

MCBA National Cannabis Equity Report

2022



Introduction

About MCBA

Founded in 2015, the Minority Cannabis Business Association (“MCBA”) is the first national trade association dedicated to serving the needs of minority cannabis businesses and their communities. Our mission is to empower and support minority entrepreneurs and their communities by creating an equitable and sustainable cannabis industry. MCBA unites community and industry leaders to drive policy, programing, and outreach initiatives to achieve equity for the communities most impacted by cannabis prohibition and the War on Drugs (“impacted communities”).

What is Social Equity?

“Equity” is defined as the quality of being fair and impartial: equity of treatment. MCBA defines “social equity” in the cannabis industry using four pillars that encompass the breadth of the restorative policies necessary to adequately address the harms of cannabis prohibition on impacted communities and create an equitable and just cannabis industry.

- **Equitable industry** promotes the inclusion and success of minorities in the cannabis industry through equal access to opportunities and resources.
- **Equitable communities** empower and support the communities most impacted by the War on Drugs through community reinvestment, corporate responsibility initiatives, and social programing.
- **Equitable justice** reduces arrests and imprisonment for non-violent cannabis offenses and restores basic rights of citizenship to individuals with non-violent cannabis offenses.
- **Equitable access** ensures safe legal cannabis products are available to immigrants, veterans, seniors, and disabled persons without risk of loss of benefits or immigration status.

The mass incarceration that began with the War on Drugs, and includes cannabis prohibition, continues to destabilize Black¹, Latino, Indigenous, and other communities of color. Cannabis prohibition has deprived impacted individuals² access to higher education, housing, employment, and the right to vote. To counter the effects on both individuals and communities, many states and localities have developed and implemented cannabis “social equity programs”³ with, or following, the legalization of adult use or medical cannabis. While the term “social equity” in the cannabis industry most often refers to the efforts to create an equitable industry outlined in this report, social equity programs should encompass all pillars of equity to ensure the efforts to redress the harms of cannabis prohibition are as broad as the harms.

¹ Roberts, Dorothy E., “The Social and Moral Cost of Mass Incarceration in African American Communities” (2004). Faculty Scholarship at Penn Law. 583. Retrieved January 27, 2022 from https://scholarship.law.upenn.edu/faculty_scholarship/583

² “Impacted individuals” defined as the individuals most impacted by cannabis prohibition and the broader War on Drugs.

³ Morris, S. J. H. (2021, April 16). State cannabis reform is putting social justice front and center. Brookings. Retrieved November 18, 2021, from <https://www.brookings.edu/blog/fixgov/2021/04/16/state-cannabis-reform-is-putting-social-justice-front-and-center/>

Executive Summary

The MCBA National Cannabis Equity Report (“Equity Report” or “Report”) presents the initial findings from the development of MCBA’s National Cannabis Equity Map (“Equity Map” or “Map”). The Equity Map is a dynamic digital tool for advocates, lawmakers, industry and other stakeholders seeking information on state and municipal social equity programs, as well as other state and local cannabis laws impacting the outcome of social equity programs and overarching diversity goals. The Report highlights the findings of 40 policy issues explored in the Map. Among the highlighted issues, MCBA identified seven initial issues for consideration as advocates, lawmakers, and other stakeholders reexamine social equity in state cannabis programs.

The number and efficacy of state social equity programs does not reflect the expressed commitment to achieving equity through cannabis.

While cannabis has been legalized for medical or adult use in 36 states, only 15 states have social equity programs. Thirteen of the 18 adult-use states and two of the 18 medical-only legal cannabis states have social equity programs. Of the 15 state social equity programs, not one has resulted in an equitable cannabis industry across all four pillars of equity (industry, justice, community, and access).

The use of non-race criteria in the social equity qualifications and definitions has not yielded diverse cannabis markets.

Race-based solutions in state cannabis reform are critical to remedying the race-based harm of cannabis prohibition. Of the 15 state cannabis equity programs, only three exist in states with laws that limit the use of remedial race classifications—Arizona, California, and Michigan. While not prohibited by law, many states with social equity programs use alternative non-race criteria despite the disparate impact of cannabis laws and enforcement on Black, Latino, and Indigenous Americans. Despite social equity legislation citing the intent to create diversity within the industry, and specifically provide opportunities to impacted individuals and communities, the data shows these efforts have been unsuccessful.

Many states continue to utilize state-level license caps to limit state markets leading to a lack of diversity and the proliferation of the legacy market.

Of the 36 legal cannabis states, 26 include state-level license caps that limit the number of licenses issued within the state. Limiting the number of licenses at the state level artificially inflates the value of the license due to limited competition within the legal market without accounting for competition from the legacy market⁴ and without providing access or incentive to transition to the legal market. Despite arguments of oversaturation in low-income neighborhoods, state-level license caps do not decrease retail outlet density or overconcentration, especially in low-income neighborhoods. Conversely, heavy competition for limited licenses leads to lawsuits that delay the implementation of social equity programs and increase costs to prospective licensees.

⁴ “Legacy” cannabis operators are unlicensed operators that (1) commenced operations before legalization and (2) continue to participate in the unregulated market after legalization.

Executive Summary

Among the few social equity programs that provide funding for social equity applicants and licensees, fewer still provide access to timely funding for social equity applicants and licensees to support minority operators' market entry and participation.

Economic and wealth disparities are among the many collateral consequences of the War on Drugs. Despite this, only six of 15 state social equity programs provide funding for social equity applicants and operators beyond fee reductions and waivers. Of the six states that provide funding for their social equity programs, all but California provide funding from adult-use tax revenues or from other monies collected from adult-use operations. As such, social equity applicants often lack adequate financial resources to support the application and start-up processes.

Requirements to secure premises prior to issuance of a license or conditional license continue to present a significant barrier to entry for social equity operators.

With the high cost of commercial real estate and the premium price of "green zone" properties, pre-application premise requirements render ownership in the legal cannabis industry beyond reach for many. Twenty-three states require an applicant or licensee to secure premises to operate a cannabis business prior to obtaining a license. Here again, administrative delays and legal challenges to social equity programs postpone the award of cannabis business licenses increasing the time applicants must pay to hold property rights without the promise of a license.

Bans on ownership for individuals with past cannabis convictions remain prevalent in state-legal cannabis programs.

Thirty-four of 36 medical cannabis programs and 14 of the 18 adult-use programs have explicit disqualifications for licensure due to certain convictions, while only four medical and five adult-use programs provide exemptions for qualified cannabis convictions. While some adult-use programs have moved away from such rigid conviction disqualifications. The inequities caused by felony exclusions in the medical market seep into the adult-use market.

Inequities in existing medical markets create inequities in adult-use markets.

State medical programs include significant barriers to entry to ownership and employment that carry from the medical to adult-use market, along with significant advantages for medical operators seeking adult-use licenses, including automatic co-location of an adult-use license with medical licenses, early market access, and opt-out and land use exemptions that create inequality in state adult-use cannabis markets. Additionally, the barriers to entry into the medical market, including the ban on ownership by individuals with cannabis convictions, remain high for the individuals most impacted by cannabis prohibition.

About the MCBA National Map

The Equity Map is a research tool that gathers and stores data critical to the understanding and analysis of cannabis equity policy with an emphasis on the “Equitable Industry” pillar of cannabis social equity. The Map includes citations to the law to facilitate research and the comparative study of cannabis laws. The Map includes both state and municipal programs. For consistency, the Equity Report includes only the initial data from state medical and adult-use cannabis programs.

