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Cannabis Law

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JUDICIAL AND LEGISLATIVE UPDATES

CANNABIS LAW

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INTRODUCTION

On July 1, 2021, Virginia became the sixteenth state to permit recreational use of cannabis.¹ As of 2022, thirty-nine states have legalized the medical use of cannabis, and nineteen states and the District of Columbia have legalized the adult use of cannabis for recreational purposes.² “A CBS News/YouGov poll released in April 2022 found that two-thirds of Americans want recreational [cannabis] use to be legalized under federal law and in their own state.”³ This Article summarizes the history of cannabis regulation and examines the current legal landscape in Virginia governing the possession, cultivation, manufacturing, and sale of cannabis.

I. HISTORY OF CANNABIS LEGISLATION

The medicinal benefits of cannabis have long been recognized, even if not fully understood. Significant scientific study of the medicinal benefits of cannabis began in the nineteenth century.⁴ Throughout much of the nineteenth and early twentieth centuries in the United States, cannabis was primarily used for medical purposes.⁵ Military physicians used cannabis as an analgesic during the U.S. Civil War.⁶ Cannabis was found to be effective in treating cocaine and opiate addictions, as well as rheumatic disorders and migraine headaches.⁷ While Mexico and the Caribbean appreciated

1. Ben Pavior, *Virginia 16th State To Legalize Recreational Pot, Latest To Emphasize 'Social Equity'*, NPR (Apr. 7, 2021, 4:47 P.M.), <https://www.npr.org/2021/04/07/985014557/virginia-16th-state-to-legalize-recreational-pot-latest-to-emphasize-social-equity> [https://perma.cc/D5ZQ-5ZSV]. For consistency, this Article will use the term “cannabis” rather than “marijuana.” Botanically, marijuana is the species and cannabis is the genus. Hemp is also part of the cannabis genus. Legally, Virginia uses the terms “cannabis” and “marijuana” interchangeably.

2. *States with Medical Marijuana 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/states-with-medical-marijuana> [https://perma.cc/23A9-FRXP]; Claire Hansen, Horus Alas & Elliott Davis Jr., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Oct. 27, 2022, 2:24 PM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [https://perma.cc/6E2L-S9KL].

3. Hansen et al., *supra* note 2.

4. David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 5 (2020).

5. *Id.*

6. *Id.*

7. *Id.* at 4–5.

its intoxicating benefits, cannabis was not largely used for recreational purposes in the United States during this time.⁸

At the turn of the twentieth century, the purity and potency of products containing cannabis was unmonitored.⁹ Many consumers of cannabis consumer products, especially pharmaceuticals, had very little knowledge of what they were putting into their bodies. Given the intoxicating properties of cannabis, politicians, as well as medical professionals and public health officials, supported the early push for regulation of cannabis.¹⁰ As research developed and the biological and physiological properties of cannabis were better understood, many saw the need for government regulation of the plant and its potential products.

In an effort to address the safety of medicine and pharmaceuticals, Congress passed the Pure Food and Drug Act of 1906.¹¹ This statute focused on regulating production to ensure a level of purity and required labeling of products to improve consumer information.¹² Among other things, it required drug labels to list items that were deemed addictive or dangerous, including alcohol, morphine, opium, and cannabis.¹³

Congress passed additional laws in the early twentieth century aimed at the regulation of opiates and coca products. In 1909, Congress passed the Act to Prohibit Importation and Use of Opium, which barred the use of opiates other than for medicinal purposes.¹⁴ Under the Opium and Coca Leaves Trade Restrictions Act, better known as the Harrison Narcotics Tax Act of 1914, the federal government taxed the production, importation, and distribution of opiates and coca products.¹⁵ Given the fees and high taxes imposed under this Act, it was ultimately seen as a prohibition

8. *Id.* at 5.

9. See ATT'Y GEN. ALL., CANNABIS LAW DESKBOOK 62–63 (Austin Bernstein & Bruce Turcott eds., 2021–2022 ed.).

10. *See id.*

11. *The Food and Drug Administration: The Continued History of Drug Advertising*, WEILL CORNELL MEDICINE, <https://library.weill.cornell.edu/about-us/snake%20oil%20social%20media-drug-advertising-your-health/food-and-drug-administration-continued#:~:text=The%20United%20States%20Food%20and,food%20medicine%20and%20cosmetics> [https://perma.cc/4TMW-3XBJ].

12. Pure Food and Drug Act of 1906, Pub. L. 59-384, 34 Stat. 768, *repealed by* Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040.

13. *Id.*

14. See Patton, *supra* note 4, at 6.

15. Opium and Coca Leaves Trade Restrictions Act, Pub. L. 63-223, 38 Stat. 785 (1914).

law.¹⁶ Individual states followed suit and passed state laws prohibiting the possession of opiates and cocaine. In 1922, Congress passed the Narcotic Drug Import and Export Act, which prohibited the possession, recreational use, or import of narcotics and established the Federal Narcotics Control Board to enforce the Act.¹⁷

In the 1930s, as the political climate changed due to rising crime and growing anti-Mexican biases, Federal Bureau of Narcotics Commissioner Harry Anslinger became a “powerful anti-marijuana voice.”¹⁸ Anslinger pushed for the adoption of the Uniform State Narcotic Drug Act, which classified cannabis as a narcotic.¹⁹ His campaign against cannabis included the infamous 1936 film *Reefer Madness*.²⁰ Anslinger’s efforts led to the passage of the Marihuana Tax Act of 1937, under which the importation, cultivation, possession, and/or distribution of cannabis were regulated.²¹ The Act imposed a tax that made producing, selling, and prescribing cannabis prohibitively expensive. The American Medical Association objected to the Marihuana Tax Act, fearing that it would halt research on the medicinal benefits of cannabis.²² The Marihuana Tax Act remained constitutional until it was overturned by *Leary v. United States* in 1969.²³

By the 1950s, with many politicians claiming cannabis was a gateway drug, Congress took steps to curb the use and trafficking of cannabis.²⁴ Congress passed harsh criminal penalties for violations of the Narcotic Drug Import and Export Act and the Marihuana Tax Act.²⁵ Many individual states followed suit by imposing harsh prison sentences for cannabis offenses.²⁶

16. See Patton, *supra* note 4, at 7.

17. Narcotic Drugs Import and Export Act, Pub. L. 67-227, 42 Stat. 596 (codified as amended at 21 U.S.C. §§ 171–174) (repealed 1970).

18. John F. Galliher, David P. Keys & Michael Elsner, *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. Crim. L. & Criminology 661, 665 (1998); *Did You Know . . . Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about/history/did-you-know/marijuana> [<https://perma.cc/UCP8-9q59>] (Dec. 20, 2019).

19. See Patton, *supra* note 4, at 9.

20. *Id.*

21. U.S. CUSTOMS & BORDER PROT., *supra* note, 18.

22. See Patton, *supra* note 4, at 10.

23. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, *invalidated by* *Leary v. United States*, 395 U.S. 6 (1969).

24. See Patton, *supra* note 4, at 12.

25. *Id.*

26. *Id.* at 12–13.

In the 1960s, the United States lead the way in drafting the United Nations Single Convention on Narcotic Drugs, a treaty which created the framework for international and domestic drug control policy.²⁷ To comply with its obligations under the Convention, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the Controlled Substances Act.²⁸ This Act created the five-tiered Schedule system, where Schedule I substances are both deemed to lack medical value and have a high potential for abuse.²⁹ Congress categorized cannabis as a Schedule I drug.

