efforts to appropriate law enforcement resources by concluding

[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.<sup>85</sup>

This precedent likely extends to any federal effort to conscript state resources into the enforcement of the CSA. As a result, the federal government must use its own resources to enforce the CSA's prohibitions on marijuana.

### 3. Enforcement Discretion

Even when individuals cultivate, distribute, or use marijuana in compliance with their state's laws, they are still in violation of the CSA. As discussed above, the responsibility for pursuing these violations falls to federal law enforcement. This creates a challenge since federal enforcement resources are finite. In response to this challenge, the federal government has issued memos delineating the enforcement priorities for the Department of Justice ("DOJ").

The first critical memorandum ("Ogden Memo") was issued on October 19, 2009, by Deputy Attorney General David W. Ogden.<sup>86</sup> The Ogden Memo was issued to provide United States Attorneys with "uniform guidance to focus federal investigations and prosecutions" in light of state efforts to legalize medical marijuana.<sup>87</sup> The document indicated that while the DOJ was committed to enforcing the CSA in all states, it was also committed to "making efficient and rational use of its limited investigative and prosecutorial resources."<sup>88</sup> The

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84. *Printz v. United States*, 521 U.S. 898 (1997).

85. *Id.* at 935.

86. U.S. DEP'T. OF JUSTICE, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (2009).

87. *Id.* at 1.

88. *Id.*

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memorandum identified the prosecution of significant illegal drug traffickers and the disruption of illegal drug manufacturing and trafficking networks as the DOJ's core priorities. However, the Ogden Memo instructed United States Attorneys to deprioritize individuals "whose actions are in clear and unambiguous compliance" with existing state medical marijuana laws.<sup>89</sup>

In 2013, the DOJ released another critical memorandum, the Cole Memo, to update enforcement priorities in response to Colorado and Washington's legalization of recreational marijuana.<sup>90</sup> The Cole Memo noted that Congress had identified marijuana as a dangerous drug and that the illegal marijuana trade provided significant revenue to dangerous criminal enterprises.<sup>91</sup> The memo went on to state that the DOJ was committed to utilizing its limited resources to address the significant threats posed by the illegal marijuana trade.<sup>92</sup> To guide enforcement resources towards addressing the most significant threats, the Cole Memo identified the following eight activities as priorities:

- (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law to other states; (4) preventing state-authorized marijuana activity from being used as a cover for the trafficking of other illegal drugs or other legal activities; (5) preventing the use of violence or firearms in the cultivation of and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands; and (8) preventing marijuana possession or use on federal property.<sup>93</sup>

To place these priorities in the context of state medical and recreational marijuana programs, the memo indicated that states with strong and effective regulatory schemes were less likely to threaten the enumerated enforcement priorities.<sup>94</sup> However, the memorandum also warned that if state regulatory

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89. *Id.* at 1–2.

90. U.S. DEP'T. OF JUSTICE, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013).

91. *Id.* at 1.

92. *Id.* at 1.

93. *Id.* at 1–2.

94. *See id.* at 3 (explaining how jurisdictions that have legalized marijuana while implementing strong regulations regarding the cultivation, distribution, sale, and possession of marijuana are less likely to threaten the federal enforcement priorities).

systems were ineffective in addressing these issues, the federal government would bring enforcement actions focused on these harms.<sup>95</sup>

Since the Ogden and Cole memos are an expression of the governing administration enforcement policies, they can change as the policies of the administration change or if a new administration assumes power. As a result, any stability they provide to state marijuana programs and the cannabis industry is precarious. This was evident when President Trump appointed Jeff Sessions as Attorney General. On January 4, 2018, Attorney General Sessions issued an enforcement memorandum (“Sessions Memo”) that rescinded the Ogden and Cole Memos and instructed federal prosecutors “to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of the criminal prosecution, and the cumulative impact of the particular crimes on the community.”<sup>96</sup>

Lawmakers from states with legal marijuana programs and the cannabis industry reacted to the Sessions Memo with alarm and fear.<sup>97</sup> Rep. Earl Blumenauer (D-Ore.), railed against the memorandum by stating that “[g]oing against the majority of Americans — including a majority of Republican voters — who want the federal government to stay out of the way is perhaps one of the stupidest decisions the Attorney General has made.”<sup>98</sup> Fear of federal prosecution loomed again, highlighting the tension between the CSA and state marijuana policies. However, little action was taken by the federal government after the issuance of the Sessions Memo and the memo may have galvanized additional support for the legalization of marijuana.<sup>99</sup> One year after the issuance of the Sessions Memo, a marijuana policy expert describe it as “more like thunder than lightning” and explained that the memo “spooked a lot of businesses, investors, and elected officials and elicited

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95. *Id.*

96. OFFICE OF THE ATTORNEY GEN., U.S. DEP’T. OF JUSTICE, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: MARIJUANA ENFORCEMENT (2018).

97. See Laura Jarrett, *Sessions Nixes Obama-era Rules Leaving States Alone That Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), <https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html> (discussing the political backlash created by the issuance of the Sessions Memo); see also Brad Auerbach, *How Cannabis Entrepreneurs Feel About Sessions’ Reversal of The Cole Memo*, FORBES (Mar. 3, 2018, 7:32 PM), <https://www.forbes.com/sites/bradbradauer/2018/03/03/how-cannabis-entrepreneurs-feel-about-sessions-reversal-of-the-cole-memo/#3e5205c7c4ae> (delineating industry concerns regarding the uncertainty the Sessions Memo creates and the chilling effect it will have on investments in the cannabis industry).

98. Josh Gerstein & Cristiano Lima, *Session Announces End to Policy That Allowed Legal Pot to Flourish*, POLITICO (Jan. 4, 2018, 9:31 AM), <https://www.politico.com/story/2020/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020>.

99. Kyle Jaeger, *One Year After Jeff Sessions Rescinded a Federal Marijuana Memo, The Sky Hasn’t Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), <https://www.marijuanamoment.net/one-year-after-jeff-sessions-rescinded-a-federal-marijuana-memo-the-sky-hasnt-fallen/>.

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responses that had real world ramification...[b]ut ultimately there was never any noticeable change in the federal enforcement of marijuana prohibition laws.”<sup>100</sup>

With the appointment of William Barr as Attorney General, federal marijuana enforcement policies appear to have reverted to pre-Sessions priorities.<sup>101</sup> While Barr has indicated his disapproval of marijuana and of the conflict between federal and state law, he has indicated that the DOJ will follow the Cole Memo.<sup>102</sup> Again, this change in policy highlights the unstable nature of the protection provided to the cannabis industry by federal enforcement discretion.

### 4. Appropriations Rider

Since 2014, Congress has passed an appropriations rider that prevents the DOJ from using any of their funding to prevent states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>103</sup> The appropriations rider has been interpreted to protect individuals engaged in conduct permitted by state medical marijuana laws, as well as the state efforts to implement medical marijuana programs.<sup>104</sup> However, individuals are only protected by the appropriations rider when they are in strict compliance with the medical marijuana laws of their states.<sup>105</sup> While the appropriations rider provides another layer of protection from federal prosecution, it is also an unstable protection because it must be renewed every year with the appropriations bill. It also critical to note that it does not prohibit the DOJ from taking enforcement actions against state recreational marijuana programs.

The legal principles of preemption, anti-commandeering, enforcement discretion, and appropriations restrictions together create the uneasy balance that allows states to administer marijuana programs despite the prohibitions of the CSA.

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100. *Id.* (quoting Mason Tvert of the Marijuana Policy Project).

101. Jeff Smith, *Congressional Legislation Reintroduced to Protect State-Legal Marijuana Markets*, MARIJUANA BUS. DAILY (Apr. 4, 2019), <https://mjbizdaily.com/congressiocon-legislation-reintroduced-protect-state-legal-marijuana/> (discussing Attorney General Barr’s priorities for enforcement of federal marijuana laws).

102. *Id.*

103. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, 128 Stat. 2217 § 538 (2014); Consolidated Appropriations Act, Pub. L. No. 115-31, 131 Stat. 135, § 537 (2017) (renewing marijuana appropriations rider for 2017); Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348 § 538 (2018) (renewing marijuana appropriation rider for 2018); Consolidated Appropriation Act, Pub. L. No. 116-93, 133 Stat. 13 § 531 (2019); H.R. 1158, 116th Cong. (1st Sess. 2019).

104. *See, e.g.*, *United States v. McIntosh*, 833 F.3d 1163, 1176–77 (9th Cir. 2016) (explaining how the DOJ is prohibited from spending appropriation act funds to prosecute individuals for conduct permitted by State Medical Marijuana Laws).

105. *Id.* at 1178.

**II. INEQUITABLE ENFORCEMENT OF DRUG LAWS AND THE IMPACT ON MINORITY COMMUNITIES**

The war on drugs has devastated minority communities, especially those that are majority African American. The inequitable enforcement of federal and state drug policies has resulted in disturbing arrest and incarceration trends and stripped government entitlements from vulnerable individuals. To gain perspective on these inequitable law enforcement practices, the prevalence of drug use amongst racial groups needs to be examined first.

*A. Drug Use Statistics*

The National Survey on Drug Use and Health, a study conducted by the Substance Abuse and Mental Health Services Administration within the U.S. Department of Health and Human Services, provides interesting insight into drug use across racial groups. The research looks at several metrics but data on illicit drug use within the past year and lifetime drug use is especially illuminating.

*1. 2018*

In 2018, the study revealed that 20.2% of White Americans had used illicit drugs in the past year compared to 20.8% of African Americans, and 17.1% of Hispanic or Latino Americans.<sup>106</sup> This data reveals comparable drug use rates amongst Black and White Americans and slightly lower use amongst Hispanic or Latino Americans. However, a different picture is revealed when lifetime drug use is examined. The National Survey on Drug Use and Health reveals that 54.5% of White Americans identified as having used illicit drugs compared to 45.9% of African Americans and 37.7% of Hispanic or Latino Americans.<sup>107</sup> When looking at marijuana use specifically, the data is comparable. The study indicates that 16.5% of White Americans had used marijuana in the past year compared to 17.8% of African Americans, and 13.6% of Hispanic or Latino Americans.<sup>108</sup> With regards to lifetime use of marijuana, 50.7% of White Americans identified as having used marijuana compared to 42.4% of African Americans and 33.0% of Hispanic or Latino Americans.<sup>109</sup> This data reveals that Hispanic and Latino Americans utilize drugs less in all metrics. Whites and Blacks have comparable drug use when surveyed about their behavior within the past year, but Whites are more likely to use drugs over the course of their lifetime.

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106. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERV., RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE & HEALTH: DETAILED TABLES, TABLE 1.23B (2018).

107. *Id.* at table 1.22B.

108. *Id.* at table 1.26B.

109. *Id.* at table 1.25B.