MCBA set out originally to develop the Map as a digital tool to gather and track information on state and local cannabis equity programs. However, throughout the process of research and analysis, it became evident that to serve as a resource to assess current cannabis social equity programs and gather insights to help develop solutions to increase the efficacy of social equity programs, the data had to extend beyond existing equity programs, none of which, to date, have proven holistically successful.

As such, we expanded the Equity Map to include additional laws that could affect outcomes of social equity programs, as well as barriers to entry and sustainability to industry equity for small minority operators in markets without social equity programs. The resulting Map includes data concerning (1) key features of social equity programs, (2) other equity and restorative justice provisions, and (3) other industry provisions affecting equitable outcomes in the cannabis industry. The latter two include data from states with and without formal social equity programs.

Given the complex and unique factors shaping state and municipal markets, MCBA does not recommend that users or readers employ the Map or this Report to draw conclusions about the efficacy of a given policy in producing favorable or unfavorable outcomes for cannabis equity from individual policies identified in the tool or the study. Instead, we recommend that users and readers assess each policy in the context of the regulatory framework, market and political factors, and other economic and social factors not included in the Equity Map or Report. This holistic assessment will enable you to utilize these tools to develop more accurate and impactful policy.

Methodology

The Equity Map and Report cites public laws, statutes, and regulations. The goal is to provide the most specific information available. However, some states have legalized but have yet to implement the programs through the regulatory process. At the time of publication, these states include Alabama, Connecticut, New Jersey, New York, Vermont, and Virginia. As such, these states may enact additional social equity provisions that will be updated in the Map as the rules are developed.

Unfortunately, at the time of publication of the Report, Virginia's incoming legislature and Republican administration have begun taking aim at the social equity provisions with the introduction of legislation to redirect adult use revenues for community reinvestment to address the harms of prohibition to the general fund. Further, the administration has taken steps to reverse the expungement provisions and undo the social equity program calling it the "give a felon a license" program.⁵

For the purposes of the Report and Map, state "legal" cannabis programs include both medical and adult-use programs allowing for the sale of cannabis products with a delta-9 THC level exceeding 0.3% as permitted under the 2018 Farm Bill.⁶ The term "social equity program" includes formalized programs intended to (1) promote and support ownership of businesses licensed under the state's medical or adult-use cannabis framework; (2) provide oversight, accountability, incentives, or mandates to effectuate the purpose of the program; and (3) include an overarching commitment to equity.

MCBA did not determine that Florida's social equity policies met the threshold for a social equity program but did include Pennsylvania despite both states having no specific programming to support minorities in the cannabis industry. Unlike Florida, Pennsylvania included provisions aimed to increase the diversity of operators in the state's cannabis industry with an eye toward enforcement. To support Pennsylvania's diversity goals, 10% of the points awarded in the evaluation of medical cannabis license applications are allotted specifically to diversity plans. While Florida law theoretically requires cannabis license holders to have a "strong diversity plan," Florida licensing, which is merit based, does not allocate points for achieving specific diversity related criteria. Additionally, the single license reserved for a Black farmer has an application fee of more than double the cost paid by general license holders. As of the publication of this report, Florida has yet to award that license.

MCBA will maintain the Equity Map as a dynamic tool with ongoing updates and periodic reviews. We invite feedback, suggestions, and revisions to ensure the accuracy and improve the impact of the tool.

⁵ Republicans Stripping Out Social Equity in Cannabis Legislation. (2022, January 10). Dana Borchardt. Green Market Report. Retrieved January 27, 2022 from <https://www.greenmarketreport.com/republicans-stripping-out-social-equity-in-cannabis-legislation/>

⁶ Hemp Production and the 2018 Farm Bill. (2019, July 25). U.S. Food and Drug Administration. Retrieved January 27, 2022 from <https://www.fda.gov/news-events/congressional-testimony/hemp-production-and-2018-farm-bill-07252019>

II. KEY FINDINGS:

The Basics

Medical use of cannabis first became legal in the United States in 1996 when California approved Prop 215. Since then, 35 other states, four out of five permanently inhabited U.S. territories, and the District of Columbia have legalized medical marijuana. While the details of the medical programs vary state to state, in general, people with qualifying conditions ranging from epilepsy to social anxiety may, with physician referral, receive cannabis to treat or manage their conditions. Today, the use and general acceptance of medical cannabis continues to evolve in favor of medical programs.⁷

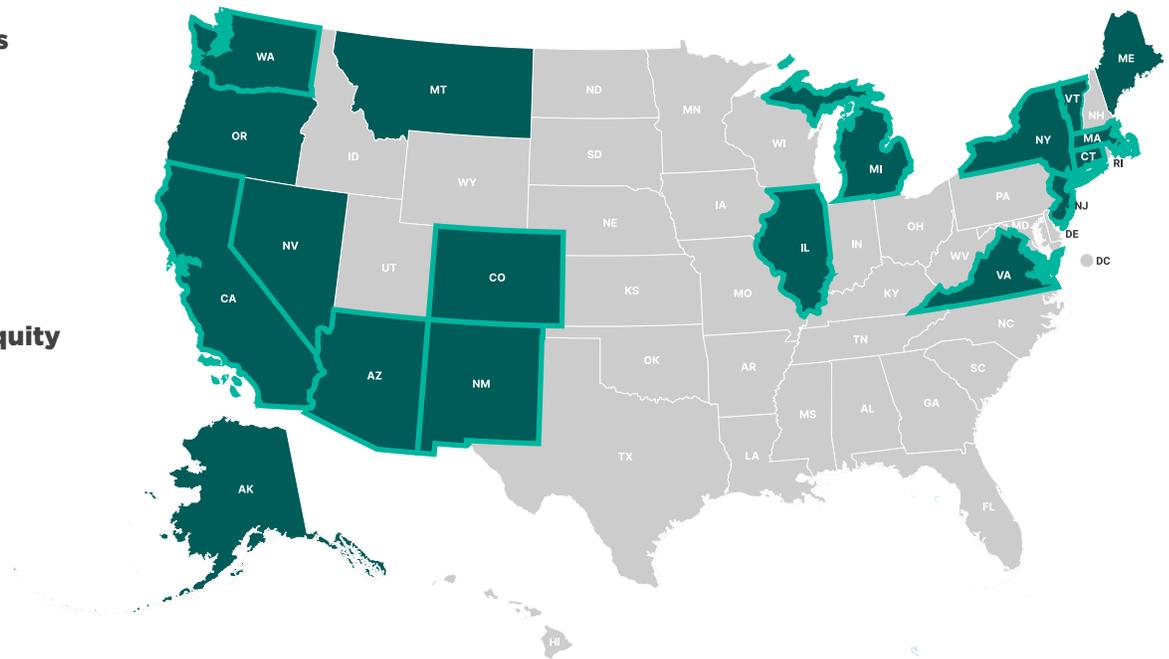
In 2012, Colorado and Washington became the first states to legalize adult-use cannabis creating the nation’s first state-regulated cannabis markets. This momentum carried over through the 2016 election, which raised the total number of state adult-use programs to eight. On November 2, 2020, Arizona, Montana, and New Jersey voters legalized adult-use cannabis. Then in 2021,⁸ New York legalized adult-use cannabis followed by Virginia, New Mexico, and Connecticut. Currently, more than one-third of Americans live where adult-use cannabis is legal.