President Richard Nixon applauded the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 as this new legislation ran parallel to his desire to push the war on drugs:

You want to know what this [war on drugs] was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.³⁰

Under the Controlled Substances Act, Congress created the National Commission on Marihuana and Drug Abuse to determine the appropriate scheduling of cannabis.³¹ This Commission issued its report on March 22, 1972, and recommended decriminalizing marijuana.³² The Nixon Administration, however, declared drug abuse to be “America’s public enemy number one” and rejected the

27. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (entered into force June 24, 1967).

28. Becoming effective on May 1, 1971, the goal of the Comprehensive Drug Abuse Prevention and Control Act of 1970 was to improve the manufacturing, importation and exportation, distribution, and dispensing of controlled substances. Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, 48 HOSP. PHARMACY 6, 473 (2013).

29. 21 U.S.C. § 812.

30. *Drug War Confessional*, VERA INST. OF JUST., <https://www.vera.org/reimagining-prison-webumentary/the-past-is-never-dead/drug-war-confessional> [<https://perma.cc/43Y6-YTMB>] (reporting a quote by John Ehrlichman, Assistant to the President for Domestic Affairs under President Richard Nixon).

31. The Commission became popularly known as the “Shafer Commission” because the chairman was then-Pennsylvania governor Raymond Shafer. See Patton, *supra* note 4, at 16.

32. See *id.* at 17.

Commission's report.³³ As a result, cannabis remained a Schedule I drug and still remains a Schedule I drug.³⁴

Although the federal government has effectively halted prosecution of cannabis crimes (other than those related to gangs, drug dealers, and money laundering) in those states that have legalized it, cannabis remains illegal under federal law.³⁵ In addition to prohibiting the manufacture, distribution, sale and possession of cannabis, the Controlled Substances Act also prohibits the transportation of cannabis across state lines, even between states that have passed laws legalizing cannabis within that state's borders.³⁶ Although the Controlled Substances Act preempts state law, the federal government cannot require states to enforce the Act under the anti-commandeering doctrine.³⁷

This conflict between state and federal laws led Justice Clarence Thomas to criticize the federal government's cannabis policies. He took the unusual step of issuing a statement in connection with the denial of a writ of certiorari in the matter of *Standing Akimbo LLC v. United States*, which asked the Supreme Court of the United States to address whether a medical marijuana dispensary could properly deduct ordinary business expenses in violation of section 280E of the federal tax code.³⁸ Justice Thomas called the federal government's approach "a half-in, half-out regime that

33. *Id.* at 17–18.

34. U.S. DEPT OF JUST. & U.S. DRUG ENF'T AGENCY, DRUG FACT SHEET (2020), https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf [<https://perma.cc/XB9M-DUU7>].

35. Between 2009 through 2013, the United States Department of Justice issued a series of memoranda addressing enforcement of federal marijuana laws in States that have legalized marijuana, which effectively deemed enforcement of such laws an inefficient use of federal resources and left regulation and enforcement to the States. The last of these memoranda, known as the Cole Memorandum, was revoked in 2018 by the then-Attorney General, Jeff Sessions, but the current Attorney General, Merrick Garland, has indicated his support of the Cole Memorandum's policies. See Cloe Pippin, *Merrick Garland Signals New Stance on Marijuana Policy if Confirmed as Attorney General*, JD SUPRA, <https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=fedd02de-8e35-4696-bbdc-10ac80682918> [<https://perma.cc/GD6N-GSUY>] (Mar. 4, 2021).

36. Controlled Substances Act, Pub. L. No. 91-513, 101, 84 Stat. 1236, 1242 (1970) (codified at 21 U.S.C. §§ 801–904).

37. The anti-commandeering doctrine was announced by the Supreme Court of the United States in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), and provides that the federal government cannot require states or state officials to adopt or enforce federal law.

38. *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018), *cert. denied* 139 S. Ct. 2745 (2019).

simultaneously tolerates and forbids local use of marijuana.”³⁹ He added, “[t]his contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.”⁴⁰ His criticism of what he calls the federal government’s “piecemeal approach”⁴¹ to enforcement of cannabis-related violations echoes the sentiment of many pushing for legalization, including those in Congress.

In May 2021, Representative Jerry Nadler (D-NY) reintroduced the Marijuana Opportunity Reinvestment and Expungement Act, also known as the MORE Act.⁴² This legislation would remove cannabis from the Controlled Substances Act and allow state-level regulation of cannabis.⁴³ In addition, the MORE Act contains various criminal and social justice reforms related to cannabis, including the expungement of prior convictions.⁴⁴ One provisions of the MORE Act includes the addition of a five percent federal sales tax that would fund programs meant to improve communities harmed by marijuana prohibition.⁴⁵ On April 1, 2022, the MORE Act passed the U.S. House of Representatives on a 220-204 vote.⁴⁶ As of June 2022, the Senate has yet to schedule a vote on the MORE Act.⁴⁷

II. THE ROAD TO LEGALIZATION OF CANNABIS IN THE COMMONWEALTH: VIRGINIA’S REGULATION OF MEDICAL CANNABIS

In 1979, Virginia became one of the first states to pass a medical cannabis law.⁴⁸ The enactment of Code of Virginia section 18.2-251.1 allowed medical doctors to avoid prosecution for dispensing

39. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236–37 (2021) (Thomas, J., concurring) (denying writ of certiorari).

40. *Id.* at 2237.

41. *Id.* at 2238.

42. *See* Marijuana Opportunity Reinvestment and Expungement Act of 2021, H.R. 3617, 117th Cong. (2021).

43. *Id.* § 3.

44. *Id.* §§ 3, 5.

45. *Id.* § 5.

46. Marijuana Opportunity Reinvestment and Expungement Act of 2021, H.R. 3617, 117th Cong. (1st Sess. 2020), <https://www.congress.gov/bill/117th-congress/house-bill/3617/actions> [<https://perma.cc/5B52-324A>].

47. *Id.*

48. *A (Brief) History of Cannabis Legislation in Virginia*, THE CULTA BLOG (Dec. 7, 2020), <https://www.culta.io/blog/patients/a-brief-history-of-cannabis-legislation-in-virginia> [<https://perma.cc/5GPY-EHT3>].

or distributing marijuana or tetrahydrocannabinol (“THC”) for the treatment of cancer or glaucoma.⁴⁹ Beginning in 2015, Virginia saw a shift in the treatment of medical cannabis under the law. Governor Terry McAuliffe signed into law House Bill 1445 and Senate Bill 1235, creating affirmative defenses against a possession charge of tetrahydrocannabinolic acid (“THC-A”) and cannabidiol (“CBD”), two cannabinoids found in cannabis, for patients with a doctor’s recommendation.⁵⁰ The affirmative defense was originally limited to only patients with intractable epilepsy.⁵¹ In 2017, Governor Ralph Northam approved legislation, Senate Bill 1027, allowing dispensaries (known as “pharmaceutical processors”) to produce THC-A and CBD oils for the first time, subject to regulations set forth by the Virginia Board of Pharmacy.⁵² Recognizing that doctors should decide which patients would benefit from cannabis rather than having their hands tied by the legislature, the General Assembly passed House Bill 1251 in 2018.⁵³ This legislation significantly expanded the law by providing an affirmative defense which allows for any condition that a registered practitioner believed could be treated by medical cannabis.⁵⁴ In September 2018, the Virginia Board of Pharmacy approved the applications for five companies to open medical cannabis dispensaries across the state. In 2020, the first medical marijuana dispensary opened in Virginia.⁵⁵ However, state law only permitted cannabis oil products during this time.⁵⁶ Thus, while not technically legal, the possession, use, and sale of medical cannabis was permissible in Virginia under an affirmative defense.