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### 2. 2010

These statistics have not changed considerably in the past decade. The 2010 National Survey on Drug Use and Health revealed that illicit drug use was similar across all three racial categories when looking at use within the past year; White Americans at 15.3%, African Americans at 15.9%, and Hispanic or Latino Americans at 14.9%.<sup>110</sup> When looking at lifetime use, White Americans again displayed the highest rate of illicit drug use at 50.9% compared with 45.1% of African Americans and 37.2% of Hispanic or Latino Americans.<sup>111</sup> The 2010 marijuana use statistics for use within the past year are comparable for each racial category: 11.6% of White Americans, 13.7% of African Americans, and 10.6% of Hispanic or Latino Americans.<sup>112</sup> However, the 2010 statistics mirrored the most recent data by revealing that White Americans were more likely to have used marijuana in their lifetime with 45.9% indicating use compared with 40.6% of African Americans and 30.6% of Hispanic or Latino Americans.<sup>113</sup> The 2010 data reveals that Hispanic and Latino Americans utilize drugs less in all metrics, Whites and Blacks have comparable drug use when look at use within the past year, but Whites are more likely to use drugs over the course of their lifetime.

#### B. Convictions and Arrests

##### 1. General Incarceration Data

The most recent federal figures show that 1,489,363 people were imprisoned in state and federal correctional facilities.<sup>114</sup> For context, this prison population is larger than the population of Dallas, Texas, which has a population of 1,345,047.<sup>115</sup> The racial composition of the U.S. prison population provides a glimpse into the impact of inequitable criminal law enforcement policies. The Bureau of Justice Statistics (“BJS”) tracks the race of prisoners who have been sentenced to at least one year in prison; this accounts for 97% of the prison population or 1,439,808 of sentenced prisoners.<sup>116</sup> Of this subsection of prisoners, 30.3% are White (436,500), 33% are Black (475,900), and 23.4% are Hispanic (336,500).<sup>117</sup> This must be juxtaposed to the racial breakdown of the U.S Population, which is 60.4% White,

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110. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERV., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE & HEALTH: DETAILED TABLES, TABLE 1.19B (2011).

111. *Id.*

112. *Id.* at table 1.24B.

113. *Id.*

114. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ252156, PRISONERS IN 2017 (2019).

115. *Quick Facts Dallas City, Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/dallascitytexas> (last visited Feb. 1, 2020).

116. *See* U.S. DEP’T OF JUSTICE, *supra* note 114, at 5–6.

117. *Id.* at 6.

13.4% Black, and 18.3% Hispanic or Latino.<sup>118</sup> The imprisonment rate statistics elucidate this inequity further. The imprisonment rate for black men is 2,336 per 100,000 people, for Hispanic men it is 1,054 per 100,000, and for white men it is 397 per 100,000.<sup>119</sup> In other words, black men are imprisoned at a rate almost six times that of white men and Hispanic men are imprisoned at a rate of 2.7 times that of their white counterparts.<sup>120</sup> The numbers are even worse for black men ages 18 to 19, who are twelve times more likely to be imprisoned than their white counterparts.<sup>121</sup>

## 2. Incarceration Data for Drug Crimes

To examine the imprisonment statistics specific to marijuana is a challenge. BJS tracks imprisonment for drug offenses but does not delineate the specific drug involved in the crime.<sup>122</sup> BJS also categorizes prisoners by their most serious offense.<sup>123</sup> This practice has the potential to underrepresent the number of people in prison with a drug conviction because they will be tracked for their most serious convicted offense, e.g., homicide. However, even with these limitations, the data provides important insight. Nearly half of all federal prisoners (47.3%) were serving time for a drug offense.<sup>124</sup> Of the 78,800 prisoners with a drug offense as their most serious crime, 22% were White (17,300), 37% were Black (29,000), and 39% were Hispanic (31,000).<sup>125</sup>

In state correction facilities, prisoners whose most serious offense is a drug crime represent a smaller percentage of the state prison population at 14.7%.<sup>126</sup> However, since state correction facilities house the majority of the nation's prison population, this 14.7% represents 190,100 prisoners.<sup>127</sup> The racial breakdown of these prisoners is 32.4% White (61,600), 30.4% Black (57,900), and 20.3% Hispanic (38,600).<sup>128</sup>

The racial breakdown of incarceration rates for drug crimes, at both the federal and state level, should raise concerns given the racial composition of the country as

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118. *Quick Facts United States*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

119. *See* U.S. DEP'T OF JUSTICE, *supra* note 114, at 17.

120. *Id.*

121. *Id.* at 15.

122. *See id.* at 22 (showing that the BJS tracks drug crimes without expressly stating the drugs involved in the offense).

123. *See id.* (tracking prisoners by their most serious offense).

124. *Id.* at 23.

125. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ252156, PRISONERS IN 2017 (2019).

126. *Id.* at 21.

127. *Id.* at 22. *See also id.* at 3 (revealing that in 2017 approximately 183,000 prisoners were housed in federal facilities while approximately 1.3 million are housed in state facilities).

128. *Id.* at 22.

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a whole (60.4% White, 13.4% Black, and 18.3% Hispanic or Latino).<sup>129</sup> This concern should be compounded when considered in the context of drug use statistics that show that more Whites use illegal drugs in the course of their lifetime than Blacks or Hispanics.<sup>130</sup> When Black Americans represent 13.4% of the population but 37% of federal prisoners and 30.4% of state prisoners convicted of drug crimes, it is clear that the law is not being equitably enforced.

### 3. Arrest Data and the Effect of State Legalization of Marijuana

While prison statistics do not track convictions for marijuana offenses, there is data on marijuana arrests that reaffirms racial bias in enforcement. A study of marijuana arrests conducted by the American Civil Liberties Union revealed that on average Blacks were on 3.7 times more likely to be arrested for marijuana possession than Whites.<sup>131</sup> However, several states trended far beyond the average.<sup>132</sup> For example, in Iowa, Blacks were 8.3 times more likely to be arrested for marijuana possession than Whites.<sup>133</sup>

With the growing state trend of marijuana legalization, there is evidence that marijuana arrests are decreasing.<sup>134</sup> Colorado recorded a 46% drop in marijuana arrests in the years following legalization.<sup>135</sup> However, racial disparities persist despite the overall decline. The number of marijuana arrests decreased by 51% for Whites, 33% for Hispanics, and 25% for Blacks.<sup>136</sup> In Alaska, marijuana arrest rates decreased dramatically post legalization at a rate of 95% for Blacks and 92% for Whites.<sup>137</sup> However, in 2016, Black Alaskans were ten times more likely to be arrested than their White counterparts.<sup>138</sup> This is a significant change from 2012, when they were less than twice as likely to be arrested for a marijuana crime.<sup>139</sup> As data regarding the effects of marijuana legalization becomes available, it reveals that despite a decrease in overall arrests, racial inequity persists in the enforcement of the law.<sup>140</sup>

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129. UNITED STATES CENSUS BUREAU, *supra* note 115.

130. *See supra*, Part II. B (providing a discussion of illicit drug use and marijuana use across racial categories).

131. AMERICAN CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 9 (2013).

132. *See id.* at 135–85 (providing data on marijuana possession arrest rates broken down by state).

133. *Id.* at 150.

134. FROM PROHIBITION TO PROGRESS: A STATUS REPORT ON MARIJUANA LEGALIZATION, DRUG POLICY ALLIANCE 5 (2018) (discussing the dramatic drop in marijuana arrests following legalization).

135. JACK K. REED, *MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS*, COLO. DEP'T OF PUB. SAFETY 5 (2016).

136. *Id.*

137. *Supra* note 134, at 30.

138. *Id.* at 39.

139. *Id.*

140. *See id.* at 30–33 (discussing continued racial disparities in the enforcement of marijuana laws post legalization).

C. *Loss of Government Benefits and the Impact on Food Security*

The inequitable enforcement of drug laws and creates problems for communities of color long after an individual's release from prison. One of these challenges arises from a federal law, the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").<sup>141</sup> PRWORA bans convicted drug felons from receiving Supplemental Nutrition Assistance Program ("SNAP") benefits.<sup>142</sup> SNAP, formerly known as food stamps, is the largest nutrition program in the country and provides low-income individuals with financial assistance to pay for food.<sup>143</sup> In 2019, SNAP spent over 58 million dollars to help feed over 34 million Americans.<sup>144</sup>

As discussed in Part II (B) of this paper, African Americans and Hispanic Americans are disproportionately targeted by law enforcement with regards to drug laws. As a result, African Americans and Hispanic Americans are more likely to be impacted by the SNAP drug felon ban. This problem is exacerbated by the fact that Black Americans and Hispanic Americans experience food insecurity, limited access to adequate food caused by a lack of money and other resources, at much higher rates than their white counterparts.<sup>145</sup> Research shows that 8.1 % of White households are food insecure, compared to 21.2% of Black households and 16.2% of Hispanic households.<sup>146</sup> By negatively impacting food security, the SNAP drug felon ban exposes ex-offenders to a broad spectrum of health problems, including an increased risk for hypertension, diabetes, obesity, and depression.<sup>147</sup>

Unfortunately, the Drug felony ban has the potential to impact the food security of the ex-offender's family as well. SNAP benefits are distributed to a household and are based on the income and number of people living in the household.<sup>148</sup>

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141. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §115, 110 Stat 2105, 2180 (1996).

142. 21 U.S.C. § 862(a) (2014) (preventing drug felons from receiving SNAP benefits and Temporary Assistance for Needy Family benefits. Discussion has been limited to SNAP for this paper).

143. Mathew Swinburne, *The 2014 Farm Bill and SNAP: Improving the Diets of Low-Income Americans?*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 329, 332–37 (2015).

144. *Supplemental Nutrition Assistance Program Participation and Costs*, USDA (Last visited May 4, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-4.pdf>.

145. Alisha Coleman-Jensen et al., *Household Food Security in the United States in 2018*, USDA, Economic Research Report Number 270, 6 (Sept. 2019), <https://www.ers.usda.gov/webdocs/publications/94849/err-270.pdf?v=963.1> (defining food insecurity).

146. *Id.* at 15.

147. Hilary Payne & Mary-Claire Morrow, *Effect of Denial of Snap Benefits on Convicted Drug Felons*, NETWORK PUB. HEALTH L. 2 (2020), <https://www.networkforphl.org/wp-content/uploads/2020/04/Issue-Brief-Snap-Felon-Ban-Updated.pdf>(discussing the negative health effects of food insecurity).

148. See 7 C.F.R. § 273.10(e)(2)(ii)(A) (2019) (explaining that a household's SNAP allotment is equal to the maximum allotment for the household's size reduced by 30% of the household's net monthly income); see also *Supplemental Nutrition Assistance Program (SNAP) Fiscal Year (FY) 2020 Maximum Allotments and Deductions*, USDA (last updated Oct. 1, 2019), <https://fns-prod.azureedge.net/sites/default/files/media/file/FY20->

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When an ex-offender is subject to the ban they are excluded from the calculation of their household's benefit.<sup>149</sup> For example, if the ex-offender lives in a SNAP household that includes four people that household is restricted to the benefits afforded a three person household. In this example, the family's benefits could be decreased up to \$137 per month.<sup>150</sup> This challenge is exacerbated because PRWORA considers the ex-offender's income to be part of the household income despite the fact they excluded from household count.<sup>151</sup> This has the potential of raising the net-income of the household, which would reduce the value of the SNAP allotment. In conjunction these two provisions force a household to survive on less benefits.

Also, research indicates that access to public assistance greater reduces the risk of recidivism in ex-offenders.<sup>152</sup> Drug offenders who are eligible for SNAP at the time of release from prison experience a 13.1% decrease in recidivism.<sup>153</sup> PRWORA's drug felon ban clearly destabilizes an already vulnerable populations as they attempt to reintegrate into broader society.