Adult-Use Cannabis Programs:

18 ●

Adult-Use Social Equity Programs:

13 ●



⁷ According to a new survey conducted by Pew Research Center, 91% of Americans believe medical cannabis should be legal. Green, T. (2021, April 16). Americans overwhelmingly say marijuana should be legal for recreational or medical use. Pew Research Center. Retrieved November 18, 2021, from <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/>

⁸ In 2021, both South Dakota and Mississippi voters also passed cannabis legalization initiatives, which were overturned by subsequent legal challenges.

II. KEY FINDINGS:

The Basics

Total



AK, AL, AR, AZ, CA, CO, CT, DE, FL, GA, HI, IL, LA, MD, ME, MA, MI, MN, MO, MT, ND, NH, NV, NJ, NM, NY, OH, OK, OR, PA, RI, UT, VA, VT, WA, WV

Discussions in early-adopting adult-use states, including Alaska, Colorado, Oregon, and Washington, mentioned social equity. This dialogue, however, did not translate into social equity programs in the states' initial legalization initiatives.

In 2018, Massachusetts became the first state to create and implement a state social equity program with the legalization of adult-use cannabis through regulations that aimed to provide resources, training, and education to bring minorities and other marginalized communities into the newly legal industry through social equity-exclusive license classes, including marijuana delivery operator, delivery only, and social consumption establishments.

In 2020, Illinois sought to make strides with its comprehensive approach to equity that included the most robust equity provisions to date with ample community reinvestment provisions, funding and support for social equity applicants, and automatically expunging from criminal histories cannabis convictions for conduct now legal for adults. However, the Illinois program has been wrought with legal challenges that have delayed implementation and led to increased, and often untenable, delays and start-up costs for prospective operators.⁹

Medical-Only programs?



AL, AR, DE, FL, GA, HI, LA, MD, MN, MO, ND, NH, OH, OK, PA, RI, UT, WV

In 2021, social equity and racial justice took center stage¹⁰ in negotiations on state legalization of adult-use cannabis, possibly creating a new benchmark. Virginia became the first Southern state to fully legalize cannabis and the first Southern state to include a cannabis social equity program. In March, New York passed the Marijuana Regulation and Taxation Act (MRTA), adult-use legalization legislation touted as the new benchmark for cannabis equity. Similarly, Connecticut Governor Lamont ultimately supported cannabis legalization with broad provisions intended to restore and empower impacted communities.

The beginning of the 2022 state legislative sessions bring both hope and concern about the future of cannabis equity. While paths exist for medical or adult-use legalization efforts in states including Pennsylvania, North Carolina, Ohio, and Mississippi, equity initiatives are absent or under attack. Pennsylvania was the first state medical social equity program. Despite this, questions remain as to whether current proposals gaining support from legislators and large industry operators will contain meaningful equity provisions. Virginia's social equity provisions are unlikely to withstand the Republican assault, while the state's four existing medical operators are pushing for at least a one-year head start on adult-use sales.

Medical Social Equity Programs



PA, MD

⁹ Recently, two companies applying for cannabis business licenses in Illinois filed lawsuits against regulators claiming the lottery system awarding permits is unconstitutional because it violates due process and equal protection. Furthermore, they allege the process is biased and does not meet the state's goal to promote social equity within the industry.

¹⁰ Racial justice discussions widely took a center stage in the United States following the 2020 murders of Breonna Taylor during a no knock drug raid and George Floyd during a police encounter.

On April 17, 2016, Pennsylvania passed Act 16 establishing a medical marijuana program. However, the medical program would not launch until February 2018. Central to the program is the requirement that reserves 100 points out of a possible 1,000 for each medical business license applicant's diversity plan. Additionally, to meet diversity goals, the state conducts outreach, provides notice of participation opportunities on its website, and tailors application materials that encourage applicants to contract with diverse groups.

Maryland passed the Natali M. Laprade Act in 2014, which required diversity in its medical license applicant evaluations. However, of the first 15 grower licenses awarded, none went to Black-owned businesses despite one in three state residents being Black. In 2018, to increase minority involvement in Maryland's medical program, the state legislature passed the Natalie M. Laprade Medical Cannabis Commission Reform Act, which created four additional grow licenses and 10 additional process licenses. This round of licenses required that 15% of applicants' scores reflect the racial and gender diversity of the business owners and employees. Additionally, to receive points for diversity, applicants needed to demonstrate that 51% of ownership interest in their company was held by a woman, minority, or those living in economically disadvantaged areas.¹¹ The initiative was met with numerous legal challenges.¹² Currently, in Maryland, only four of the 26 companies with grower licenses are majority-owned by a woman or person of color.

Ultimately, both medical social equity programs remain narrower in scope than existing adult-use social equity programs. The Pennsylvania and Maryland medical equity programs have been heavily criticized for having little impact on addressing the harms of cannabis prohibition or diversity in the cannabis industry.

Florida currently has four provisions that arguably provide for social equity in the cannabis industry but do not meet our criteria for a social equity program. Under these provisions, the state will: (1) reserve one of the 10 licenses for a Black farmer and class member as defined in *Pigford v. Glickman* 185 F.R.D 82 (D.D.C. 1999); (2) require applicants to have strong diversity plans; (3) require applicants' management, ownership, and employment to reflect an involvement of minorities and veterans; (4) allocate \$10 of the identification card fee to the Division of Research at Florida Agricultural and Mechanical University to educate minorities about marijuana for medical use and the impact of the unlawful use of marijuana on minority communities.

Alabama currently has one equity provision that reserves 1/4th of all licenses and 1/5th of vertically integrated licenses for business entities at least 51%-owned by a member of a minority group, which includes individuals of African American, Native American, Asian, or Hispanic descent.

¹¹ Thompson, M. (2020, June 10). Data reveals lack of minority investors in Maryland cannabis industry. CNS Maryland. Retrieved November 18, 2021, from <https://cnsmaryland.org/2020/05/26/data-reveals-lack-of-minority-investors-in-maryland-cannabis-industry/>

¹² Id.

III. KEY FINDINGS:

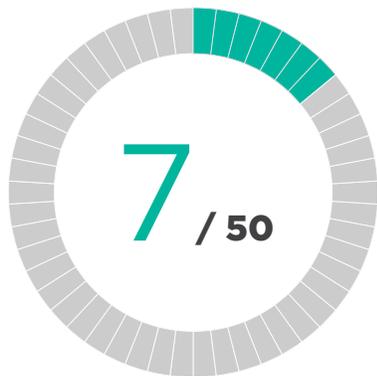
Social Equity Programs

DEFINITIONS AND QUALIFICATIONS

The “social equity” definition and criteria provide the foundation for state social equity programs. While the scope and impact of the programs vary, the states generally include in the social equity qualifications or definition a combination of the following: qualifying income, previous cannabis conviction, state residency, residency in a designated impact area, or explicitly named socially or economically disadvantaged groups. Despite overwhelming evidence of the disparate impact of cannabis laws and enforcement on Black, Latino, and Indigenous communities, states that do not expressly prohibit the use of remedial race classifications rely primarily on other criteria due to both constitutional and political concerns.¹³

SOCIAL EQUITY DEFINITION AND QUALIFICATIONS:

Previous Cannabis Conviction



Seven states to date use previous cannabis convictions in the definition or qualifications for cannabis social equity programs. While social equity program criteria in California is not set at the state level, currently, all California municipal social equity programs include previous cannabis convictions in their eligibility criteria. The inclusion of individuals with previous cannabis convictions serves to provide both pathways to the legal market for legacy operators and restorative justice through economic empowerment of the individuals most impacted by cannabis prohibition.