In 2020, House Bill 2218 and Senate Bill 1333 amended the Code of Virginia to legalize medical cannabis products, including botan-

49. 1979 Va. Acts ch. 435 (codified at VA. CODE ANN. § 18.2-251.1 (Cum. Supp. 1979)).

50. The distinction between a “prescription” and a “recommendation” is addressed in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), *cert. denied* 540 U.S. 946 (2003). *Conant* stands for the proposition that, unlike a prescription, a physician’s medical cannabis “recommendation” to a patient is protected free speech under the First Amendment. *Id.* at 635, 639. As a result, States that have legalized medical cannabis, like Virginia, use the term “recommend” instead “prescribe.” See Patton, *supra* note 4, at 23.

51. 2015 Va. Acts ch. 7 (codified as amended at VA. CODE ANN. § 18.2-250.1(C) (Supp. 2015)).

52. S.B. 1027, Va. Gen. Assembly, (Reg. Sess. 2017) (enacted as 2017 Va. Acts ch. 613).

53. H.B. 1251, Va. Gen. Assembly, (Reg. Sess. 2018) (enacted as 2018 Va. Acts ch. 246).

54. VA. CODE ANN. § 18.2-250.1(C) (Cum. Supp. 2018).

55. *First Medical Cannabis Dispensary to Open in Virginia*, NBC12 NEWSROOM, <https://www.nbc12.com/2020/10/15/first-medical-cannabis-dispensary-open-virginia/> [<https://perma.cc/23KD-S7K3>] (Oct. 15, 2020).

56. See VA. CODE ANN. §§ 54.1-3408.3, -3442.7 (Cum. Supp. 2020).

ical cannabis.⁵⁷ Under this legislation, individuals with a medical cannabis certification are permitted to purchase a ninety-day supply of cannabis from pharmaceutical processors licensed by the Board of Pharmacy within the Commonwealth and are exempt from the twenty-five dollar civil penalty.⁵⁸ Only registered practitioners may issue a medical cannabis certification.⁵⁹ This certification may be issued for “any diagnosed condition or disease determined by the practitioner to benefit from such use.”⁶⁰ Once an individual obtains the medical cannabis certification, he or she must register with the Board of Pharmacy, a process that could take months to complete.⁶¹ Only when the registration process is complete may an individual access medical cannabis products from a licensed dispensary.⁶²

Legislation signed in 2022 by Governor Glenn Youngkin, House Bill 933 and Senate Bill 671, removed this requirement to register with the Board of Pharmacy.⁶³ Effective July 1, 2022, adults can now access cannabis through pharmaceutical processors at one of the state’s twelve operational dispensaries after receiving the medical cannabis certification from a registered practitioner.⁶⁴

Additionally, House Bill 1862 extends limited employment protections to individuals registered to participate in the medical cannabis program to guard against marijuana-related termination or other adverse employment action for using medical cannabis away from work.⁶⁵ These protections do not extend to those employed by the federal government or those whose employment implicates federal contracts, nor does it restrict pre-employment drug screening.

57. H.B. 2218, Va. Gen. Assembly (Spec. Sess. 2021) (enacted as 2021 Va. Acts, Spec. Sess. I, ch. 227); S.B. 1333, Va. Gen. Assembly (Spec. Sess. 2021) (enacted as 2021 Va. Acts, Spec. Sess. I, ch. 228); VA. CODE ANN. § 54.1-3408.3(B) (Cum. Supp. 2021).

58. VA. CODE ANN. §§ 54.1-3442.7, 18.2-250.1(A) (Cum. Supp. 2021); 18 VA. ADMIN. CODE § 110-60-310(B) (2021).

59. VA. CODE ANN. § 54.1-3408.3(B) (Cum. Supp. 2022).

60. *Id.*

61. *See* VA. CODE ANN. § 54.1-3408.3(F) (Cum. Supp. 2022).

62. 18 VA. ADMIN. CODE § 110-60-310 (2022).

63. H.B. 933, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 391); S.B. 671, Va. Gen. Assembly (Reg. Sess. 2022) (enacted as 2022 Va. Acts ch. 392); VA. CODE ANN. § 54.1-3408.3(F) (Cum. Supp. 2022).

64. § 54.1-3408.3(F); *Virginia Medical Cannabis Dispensaries*, VA. NORML, <https://www.vanorml.org/dispensaries> [<https://perma.cc/L8SN-B4H2>].

65. H.B. 1862, Va. Gen. Assembly (Spec. Sess. 2021) (enacted as 2021 Va. Acts, Spec. Sess. I, ch. 395); VA. CODE ANN. § 40.1-27.4 (Cum. Supp. 2021).

As of June 2022, there remains no opportunity for the legal purchase of cannabis in Virginia without a medical card.

III. DECRIMINALIZATION UNDER VIRGINIA LAW

Prior to 2020, Virginia law allowed individuals charged with marijuana possession to be fined up to \$500 and/or sentenced to jail for up to thirty days for a first offense.⁶⁶ Subsequent offenses were charged as Class 1 misdemeanors punishable by up to one year in jail and/or a fine of up to \$2,500.⁶⁷

In 2015, Senate Bill 686 was introduced as the Commonwealth's first attempt at decriminalization.⁶⁸ Decriminalization generally refers to the removal of criminal penalties for possession of small, personal consumption amounts of cannabis.⁶⁹ Under Senate Bill 686, cannabis possession would be decriminalized, and the \$500 criminal fine for such possession would be reduced to a maximum \$100 civil penalty. In addition, the thirty-day jail sentence would be eliminated, and cultivation for personal use would be allowed.⁷⁰ That same year Senate Bill 1444 proposed that the "smoke a joint, lose your license" provision of the Code be revised for those over eighteen.⁷¹ Both bills failed.⁷²

During a Special Session in late 2020, both chambers of the Virginia General Assembly approved, and Governor Ralph Northam then signed, Senate Bill 5029.⁷³ This bill provides that no law-enforcement officer may lawfully stop, search, or seize any person, place, or thing solely on the basis of the odor of marijuana, and no evidence discovered or obtained as a result of such an unlawful

66. VA. CODE ANN. § 18.2-250.1(A) (Cum. Supp. 2019).

67. *Id.*; VA. CODE ANN. § 18.2-11 (Cum. Supp. 2019).

68. S.B. 686, Va. Gen. Assembly (Reg. Sess. 2015).

69. Jenn Michelle Pedini & Cassidy Crockett-Verba, *Decriminalization in Virginia: Marijuana in the 2020 General Assembly Session*, 24 RICH. PUB. INT. L. REV. 65, 67 (2021).

70. S.B. 686.

71. *A (Brief) History of Cannabis Legislation in Virginia*, *supra* note 48; S.B. 1444, Va. Gen. Assembly (Reg. Sess. 2015). This bill proposed to revise the existing provision of the law that a person loses his driver's license for six months when convicted of or placed on deferred disposition for a drug offense to provide that the provision does not apply to simple possession of marijuana. *Id.*

72. *A (Brief) History of Cannabis Legislation in Virginia*, *supra* note 48.