Given, the drastic public health implications of the drug felon ban, it is important to note that PRWORA contained a provision that allowed states to opt out of or modify the ban.<sup>154</sup> Fortunately, the vast majority of states have chosen to do so.<sup>155</sup> Currently, 22 states and D.C. have opted out the ban completely and 27 states have modified the ban.<sup>156</sup> Requiring parole compliance or participation in a drug treatment program as a prerequisite for receiving SNAP benefits are the most common modifications. However, some states disqualify ex-offenders permanently after multiple separate convictions, others make a distinction between possession and distribution crimes, while a few create a limited ineligibility period linked to the

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Maximum-Allotments-Deductions.pdf (providing maximum value of SNAP benefits for SNAP households based on size of household).

149. See 21 U.S.C. § 862a(b)(2) (2014) (stating that "the amount of benefits otherwise required to be provided to a household under the supplemental nutrition assistance program . . . shall be determined by considering the individual to whom subsection (a) applies not to be a member of such household, except that the income and resources of the individual shall be considered to be income and resources of the household").

150. See *Supplemental Nutrition Assistance Program (SNAP) Fiscal Year (FY) 2020 Maximum Allotments and Deductions supra* note 148 (this scenario assumes that the household is receiving the maximum allotment, which is \$646 for a four person household and \$509 for a three person household).

151. 21 U.S.C. § 862a(b)(2) (2014).

152. See Crystal S. Yang, *Does Public Assistance Reduce Recidivism?*, 107 AM. ECON REV.: PAPERS & PROC. 551, 551–55 (2017) (finding that access to public assistance, SNAP and welfare, upon release from prison greatly reduces the risk of recidivism for drug felons).

153. *Id.* at 553.

154. 21 U.S.C. § 862a (2014).

155. See *supra* note 147, at 3.

156. *Id.*

date of conviction or release from incarceration.<sup>157</sup> South Carolina is the only state that still has not opted out the ban.<sup>158</sup>

Although states have taken steps to ameliorate its impact, PRWORA's drug felon ban is another vehicle that perpetuates the harms caused to minorities by the inequitable enforcement of drug policies.

### III. STATE EFFORTS TO INCREASE REPRESENTATION IN THE LEGAL MARIJUANA INDUSTRY

#### A. Race and the Legal Marijuana Industry

As states change their policies toward medical and recreational marijuana, a flood of new financial opportunities arises. The legal cannabis industry was valued at \$10.4 billion in 2018 and employs almost 300,000 people.<sup>159</sup> As the industry grows and more states adopt marijuana legalization measures, the value of this industry is expected to reach \$30 billion by 2025.<sup>160</sup> Unfortunately, communities of color are missing out on this cannabis boom. These are the same communities that have suffered through inequitable enforcement of drug laws and have been stripped of vital government entitlements because of America's War on Drugs. A recent survey revealed that 81% of marijuana business owners and founders are White, while 19% identified as a minority (5.7% Hispanic, 4.3% African-American, 2.4% Asian, and 6.7% identified as other).<sup>161</sup> However, it is important to note that these statistics reflect individuals with ownership interest in a business, not necessarily a controlling share. As a result, the number of marijuana businesses in which there is a racial minority with a controlling interest is likely much lower than 19%.

One of the major barriers to diversity in the marijuana industry is the high startup cost associated with establishing a marijuana business. One estimate indicated that the average startup cost (application fees, licensing fees, etc.) for a retail location in the recreational market is \$312,000 and \$500,000 for a cannabis processing business.<sup>162</sup> These startup estimates do not include the capital requirement placed on marijuana businesses by the state, funds the business must have on hand to

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157. *Id.*

158. *Id.*

159. See Flaccus *supra*, note 4 (indicating that the legal cannabis industry was valued at \$10.4 billion in 2018); see also Bruce Barcott, *Special Report: Cannabis Jobs Count*, LEAFLY 1, 2 (2019), <https://d3atagt0rnqk7k.cloudfront.net/wp-content/uploads/2019/03/01141121/CANNABIS-JOBS-REPORT-FINAL-2.27.191.pdf>.

160. Iris Dorbian, *New Cannabis Report Predicts Legal Sales to Reach \$30 Billion by 2025*, FORBES (Sep. 24, 2019, 8:21 AM), <https://www.forbes.com/sites/irisdorbian/2019/09/24/new-cannabis-report-predicts-legal-sales-to-reach-nearly-30-billion-by-2025/#18fb65aa1121> (reporting projections for legal cannabis sales for 2025).

161. See MARIJUANA BUS. DAILY, *supra* note 7, at 10.

162. *Id.* at 9.

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prove financial viability.<sup>163</sup> For example, Pennsylvania’s medical marijuana program requires that applicants for grower/processor permits have at least \$2 million in capital, \$500,000 of which must be deposited in financial institutions.<sup>164</sup> For a dispensary, the requirement is \$150,000 deposited with financial institutions.<sup>165</sup>

These high buy-in costs form a barrier to minority participation in the marijuana industry because of the contours of poverty in the United States. The median income for a White household was \$70,642 in 2018; by comparison, Black households averaged \$41,361 and Hispanic households \$51,450.<sup>166</sup> To reiterate this disparity, 9% of White Americans live below the federal poverty line compared to 22% of Black Americans and 19% of Hispanic Americans.<sup>167</sup> This economic disparity is magnified in the legal cannabis industry. Since marijuana remains illegal under federal law, the vast majority of banks and credits unions will not provide services to cannabis businesses.<sup>168</sup> As a result, the vast majority of marijuana businesses are self-funded with 84% of businesses utilizing the founder’s savings to launch the business, while only 1% of business were able to secure a bank or state agency loan.<sup>169</sup>

The lack of minority-owned cannabis businesses has the potential to stifle minority employment opportunities throughout the industry. Research indicates a strong racial bias exists in hiring practices. One study revealed that on average, White applicants received 36% more callbacks than equally qualified African American applicants and 24% more than equally qualified Latino applicants.<sup>170</sup> Another study revealed that resumes with “white sounding names” received callbacks at a 50% higher rate than resumes with “African American sounding names.”<sup>171</sup>

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163. *Id.*

164. 28 PA. CODE § 1141.30 (2018).

165. *Id.*

166. *Income and Wealth in the United States: An Overview of Recent Data*, PETER G. PETERSON FOUND. (Oct. 4, 2019), <https://www.pgpf.org/blog/2019/10/income-and-wealth-in-the-united-states-an-overview-of-data> (citing data from the United States Census Bureau, Current Population Survey, 2019 Annual Social and Economic Supplement).

167. *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND. (Mar. 2, 2020), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

168. MARIJUANA BUS. DAILY, *supra* note 7, at 10–11 (explaining the challenges of financing the startup of a marijuana business).

169. *Id.*

170. LINCOLN QUILLIAN ET AL., META-ANALYSIS OF FIELD EXPERIMENTS SHOWS NO CHANGE IN RACIAL DISCRIMINATION IN HIRING OVER TIME, PROC. OF THE NAT’L ACAD. OF SCI. 10871 (Douglas S. Massey ed., 2017).

171. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003).

The racial biases of ownership and management contribute to the disparate employment opportunities available to minorities. Research has repeatedly shown that white employers are more likely to hire white employees and minority employers are more likely to hire minority employees.<sup>172</sup> One study of small businesses revealed that 57.8% of white owned firms employed no minority employees, while 93.5% of Black firms had a workforce that was made up of at least 50% minority employees.<sup>173</sup> Another report indicated that 76% of all employees in black-owned firms were black, 16% were white.<sup>174</sup> In contrast, this report found that the workforces at white-owned firms were only 29% black.<sup>175</sup> The reality of these hiring practices emphasizes the importance of minority ownership and management within the cannabis industry. Without minority representation at the highest level, minorities will have limited access to job opportunities throughout the entire industry.

States have started to adopt legal policies focused on encouraging a more inclusive cannabis industry. This challenge has been met with two complimentary categories of interventions. The first category of interventions focuses on creating space for smaller businesses in the cannabis industry by preventing the consolidation of market share by larger entities. The second category of interventions focuses on increasing minority owned businesses and minority employment in the cannabis industry.

#### *B. Preventing Market Consolidation and Creating Space*

State legislators and regulators that impose licensing restrictions may be motivated, in part, to prevent the creation of “Big Marijuana,” a market in which only a few large companies control the production and sale of marijuana. Policymakers may seek to use legislation and regulation to establish fertile ground for non-traditional, smaller entities to enter the marijuana industry. This may be done by limiting the number of licenses available, limiting the number of licenses an individual or entity may own, and restricting ownership to only one or two types of license.<sup>176</sup> While all

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172. See e.g. Michael A. Stoll et al., *Black Job Applicants and the Hiring Officer's Race*, 57 INDUS. & LAB. REL. REV. 267, 267 (2004) (discussing how black managers are more likely to hire black employees than white hiring managers); see also Laura Giuliana et al., *Manager Race and the Race of New Hires*, 27 J. OF LAB. & ECON. 589, 589–631 (2009) (concluding that the race of a hiring manager in a retail establishment effects the hiring practices of the establishment with regards to race. Concluding that white managers are less likely to hire black employees than black hiring managers).

173. Timothy Bates, *Utilization of Minority Employees in Small Business: A Comparison of Nonminority and Black-Owned Urban Enterprises*, 23 REV. OF BLACK POL. ECON. 113, 117 (1994).

174. Thomas D. Boston, *The Role of Black-Owned Businesses in Black Community Development*, in JOBS AND ECON. DEV. IN MINORITY COMMUNITIES 163 (Paul Ong & Anastasia Loukaitou-Sideris eds., 2006).

175. *Id.*

176. Danna Thomas, *License Quotas and the Inefficient Regulation of Sin Goods: Evidence From the Washington Recreational Marijuana Market* (Nov. 15, 2019), <https://ssrn.com/abstract=3312960>.



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states with medical or adult-use laws regulate licensing in some respect, looking at a few examples across the states demonstrates some of the different approaches to restrictions that may encourage involvement of non-traditional, smaller businesses.

First, states limit the number of licenses available typically for licensees that grow or process marijuana; lesser restrictions exist for licenses for retailers/dispensaries. For example, Maryland permits the licensing of at most 22 growers and 28 processors, with no restriction on the number of dispensary licenses;<sup>177</sup> Pennsylvania limits to 25 growers/processors and, initially, to 50 dispensaries;<sup>178</sup> and West Virginia limits to 10 growers and 10 processors, allowing 100 dispensaries.<sup>179</sup> Limiting the top of the chain licenses may contribute to entry of non-traditional, smaller entities and organizations into the industry, particularly when these quantity restrictions are coupled with the equity preferences discussed below. Without license quantity limitations, large corporations (“Big Marijuana”) are likely to acquire grower and/or processor licenses in each state as they are far more capable of paying for a license and navigating the licensing process than non-traditional, smaller entities. Barring antitrust limitations, the impact in that scenario could be the creation of an oligopoly of sorts, with smaller businesses incapable of competing with the big businesses that can suffer losses for a period of time in order to shutter competitors that lack a deep well to draw on. States may limit the number of licensees for a variety of reasons, including keeping the market small enough to regulate tightly, and that may inure to the benefit of non-traditional, smaller entities in the license marketplace.

