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GOING FOR THE GREEN: SOCIAL EQUITY IN THE RECREATIONAL CANNABIS INDUSTRY

*Ben Sheppard**

* Ben Sheppard is a 3L at the George Washington University Law School. I would like to thank Professor Peter Meyers, Michelle Graessle, and Brianna Prislipsky for their editorial help. I would also like to thank Professor Scott Smith and Collin Swan for teaching me the arts of historical and legal research and writing respectively.

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I. INTRODUCTION

In the Summer of 2020, Americans took to the streets to protest the killing of George Floyd and police brutality.¹ In response to these protests, the Colorado legislature passed House Bill 1424.² House Bill 1424 creates social equity cannabis³ licenses for individuals directly impacted by the war on drugs.⁴ Specifically, social equity applicants receive reduced application and licensing fees, mentorship, and grants.⁵

¹ See Diana Novak Jones, *Social Equity Lags Behind Progress in Pot Industry*, LAW360 (Jun. 12, 2020), <https://www.law360.com/articles/1281023/social-equity-lags-behind-progress-in-pot-industry>.

² Diana Novak Jones, *Colorado Gov. Signs Cannabis Social Equity Bill into Law*, LAW360 (Jun. 30, 2020), <https://www.law360.com/articles/1288074/colorado-gov-signs-cannabis-social-equity-bill-into-law>.

³ In this article, I use the term “cannabis” as much as possible, both because of the racial origins of “marijuana” in prohibition campaigns and the more positive connotation “cannabis” has compared to marijuana. Konstantia Koutouki & Katherine Lofts, *Cannabis, Reconciliation, and the Rights of Indigenous Peoples: Prospects and Challenges for Cannabis Legalization in Canada*, 56 ALBERTA L. REV. 709, 710 n.3 (2019); Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY’S J. LEGAL MAL. & ETHICS 6, n.1 (2018); Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, THE GUARDIAN (Jan. 29, 2018), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism>. Where context requires, I use the terms “marijuana” or “marihuana” and they should be considered synonymous with “cannabis.”

⁴ H.B. 20-1424, 72nd Gen. Assemb., 2020 Reg. Sess. (Colo. 2020). Under House Bill 1424, a social equity applicant must demonstrate at least one the following: (1) Reside for at least fifteen years between the years 1980 and 2010 in an opportunity zone or designated as a disparately impacted by the war on drugs; (2) the applicant or the applicant’s parent, legal guardian, sibling, spouse, child, or minor in their guardianship was arrested, convicted, or subjected to civil asset forfeiture for a cannabis offense; or (3) the applicant’s household income does not exceed an amount determined by a state licensing authority. House Bill 20-1424. In addition, the social equity licensee or collectively one or more social equity licensees must hold at least fifty-one percent of the beneficial ownership of the cannabis license. *See id.*

⁵ *Id.*

Colorado Governor Jared Polis formally signed House Bill 1424 into law on June 29, 2020 and will go into effect on January 1, 2021.⁶ Notably, Governor Polis signed House Bill 1424 outside Denver's Simply Pure Dispensary, owned and operated by Wanda James.⁷ James is believed to be America's first black cannabis dispensary owner.⁸

James is just one of many entrepreneurs participating in America's "green rush."⁹ As of 2020, 11 states have legalized recreational cannabis.¹⁰ Approximately 55 million Americans use cannabis regularly.¹¹

⁶ *Id.*; see also Charles Feldmann, *How Colorado Continues to Cultivate Cannabis Equity*, HOBAN LAW GROUP (Jul. 2, 2020), <https://hoban.law/2020/07/how-colorado-continues-to-cultivate-cannabis-equity/>.

⁷ Joey Bunch, *Polis signs social equity bill for Colorado marijuana industry*, COLORADO POLITICS (Jun. 29, 2020), https://www.coloradopolitics.com/legislature/polis-signs-social-equity-bill-for-colorado-marijuana-industry/article_a93b9574-ba5b-11ea-bb74-8b1553a52c63.html.

⁸ Maudlyne Ihejirika, *Nation's 1st African American pot shop owner laments: 'We still need more ownership by black and brown people'*, CHI. SUN TIMES (Jan. 31, 2020), <https://chicago.suntimes.com/cannabis/2020/1/31/21076466/wanda-james-simply-pure-talks-journey-to-nations-1st-black-owned-cannabis-dispensary>. Colorado's state Marijuana Enforcement Department Division's most-recent survey on cannabis business ownership found that eighty-eight percent of Colorado cannabis owners are white. See Thomas Mitchell, *Polis Signs Bill Granting Him Power to Pardon Past Weed Crimes*, WESTWORLD (Jun. 30, 2020), <https://www.westword.com/marijuana/marijuana-pardons-colorado-governor-social-equity-drug-war-11735035>.

⁹ "Green Rush" is a term that refers to the growing American cannabis industry. See Alexis N. Stein, *The Green Rush*, at 5 (Dec. 17, 2019) (unpublished thesis, Coastal Carolina Univ.) (on file with the Coastal Carolina Univ. Digital Commons), <https://digitalcommons.coastal.edu/cgi/viewcontent.cgi?article=1359&context=honors-theses>.

¹⁰ John I. Winn, *When the Going Gets Weird, The Weird Turn Pro: Management Best Practices in the Age of Medicinal Marijuana*, 25 ROGER WILLIAMS UNIV. L. REV. 60, 60-61 (2020). While not discussed in this article, 33 states have legalized medicinal cannabis. See *id.* at 61.

¹¹ See Nick Charles, *Black entrepreneurs struggle to join legal weed industry*, NBC NEWS (Feb. 11, 2020), <https://www.nbcnews.com/news/nbcblk/black-entrepreneurs-struggle-join-legal-weed-industry-n1132351>.

Cannabis' increased societal acceptance promises economic gain. In 2020, the cannabis industry expects growth of 700%.¹² By 2026, the cannabis industry is estimated to be worth \$50 billion.¹³

Unfortunately, despite cannabis' economic potential, white entrepreneurs dominate the cannabis industry – approximately 81% of cannabis business owners and founders are white.¹⁴ This vast disparity is unjust as the war on drugs disparately impacted minorities.¹⁵ Minorities entering the cannabis industry cite various concerns, such as high startup costs and prior drug convictions, that would bar them from receiving state cannabis licenses.¹⁶ In response, states have implemented various social equity programs to encourage minority participation in the burgeoning recreational cannabis industry.¹⁷ While these programs have noble intentions, multiple courts have struck down some of these programs as

¹² Kristen Clarke, *Cannabis industry shouldn't expand until we fix marijuana's racial inequities, injustices*, USA TODAY (Feb. 22, 2019), <https://www.usatoday.com/story/opinion/2019/02/22/marijuana-legalization-exposes-cannabis-industry-racial-injustice-incarceration-minorities-column/2836449002/>.

¹³ *Id.*

¹⁴ Judith Ohikuare, *Can Black Women Do Good & Get Rich In Big Cannabis?*, REFINERY29 (Jun. 22, 2018), <https://www.refinery29.com/en-us/2018/06/195690/black-women-starting-cannabis-businesses>. Comparatively, African Americans are at 4.7%, and Latinos are at 5.7% of cannabis business owners or founders. *See id.*

¹⁵ *See* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) ([Disparate treatment between crack raids by race] makes the war on drugs "look like a war on minorities."); Juan R. Torruella, *Deja Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L. J. 167, 193 (2011) ("One of the most problematic, even if probably unintended, consequences of the "War on Drugs" has been its disparate impact on minorities in this country."); Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443, 443-44 (2001).

¹⁶ Charles, *supra* note 11.

¹⁷ *Id.*

being impermissible racial classifications.¹⁸ In addition, some of these programs do not grant many minorities licenses.¹⁹

This article analyzes the various state social equity programs for minorities in the recreational cannabis industry. Part II examines the history of the war on drugs and its disparate impact on minorities. Part III depicts the various state social equity programs concerning the recreational cannabis industry and considers their Constitutionality. Part IV proposes a state statute that passes Constitutional scrutiny and utilizes the best parts of the various state social equity systems. The proposed statute encourages minority participation in the cannabis industry by offering inexpensive cannabis licenses, giving preference to those directly impacted by the war on drugs, offering mentorship to applicants, and by providing grants to assist in the operation of their cannabis business.

II. THE DRUGS OF WAR

America's history is implanted with cannabis. This section explores American history showcasing cannabis's transition from legality to illegality. In early American history, cannabis was used for both medicinal and industrial purposes.²⁰ This acceptance changed in the early twentieth

¹⁸ *Pure Ohio Wellness, LLC v. State of Ohio Bd. Of Pharmacy*, CVH 20190197, (Ct. Com. Pl. Nov. 04, 2019), <https://clerk.co.madison.oh.us/cgi-bin/imageret.cgi?check=CVCP332620163D9B6520128900&imgext=djvu;>

Pharmacann Ohio, LLC v. Ohio Dept. Commerce, 17 CV 10962, (C.P. Franklin Cty., Ohio Nov. 15, 2018), <https://fcdcfjs.co.franklin.oh.us/CaseInformationOnline/imageLinkProcessor.pdf?coords=SAYLWWJxXPq43vQI9hLajCUAOumWIV0MnJc331YYRaALlmnVZ%2F%2FqF7RjYFUI7bnteVhgs7AsYTuePMj0%2FaLeWLTpnzFIRFOt1KEUYJ%2Fpg3jgy0ojMvtJvMR2ecvKBngPw5Zoq6lk5nhHVA0n5frPdrGDTKGOUJQe4OMZ1X7Ij60%3D>.