73. S.B. 5029, Va. Gen. Assembly (Spec. Sess. 2020) (enacted as 2020 Va. Acts, Spec. Sess. I, ch. 51).

search or seizure shall be admissible in any trial, hearing, or other proceeding.⁷⁴

On May 21, 2020, Governor Northam signed legislation, House Bill 972/Senate Bill 2,⁷⁵ to decriminalize simple marijuana possession and prohibit employers from requiring job applicants to disclose information related to past criminal charges for marijuana possession. This law also provides that possession of up to one ounce of marijuana shall be charged by a summons, punishable by a fine of no more than \$25.⁷⁶ This helped make Virginia the first state in the South to legalize cannabis for adults.⁷⁷

This legislation also included a provision requiring Virginia State Police to seal records related to misdemeanor possession of marijuana.⁷⁸ Records relating to prior charges for this offense—including being arrested for, charged with, or convicted of such conduct—will generally no longer be open to public inspection and disclosure, with narrow law-enforcement-related exceptions (e.g., to determine eligibility to possess or purchase a firearm, to prepare a pretrial investigation report, and for certain employment opportunities with certain state agencies).⁷⁹ “If, however, a person is found to have possessed marijuana while operating a commercial motor vehicle, that violation will be reported to the state Department of Motor Vehicles and added to the person’s driving record.”⁸⁰

IV. LEGISLATION FOR LEGALIZATION OF CANNABIS

The most significant development in cannabis law in Virginia has been the passage of the Virginia Cannabis Control Act.

74. *Id.*

75. H.B. 972, Va. Gen. Assembly (Reg. Sess. 2020) (enacted as 2020 Va. Acts ch. 1285); S.B. 2, Va. Gen. Assembly (Reg. Sess. 2020) (enacted as 2020 Va. Acts ch. 1286).

76. 2020 Va. Acts chs. 1285 & 1286 (codified as amended VA. CODE ANN. § 18.2-250.1 (Cum. Supp. 2020)).

77. See Sarah Rankin, *Virginia Becomes First Southern State to Legalize Marijuana*, AP NEWS (Apr. 7, 2021), <https://apnews.com/article/virginia-1st-southern-state-legalize-marijuana-2346aa3ee52ce43f79b712c14346764d> [<https://perma.cc/V9YE-3QVX>].

78. 2020 Va. Acts chs. 1285 & 1286 (codified as amended VA. CODE ANN. § 19.2-389.3 (Cum. Supp. 2020)).

79. Alex Berg & Lauren M. Bridenbaugh, *Virginia Governor Signs Marijuana Decriminalization Law*, Soc’y for Hum. Res. Mgmt. (May 28, 2020), <https://www.shrm.org/resource/sandtools/legal-and-compliance/state-and-local-updates/pages/virginia-marijuana-decriminalization-law.aspx#:~:text=On%20May%202021%2C%20Virginia%20Gov,criminal%20charge%20for%20such%20possession> [perma.cc/TG9G-67PH].

80. *Id.*

Comprehensive legislation for the legalization of cannabis in Virginia was introduced in 2021. Senate Bill 1406 contained provisions for the public possession limit, personal cultivation allowances, preliminary social equity provisions, expungements, and established a new agency to oversee cannabis business licensing, regulation, and enforcement.⁸¹ These provisions took effect on July 1, 2021.⁸²

This new law legalized personal possession but did not establish a retail market for cannabis.⁸³ The Joint Legislative Audit and Review Commission (“JLARC”) concluded that it would take at least two years for Virginia to create a regulated marketplace for cannabis sales.⁸⁴

A. *Pharmaceutical Processors in Virginia*

Currently, Virginians looking to acquire cannabis may either grow their own or purchase it through a medical certification from one of the pharmaceutical processors licensed by the Board of Pharmacy. Those pharmaceutical processors are broken down into five monopolies that align with the state’s five health service areas (“HSAs”).⁸⁵ There are currently four processors in operation, while the license for the fifth processor—which covers a large area of the state including Charlottesville, Staunton and Winchester—remains vacant.⁸⁶ Based in northern Virginia, HSA II is served by Dalitso LLC (d/b/a Beyond).⁸⁷ HSA III is served by Dharma Pharmaceuticals in Abingdon, Virginia.⁸⁸ HSA IV is served by Green

81. S.B. 1406, Va. Gen. Assembly (Spec. Sess. 2021) (enacted as 2021 Va. Acts, Spec. Sess. I, ch. 550).

82. *Id.*

83. *Id.*

84. JOINT LEGIS. AUDIT & REV. COMM’N., KEY CONSIDERATIONS FOR MARIJUANA LEGALIZATION 152–54 (2020), <http://jlarc.virginia.gov/pdfs/reports/Rpt542-3-1.pdf> [<https://perma.cc/A8SW-Q3G9>].

85. VA. CODE ANN. § 54.1-3442.6 (Cum. Supp. 2022); see also *Pharmaceutical Processors - Medical Cannabis*, VA. BD. OF PHARMACY, <https://www.dhp.virginia.gov/pharmacy/PharmaceuticalProcessing/> [<https://perma.cc/E2JX-SJUC>].

86. The Virginia Board of Pharmacy originally issued a permit to MedMen for HSA I, but that permit is currently vacant as the result of an ongoing legal battle. See Monique Calello, *MedMen’s PharmaCann Virginia Sues Virginia Board of Pharmacy Over Staunton Medical Cannabis Site*, NEWS LEADER, <https://www.newsleader.com/story/news/2021/03/18/pharmacann-sues-virginia-board-pharmacy-over-staunton-medical-cannabissite/4748229001/> [<https://perma.cc/J7FS-9S49>] (Mar. 24, 2021, 10:32 AM).

87. *Id.*

88. *Id.*

Leaf Medical of Virginia, LLC in Richmond, Virginia.⁸⁹ HSA V is served by Columbia Care in Portsmouth, Virginia.⁹⁰

Each processor is required to be fully vertically integrated, with all aspects of the process completed on site.⁹¹ This means that processors must grow cannabis, turn it into saleable cannabis derivative products, and operate a retail sale space out of a single location. Initially, these processors were only providing extracts such as oils, tinctures and edible products made with these substances.⁹² In 2021, an amendment to Code of Virginia section 54.1-3408 expanded the cannabis products available through the Board of Pharmacy to include “botanical cannabis,” defined as cannabis “composed wholly of usable cannabis from the same parts of the chemovar of the cannabis plant.”⁹³

The Board of Pharmacy also regulates the production, processing, and distribution of cannabis products.⁹⁴ Producers who grow cannabis for medical use cannot use pesticide chemicals or petroleum-based solvents during cultivation.⁹⁵ However, the Board of Pharmacy can approve the use of pesticides if an infestation could result in a “catastrophic loss” of a crop.⁹⁶ No cannabis oil intended to be vaporized can contain vitamin E acetate.⁹⁷

All cannabis products intended for medical use must be registered using a brand name.⁹⁸ That registered product must be tested for a terpenes profile⁹⁹ and active ingredients.¹⁰⁰ To be sold under the same brand name, a product must contain levels of active

89. *Id.*

90. *Id.*

91. 18 VA. ADMIN. CODE § 110-60-135(A) (2021).

92. JM Pedini, *Virginia Legislature Approves Dispensing of Botanical Medical Cannabis*, VA. NORML (Feb. 23, 2021), <https://www.vanorml.org/2021-02-23-virginia-legislature-approves-dispensing-of-botanical-medical-cannabis> [<https://perma.cc/LDV8-QDZM>].

93. 2021 Va. Acts, Spec. Sess. I, ch. 227 (codified as amended at VA. CODE ANN. § 54.1-3408.3 (Cum. Supp. 2021)).