With no restrictions on the number of licenses available, California sought to allow the entry of smaller businesses by giving them a head start. According to a lawsuit by the California Growers Association,<sup>180</sup> Proposition 64,<sup>181</sup> creating the California adult-use marijuana market, was designed to give small and mid-sized businesses five years in operation before larger businesses would be permitted to secure licenses. Yet “by allowing individuals or companies to hold an unlimited number of small cultivation licenses, the [State] effectively violat[ed] the initial five-

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177. MD. CODE ANN., HEALTH—GEN. § 13-3306(a)(2)(i) (West 2020) (governing growers); *id.* at § 13-3307(f) (West 2020) (governing dispensaries); *id.* at b§ 13-3309(c)(1)(i) (West 2020) (governing processors).

178. 35 PA. CONS. STAT. § 10231.616 (2016).

179. W. VA. CODE § 16A-6-13 (2020).

180. Complaint at 2, California Growers Association v. California Department of Food and Agriculture (2018) (No. 34-2018-00225874-CU-MC-GDS), 2018 WL 3970458.

181. CAL. HEALTH & SAFETY CODE § 11018 note J (West 2020) (“The Adult Use of Marijuana Act ensures the nonmedical marijuana industry in California will be built around small and mediumsized businesses by prohibiting large-scale cultivation licenses for the first five years. The Adult Use of Marijuana Act also protects consumers and small businesses by imposing strict anti-monopoly restrictions for businesses that participate in the nonmedical marijuana industry.”).

year prohibition on large cultivations.”<sup>182</sup> Without a limit on the number of licenses, large companies were able to secure a large portion of the “small” cultivator licenses, capitalizing on economies of scale and decreasing the competitiveness of smaller businesses.<sup>183</sup> Limiting the number of licenses for cultivators could have avoided this outcome and allowed for the voters’ intent to be realized—entry into the market of small and medium sized businesses.<sup>184</sup>

Other limitations can also contribute to broader access to licenses for non-traditional, smaller entities. Limiting the number of licenses available coupled with limiting the number of licenses that one entity may hold can open the market. For example, West Virginia,<sup>185</sup> Maryland,<sup>186</sup> and Pennsylvania<sup>187</sup> allow an entity to have only one grower or processor license so that each such license is owned by a separate entity. Pennsylvania limits to five the number of dispensaries one entity may own.<sup>188</sup> Illinois law is unique in that the ownership limitations seek to limit license ownership by one entity more deeply. With respect to large growers (cultivation centers), Illinois provides that “[n]o person or entity shall hold any legal, equitable, or beneficial interest, directly or indirectly, of more than cultivation centers.”<sup>189</sup> Similarly, an individual or entity may hold interest in only one craft (small) grower, and a craft grower license may not be issued to an individual or entity with more than 10% interest in a cultivation center.<sup>190</sup> An individual or entity may hold interest in at most 10 dispensaries.<sup>191</sup> These detailed limitations avoid the common machinations of industry, creating several different entities with disparate ownership in each but some level of common ownership across all. That is, essentially, what happened with the small cultivator licenses in California.<sup>192</sup>

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182. Eli McVey, *Chart: Handful of Growers hold Hundreds of Cultivation Licenses in California’s Legal Marijuana Market*, MARIJUANA BUS. DAILY (Jun. 18, 2018), <https://mjbizdaily.com/chart-handful-growers-hold-hundreds-cultivation-licenses-california-legal-marijuana-market/>.

183. Less than 2 years into the 5-year window, “3,535 cultivation licenses had been issued to 1,607 unique license holders, meaning that the average licensee holds approximately two licenses apiece. The top 10 license holders in the state control 646 licenses – or an average of 65 each.” *Id.*

184. Ultimately the decision of whether the State acted in violation of Proposition 64 and related statutes and regulations has been left undecided. The California Growers Association dropped the lawsuit in January 2019 after a change in leadership of the Association. Scott Rodd, *Growers Association drops Lawsuit Against State over Permitting Large-Scale Cannabis Cultivators*, SACRAMENTO BUS. J. (Jan. 22, 2019), <https://www.bizjournals.com/sacramento/news/2019/01/22/growers-association-drops-lawsuit-against-state.html>.

185. W. VA. CODE § 16A-6-13(a) (2020).

186. MD. CODE ANN., HEALTH–GEN. § 13-3309(d) (West 2020) (regulating processors).

187. 35 PA. CONS. STAT. § 10231.616(4) (2016) (regulating growers and processors).

188. *Id.* at (3).

189. 410 ILL. COMP. STAT. 705/30-30 (2019).

190. *Id.*

191. *Id.*

192. See McVey, *supra* note 182.

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Limiting ownership to one license per business, like West Virginia, Maryland, and Pennsylvania, may open the door to smaller businesses. Limiting ownership to the degree provided in Illinois law may be even more effective in preventing larger business entities from securing all or most of the available licenses and, equally important, prevents large businesses from creating separate entities to secure licenses, behavior that may be possible under less strict licensing limitations in other states. Efforts to minimize the number of licenses an entity may own likely inures to the benefit of non-traditional, smaller business entities.<sup>193</sup>

States also restrict ownership of different types of licenses, particularly seeking to avoid vertical integration where one business holds a license for each step from growing to processing to selling at retail. In Michigan, a marijuana safety compliance facility or secure transporter may not also hold a license as a grower, processor, retailer, or microbusiness.<sup>194</sup> A marijuana microbusiness licensee may not also hold any other marijuana business license.<sup>195</sup> Pennsylvania permits only up to five growers to also hold a dispensary license.<sup>196</sup> “The rationale against vertical integration is that it will prevent the firm from evolving into a politically and financially powerful firm. Furthermore, vertical integration will crowd out small and new players to the industry.”<sup>197</sup>

Pushback against vertical integration occurred in Florida when growers sued the State to prevent implementation of regulations that allowed for vertical integration of the marijuana market. The First District Court of Appeals found that the statute passed to implement the constitutional amendment that gave rise to Florida’s medical marijuana program mandated vertical integration in contrast with the

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193. Patrick Murphy & John Carnevale, *Regulating Marijuana in California*, PUB. POL’Y INST. OF CAL. 1, 11 (Apr. 2016), [https://www.ppic.org/content/pubs/report/R\\_416PMR.pdf](https://www.ppic.org/content/pubs/report/R_416PMR.pdf) (“Placing limits on the number of production licenses an individual or organization can own would make it easier for small business to operate in the market.”).

194. MICH. COMP. LAWS § 333.27959(3)(d) (2018).

195. *Id.* The law is quite the opposite in West Virginia, where the statute explicitly states that “[a] person may hold a grower permit, a processor permit, and a dispensary permit, or any combination thereof, concurrently.” W. VA. CODE ANN § 16A-6-13(9) (2020).

196. 35 PA. STAT. AND CONST. STAT. ANN. § 10231.616(5) (Lexis 2019). That number changes to 20% of the growers/processors if the state expands the number of grower/processors from the initially established 25. *Id.*

197. Karen A. Parker, et. al, *Risk Management Within the Cannabis Industry: Building a Framework for the Cannabis Industry*, 28 WILEY FIN. MKTS. INST. & INST. 30 (2019), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/fmii.12104>. See also Murphy & Carnevale, *supra* note 193, at 22 (“[I]f the regulatory objective is to encourage wider participation in the marijuana industry, horizontal integration may be preferable. A horizontally structured industry could be designed to favor small businesses, while a vertically integrated industry might result in fewer businesses controlling the industry.”); Fred Hernandez, *Horizontal and Vertical Integration Affect the Cannabis Industry*, LEAFBUYER (Oct. 17, 2018), <https://www.leafbuyer.com/blog/horizontal-vertical-integration/> (“For many investors, vertical integration in the cannabis industry allows for massive scale but can risk creating cannabis monopolies.”).

amendment passed by voters.<sup>198</sup> While the case works its way through the judicial system, evidence of the impact of vertical integration supports the conclusion that small companies are left out when vertical integration is left in: As of December 2019, 6 companies own 75% of the 205 dispensaries in Florida.<sup>199</sup>

States are eager to open the marijuana industry to non-traditional, smaller businesses. Licensing restrictions can minimize the monopolizing effect of Big Marijuana and allow for entry by smaller businesses. Yet more is needed to be sure that these points of entry are actually accessible by those against whom the war on drugs has raged for generations. Social equity provisions, coupled with these licensing restrictions, should allow for minority-owned businesses to become part of the marijuana industry.

### C. *Social Equity Measures to Increase Inclusivity*

Once space has been created for smaller business entities to participate in the marijuana industry, measures to increase inclusivity are added to enhance minority representation. In evaluating these social equity measures, six major categories of interventions were identified: license application preference, special license opportunities, training and support services, financial services, fee waivers, and licensee equity requirements. The population targeted by each of these interventions varies from state to state, but broadly speaking these social equity measures target individuals and communities that were disproportionately impacted by the war on drugs, which as discussed in Part II of this paper, places a focus on minority communities.<sup>200</sup> In the discussion of each of these interventions, the paper will focus on key variations to highlight the spectrum of approaches utilized by states.

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198. Fla. Dep't of Health v. Florigrown LLC, No. 1D18-4471, 2019 WL 2943329 (Fla. Dist. Ct. App. July 9, 2019), *review granted*, 2019 WL 5208142 (Fla. Oct. 16, 2019).

199. Manuel Madrid, *Florida Officials Make "Same Old" Argument for Restricting Medical Marijuana Licenses*, MIAMI NEW TIMES (Dec. 11, 2019), <https://www.miaminewtimes.com/marijuana/vertical-integration-court-case-pits-florida-officials-against-medical-marijuana-operators-11326113>, citing FLA. HEALTH: OFF. OF MED. MARIJUANA USE (Dec. 6, 2019), [https://s27415.pcdn.co/wp-content/uploads/ommu\\_updates/2019/120619-OMMU-Update.pdf](https://s27415.pcdn.co/wp-content/uploads/ommu_updates/2019/120619-OMMU-Update.pdf).

200. See e.g., 410 ILL. COMP. STAT ANN. 705/1-10 (West 2019) (defining social equity applicant as businesses with owners and employees that have lived in disproportionately impacted areas); see also *id.* (defining disproportionately impacted area as a census tract or comparable geographic area that is impoverished and has high rates of arrest, conviction, and incarceration for cannabis related crimes); see also *id.* (defining impacted family member as a parent, legal guardian, child, spouse, or dependent, or was a dependent of an individual who was arrested for convicted of, or adjudicated delinquent of certain drug offenses prior to the passage of the Illinois Cannabis and Regulation and Tax Act).

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### 1. License Application Preference

To function as a legal cannabis business in any of the states that have legalized recreational or medical marijuana, a business must be licensed by the state government.<sup>201</sup> To increase representation within the cannabis industry some states have adopted policies that provide preferential review of the license applications submitted by social equity applicants, either in scoring of the application in a capped system or a system for expedited review. There has also been a failed attempt to utilize racial quotas in the issuance of marijuana business licenses.