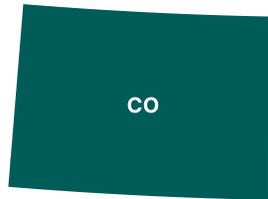
¹³ Remedial race classifications in a social equity program would have to survive strict scrutiny, which means the state would have to prove (1) a compelling governmental interest exists for the use of remedial race classifications and (2) the specific provision is narrowly tailored to achieve this interest. Race-Based Classifications: Overview. (2022). LII / Legal Information Institute. Retrieved January 27, 2022, from <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/race-based-classifications-overview>

SOCIAL EQUITY DEFINITION AND QUALIFICATIONS:

Income



Five states currently use income in the social equity program definition or qualifications. How income is calculated varies, but states generally use the federal poverty level or the median income over a period of time. In the United States, harmful enforcement of cannabis and other drug prohibition laws are frequently concentrated in urban areas,¹⁴ most of which have experienced extreme gentrification and the highest costs of living.¹⁵ The Federal Poverty Level calculation is a nationwide survey of poverty that does not account for the cost of living in urban environments versus rural areas.¹⁶ Area median income thresholds, in contrast, recognize that people live in local jurisdictions and take into account cost of living and community income in specific locales.¹⁷ Area median incomes better represent the actual net income in a given locality, versus an arbitrary nationwide survey of poverty.



¹⁴ "Forty of the nation's 43 largest cities experienced growth in drug arrests from 1980-2003. Of these, six experienced more than a 500% increase during this period. Growth in drug arrests varied significantly among the nation's cities from 1980-2003." "The top ten cities' average growth of 592% was nearly 12 times that of the 50% average growth for the bottom ten cities." The Sentencing Project, & King, R. (2008, May). Disparity By Geography: The War on Drugs in America's Cities. <https://www.sentencingproject.org/publications/disparity-by-geography-the-war-on-drugs-in-americas-cities/>

¹⁵ Reporting: Urban households spent \$7,808 (18 percent) more than rural households. Higher housing expenditures by urban consumers accounted for about two-thirds of the difference in overall spending between urban and rural households. Urban households spent 28 percent more on food away from home and 5 percent less on food at home than rural households. Overall, urban households spent 7 percent more on food than rural households. United States Bureau of Labor Statistics, Expenditures of urban and rural households in 2011 Retrieved December 29, 2021, from <https://www.bls.gov/opub/btn/volume-2/expenditures-of-urban-and-rural-households-in-2011.htm>.

¹⁶ United States Department of Agriculture, Economic Research Service, feature Adjusting for Living Costs Can Change Who Is Considered Poor. Retrieved December 29, 2021, from <https://www.ers.usda.gov/amber-waves/2006/november/adjusting-for-living-costs-can-change-who-is-considered-poor/> and United States Census Bureau, How the Census Bureau Measures Poverty, Retrieved December 29, 2021, from <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html>

¹⁷ Community Roots Housing Household Income and Unit AMI Retrieved December 29, 2021, from <https://communityrootshousing.org/find-apartment/calculate-your-income/> and California Department of Housing and Community Development Income Limits Retrieved December 29, 2021, from <https://www.hcd.ca.gov/grants-funding/income-limits/index.shtml>

SOCIAL EQUITY DEFINITION AND QUALIFICATIONS:

State Residency



Early social equity programs with state-based residency requirements were based on fears that legal cannabis would be diverted to the “illicit” market.¹⁸ Today, states, especially those seeking to avoid the use of remedial race classifications in social equity definitions and criteria, use state residency in an effort to include the individuals from their state most impacted by disparate enforcement of cannabis laws in state social equity programs. State-level residency requirements have been recently met with legal challenges.¹⁹ Under the Dormant Commerce Clause of the United States Constitution, state laws that unduly restrict interstate commerce are prohibited. Dormant Commerce Clause cases require state laws that discriminate against out-of-state goods or businesses to be narrowly tailored to protect legitimate local interests.^{20 21} Thus, for any state residency requirement to survive constitutional scrutiny, states that include such provisions must have evidence that their state residency requirements are narrowly tailored to promote legitimate local interest.

Backers of social equity program residency requirements see the requirements as necessary to economically empower state residents and small in-state businesses, especially those operated by individuals disproportionately impacted by cannabis prohibition, and to keep revenues in the state.²² Opponents argue that state requirements are a form of economic protectionism that limits competition and leaves small local operators vulnerable to predatory out-of-state partners and investors.²³



¹⁸ Howell, A.H. (2019). Residency Requirements for Marijuana Licensure. Reason Foundation. Available at: <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf>. [Accessed 15 November 2021].

¹⁹ Gora, L. G., & Patel, C. P. (2021, July 23). Constitutional Challenges to Pot Licensing Residency Requirements: Will They Impact NJ? New Jersey Law Journal. Retrieved November 18, 2021, from <https://www.law.com/njlawjournal/2021/07/23/will-constitutional-challenges-to-pot-licensing-residency-requirements-in-other-states-impact-nj/>

²⁰ State Taxation and the Dormant Commerce Clause. (2018, March 8). LII / Legal Information Institute. Retrieved November 18, 2021, from <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/state-taxation-and-the-dormant-commerce-clause>

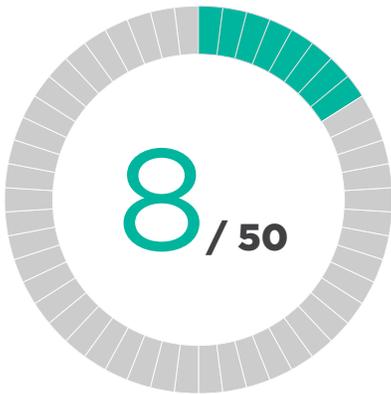
²¹ In *Tennessee Wine and Spirits Retailer Association v Thomas*, a Tennessee law imposed a two-year residency requirement for liquor license applicants. In 2016, two out-of-state businesses applied for licenses, which resulted in the Tennessee Wine and Spirits Retailer Association suing to enforce the residency requirement. The court held that Tennessee’s residency requirement for liquor licenses expressly discriminated against nonresidents and bears, at best, a tenuous relationship to public health and safety. No evidence showed that the two-year residency requirement was necessary or the least restrictive means to promote public health and safety. Instead, its predominant effect is to protect the association’s in-state liquor stores from out-of-state competition. Therefore, the residency requirement violated the Commerce Clause.

²² Smith, J. S. (2021, January 19). Have residency requirements worn out their welcome in cannabis markets? MJBizDaily. Retrieved November 18, 2021, from <https://mjbizdaily.com/ave-cannabis-residency-requirements-worn-out-their-welcome/>