¹⁹ Kris Krane, *A Tale of Two Markets: How Illinois Succeeded in Rollout of Adult-Use Cannabis and Why Massachusetts Floundered*, FORBES, (Jan. 21, 2020), <https://www.forbes.com/sites/kriskrane/2020/01/21/a-tale-of-two-markets-how-illinois-succeeded-in-rollout-of-adult-use-cannabis-and-why-massachusetts-failed/#24e272cb3188>.

²⁰ Susan David Dwyer, *The Hemp Controversy: Can Industrial Hemp Save Kentucky*, 86 KY. L.J. 1143, 1157 (1998).

century over xenophobic and racist sentiments.²¹ In the mid-twentieth century, the war on drugs caused destruction in minority communities.²²

a. PEACE BEFORE WAR

For much of American history, cannabis was not illegal.²³ Some scholars believe cannabis plants first came to North America from Asia over 10,000 years ago.²⁴ In 1524, Italian explorer Giovanni da Verrazzano discovered cannabis growing wild in present-day Virginia.²⁵ Some of the earliest uses of American cannabis use date to the Jamestown colony where colonists were ordered to plant hemp, an industrial variant of cannabis.²⁶ Other colonies, like the Massachusetts Bay, Connecticut, and the Chesapeake Bay colonies, had similar orders requiring hemp cultivation.²⁷ Hemp production continued throughout the era and both Thomas Jefferson and George Washington cultivated hemp.²⁸ The 1850 United States census noted 8327 hemp farms of at least 2000 acres each existed within the United States showcasing hemp's common use and cultivation.²⁹

²¹ See David Schlusel, *The Mellow Pot-Smoker: White Individualism in Marijuana Legalization Campaigns*, 105 CAL. L. REV. 885, 895 (2017).

²² *Id.* at 900.

²³ See K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 275 (2005).

²⁴ Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENVTL. L. & LITIG., 119, 120-21 (1996).

²⁵ See generally, Lizaveta Sergeev, *The Analyses of State and Federal Medical Marijuana Laws and How They Apply to Employment*, at 8 (2011) (unpublished thesis, Univ. of Nev. L. V.) (on file with the Digital Scholarship at Univ. of Nev. L.V.), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=2070&context=thesesdissertations>.

²⁶ See Dwyer, *supra* note 20, at 1156, n.102.

²⁷ *Id.*

²⁸ See Florence Shu-Acquaye, *The Role of States in Shaping the Legal Debate on Medical Marijuana*, 42 MITCHELL HAMLINE L. REV. 697, 703 (2016). Benjamin Franklin, James Madison and Alexander Hamilton all extolled hemp's virtues. Christen D. Shepherd, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 239 n.3 (1999).

²⁹ See Dwyer, *supra* note 20, at 1157, n.104.

During that same time period, cannabis use expanded beyond industrial uses. American medical practitioners recognized cannabis's medicinal value.³⁰ Cannabis was used as a treatment for a variety of ailments such as neuralgia, gout, tetanus, stomach pain, cholera, convulsions, and depression.³¹

Cannabis's medicinal uses sparked its earliest regulations in America.³² In the early 20th century, unscrupulous snake oil salesmen marketed "miracle cures" containing odd concoctions of ingredients including cannabis.³³ These "miracle cures" were even marketed to children and could also contain opium and alcohol.³⁴ In response, the federal government passed the Pure Food and Drugs Act of 1906 requiring the labeling of ingredients contained within certain products,³⁵ creating cannabis's first federal regulation.³⁶

b. EARLY BATTLES

The proliferation of these "miracle cures" occurred after America experienced an influx of immigrants and urbanization.³⁷ A number of Mexican immigrants entered the Southwestern United States after the Mexican Revolution of 1910 bringing with them their native customs including recreational cannabis use.³⁸ During this time, cannabis use

³⁰ See Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 792 (2019).

³¹ See Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 420-21 (2011).

³² Vitiello, *supra* note 30, at 794.

³³ Lakshmi Gandhi, *A History of "Snake Oil Salesmen,"* NPR (Aug. 26, 2013), <https://www.npr.org/sections/codeswitch/2013/08/26/215761377/a-history-of-snake-oil-salesmen>.

³⁴ Vitiello *supra* note 30, at 793.

³⁵ Pure Food and Drugs Act, ch. 3915, 34 Stat. 768 (1906); Vitiello *supra* note 30, at 794.

³⁶ See *United States v. Taylor*, 2014 U.S. Dist. LEXIS 136669, at *6 (W.D. Mich. Sept. 8, 2014).

³⁷ See Michael F. Linden, *Seeing Through the Smoke: The Origins of Marijuana Prohibition in the United States*, at 15 (Apr. 2015) (unpublished thesis, Wesleyan Univ.) (on file with Digital Collections at Wesleyan Univ.), https://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=2464&context=etd_hon_theses.

³⁸ Berkey, *supra* note 31, at 421.

remained a local concern with little outcry.³⁹ The earliest incident of a racial cannabis scare dates back to 1913 in El Paso, Texas.⁴⁰ That incident involved a Mexican man supposedly high on cannabis who chased a couple, stabbed a team of horses, killed a police officer, and wounded another police officer.⁴¹ Police stated the man, who they referred to as a “fiend” had been smoking cannabis all day.⁴² In response to the incident, El Paso became the first city in the United States to pass an ordinance banning cannabis in 1914.⁴³

Localities justified cannabis prohibitions with racism and xenophobia.⁴⁴ Supporters of cannabis bans often used racist language in calling for bans.⁴⁵ California and Texas officials

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ Trish Long, *1915: El Paso becomes first city in United States to outlaw marijuana*, EL PASO TIMES (Nov. 14, 2019), <https://www.elpasotimes.com/story/news/2019/11/14/el-paso-history-pot-possession-first-city-outlaw-weed-tbt/2579079001/>.

⁴² *Id.*

⁴³ Elena Quattrone, *The "Catch-22" of Marijuana Legalization*, 22 B.U.J. SCI. & TECH. L. 299, 307 (2016).

⁴⁴ *See United States v. Bannister*, 786 F. Supp. 2d 617, 646 (E.D.N.Y. 2011) (“[A] series of drug prohibitions in American history [were] prompted in part by fears of and distaste for distinct ethnic or racial minority groups.”); Sandra M. Praxmarer, Note, *Blazing a New Trail: Using a Federalism Standard of Review in Marijuana Cases*, 85 GEO. WASH. L. REV. ARGUENDO 25, 33 (2017).

⁴⁵ *See e.g.* Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1342 (2016) (“When some beet-field peon takes a few puffs of [cannabis], he thinks he has just been elected president of Mexico, so he starts out to execute all his political enemies.”); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 399 (2019) (“All Mexicans are crazy, and this [cannabis] makes them crazy.”). In New Orleans, newspaper articles associated cannabis with African Americans, jazz musicians and underworld whites. One critic stated, “The dominant race and most enlightened countries are alcoholic,” the critic continued, “whilst the races and nations addicted to hemp . . . have deteriorated both mentally and physically.” ERIC SCHLOSSER REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 19 (2003). In the 19th century opium bans were also justified on racist sentiments against the Chinese. *See e.g. Ex parte Yung Jon*, 28 F. 308, 312 (D. Ore. 1886) (“[The Opium den ban] proceeds more from a desire to vex and annoy the ‘Heathen Chinees’[sic] . . . than to protect the people from the evil habit.”).

told the public that cannabis caused Mexican immigrants to become violent and that Mexican immigrants distributed cannabis to children.⁴⁶ In the South, anti-cannabis crusaders claimed that the drug made African Americans violent and called for bans.⁴⁷ The resilience of these dubious claims gained public acceptance based on white fears over new immigrants and economic anxieties over job loss from new immigrants.⁴⁸ By 1933, thirty-four states outlawed recreational cannabis use though cannabis remained legal federally.⁴⁹

The federal government's involvement in cannabis regulation stemmed from the efforts of Harry J. Anslinger, the Commissioner of the Federal Bureau of Narcotics.⁵⁰ During his early years at the Federal Bureau, Anslinger dismissed the idea that cannabis caused violence or harmed its users.⁵¹ Some commentators suggest Anslinger changed his beliefs about cannabis out of job security concerns after alcohol prohibition

⁴⁶ See Schlüssel, *supra* note 21 at 895-96; see also SCHLOSSER, *supra* note 45, at 19.