94. VA. CODE ANN. § 54.1-3442.6 (Cum. Supp. 2022).

95. 18 VA. ADMIN. CODE § 110-60-280(A) (2021).

96. *Id.*

97. *Id.* § 110-60-280(G) (2021).

98. *Id.* § 110-60-285(A) (2021).

99. *Id.* Terpenes are compounds primarily responsible for aromatic characteristics of cannabis but may separately have medicinal or entourage effects apart from THC and CBD. See Sarana Rose Sommano, Chuda Chittasupho, Warintorn Ruksiriwanich & Pensak Jantrawut, *The Cannabis Terpenes*, MOLECULES, Dec. 8, 2020, at 1, 1–2, <https://www.mdpi.com/1420-3049/25/24/5792> [<https://perma.cc/387V-XB2W>].

100. § 110-60-285(A).

ingredients between 90% and 110% of the registered values.¹⁰¹ All products must contain, among other requirements, a list of all active ingredients, the name of the processor, the date of testing and packaging, an expiration date, and the registered brand name.¹⁰²

The Board of Pharmacy requires cannabis products to be dispensed in child-resistant packaging¹⁰³ and named in a way that does not encourage the use of cannabis products for recreational purposes,¹⁰⁴ or that is associated with persons younger than eighteen.¹⁰⁵ Virginia's current regulations relating to medical cannabis are silent concerning the devices used to vaporize cannabis oils and extracts. The Virginia Cannabis Control Authority may follow the Board of Pharmacy's lead in taking a similar silent stance, but there is an opportunity for the industry to participate through the public process by petitioning for clear standards specific to vaporizers.

B. *Virginia Cannabis Control Authority*

The Cannabis Control Act established the Virginia Cannabis Control Authority ("VCCA").¹⁰⁶ The Board of Directors of the VCCA (the "Board of Directors") has been vested with the authority to regulate "the possession, sale, transportation, distribution, and delivery of retail marijuana and retail marijuana products in the Commonwealth" and to create health and safety guidelines and promote diversity within the industry.¹⁰⁷ The Board of Directors "consist[s] of five citizens at large appointed by the Governor" and approved by the General Assembly to serve five-year terms.¹⁰⁸ The Board of Directors is tasked with establishing the number of licenses, creating criteria to evaluate new licenses, weighing public health outcomes, and approving labs.¹⁰⁹ Each member of the Board of Directors must be a resident of Virginia for at least three years and continue to be a resident during their tenure on the Board of

101. *Id.* § 110-60-285(B) (2021).

102. *Id.* § 110-60-290(B) (2021).

103. *Id.* § 110-60-310(F) (2021).

104. *Id.* § 110-60-285(C)(5) (2021).

105. *Id.* § 110-60-285(C)(7) (2021).

106. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-601 (2021)).

107. VA. CODE ANN. § 4.1-601 (2021).

108. *Id.* § 4.1-607 (2021).

109. *Id.* § 4.1-606 (2021).

Directors, hold at least a bachelor's degree "in business or a related field of study" and "possess a minimum of seven years of demonstrated experience or expertise in direct management, supervision, or control of a business or legal affairs."¹¹⁰ No member of the Board of Directors can hold a cannabis license during their tenure.¹¹¹

Many provisions of the 2021 legislation, including provisions establishing a retail market for marijuana, required reenactment by the 2022 General Assembly in order to take effect.¹¹² Legislation that would have established a regulatory framework for retail sales of marijuana failed to pass in the 2022 Session.¹¹³ As a result, portions of the 2021 legislation remain in effect, while others were not re-enacted as stipulated in the 2021 legislation and thus did not become law.

While the Board of Directors is currently tasked with promulgating regulations addressing a licensure process,¹¹⁴ certain sections of the Virginia Cannabis Control Act that failed to be re-enacted in 2022 addressed the administration of the different license categories that the Board of Directors could issue.¹¹⁵ This Article summarizes the 2021 licensing legislation, which is currently not the law in Virginia but could see new life in the 2023 legislative session, below. Many of these provisions are crucial to establishing a retail cannabis market in Virginia. It remains to be seen whether future legislation will modify the provisions originally passed in 2021.

The Cannabis Control Act provided for licensing for cultivation, product manufacturing, wholesale and retail.¹¹⁶ A cannabis cultivation facility license authorizes the licensee to cultivate, label, and package retail cannabis; to purchase or take possession of cannabis plants and seeds from other cannabis cultivation facilities; to transfer possession of and sell retail cannabis, immature cannabis plants, and cannabis seeds to cannabis wholesalers and retail

110. *Id.* § 4.1-607(A) (2021).

111. *See id.* § 4.1-610 (2021).

112. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551.

113. H.B. 43, Va. Gen. Assembly (Reg. Sess. 2022).

114. VA. CODE ANN. § 4.1-606 (2021).

115. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. §§ 4.1-800 to -811) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

116. *Id.* (codified at VA. CODE ANN. §§ 4.1-800 to -804) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

cannabis stores; to transfer possession of and sell retail cannabis, cannabis plants, and cannabis seeds to other cannabis cultivation facilities; to transfer possession of and sell retail cannabis to cannabis manufacturing facilities; and to sell immature cannabis plants and cannabis seeds to consumers for the purpose of cultivating cannabis at home for personal use.¹¹⁷

A cannabis manufacturing facility license authorizes the licensee to manufacture, label, and package retail cannabis and retail cannabis products; to purchase or take possession of retail cannabis from a cannabis cultivation facility or another cannabis manufacturing facility; and to transfer possession of and sell retail cannabis and retail cannabis products to cannabis wholesalers, retail cannabis stores, or other cannabis manufacturing facilities.¹¹⁸ A cannabis wholesaler license authorizes the licensee to purchase or take possession of retail cannabis, retail cannabis products, immature cannabis plants, and cannabis seeds from a cannabis cultivation facility, a cannabis manufacturing facility, or another cannabis wholesaler and to transfer possession and sell or resell retail cannabis, retail cannabis products, immature cannabis plants, and cannabis seeds to a cannabis cultivation facility, cannabis manufacturing facility, retail cannabis store, or another cannabis wholesaler.¹¹⁹ Finally, a retail cannabis store license authorizes the licensee to purchase or take possession of retail cannabis, retail cannabis products, immature cannabis plants, or cannabis seeds from a cannabis cultivation facility, cannabis manufacturing facility, or cannabis wholesaler and to sell retail cannabis, retail cannabis products, immature cannabis plants, or cannabis seeds to consumers on premises approved by the Board of Directors.¹²⁰ Retail cannabis stores may not employ a person younger than twenty-one years of age, give away retail cannabis or retail cannabis products, sell more than one ounce of cannabis or an equivalent amount of cannabis products to one person during a single transaction, or conduct sales through any means other than a direct, face-to-face

117. *Id.* (codified at VA. CODE ANN. § 4.1-800) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

118. *Id.* (codified at VA. CODE ANN. § 4.1-801) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

119. *Id.* (codified at VA. CODE ANN. § 4.1-803) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

120. *Id.* (codified at VA. CODE ANN. § 4.1-804(A)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

transaction.¹²¹ Additionally, under the original legislation, retail cannabis stores must be geographically dispersed, and their dispersion must be reassessed after every 100 licenses are issued.¹²²

Under the original legislation, and subject to reenactment, which failed to pass, the Board of Directors had the authority to refuse to grant licenses if it has reasonable cause to believe that the applicant, among other things, has been convicted of any crime of moral turpitude, has not demonstrated sufficient financial responsibility, is a licensed manufacturer, distributor, or retailer of alcoholic beverages or tobacco products, or has been sanctioned by the Board of Pharmacy.¹²³ In addition, the Board of Directors was authorized to refuse to grant licenses if the place to be occupied by the applicant was, among other things, closely situated with any place of worship; hospital; substance use disorder treatment facility; public, private, parochial school, or institution of higher education; playground or recreational facility; or child day care program.¹²⁴

The Cannabis Control Act imposes limits on the number of licenses that the Board of Directors may issue. Specifically, subsection (C)(1) of Code of Virginia section 4.1-606 allows the Board of Directors to promulgate regulations that limit the number of licenses issued by type or class to operate a cannabis establishment, provided that the number of licenses issued does not exceed the following limits: 400 retail cannabis store licenses, 25 cannabis wholesaler licenses, 60 cannabis manufacturing facility licenses, and 450 cannabis cultivation facility licenses.¹²⁵ These limitations remain good law.