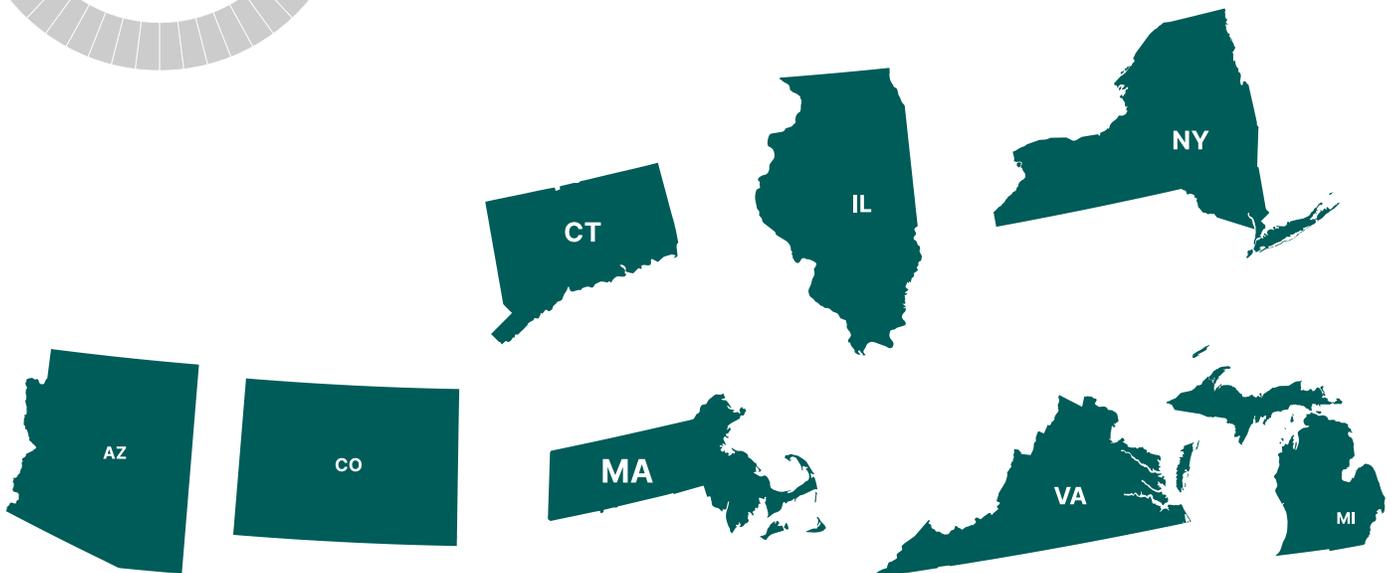
²³ Id.

SOCIAL EQUITY DEFINITION AND QUALIFICATIONS:

Residence in qualifying neighborhood or municipality



Some states take a more local approach to residency. The criteria used to determine a qualifying neighborhood varies by state. However, many states use law enforcement data, designated impact areas, or other criteria to identify the areas most impacted by cannabis prohibition and the broader War on Drugs. States have also included historical conviction and arrest rates, socio-economic status, unemployment rates, and failure to graduate high school within a given geographical area. For example, Massachusetts focused only on arrest rates. Later, Illinois used census tract data to determine areas with high arrest rates while also taking into account poverty and unemployment. Connecticut expanded on the Illinois approach by utilizing census tract data but added the requirement that qualified neighborhoods be on a census tract within the state with either a historical conviction rate greater than the 1/10th state average for drug-related offenses or unemployment rates greater than 1/10th of the state average.



SOCIAL EQUITY DEFINITION AND QUALIFICATIONS:

Other qualifying populations

New York, Pennsylvania, and Virginia include in their social equity definitions and qualifications populations that do not necessarily represent the individuals most impacted by cannabis prohibition. Both New York and Pennsylvania include veterans and women under the umbrella of individuals eligible for social equity programs. New York currently includes “distressed farmers” in its social equity criteria. New York also provides for other “socially disadvantaged” groups, namely Native Americans and Asian or Pacific Islanders. Uniquely, the Virginia social equity program currently includes in its qualifications applicants who have graduated from a historically Black college in the Commonwealth.

Both New Jersey²⁴ and Illinois²⁵ use veteran status as criteria for scoring applications, not the social equity qualifications or definition. The addition of veteran status to the scoring criteria became the center of concerns about the rollout of Illinois’s social equity program when veteran status became the sole deciding factor moving applicants to the next round of licensing.²⁶

While the Pennsylvania equity program focuses on diversity, both the Virginia and New York programs focus on the inclusion and economic empowerment of the individuals impacted by the War on Drugs. However, concerns remain that both state’s broad definitions and qualifications will inevitably lead to broad ownership by non-impacted individuals who would not otherwise meet the definition or qualifications for a social equity applicant.

WOMEN



VETERANS



OTHER ECONOMICALLY OR SOCIALLY DISADVANTAGED



²⁴ Smith, J. F. (2021, February 23). New Jersey recreational marijuana implementation law signed, setting stage for \$1 billion market. MJBizDaily. Retrieved November 18, 2021, from <https://mjbizdaily.com/new-jersey-governor-signs-recreational-marijuana-law/>

²⁵ (410 ILCS 705/15-30). Sec 15-30. Subsection (9)

²⁶ Lange, T. (2021, September 21). Greenspoon Marder Argues Veteran Points Facially Unconstitutional in Illinois Cannabis Licensing Process. Cannabis Business Times. Retrieved November 18, 2021, from <https://www.cannabisbusinesstimes.com/article/greenspoon-marder-challenges-veteran-points-in-illinois/>

Key Social Equity Provisions

Licensing Priority, exclusivity, or set asides



Ensuring a place for the individuals most impacted by cannabis prohibition in the legal cannabis industry remains a commonly stated tenet of cannabis equity. However, to date, only seven states provide licensing priority, exclusivity, or set aside a percentage of licenses for qualified social equity applicants in a specific licensing round, class, or time period.

Connecticut, New York, and New Jersey include specific percentage set asides on all cannabis business license types rather than a specific amount of licenses. In Connecticut, 50% of all licenses must be awarded to social equity applicants. Whereas, in New York, the state set a “goal” of awarding 50% of licenses to social equity applicants. New Jersey will require the Cannabis Regulatory Commission to measure the effectiveness of its provisions by determining whether or not they have resulted in at least 30% of the total number of licenses issued by the Commission going to minority, women, and veteran businesses. Virginia has currently set aside licenses with intent to provide licenses to Black Americans and other individuals who have been disproportionately targeted by police for marijuana arrests, but the number of licenses has yet to be determined. While Alabama’s new medical market does not have a set social equity program, 1/4th of all licenses and 1/5th of integrated licenses must be awarded to business entities that are at least 51% owned by a member of a minority group.

Currently, only two states, New York and Massachusetts, provide social equity operators exclusivity for specific license classes. In New York, the microbusinesses license will be awarded exclusively to social equity applicants. In Massachusetts, social consumption establishment licenses, marijuana delivery operator licenses, and marijuana courier (formerly known as delivery-only) licenses are limited on an exclusive basis to businesses controlled by a majority ownership of “economic empowerment priority applicants” or “social equity program” participants. However, this exclusivity period lasts only for 24 months²⁷ for the marijuana courier licenses and 36 months²⁸ for social consumption establishments licenses and marijuana delivery operator licenses.

²⁷ The CCC extended the exclusivity period for economic empowerment and social equity applicants to three years, beginning on the date when the first delivery operator commences operations (which has not yet occurred, as of January 28, 2022).

²⁸ Social consumption establishments were initially contemplated in Ballot Question 4 and are limited to equity applicants for the first three years. However, unlike delivery, very little progress has been made over the past five years to license social consumption establishments and enable such businesses to commence operations. The Commission’s regulations do provide for a Social Consumption Pilot Program, where a limited number of social consumption establishments would operate in a select number of municipalities. And while some of the more progressive municipalities—such as North Adams, Amherst, Springfield, Provincetown, and Somerville—have expressed interest in participating in the pilot program, the Commission stated that a change in state law granting municipalities the right to authorize social consumption is necessary before that can happen.

Funding

Fee waivers and reductions for social equity Fee reductions

FEE REDUCTIONS

6 or 8

AZ, CA, CT, IL, MA, MI, NY*, VA*

FEE WAIVERS

4 or 5

CA, CO, MA, IL, NY*

*Both New York and Virginia have included language for fee reductions or waivers in legislation but have yet to promulgate regulations.