⁴⁷ Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016). Cannabis opponents also claimed the substance caused white women to be seduced by African American men. *Id.* Racist language like this is still used today. See Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color through a Prosecution Lens*, 71 ME. L. REV. 227, 229 (2018). For example, in 2016, Maine Governor Paul LePage stated "These are guys by the name D-Money, Smoothie, Shifty – these types of guys that come from Connecticut and New York; they come up here, they sell their heroin, then they go back home. Incidentally, half the time they impregnate a young, white girl before they leave. Which is a real sad thing because then we have another issue that we have to deal with down the road." See MICHAEL T. SOLOMON WHERE HAVE ALL THE BLACK PEOPLE GONE?: THE PARADOX OF RACE, CULTURE, AND POLITICS IN THE SHADOW OF BARACK OBAMA 93-94 (2019).

⁴⁸ Thomas J. Moran, Note, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How it Might Affect Racial and Ethnic Minorities*, 17 WASH. & LEE J.C.R. & SOC. JUST. 557, 561 (2015).

⁴⁹ Schlüssel, *supra* note 21, at 896.

⁵⁰ See Quattrone, *supra* note 43, at 306-07.

⁵¹ Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 682 (2009).

ended.⁵² Anslinger made explicitly racist appeals when urging for cannabis prohibition claiming cannabis caused violence, insanity, suicidal thoughts, and sexual promiscuity.⁵³ Anslinger's supposed "scientific evidence" showing negative effects of cannabis was fabricated.⁵⁴ These racist appeals eventually earned Congress's attention.⁵⁵ In 1937, Anslinger testified before Congress and told fictitious stories that cannabis led two individuals high on cannabis to kill a police officer in Chicago, that cannabis was a gateway drug to heroine, and that two African-American men impregnated a white college student because the men were high on cannabis.⁵⁶

In response to Anslinger's testimony, Congress passed the Marihuana Tax Act of 1937 ("MTA") representing the federal government's first federal law meant to discourage cannabis use.⁵⁷ The MTA did not outlaw cannabis,⁵⁸ but it was

⁵² Craig Brand, *USA: Protecting Unnecessary Federal Drug War Budgets & Pharmaceutical Hegemony: Sessions Resurrects the Ghost of Anslinger*, CANNABIS L.J., <https://journal.cannabislaw.report/usa-protecting-unnecessary-federal-drug-war-budgets-pharmaceutical-hegemony-sessions-resurrects-the-ghost-of-anslinger/>.

⁵³ RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 4-9* (2004). For example, Anslinger once stated that "reefer makes darkies think they're as good as white men," (quoting Matthew J. Routh, *Re-Thinking Liberty: Cannabis Prohibition and Substantive Due Process*, 26 KAN. J.L. & PUB. POL'Y 143, 145 (2017)). Other racist quotations from Anslinger are readily available. See JEFF DITCHFIELD & MEL THOMAS, *THE MEDICAL CANNABIS GUIDEBOOK 17-19* (2014), https://saltonverde.com/wp-content/uploads/2017/09/14-The_Medical_Cannabis_Guidebook.pdf.

⁵⁴ GERBER, *supra* note 53, at 6.

⁵⁵ See Schlusell, *supra* note 21, at 897.

⁵⁶ GERBER, *supra* note 53, at 10-11.

⁵⁷ 26 U.S.C. § 4741 (1964), *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. III, § I 101(b)(3)(A), 84 Stat. 1292; Christine A. Kolosov, Comment, *Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act*, 57 UCLA L. REV. 237, 245 (2009).

⁵⁸ See *Leary v. United States*, 395 U.S. 6, 21 (1969); Kasey C. Phillips, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 CHAP. L. REV. 645, 654 (2010).

so burdensome both financially and procedurally that it made compliance virtually impossible.⁵⁹

In the 1950s, Congress again, at the urging of Anslinger, enacted the 1951 Boggs Act and the 1956 Narcotics Control Act, which in conjunction increased criminal penalties and established mandatory minimums for cannabis possession.⁶⁰

c. TOTAL WAR AND ITS COSTS

Anslinger's early efforts laid the groundwork for the total war on drugs waged by later presidential administrations. President Richard Nixon started ramping up the war on drugs.⁶¹ Nixon was elected president by tapping into white anxieties about race, civil rights, and domestic unrest by calling for "law and order."⁶² The war on drugs encompassed Nixon's broader "law and order" strategy.⁶³ Nixon promised a total war on drugs stating, "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."⁶⁴ Years later, former Nixon advisor John Ehrlichman revealed that Nixon's war on drugs specifically targeted Nixon's political enemies including the minority community.⁶⁵

⁵⁹ See *Seeley v. State*, 940 P.2d 604, 614 n.10 (Wash. 1997) (Sanders, J., dissenting) (describing the MTA as so burdensome both financially and procedurally that it virtually eliminated any legal medical, industrial, or recreational use of cannabis.). The MTA was ultimately held to be unconstitutional as it violated the Fifth Amendment's guarantee against self-incrimination. See *Leary*, 395 U.S. at 37.

⁶⁰ See Cynthia Brown, *Beyond the Money: Expected (and unexpected) Consequences of America's War on Drugs*, 4 LINCOLN MEM'L U. L. REV. 118, 134-36 (2017).

⁶¹ See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005); Alfred W. McCoy, *From Free Trade to Prohibition, A Critical History of the Modern Asian Opium Trade*, 28 FORDHAM URB. L.J. 307, 330 (2000).

⁶² *Schlüssel*, *supra* note 21, at 898.

⁶³ See *id.*

⁶⁴ President Richard M. Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, (Jun. 17, 1971), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control>.

⁶⁵ Ira P. Robbins, *Guns N' Ganja: How Federalism Criminalizes the Lawful Use of Marijuana*, 51 U.C. DAVIS L. REV. 1783, 1808-09 (2018); Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted*

Nixon's efforts led to the creation of the Controlled Substances Act ("CSA").⁶⁶ Cannabis is classified as a Schedule I drug under the CSA.⁶⁷ This classification is significant. As a Schedule I drug, cannabis is deemed to have no medicinal value and all uses are strictly prohibited.⁶⁸ This prohibition federally criminalizes the manufacturing, distribution, or possession of any amount of cannabis.⁶⁹ The CSA laid the groundwork for an even larger war on drugs that launched in the 1980s.⁷⁰

In the 1980s, the Reagan administration ratcheted up the war on drugs and increased criminal penalties for drug offenses, along with massively expanding the drug enforcement budget.⁷¹ As President Ronald Reagan increased funds to wage the war on drugs, he slashed funds for drug treatment and education.⁷² Reagan's successor, George H.W. Bush, continued the Reagan administration's anti-drug

Blacks, Hippies, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html>.

⁶⁶ See Quattrone, *supra* note 43, at 302.

⁶⁷ The Controlled Substance Act, 21 U.S.C. § 812(b)(1) (2012). Cannabis remains at a Schedule I classification alongside heroine and LSD. See Grant M. Hamel, Comment, *Waiting for the Waitlist: The Case for State Protection of Medical Marijuana Users Against Denial of Organ Transplant*, 49 U. TOL. L. REV. 115, 128 (2017). Many cannabis proponents point out that cocaine is classified as a Schedule II drug despite killing over 4,000 Americans a year. Anastasia Hautanen, *Seeing through the Haze: Navigating Veteran Employment Rights in Government Contracting, Medical Marijuana, and the Drug-Free Workplace Act of 1988*, 49 PUB. CONT. L.J. 371, 377-78 (2020). By contrast, cannabis has no reported deaths directly related to substance use. *Id.* at 378.

⁶⁸ 21 U.S.C. § 812(b)(1) (2012).

⁶⁹ See 21 U.S.C. § 841(a)(1) (2012).

⁷⁰ See Vitiello, *supra* note 30, at 804.

⁷¹ IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 51-52 (2013) (describing how during Reagan's first term an increase in anti-drug funds at the FBI from \$ 38 million to \$ 181 million; and an increase in the Drug Enforcement Agency budget from \$ 86 million to \$ 1 billion).

⁷² Schlüssel, *supra* note 21, at 899.

policies.⁷³ Bush increased anti-drug enforcement spending,⁷⁴ and appointed William Bennett as “drug czar” who advocated for the death penalty for drug dealers.⁷⁵

Journalists and Democrats acquiesced to Reagan’s and Bush’s scorched-earth drug war policies giving the total war bipartisan support.⁷⁶ This bipartisan support continued when Democratic President Bill Clinton, escalated the war on drugs by pushing “three strike laws” and signing a \$30 billion funding “law and order” bill for prisons and police agencies.⁷⁷

d. THE DEVASTATING EFFECTS OF TOTAL WAR

The bipartisan and devastating policies of the war on drugs live with us today.⁷⁸ Even as overall drug arrests started to decline in 2006, cannabis arrests accelerated and were more than half of all drug arrests by 2010.⁷⁹ Approximately 88% of cannabis arrests are for unlawful possession rather than trafficking in drugs.⁸⁰ Despite similar cannabis usage among

⁷³ Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or “Why the War on Drugs” Was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 387 (2002).

⁷⁴ Bush’s drug war budget in 1991 was \$ 10 billion and constituted a 62% increase over the 1989 budget. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution, and the Black Community*, 24 U.C. DAVIS L. REV. 557, 567 (1991).

⁷⁵ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36 n.4 (1998).

⁷⁶ See, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 52-55 (2010).