#### a. Preferential Scoring-Maryland

The Maryland Medical Cannabis Commission (“MMCC”) has adopted regulations that incorporate social equity considerations into the application process for grower, processor, and dispensary licenses. Since Maryland has capped the number of business licenses awarded in its medical cannabis program,<sup>202</sup> each license application is evaluated based on six factors.<sup>203</sup> While these factors vary slightly depending on the type of license, each application standard includes a social equity metric. These social equity considerations are referred to as “additional factors” and are afforded 15% weight in the evaluation of the application.<sup>204</sup> For example, the medical cannabis grower license application utilizes the following weighted criteria:

Operational factors afforded 20% weight;  
Safety and security Factors afforded 20% weight;  
Commercial horticulture or agriculture factors afforded 15% weight;  
Production control factors afforded 15% weight;  
Business and economic factors afforded 15% weight; and  
Additional factors afforded 15% weight.<sup>205</sup>

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201. See e.g., MD. CODE ANN., HEALTH-GEN. § 13-3306 (West 2019) (creating a cannabis growers license requirement); see also *id.* § 13-3309 (creating a cannabis processors license requirement); see also *id.* § 13-3307 (creating dispensary license requirement).

202. See MD. CODE ANN., HEALTH-GEN. § 13-3306(a)(2) (West 2019) (creating a cannabis growers license cap); see also *id.* § 13-3309(c) (creating a cannabis processors license cap); see also *id.* § 13-3307(a) (tasking the Maryland Medical Cannabis Commission with setting the dispensary license cap based on state demand for medical cannabis).

203. See MD. CODE REGS. 10.62.08.05 (2019) (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

204. See MD. CODE REGS. 10.62.25.05 (2019).

205. *Id.* 10.62.08.05 (providing application review standards for cannabis grower license).

The additional factors/social equity factors are the same for each category of license and include four social equity variables upon which the applicant is evaluated.<sup>206</sup>

The first variable is the applicant’s diversity plan.<sup>207</sup> The diversity plan is the business’s “detailed written plan, including objectives, timetables, and evaluation metrics that describes the steps applicant will take to ensure that a business will promote the meaningful inclusion of diverse groups.”<sup>208</sup> Regulations dictate the contents of the diversity plan. For example, the diversity status of each owner, investor, employee, and contractor, internal numerical diversity goals, and a plan for diversity-related outreach.<sup>209</sup>

The second variable is disadvantaged equity applicant ownership status.<sup>210</sup> To qualify as a disadvantaged equity applicant, an individual must be a member of an identified minority group, which includes African Americans, American Indians/Native Americans, Asians, Hispanics, and women. Also, the individual’s personal net worth must be less than \$1,713,333, adjusted for inflation, or they must be a disadvantaged owner of a certified minority business enterprise as defined in State Finance Procurement Article §14-301(d).<sup>211</sup> In the evaluation of disadvantaged equity applicant ownership status, the benchmark is majority ownership (at least 51 %) or good faith efforts to have a majority ownership interest held by disadvantaged equity applicants.<sup>212</sup>

The third variable is ownership by the most disadvantaged groups in the medical cannabis industry, as identified by the MMCC.<sup>213</sup> This variable is a subset of the disadvantaged equity applicant pool and is limited to African American and American Indian/Native American applicants.<sup>214</sup> The evaluation of this variable is

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206. See *id.* 10.62.08.05 (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

207. MD. CODE REGS. 10.62.25.05 (2019).

208. *Id.* 10.62.01.01(B) (12).

209. *Id.*

210. See *id.* 10.62.08.05 (2019) (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

211. MD. CODE REGS. 10.62.01.01(B) (10).

212. See *id.* 10.62.08.05 (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

213. See MD. CODE REGS. 10.62.08.05 (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

214. See *Affidavit of Certification of Member of the Most Disadvantaged Groups in the Med. Cannabis Indus.*, MD. MED. CANNABIS COMMISSION, <https://mmcc.maryland.gov/Documents/2019GrowerLicenseApplications/Attachment%20E%20->

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broken into two benchmarks: (1) 25 to 50% ownership interest held by members of the most disadvantaged groups and (2) at 51% ownership interest held by members of the most disadvantaged group.<sup>215</sup> In addition to achieving these benchmarks, the application review also considers the applicant's good faith efforts to achieve these metrics.<sup>216</sup>

The fourth evaluation variable is related to economically disadvantaged areas<sup>217</sup> and household income levels of the applicant's ownership.<sup>218</sup> To meet this evaluation metric an applicant must demonstrate three or more of the following criteria:

At least 51 percent of its ownership interest is held by one or more individuals who have lived in an economically disadvantaged area for 5 of the preceding 10 years;

A majority of the current employees live in an economically disadvantaged area;

A majority of the current contractors live in an economically disadvantaged area;

At least 51 percent of its ownership interest is held by one or more individuals who are a member of a household that earns no more than 80 percent of the State median household income; and

The applicant has significant past experiences in or business practices that promote economic development and empowerment in economically disadvantaged areas.<sup>219</sup>

By providing up to 15% of the license applications score for these social equity metrics, Maryland is attempting to increase the inclusivity of their marijuana industry.

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[%20Affidavit%20of%20Certification%20of%20Member%20of%20the%20Most%20Disadvantaged%20Groups%20\(Grower\).pdf](#) (last visited Feb. 20, 2020).

215. See MD. CODE REGS. 10.62.08.05 (2019) (providing application review standards for cannabis grower license); see also *id.* .62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

216. See MD. CODE REGS. 10.62.25.05 (2019).

217. See *id.* 10.62.01.01(B)(13) (defining an economically disadvantaged area as a geographic area, identified by the Maryland Medical Cannabis Commission, which meets at least three of the following criteria: (1) a median income is 80% or less of the average median household income for the state, (2) an unemployment rate that is at least 150% of the unemployment rate in the state, (3) a health uninsured rate that is at least 150% of the uninsured rate in the state, (4)a Supplemental Nutrition Assistance Plan rate that is at least 150% of the state rate for this program and (5) a poverty rate that is at least 150% of the poverty rate for the state).

218. See *id.* 10.62.08.05 (providing application review standards for cannabis grower license); see also *id.* 10.62.19.04 (providing application review standards for cannabis processor license); see also *id.* 10.62.25.05 (providing application review standards for cannabis dispensary license).

219. MD. CODE REGS. 10.62.25.05 (2019).

*b. Expedited Review-Massachusetts*

As part of its recreational marijuana program, Massachusetts grants priority review of marijuana establishment license applications to Economic Empowerment Priority Applicants.<sup>220</sup> Economic Empowerment Priority Applicants are parties that demonstrate three of the following criteria.

A majority of ownership belongs to people who have lived for five of the preceding ten years in an *Area of Disproportionate Impact*, as determined by the Commission;

A majority of ownership has held one or more previous positions where the primary population served were disproportionately impacted, or where primary responsibilities included economic education, resource provision or empowerment to disproportionately impacted individuals or communities;

At least 51% of current employees or subcontractors reside in Areas of Disproportionate Impact and by the first day of business, the ratio will meet or exceed 75%;

At least 51% of employees or subcontractors have drug-related CORI and are otherwise legally employable in Cannabis enterprises;

A majority of the ownership is made up of individuals from Black, African American, Hispanic or Latino descent; and

Other significant articulable demonstration of past experience in or business practices that promote economic empowerment in Areas of Disproportionate Impact.<sup>221</sup>

Critical to these applicant parameters is the definition of “Area of Disproportionate Impact.” This term refers to the 29 cities with the highest historical rates of arrest, conviction, and incarceration related to marijuana crimes.<sup>222</sup> Applicants that meet the Economic Empowerment Priority Applicant criteria have their applications reviewed before noncertified applications.<sup>223</sup>

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220. See 935 MASS. CODE REGS. 500.002 (2019) (defining a marijuana establishment as a “Marijuana Cultivator (Indoor or Outdoor), Craft Marijuana Cooperative, Marijuana Product Manufacturer, Marijuana Microbusiness, Independent Testing Laboratory, Marijuana Retailer, Marijuana Transporter, Delivery-only Licensee, Marijuana Research Facility, Social Consumption Establishment or any other type of licensed Marijuana-related business, except a Medical Marijuana Treatment Center (MTC)”).

221. See *id.* (defining an Economic Empowerment Priority Applicant).

222. See *id.* (defining Area of Disproportionate Impact); see also *Guidance for Identifying Areas of Disproportionate Impact*, CANNABIS CONTROL COMMISSION <https://mass-cannabis-control.com/wp-content/uploads/2018/04/FINAL-DRAFT-Areas-of-Disproportionate-Impact-1.pdf> (last visited Feb. 18, 2020) (identifying the 29 communities that qualify as Areas of Disproportionate Impact).

223. See 935 MASS. CODE REGS. 500.102(2) (2019) (explaining the priority review process).



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Since Massachusetts has not capped the number of marijuana establishment licenses, this expedited review provides a competitive advantage because it allows Economic Empowerment Priority Applicants to enter the marketplace faster; but does not prevent other applicants from receiving a license.

### *c. Racial Quotas-Ohio*

In an attempt to increase representation of minorities in its medical marijuana industry, Ohio passed legislation that required that at least 15% of the cultivator, processor, and testing laboratory licenses be awarded to entities that are owned and controlled by members of an economically disadvantaged group.<sup>224</sup> Ohio defined economically disadvantaged group for this program to include Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians who were U.S. citizens and residents of Ohio.<sup>225</sup> However, this provision was found to be unconstitutional in *Pharmacann Ohio, LLC v. Williams*.<sup>226</sup> In this case, the plaintiff argued that they were denied equal protection under the law, as required by U.S. Constitution and the Ohio Constitution.<sup>227</sup> Plaintiffs asserted that they were denied equal protection under the law because Ohio had denied their license application even though they scored higher than economically disadvantaged applicants who were awarded licenses under the racial quota requirement.<sup>228</sup>

Since the statute at issue included racial classifications, the court utilized strict scrutiny to evaluate its constitutionality.<sup>229</sup> Under this review, there are two prongs of examination: (1) the government must have a compelling interest for utilizing racial classifications, and (2) the means used to achieve this interest must be narrowly tailored to achieving this goal.<sup>230</sup> The court found that the state failed both prongs of the strict scrutiny review.<sup>231</sup> First, Ohio asserted that the State had a compelling interest in “redressing past and present effects of racial discrimination within its jurisdiction....”<sup>232</sup> The court recognized that remedying past and present racial discrimination could qualify as a compelling government interest.<sup>233</sup> However, to find a compelling interest there must be strong evidence to support that state’s intervention.<sup>234</sup> The Court held that Ohio did not have strong

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224. OHIO REV. CODE ANN. § 3796.09(C) (West 2019).

225. *Id.*

226. *Pharmacann Ohio, LLC v. Williams*, No. 17 CV 10962, at \*9 (Ohio Com. Pl 2018).

227. *Id.* at \*2.

228. *See id.* at \*2–3 (discussing application scoring).

229. *Id.* at \*4.

230. *Id.* at 5–6 (citing *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 274 (1986)).

231. *Id.* at \*12–13.

232. *Pharmacann*, No. 17 CV 10962 at \*7.