The Cannabis Control Act includes numerous safeguard provisions in an effort to prevent the legalization of cannabis and creation of a retail cannabis market from adversely affecting the health, safety, and welfare of the people of the Commonwealth. The legislation requires the Board of Directors to establish a testing

121. *Id.* (codified at VA. CODE ANN. § 4.1-804(B)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

122. *Id.* at cl. 11.

123. *Id.* (codified at VA. CODE ANN. § 4.1-809(1)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

124. *Id.* (codified at VA. CODE ANN. § 4.1-809(2)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

125. VA. CODE ANN. § 4.1-606(C)(1) (2021). In determining the number of licenses issued, the Board of Directors will not include any license granted through allowable vertical integration practices to a pharmaceutical processor or an industrial hemp processor. *Id.*

program for retail cannabis and retail cannabis products.¹²⁶ The program must require licensees, prior to selling or distributing retail cannabis or a retail cannabis product to a consumer or to another licensee, to submit a representative sample of the retail cannabis or retail cannabis product to a licensed cannabis testing facility for testing to ensure that the retail cannabis or retail cannabis product does not exceed the maximum level of allowable THC or contamination and to ensure correct labeling.¹²⁷ The Board of Directors is further required to establish acceptable testing and research practices, quality control analysis, equipment certification and calibration requirements, marijuana testing facility record-keeping, and disposal practices.¹²⁸ Thus, while the provision requiring the Board of Directors to promulgate regulations establishing a testing program for retail cannabis and retail cannabis products remains in effect,¹²⁹ the specific legislation governing the licensing of testing facilities and testing procedures is no longer the law.

Additional provisions specifically addressing the retail of cannabis and retail cannabis products failed to be reenacted in 2022. Although the Board of Directors is instructed to establish the requirements for health and safety warning labels to be placed on retail marijuana and retail marijuana products to be sold or offered for sale by a licensee to a consumer,¹³⁰ the provisions governing the labeling and packaging of retail cannabis and retail cannabis products originally set forth in Code of Virginia section 4.1-1402 were not re-enacted. This provision required retail cannabis and retail

126. *Id.* § 4.1-606(B)(4) (Cum. Supp. 2021). The provisions of the testing program were set forth in the proposed language for Code of Virginia section 4.1-1400 and 4.1-1401. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-1400 to -1401) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass). In addition, the original legislation allowed for cannabis testing facility licenses, which authorize the licensee to develop, research, or test retail cannabis, retail cannabis products, and other substances. *Id.* (codified at VA. CODE ANN. § 4.1-802(B)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass). In an effort to promote independent testing, the original legislation prohibited any person that has an interest in a cannabis testing facility license from having any interest in a licensed cannabis cultivation facility, cannabis manufacturing facility, cannabis wholesaler, or retail cannabis store. *Id.* (codified at VA. CODE ANN. § 4.1-802(F)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

127. 2021 Va. Acts chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-1401) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

128. *Id.* (codified at VA. CODE ANN. § 4.1-1400) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

129. VA. CODE ANN. § 4.1-606(B)(4) (2021).

130. *Id.* § 4.1-606(B)(6) (2021).

cannabis products to be labeled with the following information: (i) identification of the type of marijuana or marijuana product and the date of cultivation, manufacturing, and packaging; (ii) the license numbers of the cannabis cultivation facility, the cannabis manufacturing facility, and the retail cannabis store where the retail cannabis or retail cannabis product was cultivated, manufactured, and offered for sale; (iii) a statement of the net weight of the retail cannabis or retail cannabis product; (iv) information concerning pharmacologically active ingredients and potency, including information regarding THC and CBD; (v) information regarding serving sizes; (vi) information on gases, solvents, and chemicals used in marijuana extraction; (vii) instructions on usage; (viii) a list of ingredients and possible allergens; (ix) a recommended use by date or expiration date; (x) a nutritional fact panel; (xi) a universal symbol; and (xii) a warning that the product is for use only by persons twenty-one years of age or older, impairs cognition and the ability to drive, may be habit forming, and should not be used while pregnant or breastfeeding.¹³¹ The original legislation also required retail cannabis and retail cannabis products to be packaged in opaque, child-resistant, tamper-evident, and resealable packaging.¹³²

Under the current legislation, the Board of Directors is instructed to establish a maximum THC level for retail cannabis products.¹³³ Edible retail cannabis products may not contain more than five milligrams of THC per serving and fifty milligrams of THC per package.¹³⁴ The original provisions that prohibit edible retail cannabis products from containing additives that are toxic or harmful, are designed to make the product more addictive, contain alcohol or nicotine, are misleading, or are designed to make the product appeal particularly to persons younger than twenty-one years of age failed to pass reenactment.¹³⁵

131. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified as amended at VA. CODE ANN. § 4.1-1402(A)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

132. *Id.* (codified at VA. CODE ANN. § 4.1-1402(B)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

133. VA. CODE ANN. § 4.1-606(B)(7) (2021).

134. *Id.*

135. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-1403(A)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

C. *Taxation and Revenue Appropriation*

The retail cannabis market is expected to generate significant revenue for the Commonwealth.¹³⁶ The Cannabis Control Act sets forth the tax structure for cannabis sales by which revenue will be generated and preemptively establishes parameters for the manner in which such revenue will be appropriated.¹³⁷ In addition to any state sales and use tax and certain other federal, state, and local taxes, the original legislation specified a tax of twenty-one percent to be levied on the sale of any retail cannabis, retail cannabis products, cannabis paraphernalia sold by a retail cannabis store, non-retail cannabis, and non-retail cannabis products.¹³⁸ Additionally, localities were permitted to levy a three-percent tax on such sales.¹³⁹

While the tax structure failed to pass reenactment, the manner in which the tax revenue will be spent did not require reenactment.¹⁴⁰ After accounting for the VCCA's expenses, net profits will be appropriated between pre-kindergarten programs for at-risk three-year-olds and four-year-olds, the Cannabis Equity Reinvestment Fund, the Department of Behavioral Health and Developmental Services, community services boards for the purpose of administering substance use disorder prevention and treatment programs, and public health programs, including public awareness campaigns that are designed to prevent drugged driving, discourage underage consumption, and inform the public of other potential risks.¹⁴¹

D. *Personal Cultivation, Adult Sharing, and Possession*

As of July 1, 2021, adults twenty-one years old and older are legally permitted to grow up to four cannabis plants per house

136. *Virginia Cannabis Market*, POINT 7 GRP., <https://pointsevengroup.com/marijuana-markets-united-states/virginia/> [<https://perma.cc/8A3H-FY44>] (2022).