⁷⁷ Schluskel, *supra* note 21, at 899-900. More than three times as many people were arrested for cannabis while Bill Clinton was President than Richard Nixon. SCHLOSSER, *supra* note 45, at 48-49.

⁷⁸ See Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 SOC. JUST. & EQUITY L.J. 205, 225 (2019).

⁷⁹ AM. C.L. UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 36-37 (2013).

⁸⁰ Bender, *supra* note 47, 691 n*12.

racial groups,⁸¹ minorities are more likely to be arrested,⁸² prosecuted,⁸³ and face incarceration from judges⁸⁴ than white offenders.⁸⁵ These factors place many non-violent minority drug offenders in prison.⁸⁶

The war on drugs greatly contributed to both mass incarceration and the racialization of American prisons.⁸⁷ In less than thirty years, the American prison population spiked from 300,000 to more than 2 million largely from drug convictions.⁸⁸ Drug convictions account for two-thirds of the rise in federal inmate population.⁸⁹ Minorities make up sixty percent of the American prison population while whites account for only thirty-nine percent.⁹⁰

⁸¹ Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 182 n. 122 (2013).

⁸² AM. C.L. UNION, *supra* note 79, at 17–20; Blacks are three times more likely to be arrested for drug offenses and nearly ten more likely to be imprisoned for a drug offense than whites. Baradaran, *supra* note 81, at 200. Other studies show black drivers are more likely to be stopped by police than other racial groups, despite blacks having a lower probability of carrying large amounts of drugs than other racial groups. See Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1113, 1132–35 (2005).

⁸³ See Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America's Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 336 (2010).

⁸⁴ See Baradaran, *supra* note 81, at 165–66.

⁸⁵ See generally, Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 249–55 (2020)

⁸⁶ See Swinburne, & Hoke, *supra* note 85 at 250–53.

⁸⁷ See Gene Taras, Note, *High Time for Change: How Legalizing Marijuana Could Help Narrow the Racial Divide in the United States*, 24 CARDOZO J. INT'L & COMP. L. 565, 572 (2016).

⁸⁸ ALEXANDER, *supra* note 76, at 6.

⁸⁹ *Id.* at 59.

⁹⁰ Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CENTER FOR AMERICAN PROGRESS, (June. 28, 2015),

<https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>.

Incarceration scars former offenders. A drug conviction brings people into the criminal justice system where they face prosecution, jail time, and a conviction that will remain on their record, often without specifying the nature of the drug offense.⁹¹ Convictions impact many areas of life such as child custody disputes, immigration, voting rights, public housing, Supplemental Nutrition Assistance Program (“SNAP”) benefits, financial aid for secondary education, sentencing for future offenses, and employment.⁹² As many Americans live everyday with these scars from the war on drugs, state legalization of cannabis shows signs of hope.

III. STATE LEGALIZATION AND SOCIAL EQUITY

As of 2020, eleven states have legalized recreational cannabis use.⁹³ This trend in legalization promises cannabis entrepreneurs plentiful business opportunities.⁹⁴ Despite the disparate racial impact of the war on drugs, the American cannabis industry is dominated by white men.⁹⁵ Several factors cause this disparity, including financial assets, criminal records, and concerns about cannabis’s legality.⁹⁶ To combat this disparity, some states have created social equity programs encouraging minority participation in the recreational cannabis industry.⁹⁷ Various accommodation systems have been challenged by opponents over the years on both Constitutional and effectiveness grounds.⁹⁸

a. STATE LEGALIZATION AND THE GREEN RUSH

The long journey to cannabis legalization began in 1996 when voters in Arizona and California legalized medicinal

⁹¹ Schlüssel, *supra* note 21, at 900.

⁹² Schlüssel, *supra* note 21, at 900; Vitiello, *supra* note 30, at 806-07.

⁹³ Winn, *supra* note 10, at 61-62.

⁹⁴ See Bender, *supra* note 47, at 695.

⁹⁵ *United States v. Rodriguez*, 147 F. Supp. 3d 1278, 1293 (D.N.M. 2015).

⁹⁶ Bender, *supra* note 47, at 696-97.

⁹⁷ Krane, *supra* note 19.

⁹⁸ See Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55 (2016).

cannabis.⁹⁹ In 2012, Colorado and Washington became the first states to legalize recreational cannabis.¹⁰⁰ Early cannabis legalization campaigns relied on various policy arguments that cannabis legalization would: (1) increase state government tax revenue, (2) lower government spending on cannabis enforcement, (3) increase privacy rights, and (4) improve public health.¹⁰¹ Early campaigns rarely focused on the disparate impact of the war on drugs on minority communities.¹⁰² Instead, some campaigns used subtle racial dog whistles appealing to white anxieties.¹⁰³ For example, one ad in Colorado contained a voice-over saying “Let’s vote for the good guys and against the bad guys. Let’s have marijuana tax money go to our schools rather than criminals in Mexico.”¹⁰⁴ These early campaigns ignored the racial injustices of the drug war.¹⁰⁵

This avoidance changed when Washington, D.C. prominently used racial justice messaging in their successful cannabis legalization campaign.¹⁰⁶ The D.C. campaign website’s slogan was “Legalization Ends Discrimination,”¹⁰⁷ and their website noted that “billions of dollars [were] wasted on racially

⁹⁹ *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 116 n.1 (D.D.C. 2001) (“Arizona and California voters approved medical marijuana laws in 1996.”); Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHOENIX L. REV. 415, 430 (2012). Arizona’s medicinal cannabis law was voided because of a language technicality in the statute. See Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 308 (2019).

¹⁰⁰ See Melanie Reid, *The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M. L. REV. 169, 177 (2014).

¹⁰¹ Schlusssel, *supra* note 21, at 905-06.

¹⁰² Bender, *supra* note 47, at 693.

¹⁰³ Schlusssel, *supra* note 21, at 909.

¹⁰⁴ Colorado Marijuana Initiative 2012, *Yes on 64 TV Ad – “Vote for Colorado,”* YOUTUBE (Oct. 6, 2012), <https://www.youtube.com/watch?v=1KAOq7XX2OY>.

¹⁰⁵ See Schlusssel, *supra* note 21, at 886-87.

¹⁰⁶ Bender, *supra* note 47, at 694.

¹⁰⁷ DCMJ, *Legalize. Legalization Ends Discrimination.* (photograph), FACEBOOK (Nov. 10, 2014), <https://www.facebook.com/dcmj2014/photos/pb.405634282868085.-2207520000.1462594391./679469155484595>.

biased arrests.”¹⁰⁸ Subsequently, both California’s and Massachusetts’s successful legalization campaigns prominently featured racial justice arguments.¹⁰⁹ In California’s legalization campaign, organizers aired ads highlighting racial inequality in the war on drugs.¹¹⁰ One ad, narrated by Jay-Z, stated “[T]he war on drugs exploded the U.S. prison population disproportionality, locking away blacks and Latinos.”¹¹¹ Like California, Massachusetts also used racial justice messaging in their legalization campaign.¹¹² Massachusetts’s cannabis legalization website reads, “Too often young people and people of color can’t find a job or take care of their families because they have a petty arrest record for possessing marijuana.”¹¹³ The website also highlighted the racial disparity of the drug war. “In Massachusetts, people of color are three times more likely to be arrested for marijuana possession.”¹¹⁴ These campaigns show that racial justice is a growing reason that voters legalize cannabis.

While some jurisdictions have highlighted racial justice in their campaigns the benefits of cannabis legalization have stark racial disparities. In the states that have legalized cannabis it is taxed heavily (in Washington, for example, the effective tax rate on cannabis is 46%).¹¹⁵ Cannabis’s taxation scheme is regressive, imposing steep costs on less affluent users.¹¹⁶ This steep tax leads buyers of color to turn to still illegal channels in the cannabis market, perpetuating drug arrests and incarceration.¹¹⁷

¹⁰⁸ *About*, DCMJ, <http://dcmj.org/about> (last visited Mar. 07, 2020).

¹⁰⁹ *Schlüssel*, *supra* note 21, at 917.

¹¹⁰ *Id.*

¹¹¹ *Jay Z - The War on Drugs: From Prohibition to Gold Rush | Yes on 64*, YOUTUBE (Oct. 18, 2016), <https://www.youtube.com/watch?v=eI5mE5PBGJg>.

¹¹² *Schlüssel*, *supra* note 21, at 918.

¹¹³ *Why Vote YES on Question 4?, Yes on 4: Regulate Mass.*, <https://www.regulatemassachusetts.org/yeson4> [<https://perma.cc/M3LV-89T3>] (last visited Mar. 07, 2020).

¹¹⁴ *Id.*

¹¹⁵ *See* Bernie Becker, *Cannabis was supposed to be a tax windfall for states. The reality has been different.*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/marijuana-tax-revenue-001062>.

¹¹⁶ *Vitiello*, *supra* note 30, at 818.

¹¹⁷ *Bender*, *supra* note 47, at 699-700.