233. *Id.*

234. *Id.*

enough evidence to justify the legislature’s actions because the only evidence considered prior to the passage of the provision were marijuana arrest rates and the State lacked any evidence of discrimination in the legal marijuana industry.<sup>235</sup>

To determine if a racial classification is narrowly tailored, courts must consider several factors including the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the relevant labor market; and the impact of the provision on third parties.<sup>236</sup> The Court found that an evaluation of these factors indicated that the license quota was not narrowly tailored.<sup>237</sup> First, the State did not consider any race-neutral alternatives to the license quotas which cut against the validity of the provision.<sup>238</sup> Second, the court found the provision to be inflexible because the 15% license quota was a strict percentage and did not have a set duration for how long it would be in effect.<sup>239</sup> Third, the Court held that the 15% license set aside had no relationship to the magnitude of discrimination in the relevant labor market and appeared to be “selected at random by the legislature, and not based on the evidence provided.”<sup>240</sup> Fourth, the contested provision had significant impact on third parties and the burden created by the license quota was excessive in a new industry with limited licenses.<sup>241</sup> For these reasons, the court found that the contested provision was not narrowly tailored.<sup>242</sup> Without a narrowly tailored intervention to a compelling government interest, the court held that the license quotas were unconstitutional.<sup>243</sup> Explicit racial quotas must pass such a high bar that no other states have been as direct as Ohio in attempting to create a diverse marijuana industry.

## 2. *Special License Opportunities*

The creation of a special category of marijuana business license that is only available to social equity applicants is an intervention employed by a minority of states. These exclusive opportunities attempt to create entry points into the legal cannabis industry without the high startup costs of traditional licensing opportunities, e.g., cultivator licenses, processor licenses, and dispensary licenses.

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235. *See id.* at \*8–9 (evaluating the sufficiency of the state’s evidence and stating that the evidence must show racial discrimination in the particular industry to warrant government intervention).

236. *Id.* at \*13 (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987) for the legal standard).

237. *Id.* at \*20.

238. *Pharmacann*, No. 17 CV 10962 at \*14.

239. *Id.* at \*15.

240. *Id.* at 16–17.

241. *Id.* at \*17–18.

242. *Id.* at \*20.

243. *Id.*

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### a. Colorado-Accelerator Licenses

In 2019, Colorado passed legislation which created two new categories of marijuana business licenses: accelerator cultivators and accelerator manufacturers.<sup>244</sup> To secure an accelerator license, a person must have resided in a census tract designated by the Colorado Office of Economic Development and International Trade as an Opportunity Zone for five of the ten years prior to application.<sup>245</sup> Opportunity Zones are designated low-income communities; investment in these communities receives favorable federal tax treatment under the Tax Cuts and Jobs Act of 2017.<sup>246</sup>

The accelerator license allows the licensee to work out of an established marijuana cultivator or manufacture's premises.<sup>247</sup> This is intended to address the high entry cost of securing appropriate facilities for a new licensee. In addition, the established business, which is referred to as the "Accelerator-Endorsed Licensee," can provide technical and capital support to the accelerator licensee.<sup>248</sup> The program essentially functions as a mentorship or apprenticeship program. In addition, to encourage established businesses to serve as Accelerator-Endorsed Licensees, the legislation allows the regulating agency to create an incentive system that may include reduced license fees.<sup>249</sup>

For most of Colorado's cannabis licenses, individuals with a felony conviction cannot apply for a license within three years of their conviction or while subject to a sentence, including probation and parole, for a felony conviction.<sup>250</sup> However, for the accelerator licenses, a marijuana conviction cannot be the sole basis of denial.<sup>251</sup> The Colorado Department of Revenue has started the rulemaking process for the accelerator license system and more information on this program should be forthcoming.<sup>252</sup>

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244. See COLO. REV. STAT. § 44-10-103 (2019) (describing new accelerator license categories).

245. *Id.*

246. See 26 U.S.C. § 1400Z-1 (2018) (describing the designation process for Opportunity Zones).

247. COLO. REV. STAT. §§ 44-10-602, 44-10-603 (2019).

248. See *id.* § 44-10-103 (defining Accelerator-Endorsed Licensee); see also *id.* §§ 44-10-602, 44-10-603 (providing for the provision of technical and capital assistance).

249. *Id.* §§ 44-10-602, 44-10-603.

250. *Id.* § 44-10-307(1)(g).

251. *Id.*

252. See *Work Group Announcement*, COL. DEP'T OF REV., (Sept. 13, 2019) <https://www.colorado.gov/pacific/sites/default/files/190814%20SB224%20Accelerator%20Work%20Group%20Announcement.pdf>; see also *Accelerator Program Workgroup Materials*, COL. DEP'T OF REV., (Sept. 13, 2019), [https://www.colorado.gov/pacific/sites/default/files/190913%20Accelerator%20Work%20Group%20Material\\_Final.pdf](https://www.colorado.gov/pacific/sites/default/files/190913%20Accelerator%20Work%20Group%20Material_Final.pdf).

*b. Massachusetts – Delivery-Only and Social Consumption Establishment Licenses*

The Massachusetts Cannabis Control Commission (“MCCC”) recently created two special licensing opportunities for social equity applicants. The first special license is the new Delivery-only License which allows a business to deliver marijuana and marijuana products directly to consumers from a marijuana retailer or a medical marijuana treatment center.<sup>253</sup> This new license opportunity is offered exclusively to Economic Empowerment Priority Applicants and Social Equity Program Participants for the first 24 months.<sup>254</sup> The MCCC may extend this exclusivity period if the objective of increasing representation in the regulated marijuana industry by “people from communities that have previously been disproportionately harmed by Marijuana prohibition and enforcement of the law has not been met.”<sup>255</sup>

The Social Consumption Establishment Pilot Program creates a special license that allows a business to sell marijuana and marijuana products for onsite consumption.<sup>256</sup> This new license is offered exclusively to a select group of applicants, which includes Economic Empowerment Priority Applicants and Social Equity Program Participants, for the first 24 months.<sup>257</sup> Again, the MCCC may extend this exclusivity period if the objective of increasing representation in the regulated marijuana industry by “people from communities that have previously been disproportionately harmed by Marijuana prohibition and enforcement of the law has not been met.”<sup>258</sup>

In addition to providing the benefit of an exclusivity period for these new marijuana business licenses, the Commonwealth has also tried to address the potential financial barriers created by the application and annual license fees. Both the Delivery-only and the Social Consumption Establishment license are subject to a \$1,500 application fee and a \$10,000 annual license fee.<sup>259</sup> This is the same fee structure imposed on marijuana retail establishments, marijuana product manufactures, and outdoor marijuana cultivators with between 30,001 and 40,000

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253. 935 MASS. CODE REGS. 500.050(10) (2019).

254. *See id.* (providing the 24-month exclusivity period for Economic Empowerment Priority Applicants and Social Equity Program Participants); *see also id.* 500.002 (defining Economic Empowerment Priority Applicant as license applicants that meet several variables intended to increase representation in the cannabis industry by those disproportionately affected by the war on drugs); *see also id.* 500.105(17)(providing that the Social Equity Program Participants are individuals that have lived in areas disproportionately impacted by the war on drugs, have a drug conviction, or are related to an individual with a drug conviction. These individuals have access to special business support services through the state to facilitate their participation in the legal marijuana industry).

255. 935 MASS. CODE REGS. 500.105(17) (2019).

256. *Id.* 500.050(6).

257. *Id.* 500.050(6) (b).

258. *Id.*

259. *Id.* 500.005(1)(d).

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square feet of marijuana canopy.<sup>260</sup> However, the Commonwealth has waived the application fee and cut the annual license fee in half for Social Equity Program Participants and Economic Empowerment Priority Applicants.<sup>261</sup>

### 3. *Trainings and Support Services*

To facilitate the creation of an inclusive marijuana industry, many states offer special trainings and support services to social equity applicants and licensees. The training and services are intended to help businesses navigate the complex regulatory landscape of the marijuana industry and provide skills critical to successfully establishing and maintaining a marijuana business.

For example, when Michigan legalized adult-use marijuana, the legislature mandated that the Michigan Department of Licensing and Regulatory Affairs (“LARA”) create “a plan to promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and to positively impact those communities.”<sup>262</sup> The regulations passed to enact this mandate do not address the details of this plan, but indicate that LARA will publish information to address: selection criteria to identify disproportionately impacted communities, the list of communities that qualify under this criteria, and special services available to license applicants from these communities.<sup>263</sup> To date, LARA has not released a comprehensive plan but has been providing details regarding their Social Equity Program through press releases on the agency’s website.<sup>264</sup>

To identify disproportionately impacted communities, LARA considered two variables (1) marijuana-related convictions and (2) poverty rates.<sup>265</sup> Specifically, LARA selected counties in which marijuana-related convictions exceeded the state average and in which more than 30% of the population lived below the federal poverty rate.<sup>266</sup> Initially, 19 counties were selected.<sup>267</sup> However, LARA has expanded the program to 41 communities as of October 2, 2019.<sup>268</sup>

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260. *Id.*

261. 935 MASS. CODE REGS. 500.005(1)(b) (2019).

262. MICH. COMP. LAWS § 333.27958(1)(j) (2018).

263. MICH. ADMIN. CODE R. 23.2 (2019).

264. *Michigan’s Marijuana Regulatory Agency Announces Social Equity Program Details*, MICH. DEP’T OF LICENSING & REG. AFF. (July 18, 2019), [https://www.michigan.gov/lara/0,4601,7-154-89334\\_79571\\_79784-502157—,00.html](https://www.michigan.gov/lara/0,4601,7-154-89334_79571_79784-502157—,00.html) (providing initial information on the Social Equity Program).

265. *Id.*

266. *Id.*

267. *Id.*

268. See Press Release, Mich. Dep’t of Licensing & Reg. Aff., Mich.’s Marijuana Reg. Agency Announces Soc. Equity Program Expansion (Oct. 2, 2019) <https://www.michigan.gov/lara/0,4601,7-154-89505-508912—,00.html> (indicating that state expanded the program as the agency continued to research municipal data).

Applicants that have resided in one of the identified communities for the last five years have access to additional business services from the State.<sup>269</sup> LARA is conducting educational outreach sessions in these disproportionately impacted communities.<sup>270</sup> At these sessions, LARA provides information on the application and licensure process.<sup>271</sup> In addition, LARA offers one-on-one application assistance and connects social equity applicants with additional state and private sector resources.<sup>272</sup> These resources are intended to help social equity applicants run a viable marijuana business. For example, the Michigan Department of Treasury offers guidance on tax requirements and tax payments and the Michigan Bureau of Fire Services offers help with pre-licensure inspections.<sup>273</sup>

Massachusetts also provides trainings and technical services for participants in its Social Equity Program.<sup>274</sup> The program offers a broad range of services that include management, recruitment, and employee trainings; accounting and sales forecasting; legal compliance; marijuana industry best practices; and assistance with identifying or raising funds or capital.<sup>275</sup>

While Illinois' new marijuana legislation tasks its Department of Commerce and Economic Opportunity with developing a program that will provide technical assistance to Social Equity Applicants, it also includes an interesting educational resource.<sup>276</sup> Illinois has created a Community College Cannabis Vocational Pilot Program.<sup>277</sup> The Illinois Department of Agriculture is tasked with working in coordination with the Illinois Community College Board to create and administer a certificate program that trains individuals to work in Illinois' legal cannabis industry.<sup>278</sup>

#### 4. *Financial Services*

As discussed earlier, the high start-up costs associated with the marijuana industry serve as a financial barrier to forming an inclusive industry. This challenge is

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269. *Id.* (discussing Social Equity Program eligibility); see also *Social Equity Program Application*, MICH. DEP'T OF LICENSING & REG. AFF., [https://www.michigan.gov/documents/lara/MRA\\_Social\\_Equity\\_Application\\_662352\\_7.pdf](https://www.michigan.gov/documents/lara/MRA_Social_Equity_Application_662352_7.pdf). (last updated Oct. 2019).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* (providing an overview of available state and private business support services made available to social equity applicants).