137. See 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-1000 to -1009) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

138. *Id.* (codified at VA. CODE ANN. § 4.1-1003(A)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

139. *Id.* (codified at VA. CODE ANN. § 4.1-1004(A)) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

140. VA. CODE ANN. § 4.1-614 (2021).

141. *Id.* § 4.1-614(B) (2021).

hold.¹⁴² Plants must not be visible from a public way and each plant must be tagged with the individual's name, driver's license number, and notation that the plant is being grown for personal use.¹⁴³

Plants are permitted to be shared through adult sharing.¹⁴⁴ Adult sharing is defined as transferring cannabis "between persons who are 21 years of age or older without remuneration."¹⁴⁵ No civil or criminal penalty may be imposed for adult sharing of cannabis or cannabis products weighing up to one ounce. Adult sharing does not include when marijuana is contemporaneously given away with another reciprocal transaction or as a gift with a purchase.¹⁴⁶

Adults also are permitted to possess up to one ounce of cannabis or an equivalent amount of cannabis product in public.¹⁴⁷ However, possession of greater than one ounce of cannabis or cannabis product is subject to a twenty-five-dollar civil fine.¹⁴⁸ Possession of greater than one pound of cannabis or cannabis product is subject to felony imprisonment and/or a fine of not more than \$250,000.¹⁴⁹

E. *Social Equity*

The legalization of cannabis creates an opportunity for Virginia to implement criminal justice reforms, promote diverse participation in the cannabis industry, and reinvest in communities disproportionately affected by marijuana prohibition. The Cannabis Control Act includes numerous social equity provisions that attempt to promote business ownership and economic growth among communities disproportionately impacted by the former prohibition of marijuana.¹⁵⁰ Among these provisions, the Board of Directors is required when issuing licenses to give preference to qualified social equity applicants for the first six months after it begins issuing licenses, and the applicants must have at least sixty-six percent

142. *Id.* § 4.1-1101(A) (2021). Household is defined as those individuals, related or not, who live in the same house or other place of residence. *Id.*

143. *Id.* § 4.1-1101(B) (2021).

144. *Id.* § 4.1-1101.1 (2021).

145. *Id.* § 4.1-1101(A) (2021).

146. *Id.*

147. *Id.* § 4.1-1100(A) (2021).

148. *Id.* § 4.1-1100(B) (2021).

149. *Id.* § 4.1-1100(C) (2021).

150. *See, e.g.*, 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-606(B)(13) (2021)).

ownership of the business.¹⁵¹ “[S]ocial equity license applicants” includes applicants that: (1) reside in a jurisdiction disproportionately targeted by police for marijuana arrests, (2) reside in a jurisdiction that is economically distressed, (3) were convicted of misdemeanor violations relating to marijuana, (4) are a relative of someone who has been convicted, or that graduated from a historically black college or university located in the Commonwealth.¹⁵² In addition, the Board of Directors is tasked with establishing standards and requirements for evaluating which jurisdictions have been disproportionately policed for marijuana crimes or are economically distressed, any preference in the licensing process for qualified social equity applicants, the percentage of application or license fees that are waived for qualified social equity applicants, and a low-interest business loan program for qualified social equity applicants.¹⁵³ This provision was not subject to reenactment and remains a mandate of the Board of Directors.¹⁵⁴

The Cannabis Control Act also created the Virginia Cannabis Equity Business Loan (“VCEBL”) Program and Fund to assist social equity licensees.¹⁵⁵ The goal of the VCEBL Program is to: (1) identify social equity qualified cannabis licensees who are in need of capital for the start-up of a properly licensed cannabis business; (2) provide loans and technical assistance to qualified social equity cannabis licensees; and (3) bring together community partners to sustain the program.¹⁵⁶ The VCEBL Fund will be used solely to provide low-interest and zero-interest loans to social equity licensees in order to foster business ownership and economic growth among communities that have been the most disproportionately impacted by the former prohibition of marijuana.¹⁵⁷ Loans will be issued through the VCEBL Program, to be established by the VCCA.¹⁵⁸ The VCEBL Program and Fund provisions are not subject to reenactment.¹⁵⁹

151. VA. CODE ANN. § 4.1-606(B)(13) (2021).

152. *Id.*

153. *Id.* § 4.1-606(B)(14)–(15) (2021).

154. *Id.*; 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551, cl. 7.

155. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-1500 to -1503 (2021)).

156. VA. CODE ANN. §§ 4.1-1502(B) (2021).

157. *Id.* § 4.1-1501 (2021).

158. *Id.* § 4.1-1502 (2021).

159. *Id.* §§ 4.1-1501, -1502 (2021); 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551, cl. 7.

Additionally, the Cannabis Control Act established a Cannabis Equity Reinvestment (“CER”) Board and Fund.¹⁶⁰ CER is intended to address the impact of economic disinvestment, violence, and historical overuse of criminal justice responses to communities and individuals by providing resources to support local design and control of community-based responses to such impacts.¹⁶¹ The primary powers and duties of the CER Board consist of the following: (1) support persons, families, and communities historically and disproportionately targeted and affected by drug enforcement; (2) develop and implement scholarship programs and educational and vocational resources for historically marginalized persons who have been adversely impacted by substance use individually, in their families, or in their communities; (3) develop and implement a program to award grants to support workforce development programs, mentoring programs, job training and placement services, apprenticeships, and reentry services that serve persons and communities historically and disproportionately targeted by drug enforcement; (4) administer the CER Fund; and (5) collaborate with the Board of Directors and the Office of Diversity, Equity, and Inclusion to implement programs and provide recommendations in line with CER Program purposes.¹⁶² The CER Board and Fund provisions are not subject to reenactment.¹⁶³

F. Current State of Virginia Law Following 2022 Legislative Session

As noted above, many provisions of the 2021 Cannabis Control Act, including provisions that would have established a regulatory framework for retail sales of cannabis, required reenactment by the 2022 General Assembly in order to take effect.¹⁶⁴ However, the General Assembly failed to pass omnibus legislation necessary to establish a retail market for cannabis in the 2022 Session.¹⁶⁵ It is possible the General Assembly may address this issue in its 2023 Session, which begins next January.

160. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. §§ 2.2-2499.5 to -2499.8 (Cum. Supp. 2021)).

161. VA. CODE ANN. § 2.2-2499.5(A) (Cum. Supp. 2021).

162. *Id.* § 2.2-2499.7 (Cum. Supp. 2021).

163. *Id.* §§ 2.2-2499.5, -2499.7 (Cum. Supp. 2021); 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551, cl. 7.

164. *See supra* Section IV.B.