The continued perpetuation of drug convictions continues to lock out minorities from the recreational cannabis industry. State policies vary in granting recreational cannabis licenses to a person with a felony conviction.¹¹⁸ Alaska, Colorado, Maine, and Nevada forbid granting a license to someone with a felony conviction.¹¹⁹ Colorado and Maine have time limits on the offense.¹²⁰ Colorado only considers felony offenses in the past five years and Maine considers disqualifying drug offenses in the past ten years.¹²¹

The next category of jurisdictions takes a holistic view of an applicant. In both Oregon and Washington, a drug offense is not disqualifying but is considered in granting the license.¹²² California forbids all felony offenses except for drug-related felony convictions for cannabis.¹²³ In excluding cannabis offenses, the California legislature intended to address “racially, ethnically, and economically diverse populations.”¹²⁴ The final category of jurisdictions add additional points towards an application for an applicant convicted of a prior drug offense. The only jurisdictions in this category are Illinois, Massachusetts, and Michigan.¹²⁵

¹¹⁸ Maya Rahwanji, “Hash”ing Out Inequality in the Legal Recreational Cannabis Industry, 39 N.W. J. INT’L L. & BUS. 340-41 (2019).

¹¹⁹ ALASKA STAT. ANN. § 17.38.200(i) (2019); COLO. REV. STAT. § 12-43.4-306(g)(I)-(II) (2016); 7 ME. REV. STAT. ANN. § 2447(1)(B) (2017); NEV. REV. STAT. c.453D.210(f)(1)-(2) (2017).

¹²⁰ Rahwanji, *supra* note 118, at 342.

¹²¹ COLO. REV. STAT. § 12-43.4-306(g)(I)-(II) (2016); 7 ME. REV. STAT. ANN. § 2447(1)(B) (2017).

¹²² OR. REV. STAT. § 475B.045(3) (2017); WASH. REV. CODE 314-55-040(1)-(3) (2017). Despite this holistic review the state cannabis commission sometimes is harsh when reviewing applications. See Haines-Marchel v. Wash. State Liquor & Cannabis Bd., 406 P.3d 1199 (Wash. Ct. App. 2017) (upholding state cannabis commission’s denial of recreational cannabis license because applicant’s spouse was an incarcerated felon).

¹²³ CAL. HEALTH & SAFETY CODE §§ 11370.4, 11054 (2017).

¹²⁴ S.B. 94, 2017-2018 Reg. Sess. (Cal. 2017).

¹²⁵ MICH. COMP. LAWS SERV. § 333.27958(1)(j) (LexisNexis 2018); 410 ILL. COMP. STAT. ANN. 130 / 115 (West 2020); MASS. GEN. LAWS ch. 94G § 5(b)(4) (2016). Illinois has gone further and is in the process of expunging the criminal records of 800,000 people convicted of purchasing or possessing 30 grams or less of marijuana. See John O’Connor, *800,000 Eligible to Clear Their Record in Illinois Legal Pot*,

Even if an applicant lacks a criminal record or has their record expunged, minorities still face financial barriers for entry into the cannabis industry. Entering the cannabis industry comes with costs that other businesses don't face.¹²⁶ Application fees for obtaining a license to sell cannabis can be as high as \$200,000 and in some states the application fee is nonrefundable.¹²⁷

If an applicant is granted a license, running a cannabis business has unique costs. Cannabis as a commodity requires specialized legal work because it is highly regulated.¹²⁸ The costs of an attorney for a cannabis business owner can reach \$50,000 annually.¹²⁹ A cannabis business owner often must invest additional money in security such as camera feeds, complex security systems, and armed-guards for protection.¹³⁰

These added costs are because cannabis remains largely a cash-only business.¹³¹ Major credit card companies prohibit using their cards for cannabis purposes because cannabis is still federally illegal.¹³² An estimated 70% of cannabis businesses have no relationships with financial institutions and solely use cash for all business transactions.¹³³ This model places cannabis

U.S. NEWS & WORLD REPORT, (Jun. 26, 2019),
<https://www.usnews.com/news/best-states/illinois/articles/2019-06-26/marijuana-legalization-allows-criminal-record-clearing>.

¹²⁶ Nick Kovacevich, *The Hidden Costs of The Cannabis Business*, FORBES, (Feb. 1, 2019),

<https://www.forbes.com/sites/nickkovacevich/2019/02/01/the-hidden-costs-of-the-cannabis-business/#33922b727da3>.

¹²⁷ *Id.*

¹²⁸ Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 904 (2013).

¹²⁹ Kovacevich, *supra note* 126.

¹³⁰ See Rachel Cheasty Sanders, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN. ST. L. REV. 281, 299 n. 145 (2015).

¹³¹ *Id.* at 298.

¹³² Gabriel J. Greenbaum, Note, *What to Do with All This Green: Using Casino Regulations as a Model for Cannabis Industry Banking*, 58 WASHBURN L.J. 217, 223 n.50 (2019).

¹³³ Stuart Leavenworth, *When does too much cash become a health risk? When you own a marijuana shop*, MCCLATCHY DC (Feb. 7, 2018),
<https://www.mcclatchydc.com/news/nation-world/national/article198941964.html>.

businesses at a heightened risk of robbery and other types of violent crimes.¹³⁴

Participation in the cannabis industry requires substantial capital resources that many minority Americans do not have and are unlikely to acquire.¹³⁵ A widening racial wealth gap exists in America.¹³⁶ One analysis in 2011, found the average white household wealth was \$111,146.00, the average Latino household was \$8,348, and the average Black household wealth was \$7,113.¹³⁷ The high capital requirements alongside racial wealth disparities are a factor in low minority participation in the recreational cannabis industry.¹³⁸

Despite these many obstacles for minorities, the cannabis industry offers economic prosperity.¹³⁹ By 2021, expected spending on legal cannabis will be \$14.9 billion and research estimates a 25% compound growth rate from 2016 to 2021.¹⁴⁰ That success also reaches employees- as of 2019, 211,000 full-time jobs in America came from the legal cannabis industry.¹⁴¹ White entrepreneurs enjoy a greater share of this

¹³⁴ Katherine P. Franck, Note, *Cannabis Reform: High on the Banking Agenda*, 24 N.C. BANKING INST. 165, 173 (2020).

¹³⁵ Karen Mawdsley et al., *Experts: Minorities Struggle for Footing in Lucrative Cannabis Industry*, NEWS21 (Aug. 15, 2015), <http://weedrush.news21.com/experts-minorities-struggle-for-footing-in-lucrative-cannabis-industry>.

¹³⁶ LAURA SULLIVAN ET. AL., *THE RACIAL WEALTH GAP: WHY POLICY MATTERS* 5 (2015), <https://iasp.brandeis.edu/pdfs/2015/RWA.pdf>.

¹³⁷ *Id.* at 5.

¹³⁸ See generally, Elizabeth Danquah-Brobby, Comment, *Prison for You. Profit for Me. Systemic Racism Effectively Bars Blacks from Participation in Newly-Legal Marijuana Industry*, 46 U. BALT. L. REV. 523, 539 (2017).

¹³⁹ See The Arcview Group, *The State of Legal Marijuana Markets, 5th Ed., Executive Summary*, https://arcviewgroup.com/documents/report/5thedition/es/executive-summary_the-state-of-legal-marijuana-markets_5th-edition_22qxqmRQPyp7R.pdf.

¹⁴⁰ See *id.*

¹⁴¹ Bruce Barcott, *As of 2019, legal cannabis has created 211,000 full-time jobs in America*, LEAFLY (Mar. 4, 2019), <https://www.leafly.com/news/industry/legal-cannabis-jobs-report-2019>.

prosperity as only an estimated 17% of self-identified cannabis senior executives, owners or founders are minorities.¹⁴²

b. STATE SOCIAL EQUITY SYSTEMS

In attempting to remedy the cannabis industry's racial disparities and the disparate impact of the war on drugs, some states have implemented social equity systems for minorities in the cannabis industry.¹⁴³ Among the states that have legalized recreational cannabis, only five utilize social equity systems.¹⁴⁴ These states are: California, Illinois, Massachusetts, Michigan, and Washington.¹⁴⁵ State social equity systems vary in these states.¹⁴⁶ California's social equity system focuses on assisting municipalities with their respective systems instead of a blanket

¹⁴² Meera Jagannathan, *People of color are reclaiming their place in a cannabis industry 'built on the backs of people from marginalized communities,'* MARKETWATCH (Nov. 12, 2019), <https://www.marketwatch.com/story/people-of-color-are-reclaiming-their-place-in-a-cannabis-industry-built-on-the-backs-of-people-from-marginalized-communities-2019-08-05>.

¹⁴³ Kayla Siam, *Social Equity Programs in Cannabis – Worth their Weight?*, SEYFARTH, (Feb. 27, 2020), <https://www.bluntruthlaw.com/2020/02/social-equity-programs-in-cannabis-worth-their-weight/>. Maryland and Pennsylvania also provide social equity programs for minorities seeking to enter the medicinal cannabis market. In Maryland, the state must consider racial, ethnic, gender, and geographic diversity when awarding licenses. MD. CODE ANN., HEALTH-GEN. § 13-3306(9)(i) (2020). In Pennsylvania, applicants who submit a diversity plan are giving additional points on their application. 35 PA. CONS. STAT. § 10231.615(b)(3) (2020); Medical Marijuana Permit Application, at http://www.health.state.pa.us/mmrtk/docs-dispensaries/D-2018-17_Redacted.pdf (last visited May 31, 2020). Factors considered include diversity in the principals, operators, and employers. Diverse groups included are women, veterans, service-disabled veterans, and racial minorities. These states are not discussed further because they only apply for state medicinal cannabis licenses.