274. 35 MASS. CODE REGS. 500.105(17) (2019) (listing services provided by the Social Equity Program and defining eligible participants).

275. *Id.*

276. 410 ILL. COMP. STAT. 705/7-15 (2019).

277. *Id.* 705/25-5.

278. *Id.*

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compounded by the fact that banks are reluctant to provide financial services to marijuana businesses because marijuana is a Schedule I substance and criminalized under federal law.<sup>279</sup> For example, banks that provide financial services to a marijuana business can incur criminal liability for money laundering.<sup>280</sup> Under 18 U.S.C. §1956, banks that engage in financial transactions involving the proceeds of an unlawful activity, e.g. the proceeds of marijuana sales, can face fines up to \$500,000 or twice the value of the transaction, whichever is greater, and/or imprisonment up to twenty years.<sup>281</sup> In addition, banks that work with marijuana businesses run the risk of losing their deposit insurance coverage.<sup>282</sup>

In response to the lack of financial services, Illinois created the Cannabis Business Development Fund to provide low-interest rate loans and grants to assist Social Equity Applicants gain entry to, and successfully operate in, the State's regulated marijuana marketplace.<sup>283</sup> To qualify as a Social Equity Applicant the business must meet one of the following three criteria: (1) at least 51% ownership and control by one or more individuals who have resided for at least 5 of the preceding 10 years in a Disproportionately Impacted Area; (2) an applicant with at least 51% ownership and control by one or more individuals who have been arrested for, convicted of, or adjudicated delinquent for certain drug crimes or the member of an impacted family; or (3) have at least 10 full-time employees, at least 51% of whom live in a Disproportionately Impacted Area or have been arrested for, convicted of, or adjudicated delinquent for certain drug crimes or the member of an impacted family.<sup>284</sup> For the purposes of this program, a Disproportionately Impacted Area is a census tract or comparable geographic area that is impoverished and has high rates of arrest conviction, and incarceration for cannabis related crimes.<sup>285</sup> To meet the poverty element the community must meet at least one of four metrics: (1) a poverty rate of at least 20%; (2) 75% or more of children qualify for the federal free lunch program; (3) at least 20% of households receive Supplemental Nutrition

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279. TODD GARVEY, ET. AL., CONG. RESEARCH SERV., R43425, MARIJUANA: MEDICAL AND RETAIL-SELECTED LEGAL ISSUES (2015) (discussing the challenge of securing financial services and the potential legal repercussions for providing financial services to a marijuana business).

280. See *id.* (discussing the potential for money laundering charges); see also 18 U.S.C. § 1956 (2016) (providing criminal penalties for financial transactions involving the proceeds of an unlawful activity).

281. 18 U.S.C. § 1956(a)(1) (2016).

282. 12 U.S.C § 1818 (2011) (providing for the termination of depository insurance for engaging in unsafe or unsound practices or for violating any applicable law).

283. 410 ILL. COMP. STAT. 705/7-15 (2019).

284. See *id.* 705/1-10 (2019) (defining social equity applicant and also defining impacted family member as a parent, legal guardian, child, spouse, or dependent, or was a dependent of an individual who was arrested for convicted of, or adjudicated delinquent of certain drug offenses prior to the passage of the Illinois Cannabis and Regulation and Tax Act).

285. *Id.*

Assistance Program benefits; or (4) an unemployment rate that is 120% of the national average for the proceeding two calendar years.<sup>286</sup>

The Cannabis Business Development Fund received an initial infusion of \$12,000,000 from the State.<sup>287</sup> The Fund will also be supported by fees collected in connection with the early approval licensing process for dispensing organizations and cultivation organizations.<sup>288</sup> This early approval process grants priority licensing in the adult use program to dispensaries and cultivation centers that are in good standing with the State's medical marijuana program.<sup>289</sup> As part of this priority licensing process, these businesses must pay into the Cannabis Business Development Fund.<sup>290</sup> For example, a cultivation center seeking an early approval license must make a nonrefundable payment of 5% of their total sales from June 1, 2018 to June 1, 2019 or \$750,000, whichever is less, but not less than \$250,000 into the Cannabis Business Development Fund.<sup>291</sup>

### 5. Fee Waiver

Fee waivers are another intervention states utilize to address the financial barriers to an inclusive marijuana industry. While the concept itself is straight forward, the structure and mechanics of these waivers vary considerably amongst states. As mentioned earlier, Massachusetts simply waives all application fees and 50% of annual license fees for Social Equity Program Participants and Economic Empowerment Priority Applicants.<sup>292</sup> By comparison, Michigan takes a more intricate approach to calculating fee waivers. Michigan grants up to a 60% reduction to the application fee, initial license fee, and future license renewal fees to participants in their Social Equity Program whose businesses will be located in disproportionately impacted communities.<sup>293</sup> The fee reduction is calculated by looking at three factors. First, applicants who have resided in one of the disproportionately impacted communities for the past five years receive a 25% fee

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286. *Id.*

287. *Id.* 705/7-10.

288. *See id.* 705/15-5 (requiring early approval adult use dispensing organization to pay into the Cannabis Business Development fund); *see also id.* 705/20-10 (2019) (requiring early approval adult use cultivation centers to pay into the Cannabis Business Development Fund).

289. 410 ILL. COMP. STAT. 705/20-10 (2019).

290. *Id.*

291. *Id.*

292. 935 MASS. CODE REGS. 500.005(1)(b) (2019).

293. *See Michigan's Marijuana Regulatory Agency Announces Social Equity Program Expansion*, MICH. DEP'T OF LICENSING AND REG. AFF. (Oct. 2, 2019), <https://www.michigan.gov/lara/0,4601,7-154-89505-508912--,00.html> (discussing the fee waiver structure); *see also supra* Part III(B)(3) (discussing who is eligible for the Social Equity program and what areas qualify as disproportionately impacted by marijuana prohibition and enforcement).



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reduction.<sup>294</sup> Second, an additional 25% reduction is awarded if the individuals holding majority ownership have been residents of one of the disproportionately impacted communities for the past five years and have a marijuana-related conviction.<sup>295</sup> Third, an additional 10% reduction is granted if the individuals holding majority of ownership have resided in a disproportionately impacted community for the past five years and were registered as primary caregivers in the State's medical marijuana program for at least two years between 2008 and 2017.<sup>296</sup> A primary caregiver is "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime. . . ."<sup>297</sup> This definition appears to limit this 10% discount to applicants without a conviction or a marijuana-related misdemeanors.

Illinois' fee waiver is not available to wealthy Social Equity Applicants.<sup>298</sup> Illinois offers a 50% reduction of any nonrefundable license application fee, any nonrefundable fees associated with purchasing a license to operate a cannabis business establishment, and any surety bond or other financial requirements for certain Social Equity Applicants.<sup>299</sup> However, a Social Equity Applicant may not have interests in more than 2 other cannabis establishment licenses in Illinois.<sup>300</sup> Illinois also places an income limitation that requires an "applicant, including all individuals and entities with 10% or greater ownership and all parent companies, subsidiaries, and affiliates, ha[ve] less than a total of \$750,000 of income in the previous calendar year."<sup>301</sup>

### D. Licensee Equity Requirements

In addition to focusing on diversity in the ownership of marijuana businesses, states are adopting measures to promote diversity in the industry's workforce. As discussed earlier, 81% of marijuana business owners are white.<sup>302</sup> This, coupled with the established racial hiring biases that result in white owners and managers being more likely to hire white employees, stifles employment opportunities for

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294. See *Michigan's Marijuana Regulatory Agency Announces Social Equity Program Expansion*, *supra* note 293.

295. *Id.*

296. *Id.*

297. MICH. COMP. LAWS § 333.26423 (2020).

298. See *supra* Part III(B)(4) (providing Illinois's requirements for Social Equity Applicants).

299. 410 ILL. COMP. STAT. 705/20-10 (2019).

300. *Id.*

301. *Id.*

302. See *supra* note 7, at 10.

minorities in the marijuana industry.<sup>303</sup> To combat this dynamic several states have adopted diversity plan requirements.<sup>304</sup> These laws require applicants for a marijuana business to submit a diversity plan with their license application.<sup>305</sup> For example, in Massachusetts, an applicant must provide a detailed summary of the measures they will utilize to promote equity among minorities, women, veterans, and people with all gender identities and sexual orientations in the operation of the establishment.<sup>306</sup> Similarly, Illinois requires applicants to provide a document that outlines the “goal of diversity in ownership, management, employment, and contracting to ensure diverse participants and groups are afforded equality of opportunity.”<sup>307</sup>

**IV. STATE EFFORTS TO USE CANNABIS TAX REVENUE TO REINVEST IN COMMUNITIES DISPROPORTIONATELY AFFECTED BY THE WAR ON DRUGS**

With legalization of marijuana sales comes revenue. While it is beyond the scope of this paper to assess the tax and other economic benefits states reap from allowing and taxing marijuana sales, two states have included provisions in their adult-use laws that direct some of the tax windfall to communities impacted by the historic and persistent disparate enforcement of drug laws. The Illinois adult-use law created the Restore, Reinvest, and Renew (“R3”) Program,<sup>308</sup> funded by marijuana taxes,<sup>309</sup> and the Massachusetts adult-use law<sup>310</sup> established the similarly funded Marijuana Regulation Fund.<sup>311</sup> Because both funds are nascent, their impact on the relevant communities cannot yet be measured. But there is value in a jurisdiction establishing such a fund at the time of legalization; it is far easier to get legislators to establish a fund before monies start flowing than to divert monies that are already flowing into a state. And it is certainly easier to create programs to assist communities when a direct funding source is available.

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303. See *supra* Part III(A) (discussing racial hiring biases).

304. See *e.g.*, MD. CODE REGS. 10.62.01.01(B)(12) (2019); MICH. ADMIN. CODE r. 7.13 (2020); see also 935 MASS. CODE REGS. 500.101(1) (2019).

305. See *e.g.*, MD. CODE REGS. 10.62.01.01(B)(12) (2019); MICH. ADMIN. CODE r. 7.13 (2020); see also 935 MASS. CODE REGS. 500.101(1) (2019).

306. 935 MASS. CODE REGS. 500.101(1)(c)(7)(k) (2019).

307. See 410 ILL. COMP. STAT. 705/15-30 (2019) (discussing diversity plan as part of dispensing organization license application); see also *id.* 705/20-20 (discussing diversity plan as part of cultivation center license application); see also *id.* 705/35-15 (discussing diversity plan as part of infuser organization license application); see also *id.* 705/40-15 (discussing diversity plan as part of transporting organization license application).

308. 410 ILL. COMP. STAT. 70/10-40 (2019).

309. 30 ILL. COMP. STAT. 105/6z-107(c)(3)(C) (2019) (discussing the funding of the Restore, Reinvest, and Renewal Program).

310. MASS. GEN. LAWS ch. 94G, § 7 (2020).

311. *Id.* at § 14.