Blacks and Latinos have borne the brunt of cannabis prohibition and, therefore, stand as the primary intended beneficiaries of many cannabis social equity programs. However, the average Black and Hispanic or Latino households earn about half as much as the average White household with just 15 to 20 percent of the net wealth.²⁹ Entering the legal cannabis market in any state requires substantial upfront capital. Without ready access to funding to cover startup and operational costs, many social equity applicants are shut out of the industry or fall victim to predatory partners to cover the extraordinary expense.

As cannabis remains federally illegal, securing loans and other financing options for new cannabis operations are limited because many financial institutions will not incur the risks of banking most cannabis businesses.³⁰ To help bridge the resource gap, some states have implemented measures to provide financial assistance to social equity applicants and licensees.

Generally, the licensing process includes both application and licensing fees. Currently, only the state of Montana does not require an initial application fee. License application fees range from \$250-\$125,000 per application. The application fees are generally lower in states with lotteries. For example, the range of application fees for social equity applicants in states that have a lottery system (Arizona, Connecticut) or a qualified lottery system (Illinois, New Jersey, Rhode Island, and Washington) range from \$250-\$10,000. While the lower fees provide greater access to the application process for lower income individuals, the lower fees make it easier for highly-capitalized applicants to submit more applications, thus increasing their chances of obtaining a license over individuals without similar access to capital. For example, in Illinois, social equity applicants were allowed to submit multiple applications at \$5,000 or \$2,500, which resulted in 901 applications being submitted for 47 available licenses.³¹

²⁹ Aladangady, A. (2021, October 22). Wealth Inequality and the Racial Wealth Gap. federalreserve.gov. Retrieved January 27, 2022, from <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.htm>

³⁰ GGurien, N. (2021, June 23). Cannabis Business Loans and Lending: What's The Real Deal? Fincann. Retrieved January 27, 2022, from <https://fincann.com/blog/cannabis-lending%EF%BB%BF%EF%BB%BF/>

³¹ Pletz, J. P. (2021, October 22). Is a lottery the fairest way to issue pot-shop licenses? Plenty say no. Crain's Chicago Business. Retrieved November 18, 2021, from <https://www.chicagobusiness.com/cannabis/illinois-marijuana-lottery-opposed-lawmaker>

Funding

Fee waivers and reductions for social equity Fee reductions

The reduction in application fees for social equity applicants range from as low as 25% in Michigan to as high as 80% in Arizona. Currently, Connecticut, Illinois, and Massachusetts all offer a 50% reduction of application fees. Michigan is unique as an applicant receives a 25% fee reduction if the applicant has ever been convicted of a marijuana-related misdemeanor and 40% for a felony.

FEE REDUCTIONS

6 or 8

AZ, CA, CT, IL, MA, MI, NY*, VA*

Licensing fees, the periodic fees due to maintain a license, are generally far higher than application fees, ranging from \$1,381 in Washington to \$200,000 in Georgia. Four states— Arizona, Florida, Minnesota, and Oklahoma—have combined the application and licensing fee. Currently, only California has a program for license fee reductions. Illinois, Massachusetts, Michigan, New York, and Virginia have expressed intent to provide license fee reductions for social equity applicants but have yet to establish regulations.

FEE WAIVERS

4 or 5

CA, CO, MA, IL, NY*

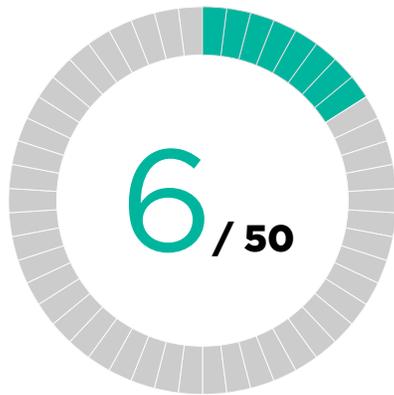
As for fee waivers, currently, Massachusetts offers an automatic application fee waiver for social equity applicants. Similarly, under the Illinois social equity program, both application and license fees may be waived for certain social equity applicants. Michigan offers potential social equity applicants the opportunity to apply for a fee waiver, but it is not guaranteed. California’s recently enacted Senate Bill 166 requires the California Department of Cannabis Control to create a fee waiver and deferral program for licensing and renewal fees by 2022. The bill requires that at least 60% of the total dollar amount of deferrals or waivers of fees be allocated for local equity applicants and licensees. Currently, Virginia and New York are promulgating rules for their respective social equity programs and both have included language for fee reductions in their proposed legislation.

*Both New York and Virginia have included language for fee reductions or waivers in legislation but have yet to promulgate regulations.

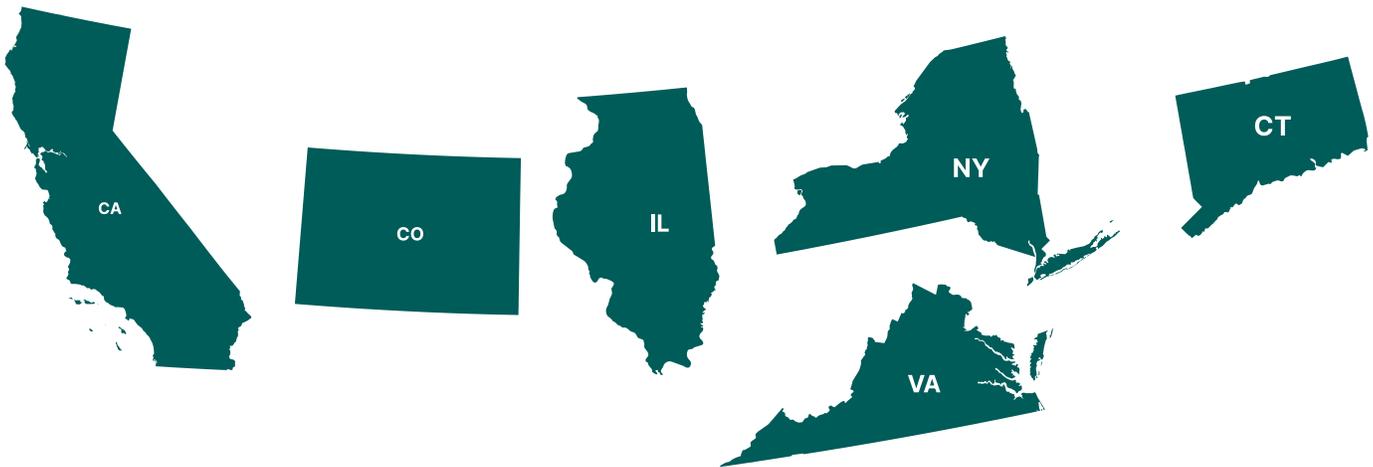
Funding

Grants or other financial support for social equity applicants and licensees

To account for economic disparities and facilitate participation in the cannabis industry by impacted individuals, six states provide funding to social equity applicants or licensees by way of grants, micro-loans, and no- or low-interest loans. In Vermont, Senate Bill 25 sets aside \$500,000 from the state coffers to establish a marijuana business development fund that is slated to provide financial assistance, loans, grants, and outreach to social equity business applicants. Similarly, in Illinois, social equity applicants can apply for a low-interest loan to assist with the expenses of starting and operating a marijuana business as part of the Social Equity Cannabis Business Development Fund. Both of these programs allow the money to go to applicants, not just operators.