¹⁴⁴ See *infra Id.*

¹⁴⁵ CAL. BUS. & PROF. § 26244 (2019), MICH. COMP. LAWS SERV. § 333.27958 (2018); 410 ILL. COMP. STAT. ANN. 130 / 115(a-5) (West 2020); MD. CODE ANN., HEALTH-GEN. § 13-3306(9)(i) (2020); MASS. GEN. LAWS ANN. ch. 94G, § 4 (West 2019); 35 PA. CONS. STAT. § 10231.615 (2020); H.B. 2870, 2020 Reg. Sess. (Wash. 2020).

¹⁴⁶ Siam, *supra* note at 143.

statewide system.¹⁴⁷ Washington awards social equity applicants forfeited, canceled, revoked or otherwise unissued recreational cannabis licenses.¹⁴⁸ The states of Illinois, Massachusetts, and Michigan provide social equity programs for communities disproportionality impacted by the war on drugs.¹⁴⁹ While Oklahoma does not have a social equity system the state allows for an unlimited number of medicinal cannabis licensees and has low application fees which has created a diverse industry.¹⁵⁰

California does not have a statewide social equity provision but instead assists municipalities in administering their social equity programs.¹⁵¹ The California Cannabis Bureau considers the effectiveness of the local jurisdiction's program at remedying the disparate impact of cannabis arrests and convictions on certain communities.¹⁵² In 2020, California awarded twelve jurisdictions \$30,000,000 to assist in their local social equity programs.¹⁵³ California's social equity program is unique from other states as it merely provides grants and assistance to municipalities without creating a blanket social equity program for the entire state.¹⁵⁴

By contrast, Washington's state social equity program is state-wide and applies to unused cannabis licenses.¹⁵⁵ To qualify, the applicant must come from a disparately impacted

¹⁴⁷ CAL. BUS. & PROF. § 26244 (2019).

¹⁴⁸ H.B. 2870, 2020 Reg. Sess. (Wash. 2020).

¹⁴⁹ 410 ILL. COMP. STAT. ANN. 130 / 115(a-5) (West 2020); MASS. GEN. LAWS ANN. ch. 94G, § 4 (West 2019); MICH. COMP. LAWS SERV. § 333.27958 (2018); Equity Programs, <https://mass-cannabis-control.com/equityprograms-2/#tab-id-2> (hereafter Massachusetts Social Equity Program).

¹⁵⁰ Siam, *supra* note 143.

¹⁵¹ CAL. BUS. & PROF. § 26244 (2019).

¹⁵² CAL. BUS. & PROF. § 26244(3) (2019).

¹⁵³ Compton Herald, *Governor trumpets \$30 million in grant funding*, (Apr. 24, 2020), <https://comptonherald.org/governor-trumpets-30-million-grants/>.

¹⁵⁴ See Eli McVey, *Chart: Not all states' cannabis social equity programs are equal*, MARIJUANA BUSINESS DAILY (Aug. 20, 2019), <https://mjbizdaily.com/chart-not-all-states-cannabis-social-equity-programs-are-equal/>.

¹⁵⁵ See Alison Malsbury, *Washington Cannabis Finally Adopts a Social Equity Program*, HARRIS BRICKEN (Apr. 9, 2020), <https://harrisbricken.com/cannalawblog/washington-cannabis-finally-adopts-a-social-equity-program/>.

area determined based on poverty and drug conviction rates.¹⁵⁶ The applicant must also submit a social equity plan on how they intend to achieve equity goals.¹⁵⁷ The program only applies for licenses that were forfeited, canceled, revoked or otherwise unissued instead of all cannabis licenses.¹⁵⁸ Nonetheless, the applications are relatively inexpensive, costing \$1,480 with an application fee of \$250.¹⁵⁹

The states of Illinois, Massachusetts, and Michigan have enacted state-wide laws to promote opportunities for communities or individuals disparately impacted by the war on drugs that impact *all* cannabis licenses.¹⁶⁰ Massachusetts's cannabis laws require their cannabis commission to promote policies that encourage participation by communities disproportionality harmed by the war on drugs.¹⁶¹ To achieve these goals the Massachusetts Cannabis Commission provides professional training, technical assistance, and mentoring for those who qualify as social equity applicants.¹⁶² To qualify for the social equity program an applicant must meet one of the following criteria: residing in an area of disproportionate impact for at least five of the past ten years and their current income may not exceed 400% of federal poverty level; having a past drug conviction; or having been married to or the child of a person with drug conviction.¹⁶³

Michigan law also requires their state marihuana regulatory agency develop a plan to promote and encourage participation in the state cannabis industry for individuals who were disproportionality impacted by cannabis prohibition and enforcement.¹⁶⁴ An applicant qualifies for Michigan's social equity program if they live in a community disparately

¹⁵⁶ H.B. 2870, 2020 Reg. Sess. (Wash. 2020).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ McVey, *supra* note 154. Colorado's law applies in a similar fashion. H.B. 20-1424, 72nd Gen. Assemb., 2020 Reg. Sess. (Colo. 2020)

¹⁶¹ MASS. GEN. LAWS ANN. ch. 94G, § 4(a1/2)(iii) (West 2019).

¹⁶² Massachusetts Social Equity Program, *supra* note 149.

¹⁶³ *Id.*

¹⁶⁴ MICH. COMP. LAWS SERV. § 333.27958(1)(j) (2020).

impacted by the war on drugs.¹⁶⁵ This is different from Massachusetts's program as it does not have a length of time requirement.¹⁶⁶ Like Massachusetts, Michigan offers benefits to qualifying social equity applicants. Michigan's benefits are more expansive than Massachusetts's. Michigan provides regional presentations, application assistance, reduced fees, and program resources for social equity participants.¹⁶⁷

Like Massachusetts and Michigan, Illinois also provides benefits for social equity applicants, but their program is codified into law and has specific requirements.¹⁶⁸ An applicant qualifies as a social equity applicant if 51% of ownership and control is by individuals previously convicted of an offense eligible for expungement or live in disproportionality impacted area for at least five of the preceding ten years.¹⁶⁹ Additionally, an applicant is also considered a social equity applicant if 51% of employees reside in a disparately impacted area, or they or a family member has been convicted or arrested for an offense eligible for expungement.¹⁷⁰ If an applicant meets these requirements additional points are awarded on their application.¹⁷¹ A social equity applicant may also be awarded loans or grants to assist in the application process and operating their business by the state's cannabis business development fund.¹⁷² The states of Illinois, Massachusetts, Michigan, and Washington all focus on providing social equity for areas disparately impacted by the war on drugs and individuals convicted of drugs offenses.¹⁷³ These laws do not explicitly

¹⁶⁵ Michigan's Marijuana Regulatory Agency Announces Social Equity Program Expansion, https://www.michigan.gov/lara/0,4601,7-154-89334_79571_79784-508912--,00.html (hereafter Michigan Social Equity Program).

¹⁶⁶ Compare *id.* with Massachusetts Social Equity, *supra* note 149.

¹⁶⁷ Michigan Social Equity Program, *supra* note 165.

¹⁶⁸ 410 ILL. COMP. STAT. ANN. 130 / 115 (West 2019).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 410 ILL. COMP. STAT. ANN. 130 / 115(a-5) (West 2019).

¹⁷² 410 ILL. COMP. STAT. ANN. 705 / 7-10 (West 2019).

¹⁷³ See Marcus Hernandez, *Leveling the Playing Field: Various Approaches to Social Equity*, BURNS LEVINSON (Aug. 20, 2020), <http://www.cannabusinessadvisory.com/2020/08/20/leveling-the-playing-field-various-approaches-to-social-equity/>

consider race when creating accommodations but instead assist all people impacted by the war on drugs.¹⁷⁴

c. CONSTITUTIONAL AND EFFECTIVENESS CONCERNS

The previously discussed measures largely avoided race-conscious measures.¹⁷⁵ Prior to 2018, Ohio's state medicinal cannabis law utilized quotas requiring 15% of all licenses to be awarded to racial minorities.¹⁷⁶ Ohio's law succeeded in expanding racial diversity as over 16% of all licensees were minorities.¹⁷⁷

Despite this success, the law was deemed unconstitutional as an impermissible racial quota.¹⁷⁸ The Supreme Court has held policies that benefit individuals on the basis of race are subjected to a two-part strict scrutiny test under the Equal Protection Clause.¹⁷⁹ First, to withstand strict scrutiny, a policy that benefits individuals on the basis of race must serve a "compelling" government interest.¹⁸⁰ Second, the government's method to achieve such an interest must be "narrowly tailored."¹⁸¹ Interests the Court has found

¹⁷⁴ See generally, Siam, *supra* note 143.