165. H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022).

In addition to the licensing and retail provisions discussed above, additional provisions of the 2021 legislation that were not reenacted, and thus are not in effect, pertain to local regulation of cannabis. Provisions allowing a local referendum on whether retail sales within the locality would be prohibited,¹⁶⁶ as well as provisions allowing localities to regulate the hours of operation for retail sales were not reenacted in 2022.¹⁶⁷ Similarly, provisions barring localities from regulating or prohibiting cultivation, manufacture, possession, sale, or other aspects of retail marijuana were not reenacted.¹⁶⁸

During the 2022 Session, the Virginia Senate voted to send Senate Bill 591 back to Committee, thereby killing the bill.¹⁶⁹ This legislation would have effectively eliminated the delta-8 THC product market in Virginia.¹⁷⁰ There are over 100 cannabinoids found in cannabis.¹⁷¹ Delta-9 THC is found in abundance in cannabis and has long been recognized as the main psychoactive ingredient in the plant.¹⁷² Other psychoactive cannabinoids are found in cannabis as well, including delta-8 and delta-10 THC, but in lower quantities.¹⁷³ Both marijuana and hemp are produced from the cannabis sativa plant, with the difference being the amount of the delta-9 THC.¹⁷⁴ Anything above a percentage of 0.3% of the plant's dry weight constitutes marijuana, and anything under that threshold

166. 2021 Va. Acts, Spec. Sess. I, chs. 550 & 551 (codified at VA. CODE ANN. § 4.1-629) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

167. *Id.* (codified at VA. CODE ANN. § 4.1-631) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

168. *Id.* (codified at VA. CODE ANN. § 4.1-630) (subject to reenactment by H.B. 430, Va. Gen. Assembly (Reg. Sess. 2022), which failed to pass).

169. Nicole Potter, *Virginia Senate Votes Against Governor's Amendment to Criminalize Possession of Cannabis*, HIGH TIMES (Apr. 29, 2022), <https://hightimes.com/news/virginia-senate-votes-against-governors-amendment-to-criminalize-possession-of-cannabis/> [<https://perma.cc/BEL7-2Z6D>].

170. S.B. 591, Va. Gen. Assembly (Reg. Sess. 2022); Potter, *supra* note 169.

171. *5 Things to Know About Delta-8 Tetrahydrocannabinol – Delta-8 THC*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-the> [<https://perma.cc/L6ZB-CG5M>].

172. *See id.*

173. Amber Smith, *Delta 10 Vs Delta 8: What's the Difference?*, DISCOVER (Oct. 19, 2022, 2:00 AM), <https://www.discovermagazine.com/lifestyle/delta-10-vs-delta-8-whats-the-difference> [<https://perma.cc/5A58-KYZN>].

174. Katrina Lubiano, *What's the Difference? Delta-8 vs. Delta-9 THC*, NEUROGAN (Mar. 25, 2022), [https://neurogan.com/blogs/news/delta8-vs-delta-9-thc#:~:text=The%20cannabis%20plant%20\(hemp%20and,isomer%20of%20delta%2D9%20THC](https://neurogan.com/blogs/news/delta8-vs-delta-9-thc#:~:text=The%20cannabis%20plant%20(hemp%20and,isomer%20of%20delta%2D9%20THC) [<https://perma.cc/N49K-R4Y3>].

can be considered hemp.¹⁷⁵ To the extent delta-8, delta-10, and other extracts are derived from a cannabis plant with less than 0.3% delta-9 THC, they constitute hemp.¹⁷⁶ Hemp production was legalized with the Agricultural Improvement Act of 2018 or the 2018 Farm Bill.¹⁷⁷ In 2019, Virginia passed House Bill 1839 that legalized the farming and cultivation of hemp, as well as the use, possession, sale, distribution, and production of hemp-derived compounds, including delta-8 THC.¹⁷⁸

In 2020, Virginia amended or added specific definitions of marijuana and hemp in its Drug Control Act.¹⁷⁹ Code of Virginia section 54.1-3401 defines hemp as separate from marijuana under state law.¹⁸⁰ Similarly, Code of Virginia section 54.1-3446 removes hemp-derived tetrahydrocannabinol from its list of Schedule I controlled substances.¹⁸¹

Currently, in Virginia, hemp and CBD products can contain no more than 0.3% delta-9 THC if they are sold outside of a licensed dispensary, but there is no limit on how much delta-8 or delta-10 they can contain (or any other THC), so long as those other types of THC are derived from hemp.¹⁸² The amendments proposed by Governor Youngkin in Senate Bill 591 would have capped total THC (including delta-8 and delta-10) to 0.3%, effectively wiping out the delta-8 product market since that low of a concentration is unlikely to produce any psychoactive effect.¹⁸³ The amendments would have also banned the use of synthetic delta-8 THC.¹⁸⁴ With the end of Senate Bill 591, delta-8 THC products can remain on Virginia store shelves for now.

On June 1, 2022, the General Assembly voted to approve the budget bill, House Bill 30, which contains language to recriminalize personal possession of over four ounces of marijuana in

175. Agricultural Improvement Act of 2018, 7 U.S.C. § 1639o (defining the term “hemp”).

176. See Lubiano, *supra* note 174.

177. 7 U.S.C. §§ 1639o–1639s.

178. H.B. 1839, Va. Gen. Assembly (Reg. Sess. 2019) (enacted as 2019 Va. Acts ch. 653).

179. 2020 Va. Acts ch. 831 (codified as amended at VA. CODE ANN. § 54.1-3401 (Cum. Supp. 2020)).

180. VA. CODE ANN. § 54.1-3401 (Cum. Supp. 2020) (stating that the definition of “[m]arijuana” does not include hemp).

181. *Id.* § 54.1-3446 (Cum. Supp. 2021).

182. See VA. CODE ANN. § 3.2-4113 (Cum. Supp. 2022).

183. S.B. 591, Va. Gen. Assembly (Reg. Sess. 2022) (as amended in the nature of a substitute, Apr. 11, 2022).

184. *Id.*

public.¹⁸⁵ The language, which creates two new misdemeanors, took effect immediately upon Governor Youngkin's signing of the budget.¹⁸⁶ Currently, the personal possession in public of more than one ounce and up to one pound of marijuana by adults twenty-one and older is subject to no more than a twenty-five dollar civil penalty.¹⁸⁷ Upon the Governor's signature, personal possession in public of over four ounces and less than a pound of cannabis became a Class 3 misdemeanor, making it punishable by a \$500 fine.¹⁸⁸ Second or subsequent offenses will be Class 2 misdemeanors punishable by up to six months in jail and/or a \$1,000 fine.¹⁸⁹

With a long regulatory road ahead, the schedule for the state's recreational market is currently unclear. With recreational sales stalled for the foreseeable future, Virginia's medical cannabis program remains the only way for most residents to legally acquire marijuana short of growing it themselves.

185. H.B. 30, Va. Gen. Assembly (Spec. Sess. 2022) (enacted as 2022 Va. Acts, Spec. Sess. I, ch. 2) (amending VA. CODE ANN. § 4.1-1100(C) (Cum. Supp. 2022)).

186. JM Pedini, *Approved Budget Recriminalizes Public Marijuana Possession Over Four Ounces of Marijuana*, VA. NORML (June 1, 2022), <https://www.vanorml.org/2022-06-01-approved-budget-recriminalizes-public-marijuana-possession-over-four-ounces-of-marijuana> [<https://perma.cc/2MVY-A27K>] (stating that "the budget bill which contains language to recriminalize personal possession of over four ounces of marijuana in public" will "take effect immediately upon Republican Governor Glenn Youngkin's signature on the budget"); Tyler Arnold, *Youngkin Signs Budget, Vows to Keep Pushing for Gas Tax Relief*, POTOMAC LOC. NEWS, (June 22, 2022, 2:29 PM), <https://www.potomaclocal.com/2022/06/22/youngkin-signs-budget-vows-to-keep-pushing-for-gas-tax-relief/> [<https://perma.cc/Z2YH-Q38R>] (noting that Virginia Governor Glenn Youngkin had signed the state budget).

187. VA. CODE ANN. § 4.1-1100(A)–(B) (Cum. Supp. 2021).

188. H.B. 30; VA. CODE ANN. § 18.2-11 (2021).

189. H.B. 30; § 18.2-11.