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Illinois created the R3 Program when the legislature passed the state's adult-use law in June 2019. The R3 Program is intended:

- (1) to directly address the impact of economic disinvestment, violence, and the historical overuse of criminal justice responses to community and individual needs by providing resources to support local design and control of community-based responses to these impacts;
- (2) to substantially reduce both the total amount of gun violence and concentrated poverty in [Illinois];
- (3) to protect communities from gun violence through targeted investments and intervention programs, including economic growth and improving family violence prevention, community trauma treatment rates, gun injury victim services, and public health prevention activities;
- (4) to promote employment infrastructure and capacity building related to the social determinants of health in the eligible community areas.<sup>312</sup>

These are laudable goals. As explained above, certain communities, particularly those populated by a majority of lower income people of color, have been devastated by enforcement of drug laws. Recognizing these impacts and creating a fund to serve those communities is a positive step toward reducing the effect of decades of disparate enforcement and impact. Illinois' focus on economic development, prevention of violence, and creation of employment speaks directly to the social determinants of health touted by the public health community.<sup>313</sup> Addressing these factors can create deep, sustainable improvements throughout a community.<sup>314</sup> Of course, the devil is often in the details. And there is much to be revealed in the Illinois details as the State implements the R3 Program starting in 2020.

First, the State must identify communities that may receive funding through the R3 Program. In January 2020, the Illinois Criminal Justice Information Authority ("ICJIA"), responsible for implementing the R3 Program,<sup>315</sup> announced areas that have been approved as eligible for R3 Program grants.<sup>316</sup> These are areas that are

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312. 410 ILL. COMP. STAT. 705/10-40(a) (2019).

313. Samantha Artiga & Elizabeth Hinton, *Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity*, KAISER FAM. FOUND. (MAY 10, 2018), <https://www.kff.org/disparities-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity/>.

314. *Id.*

315. 410 ILL. COMP. STAT. 705/10-40(b) (2019) (stating that this work is done in coordination with the Justice, Equity, and Opportunity Initiative of the Lieutenant Governor's Office).

316. ILL. CRIM. JUST. INFO. AUTHORITY, ICJIA ANNOUNCES STATEWIDE AREAS ELIGIBLE FOR RESTORE, REINVEST, AND RENEW (R3) PROGRAM GRANTS (Jan. 12, 2020), [https://www2.illinois.gov/IISNews/21029-ICJIA\\_Announces\\_Statewide\\_Areas\\_Eligible\\_for\\_R3\\_Program\\_Grants\\_.pdf](https://www2.illinois.gov/IISNews/21029-ICJIA_Announces_Statewide_Areas_Eligible_for_R3_Program_Grants_.pdf); see also *Areas Eligible for R3 Program Grants*, ILL. CRIM. JUST. INFO. AUTHORITY <https://icjia.illinois.gov/r3/> (last visited Feb. 18, 2020).

“high need, underserved, disproportionately impacted by historical disinvestment, and ravaged by violence as indicated by the highest rates of gun injury, unemployment, child poverty rates, and commitments to and returns from the Illinois Department of Corrections.”<sup>317</sup> Now the work is handed off to the Restore, Reinvest, and Renew Board (“the Board”) created by the legislature.<sup>318</sup> The Board is comprised of an array of individuals, including representatives from state and local government, organizational representatives or individuals who serve the community in various ways, experts in violence reduction, and individuals who have been incarcerated.<sup>319</sup> Notably, the Board is comprised of eight governmental representatives and ten non-governmental representatives. The Board’s primary responsibility is to solicit proposals for funding and award grants that will be used to address “economic development, violence prevention services, re-entry services, youth development, and civil legal aid.”<sup>320</sup>

The Illinois Justice Project (“ILJP”), which helped craft the R3 provisions, notes that the legislation addresses root causes of violence as a mechanism of prevention, yet also that the R3 Program is just one step in the right direction.<sup>321</sup> According to the ILJP,

this law stands for . . . the idea that we’re going to invest in prevention and not just punishment, and that is something that is novel for our state. We will only be successful when every bill we pass speaks with the same voice as this one does. No one piece of legislation can address hundreds of years of systematic oppression and disinvestment, but this law had the intent that we’re going to start the process.<sup>322</sup>

Evaluation of the R3 Program is years away yet other states should consider replication of R3 at the outset because, as noted above, allocating funds at the outset of an expected revenue increase is far more feasible politically than diverting funds that are already flowing into a state.

Massachusetts adopted a more modest—or at least less detailed—approach to using adult-use marijuana revenue to address the needs of the communities impacted by aggressive and disparate enforcement of drug laws. The Massachusetts Marijuana Revenue Fund consists of licensing and registration fees

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317. 410 ILL. COMP. STAT. 705/10-40(c)(1) (2019); *id.* 705/10-40(c)(2) (2019) (stating that the ICJIA must reassess these designations every four years).

318. 410 ILL. COMP. STAT. 705/10-40(e) (2019).

319. *Id.* 705/10-40(e)(2).

320. *Id.* 705/10-40(g)(2).

321. Anna Lee & Sharone Mitchell, *How Illinois Cannabis Law Aim to Reduce Violence and Restore Communities*, CHI. COMMUNITY TR. (July 30, 2019), <https://www.cct.org/2019/07/how-illinois-cannabis-laws-aim-to-reduce-violence-and-restore-communities/>.

322. *Id.*

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from industry, civil penalties issued to those who violate laws regulating the industry, and adult-use marijuana taxes.<sup>323</sup> Funds will be used to administer the adult-use program, with the remainder going to public-health oriented programs. Specifically, the funds will be used for:

(i) public and behavioral health including but not limited to, evidence-based and evidence-informed substance use prevention and treatment and substance use early intervention services in a recurring grant for school districts or community coalitions who operate on the strategic prevention framework or similar structure for youth substance use education and prevention; (ii) public safety; (iii) municipal police training; (iv) the Prevention and Wellness Trust Fund<sup>324</sup> . . . ; and (v) programming for restorative justice, jail diversion, workforce development, industry specific technical assistance, and mentoring services for economically-disadvantaged persons in communities disproportionately impacted by high rates of arrest and incarceration for marijuana offenses . . . .<sup>325</sup>

Where Illinois' law is steeped in detail, Massachusetts' law is devoid of detail on implementation. Without legislative direction, the MCCC created the Citizens Review Committee, a nine-member body comprised of community members, to assist the Commission with the social equity elements of the adult-use law and "make[] specific recommendations as to the use of community reinvestment funds in the areas of programming, restorative justice, jail diversion, workforce development, industry-specific technical assistance, and mentoring services, in areas of disproportionate impact."<sup>326</sup> Unlike in Illinois, the Committee's role is advisory only; the Committee does not have the power to allocate any funds. Perhaps because of the lack of specificity regarding the use of marijuana revenues, the Massachusetts legislature is considering bills that would allocate marijuana tax revenues for specific purposes, such as after-school programs and youth substance abuse prevention.<sup>327</sup> At this time, it is unclear how Massachusetts will use its

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323. MASS. GEN. LAWS ch. 94G, § 14(a) (2020).

324. MASS. GEN. LAWS ch. 111 § 2G(c) (2020) (stating that the Prevention and Wellness Trust Fund is used to "(1) reduce rates of the most prevalent and preventable health conditions, including substance abuse; (2) increase healthy behaviors; (3) increase the adoption of workplace-based wellness or health management programs that result in positive returns on investment for employees and employers; (4) address health disparities; or (5) develop a stronger evidence-base of effective prevention programming").

325. MASS. GEN. LAWS ch. 94G, § 14(b) (2020).

326. 935 MASS. CODE REGS. 500.002 (2019).

327. S.B. 260, 191st Sess. (Mass. 2019) (allocating a portion of the marijuana revenue to support after-school and out-of-school programs); S.B. 1132, 191st Sess. (Mass. 2019) (proposing that marijuana revenue be used to fund youth substance use prevention programs).

community reinvestment funds or whether these funds will be siphoned off through piecemeal legislation.

States considering adoption of adult-use laws with taxation of marijuana and licensure revenue should consider allocating funds to address the decades-long impact of aggressive, disparate enforcement of drug laws in communities of color. While we know little about how the Illinois provisions will ultimately impact the targeted communities, a law allocating the funds for particular purposes to be controlled by a public-private body through a grant process may be more effective than simply creating a fund with little specificity on its use and control solely in the government. Massachusetts legislators are already seeking to use marijuana revenue for various purposes<sup>328</sup> and that trend will likely continue since the Commonwealth's adult-use law and related regulations provide no assurance as to how the revenues will be used. Failure to separate marijuana revenues and create a system to process those funds for public health purposes may result in the use of revenues for purposes unrelated to the harms caused by drug policy in our communities of color. Much like funds from tobacco companies that started to flow into states as a result of the 1998 Master Settlement Agreement, marijuana revenues could be used to balance budgets in times of fiscal crisis<sup>329</sup> or to increase general funds that can be used for any purpose.<sup>330</sup> Creating a fund, establishing a process for use of the funds, and designating a public-private body to allocate the funds may be the better approach for states truly interested in reducing the profound negative impact of drug policy on communities of color. Creating such a fund concurrent with legalizing adult use and imposing a marijuana tax is likely the best approach to making sure those revenues are used effectively.

#### CONCLUSION

The war on drugs has taken an unjust toll on communities of color in this country with its shockingly disparate incarceration rates and the ancillary effects of this practice. As states liberalize their marijuana laws, through medical and recreational programs, efforts are being made to address the injustice of former policies. These efforts are both prospective, the policy efforts to create a more inclusive legal marijuana industry, and retrospective, efforts to reinvest in communities

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328. See MASS. GEN. LAWS ch. 94G (2020).

329. See generally Johnson et al., *Tobacco Securitization & Public Spending*, 6 ALB. GOV'T L. REV., 21 (2013).

330. Matthew L. Myers, *On the 20th Anniversary of the State Tobacco Settlement (The MSA), It's Time for Bold Action to Finish the Fight Against Tobacco*, CAMPAIGN FOR TOBACCO-FREE KIDS (Nov. 26, 2018), [https://www.tobaccofreekids.org/press-releases/2018\\_11\\_26\\_msa20](https://www.tobaccofreekids.org/press-releases/2018_11_26_msa20) ("Over the past 19 years, from Fiscal Year 2000 to FY2018 . . . , the states have spent just 2.6 % of their total tobacco-generated revenue on tobacco prevention and cessation programs."); see also *Broken Promises to Our Children: A State-by-State Look at the 1998 Tobacco Settlement 21 Years Later*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jan. 16, 2020), <https://www.tobaccofreekids.org/what-we-do/us/statereport> (noting that Massachusetts and Illinois are ranked 37th and 35th in use of MSA funding for FY2019).

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disproportionately impacted by the war on drugs. As recently implemented state laws, there is insufficient data regarding which policies are the most effective in achieving the goals of inclusivity and reinvestment and this needs to be studied. However, even without this data, states that are on the cusp of implementing a legal marijuana industry should embrace inclusivity and reinvestment measures from the outset. Once a regulatory system is established, generating the political momentum to implement these measures can be a challenge. Business interests with political influence and community presence may resist the increased administrative responsibilities and costs associated with these policy interventions. Resistance and incomplete data should not be allowed to perpetuate the disproportionate concentration of economic benefit from the legal marijuana industry or the lingering effects of the unjust war on drugs. Every state that has or will liberalize their marijuana laws needs to escape from the shadow of discriminatory drug policies and work towards social justice and inclusion.