¹⁷⁵ *Id.*

¹⁷⁶ Siam, *supra* note 143. While medicinal cannabis is not directly discussed in this article the Ohio law is helpful for showing the Constitutional defects of an explicit racial quota for potential legislation.

¹⁷⁷ *Id.*

¹⁷⁸ *Pharmacann Ohio, LLC v. Williams*, No. 17-CV-10962, 2018 WL 7500067 (Ohio Ct. Com. Pl. Nov. 15. 2018).

¹⁷⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 323-28 (2003).

¹⁸⁰ *Grutter*, 539 U.S. at 326.

¹⁸¹ *Id.* The Court has interpreted "narrowly tailored" to mean policies that benefit individuals on the basis of race must tightly fit the compelling interest, avoid unduly burdening adversely impacted individuals, and consider race-neutral means for achieving the government's interest. *Id.* at 333-43.

“compelling” have involved diversity in education¹⁸² and remedying past discrimination in a particular industry.¹⁸³

This framework was used by the Franklin County Court of Common Pleas in *Pharmacann Ohio, LLC. v. Williams* where the court considered the Ohio law’s set-aside provision.¹⁸⁴ In *Pharmacann*, the plaintiff, received a final score in their medicinal cannabis license application that would otherwise qualify it for a license.¹⁸⁵ However, the plaintiff was denied a license because two other lower scoring applicants were members of a disadvantaged group.¹⁸⁶

The court examined the state’s racial quota under the standard of strict scrutiny.¹⁸⁷ Under strict scrutiny, the racial classification must be justified by a compelling government interest *and* must be narrowly tailored to achieve that goal.¹⁸⁸ The court first considered whether the classification was a compelling interest.¹⁸⁹ The defendant provided evidence that the legislature sought to remedy racial disparities of African Americans and Latinos regarding arrest rates for cannabis offenses.¹⁹⁰ The court found this evidence was not enough to support a finding of discrimination within the brand new Ohio medicinal cannabis industry for African Americans, Latinos, American Indians, and Asians.¹⁹¹ The defendant also offered evidence of discrimination in government procurement.¹⁹² This evidence was unpersuasive as the court held that discrimination must be directly related to that particular

¹⁸² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (holding race can be considered in educational institutions so long as it is not decisive in admittance) (Powell, J.). *But see*, *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (holding college policy that made race the decisive factor for admittance constituted an unconstitutional racial classification).

¹⁸³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989) (O’Connor, J., joined by Rehnquist, C.J., and White, J.).

¹⁸⁴ *Pharmacann*, 2018 WL 7500067 at *2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *3.

¹⁸⁸ *Id.* at *5-*6 (quoting *Wygant v. Jackson Bd. Edn.*, 476 U.S. 267, 274 (1986)).

¹⁸⁹ *Id.* at *4.

¹⁹⁰ *Pharmacann*, 2018 WL 7500067 at *10.

¹⁹¹ *Id.*

¹⁹² *Id.*

industry, here medicinal cannabis, which was not demonstrated.¹⁹³

Though the court did not find the state had provided a compelling interest, the court considered whether the remedy was narrowly tailored.¹⁹⁴ The court found that the quota was not narrowly tailored because the legislature did not consider alternative race-neutral remedies such as giving preference to companies owned by those previously convicted or arrested on a cannabis offense.¹⁹⁵ Because the Ohio law failed both prongs, the court held the law was unconstitutional.¹⁹⁶ In 2019, the Madison County Court of Common Pleas considered the same Ohio law and followed *Pharmacann's* reasoning to find the quota was again unconstitutional.¹⁹⁷

Race-based classifications have been challenged beyond Constitutional grounds and on policy grounds. First, race-based programs are challenged by opponents as warping meritocracy.¹⁹⁸ Instead of taking a holistic view of an individual's characteristics, race is given special consideration.¹⁹⁹ Another argument made by opponents is that race-based classification stoke racial tension because it divides individual's based on their race.²⁰⁰ Finally, opponents argue

¹⁹³ *Id.*

¹⁹⁴ *Id.* at *13.

¹⁹⁵ *Id.* at *14.

¹⁹⁶ *Id.* at *20.

¹⁹⁷ *Pure Ohio Wellness, LLC v. State of Ohio Brd. Of Pharmacy*, CVH 20190197 (C.P. Madison, Cnty, Ohio Nov. 04, 2019).

¹⁹⁸ *Fullilove v. Klutznick*, 448 U.S. 448, 532-33 (1980) (Stevens, J., dissenting); Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1140 (2006) ("In a country that prides itself on being a meritocracy without official ranks of nobility attached at birth, affirmative action seems especially perverse.").

¹⁹⁹ *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 273-74 (2003) (noting that system that assigned points based on race hindered other considerations about an individual's background or other characteristics beyond race); *Fullilove*, 448 U.S. at 533.

²⁰⁰ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (Scalia, J., concurring) ("Those who believe that racial preferences can help... display, and reinforce, a manner of thinking by race....").

that broad race-based quotas burden individuals who did not cause the racial injury.²⁰¹

While these arguments have merit, state social equity programs that focus on remedying individuals directly harmed by the war on drugs offer the best remedial measures because they survive Constitutional scrutiny and help those directly impacted by the war on drugs.²⁰² It is true that the war on drugs had a disparate impact on minorities²⁰³ and that laws giving preferences to individuals directly impacted by the war on drugs would have a disparate impact favoring minorities.²⁰⁴ While this is true, these laws would not be found unconstitutional. The Supreme Court has held that a law that has a disparate impact on racial minorities is unconstitutional under the Equal Protection Clause only if the law had a discriminatory purpose.²⁰⁵ Laws that favor individuals directly impacted by the war on drugs would likely pass Constitutional scrutiny.²⁰⁶ The laws are not adopted for a discriminatory purpose but instead serve as an accommodation for *all* individuals directly impacted by the war on drugs regardless of race. These laws are race neutral as they can apply to individuals of all races who were directly impacted by the war on drugs.

Aside from Constitutionality concerns over certain social equity systems, effectiveness concerns are also relevant. Data regarding diversity in the cannabis industry is limited. The social equity initiatives in Illinois and Michigan are just beginning and more time is required to determine their effectiveness. In Massachusetts only 1.2% of cannabis

²⁰¹ Tung Yin, *A Carbollic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 215 (1997) (reviewing RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)).

²⁰² See Robert A. Mikos, *What Makes Illinois's New Adult-Use Marijuana Law Noteworthy . . .*, MARIJUANA L., POL'Y, & AUTH. BLOG (Jun. 28. 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/06/what-makes-illinoiss-new-adult-use-marijuana-law-noteworthy/>

²⁰³ See *infra* notes 20-93 and accompanying text.

²⁰⁴ See Brown, *supra* note 78, at 207.

²⁰⁵ Wash. v. Davis, 426 U.S. 229, 237 (1976).

²⁰⁶ See Mikos, *supra* note 200.

businesses are owned by racial minorities.²⁰⁷ Massachusetts set aside 123 licenses for social equity applicants and only 10 people applied.²⁰⁸ Commentators suggests the lack of participation stem from the high costs: an applicant can expect to pay \$50,000 to \$60,000 in costs to complete an application.²⁰⁹ A better way forward must exist.

IV. CLEARING THE HAZE: PROPER STATE ACTION

Diversifying the recreational cannabis industry requires action by state governments. This section offers a statute aimed to provide inexpensive cannabis licenses and continuous mentorship for applicants while also discouraging illegal cannabis markets.

a. STATUTE RECOMMENDATION

Based on the experiences of various state social equity systems for minority cannabis entrepreneurs, I propose the following language be used in state cannabis statutes:

§ X. Cannabis Social Equity

(a) For any dispensing organization registered on or after July 1, 2021, the State Cannabis Bureau (“SCB”) shall award not less than 20% of all available licenses to applicants that qualify as Social Equity Applicants.

²⁰⁷ Erin Magner, *The cannabis world has a diversity problem, but Cannaclusive’s founders are seeking to change that*, WELL + GOOD, (Mar. 4, 2020), <https://www.wellandgood.com/good-advice/cannaclusive-minorities-cannabis-industry/> (noting that 11.5% of companies in the traditional economy are owned by minorities).

²⁰⁸ Jeanette DeForge, *State cannabis law offers licenses for marginalized populations but few apply, experts said in Holyoke panel discussion*, MASSLIVE, (Jun. 24, 2019), <https://www.masslive.com/news/2019/06/state-cannabis-law-offers-licenses-for-marginalized-populations-but-few-apply-experts-said-in-holyoke-panel-discussion.html>.

²⁰⁹ Jeff Smith, *Medical cannabis business opportunities could swell in several states this year*, MARIJUANA BUSINESS DAILY (Feb. 14, 2020), <https://mjbizdaily.com/medical-cannabis-business-opportunities-could-swell-in-several-states-this-year/>.