California provided \$15 million³² dollars to 10 cities and counties from the Cannabis Equity Grants Program for Local Jurisdictions to provide grant funding for localities to implement cannabis social equity programs. The state does not require that the money go directly to licensees. Additionally, the funds may be used for other assistance beyond loans and grants. Other uses for the grant funds include technical support, regulatory compliance assistance, and assistance with securing capital.



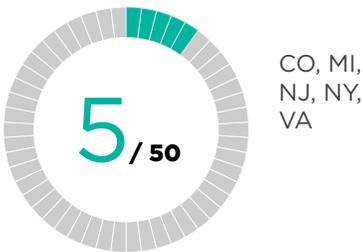
³² Governor's Office of Business and Economic Development - State of California. (2021). Cannabis Equity Grant Program for Local Jurisdictions Fiscal Year 2020-21 Grant Recipients. <https://static.business.ca.gov/wp-content/uploads/2021/10/CEG-Program-Grant-Recipients-2020-21.pdf>

Funding

Source of funding for social equity programs?

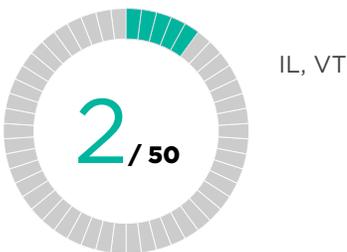
The source of funding for social equity programs impacts both the amount, timing, and impact of funding in support of social equity applicants and licensees. The source of funding varies, however, funding primarily comes from adult-use tax revenues or from other monies collected from adult-use operations. As such, the resources are often unavailable to social equity program beneficiaries at the time of application or startup. This leaves social equity applicants without funding to cover pre-application startup costs and application fees.

Adult-Use Tax



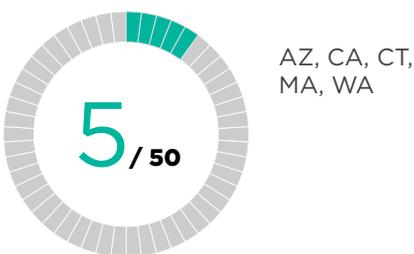
In Massachusetts, the legislature can specifically designate funds to the social equity program. However, if it doesn't, then the funding comes straight out of the Cannabis Control Commission's (CCC) budget, which has resulted in the CCC encouraging cannabis businesses to donate 1% of their earnings towards community reinvestment. Washington combined both adult-use taxes and licensing fees by annually allocating \$1,100,000 from the "Dedicated Marijuana Fund," which consists of monies from all marijuana excise taxes, license fees, penalties, forfeitures, and all other moneys, income, or revenue received by the state's liquor control board from marijuana-related activities to fund state social equity initiatives.

Adult-use Licensing Fees



Only two states, Illinois and Vermont, rely primarily on licensing and application fees to fund their programs. In Illinois, licensing fees collected for early approval adult-use licensing of medical operators goes into the "Cannabis Business Development Fund" that provides low-interest loans for social equity applicants. Illinois' funding structure has been heavily criticized for not doing enough to assist social equity operators to enter a competitive market, with significant barriers to entry, already dominated by large medical operators.³³ Similarly, Vermont's "Cannabis Regulation Fund" comprises all state application fees, annual license fees, renewal fees, and civil penalties collected by the Vermont Cannabis Control Board.

Other



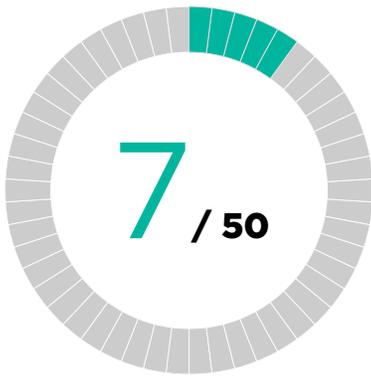
Five states rely primarily on adult-use taxes to fund their social equity programs. Colorado had an initial \$4,000,000 from the cannabis tax fund allocated towards its social equity program. Arizona relies on \$2,000,000 from the "Medical Marijuana Fund," which is composed of all fees, civil penalties, and private donations transferred to the Department of Health Services (DOH), to implement a social equity program.

³³ Vinicky, A. (2020, December 29). Illinois' Pot Program Falls Short on Social Equity Promises. WTTW News. Retrieved January 20, 2022, from <https://news.wttw.com/2020/12/28/illinois-pot-program-falls-short-social-equity-promises>

Funding

Technical support or training

SE States



CA, CO, CT, IL,
MA, VT, WA

The technical expertise required to succeed in the highly-regulated cannabis industry includes, but is not limited to: financial management, general business practices, regulatory compliance, administrative and business law, and good manufacturing and agricultural practices. With limited access to capital and extraordinary economic and compliance burdens from the outset, individuals with significantly lower net wealth from under-resourced communities face considerable challenges in obtaining the expertise to enter, sustain, and compete in the cannabis industry.

Seven states offer technical support or training to social equity applicants and licensees to help bridge the resource gap. Connecticut developed a cannabis business accelerator program, which will provide technical assistance to participants by partnering participants with an established cannabis establishment. Massachusetts provides technical assistance to eligible applicants and licensees in fields that may include: management, recruitment and employee training, accounting, and sales forecasting.

Other areas of technical support that states provide include assistance navigating the cannabis licensure process, cannabis business-specific education, business plan creation, operational development, regulatory compliance training, financial management training, taxes, and assistance with identifying or raising capital.

IV. KEY FINDINGS:

General Licensing Provisions

SE Program

9

AZ, CT, IL, NY, NJ, VA, VT, WA, PA

Of the 36 legal cannabis states, 27, including nine of the 15 states with social equity programs, have state-level license caps that limit the number of the licenses issued within the state either for medical or adult-use or both. License caps are limitations on the number of licenses that may be issued in the state in total or by license class. While some states³⁴ simply choose a number of licenses to issue with no given justification, others base the number of licenses to issue on population³⁵, without regard for market demand.³⁶

No SE Program

18

AL, AR, DE, FL, GA, HI, LA, MD, MN, MO, MT, NV, NH, ND, OH, RI, UT, WV

The limited number of licenses at the state level artificially inflates license value³⁷ due to limited competition within the legal market without accounting for competition from the legacy market or giving access or incentive for legacy operators to enter the legal market.³⁸ Additionally, the heavy competition for limited licenses leads to lawsuits³⁹ by unsuccessful applicants that delay⁴⁰ implementation of social equity programs and increase costs to prospective licensees.

³⁴ AR, DE, HI, IL, LA, MN, ND, NH, VA, VT, WA, PA, WV, and UT.

³⁵ AL, AZ, FL, GA, MD, NJ, NV, NY, OH, and RI.

³⁶ Allowing arbitrarily low licensing caps to stay "in place would not only limit competition and privilege larger corporations at the expense of other applicants, it would also create a situation where New Jersey's recreational and medical cannabis markets are unable to provide adequate supply and meet the level of demand that exists, thus inflating prices and allowing nearby states — once they get their legal markets up and running — to siphon off business from New Jersey operators". McKoy, B. (2020, November 18). Proposed Cap on Legal Marijuana Licenses Undermines Racial Equity. New Jersey Policy Perspective. Retrieved January 20, 2022, from <https://www.njpp.org/publications/blog-category/proposed-cap-on-legal-marijuana-licenses-undermines-racial-equity/>

³⁷ Gettman, J., & Kennedy, M. (2014). Let it grow—the open market solution to marijuana control. Harm Reduction Journal, 11(1), 32. <https://doi.org/10.1186/1477-7517-11-32>

³⁸ "Our best estimates suggest that within three years of the state's creating a new regulatory system, between 40 percent and 60 percent of THC obtained by Washington residents may have been obtained through the state-licensed stores. That likewise means that 40 percent to 60 percent of THC was not obtained through state-licensed stores, presumably meaning it came through the illicit market or from those authorized to grow for medicinal purposes."