“Social Equity Applicant” means an applicant that is a state resident that meets one of the following criteria:

- (1) an applicant with 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% of ownership and control by one or more individuals who have been arrested for, convicted of, a past drug offense; or have been married to or a child of a person with a past drug arrest or conviction in the state.
- (b) The SCB shall make available the following for a successful social equity applicant:
- (1) Application Assistance and continued business operation assistance.
 - (2) A 50% reduction in renewal fees.
 - (3) The SCB shall partner with other state agencies that are relevant to individuals participating in the cannabis industry.
 - (4) The SCB shall award social equity applicants grants in gaining entry to, and successfully operating in, the State’s regulated cannabis marketplace.
- (c) The tax on retail cannabis sales will be established at seven percent (7%) of the gross amount received by the seller.
- (d) The application fee shall be two hundred fifty dollars (\$250). The application fee is refundable if the application is rejected.

b. STATUTE ANALYSIS

This statutory language combines the best features of the existing state social equity programs. It also takes into consideration lessons from state courts. It encourages the continued participation of those disparately impacted by the war on drugs in the burgeoning recreational cannabis industry. This section considers the purpose and effect of each element of the statute and how the statute improves upon existing law.

i. SECTION (A) – WHO IS A SOCIAL EQUITY APPLICANT UNDER THE STATUE

Section (a) of this statute describes who is a social equity candidate. The statute begins with a set-aside requirement. This aspect follows the Ohio law that required 15% of state medicinal cannabis licensees to be awarded to racial

minorities.²¹⁰ The Ohio law was successful in achieving racial diversity but was found to be an unconstitutional racial quota.²¹¹ The proposed statute learns from the lessons of the Ohio statute and is racially neutral as it applies to *all* individuals who were directly impacted by the war on drugs regardless of race.

The statute then describes who is a social equity applicant. The language of this statute combines aspects of Illinois's and Massachusetts's social equity programs. The statute defines a social equity applicant as an individual who either lives in an area disproportionately impacted by the war on drugs, has an arrest or conviction for drug arrest or is married to or a child of someone arrested or convicted of a drug offense. This language allows for an individual who lives in an area disparately impacted by the war on drugs to be given reparations. The statute contains a residency requirement to prevent individuals from owning property briefly to meet the requirement.²¹² The statute then also turns to individuals with a drug arrests or convictions. This language protects those directly impacted by the war on the drugs. The statute omits Illinois's problematic language of considering someone a social equity applicant by having 51% of employees to be disproportionately impacted by the war on drugs. This omission seeks to focus on empowering the ownership of cannabis businesses and not merely employment.²¹³ Ownership of a business comes with more economic potential.²¹⁴ This language prevents individuals from manipulating the social

²¹⁰ *Pharmacann*, 2018 WL 7500067 at *8.

²¹¹ *Siam*, *supra* note 143.

²¹² Cannabis residency requirements ensure the licensee has a connection to the local community, profits stay within the community, and prevent large corporations from controlling the cannabis industry. See Daniel Shortt, *Marijuana Industry Residency Requirements*, HARRIS BRICKEN (Apr. 28, 2015), <https://harrisbricken.com/cannalawblog/marijuana-industry-residency-requirements/>.

²¹³ See Amanda Vinicky, *Will Illinois' Marijuana Law Meet its Social Equity Aims?*, WTTW (Nov. 21, 2019), <https://news.wttw.com/2019/11/21/will-illinois-marijuana-law-meet-its-social-equity-aims>.

²¹⁴ See *Id.*

equity program by having a majority white ownership who are still social equity applicants.²¹⁵

ii. SECTION (B) – SOCIAL EQUITY APPLICANT ASSISTANCE

Section (b) addresses the various forms of assistance the SCB may provide applicants. The forms of assistance are codified providing clear guidance for the SCB. These forms of assistance help to break down barriers that social equity applicants face in entering the cannabis market. First, this statute helps applicants navigate the application process by providing direct assistance when completing the application.²¹⁶ Second, reducing application and renewal fees helps remedy the fact that minority family wealth is significantly less than that of white families.²¹⁷ This provision helps remove an early barrier for poorer applicants. Third, by partnering with various state agencies relevant to the cannabis industry the state provides applicants who are often first-time business owners assistance in operating a complicated business.²¹⁸ Fourth, this portion acknowledges the heavy costs of operating a cannabis business and provides applicants with continued monetary support.²¹⁹

iii. SECTION (C) – WEAKENING THE ILLEGAL MARKET

Section (c) attempts to weaken the existing illegal cannabis markets and keep profits in social equity applicant's hands. A low tax ensures people use legal channels to purchase inexpensive cannabis. It learns from the lessons of California

²¹⁵ See Josh McGhee, 'Freeway' Rick Ross' advice to black Chicagoans heading into the legal marijuana business: don't sell out, CHICAGO REPORTER (Dec. 13, 2019), <https://www.chicagoreporter.com/freeway-rick-ross-advice-to-black-chicagoans-heading-into-the-legal-marijuana-business-dont-sell-out/>.

²¹⁶ Vinicky, *supra* note 213.

²¹⁷ SULLIVAN, *supra* note 136, at 5.

²¹⁸ See Sarah Ravani, *Oakland's groundbreaking cannabis equity program showing modest results so far*, SAN FRANCISCO CHRONICLE (May 25, 2019), <https://www.sfchronicle.com/bayarea/article/Oakland-s-groundbreaking-cannabis-equity-13895654.php>.

²¹⁹ See Krane, *supra* note 19 (describing the hefty costs of cannabis business such as added security, and legal fees).

which imposes a high tax on cannabis sales that is incredibly problematic.²²⁰ Experts estimate that in California legal sales of cannabis will be \$3 billion in revenue, compared to \$8.7 billion in illegal sales.²²¹ The state's high cannabis tax caused California to reduce its expected revenue from cannabis sales.²²² By contrast, Oklahoma's tax on medicinal cannabis is the same rate as this proposed statute and the state's revenue on medicinal cannabis sales is exceeding analysts' wildest expectations.²²³ Finally, keeping the tax on cannabis low is essential to avoid another war on drugs.²²⁴ Even after legalization, drug enforcement continues to have a disparate impact on minorities.²²⁵

iv. SECTION (D) – LOW BARRIERS TO ENTRY

Section (d) avoids the mistakes of other states that create a barrier to entry in the cannabis market due to high fees by copying the Washington application fee costs.²²⁶ Notably, these licenses apply to *all* state recreational cannabis licenses.²²⁷ Data is not available regarding diversity in Washington state's recreational cannabis market. However, Oklahoma's medicinal cannabis program's low application fees has caused their state's

²²⁰ California imposes a 15% state excise tax on cannabis sales. Patrick McGreevy, *California lawmakers say pot taxes must be cut to help an industry 'on the brink'*, LOS ANGELES TIMES (Jan. 17, 2020), <https://www.latimes.com/california/story/2020-01-17/california-lower-pot-taxes-gavin-newsom>.

²²¹ Scott Shackford, *The Marijuana Black Market Will Keep Its Throne in California, Thanks to Tax Increases*, REASON (Nov. 25, 2019), <https://reason.com/2019/11/25/the-marijuana-black-market-will-keep-its-throne-in-california-thanks-to-tax-increases/>.

²²² *Id.*

²²³ Eli McVey, *Chart: Oklahoma medical marijuana sales far exceed expectations*, MARIJUANA BUSINESS DAILY (Nov. 19, 2019), <https://mjbizdaily.com/oklahoma-medical-marijuana-industry-on-pace-to-hit-350-million/>.

²²⁴ Shackford, *supra* note 221. California is seemingly launching another drug war to crack down on illegal cannabis facilities. *Id.*

²²⁵ See Michael Tackeff, *Constructing a "Creative Reading": Will US State Cannabis Legislation Threaten the Fate of the International Drug Control Treaties?*, 51 VAND. J. TRANSNAT'L L. 247, 253 (2018).

²²⁶ H.B. 2870, 2020 Reg. Sess. (Wash. 2020).

²²⁷ Washington's social equity program only applies to forfeited, canceled, revoked or otherwise unissued cannabis licenses. *Id.*

market to be one of the most diverse in the entire nation.²²⁸ Finally, this statute makes an application refundable if denied ensuring applicants that a rejected application will not be financially harmful.

V. CONCLUSION

The war on drugs had a disparate impact on minorities.²²⁹ As states legalize recreational cannabis, the industry is increasingly dominated by rich white men.²³⁰ These individuals did not experience the same destructive effects of the war on drugs as minorities did.²³¹ One conclusion is certain – states with legalized cannabis should take steps to encourage minority participation in the recreational cannabis industry.

²²⁸ Siam, *supra* note 143.

²²⁹ Amanda Chicago Lewis, *How Black People are Being Shut Out of America's Weed Boom*, BUZZFEED (Mar. 16, 2016), https://www.buzzfeed.com/amandachicagolewis/americas-white-only-weed-boom?utm_term=.jkGzyOM3L#.gyaw1enPL.

²³⁰ *Id.*

²³¹ *Id.*

Appendix A

State Social Equity in Recreational Cannabis*

Social Equity for all Cannabis Licenses	Social Equity Program for Unused Cannabis licenses	State Grants for Municipalities	No Social Equity Program
Colorado** Illinois Massachusetts Michigan	Washington	California	Alaska Colorado Maine Nevada Oregon Vermont

* See *infra* notes 143-173 and accompanying text.

** Legislation will go into effect January 1, 2021.