³⁹ At least 11 of 26 limited license states have experienced litigation brought by unsuccessful licensure applicants including Florida, Illinois, Maryland, Nevada, Ohio, Pennsylvania, and Washington.

⁴⁰ In Hippocratic Growth, LLC v The Natalie M LaPrade Medical Cannabis Commission Case no. CV-17-CV-20-000176 (2020), the social equity program was delayed due to a lawsuit against the Maryland Medical Cannabis Commission (MMCC) and a number of minority-owned cannabis companies arguing that the process for scoring minority businesses is unfair to white women.

IV. KEY FINDINGS: GENERAL LICENSING PROVISIONS

Local Opt-In or Opt-Out

18

AL, AK, AZ, CA, CO, CT, FL, IL, ME, MA, MI, MT, NJ, NY, OR, VT, WA, WV

OPT-OUT

SE Program

10

AZ, CA, MI (adult use), CO, IL, CT, MA, NY, NJ (adult use), WA

No SE Program

4

AK, OR, WV, FL

OPT-IN

SE Program

3

VT, NJ (medical), MI (medical)

No SE Program

3

AL, ME, MT

Seventeen states allow local governments to opt in or opt out of the legal cannabis market within a given locality. Cannabis businesses will not be allowed in localities that do not “opt in” to the legal cannabis market after state legalization. In “opt-out” states, cannabis businesses are allowed unless the locality opts out of the cannabis market. Of the nine states without state-level license caps, seven provide for local opt-ins that dramatically limit the number of licenses. Both opt-in and opt-out provisions can impact market access and minimize first-mover advantages for social equity licensees in states that include periods of exclusivity for social equity licensees, while maximizing first-mover advantage for existing medical operators with opt-in and opt-out exemptions.

In New Jersey, roughly 400 of the state’s 565 total municipalities opted out of the adult-use market.⁴¹ New York allowed municipalities to opt out of retail dispensaries and on-site consumption, not the other classes of operational licenses. Out of 1,518 municipalities, 642 municipalities opted out of dispensaries, and 733 opted out of consumption sites.⁴²

State opt-in or opt-out requirements often include exemptions for existing medical operators. Arizona, Connecticut, Illinois, Michigan, and Massachusetts prevent localities from passing opt-in or other land use laws that prohibit adult-use operations of existing medical operators. This can create monopolies and oligopolies making it difficult to impossible for new operators to enter the market.

While some localities express intent to ban legal cannabis operations, others claim to opt out to allow more time to create local rules. In New Jersey, 70% of municipalities initially opted out.⁴³ Many local officials actively seek to secure the biggest wins for their municipalities by securing the greatest revenue generation while minimizing the local industry footprint.⁴⁴

While practical at first glance, this approach can lead to artificially limited markets without a decrease in supply causing unintended consequences, including the proliferation of the unregulated market and a lack of opportunity for small and minority owned businesses.^{45 46}

⁴¹ Schiller, Melissa (August 2021) Cannabis Business Times: More Than 70% of New Jersey Municipalities Ban Adult-Use Cannabis Businesses Retrieved December 22, 2021, from <https://www.cannabisbusinesstimes.com/article/more-than-70-percent-of-new-jersey-municipalities-ban-adult-use-cannabis-businesses/>

⁴² Rockefeller Institute of Government, Marijuana opt out tracker. Retrieved January 1, 2022 from <https://rockinst.org/issue-areas/state-local-government/municipal-opt-out-tracker/>

⁴³ Id.

⁴⁴ MCBA communicates regularly with lawmakers as well as operators and prospective operators who share anecdotes of the ongoing process in the New Jersey municipalities that have initially opted out.

⁴⁵ “More than half of New Jersey opted out of allowing cannabis within the borders of their town altogether. For the ones that have [allowed commercial activity], they can set caps on the number of cannabis businesses they will approve and levy extra fees on applicants. If municipalities go into the direction of levying high fees, it results in a market that’s hostile to small business... You’ll get one of two results, either complete exclusion of people of color and small businesses or you will force these businesses to partner with multistate operators or venture capitalists in order to get in.” Jelani Gibson, NJ Advance Media for NJ.com. (2021, December 20). Black businesses feel shafted as N.J. gets set to choose who can grow and sell weed legally. Nj. Retrieved January 20, 2022, from <https://www.nj.com/marijuana/2021/12/applications-to-grow-sell-weed-in-nj-open-today-will-new-operators-include-black-businesses.html>

⁴⁶ “Allowing arbitrarily low licensing caps to stay “in place would not only limit competition and privilege larger corporations at the expense of other applicants, it would also create a situation where New Jersey’s recreational and medical cannabis markets are unable to provide adequate supply and meet the level of demand that exists, thus inflating prices and allowing nearby states—once they get their legal markets up and running—to siphon off business from New Jersey operators”. McKoy, B. (2020b, November 18). Proposed Cap on Legal Marijuana Licenses Undermines Racial Equity. New Jersey Policy Perspective. Retrieved January 20, 2022, from <https://www.njpp.org/publications/blog-category/proposed-cap-on-legal-marijuana-licenses-undermines-racial-equity/>

IV. KEY FINDINGS: GENERAL LICENSING PROVISIONS

Premises Requirements

22

AK, AZ, CA, CO, IL, ME, MA, MI, NM, NH, NV, NJ, NY, OR, VA, CT, DE, FL, HI, OR, RI, WV, PA

SE PROGRAM

Adult Use

Application - 7
AZ, CA, CO, MI, NJ, NM, MA

Licensure - 3
VA, NY, IL

Medical

Application - 1
PA

Licensure - 0

NO SE PROGRAM

Adult Use

Application - 4
AK, ME, NV, OR

Licensure - 0

Medical

Application - 11
AK, AZ, CO, IL, ME, NV, NJ, NY, OR, VA, WV

Licensure - 7
CT, DE, FL, HI, MA, NH, RI

Twenty-two of 36 states with legal cannabis programs, including 14 adult-use and 19 medical programs, require proof of the right to possess or occupy a premises for use as a cannabis business as a condition of application or licensure. Proof of premises requires either an executed deed, trust, lease, or other written document conferring present or future rights to the applicant. This is particularly burdensome in the 11 adult-use and 12 medical programs where the premises are required at the point of application. Both Illinois and New York’s medical programs require proof of the applicant’s rights to a premise be submitted at the time of the application, but at the point of licensure for the adult-use program.

In Alaska, adult-use applicants must provide proof of possession as part of the application process. This requires applicants to secure a valid deed or lease with permission from the landlord to conduct cannabis operations. Similarly, in New Jersey, adult-use applicants will be disqualified from licensure consideration unless they provide documentation demonstrating they will have control of the premises. Such documentation can be in the form of a lease agreement, contract for sale, title, deed, or similar documentation. Michigan adult-use applicants must submit a certificate of use and occupancy.

Some states, including Illinois and New York’s adult-use programs, will grant operators a conditional license to allow them to secure the rights to use their physical location prior to awarding a license.⁴⁷ California adult-use and medical applicants who do not own their premises must provide a statement from the landowner as proof that the landowner has acknowledged and consented to permit commercial cannabis activities to be conducted on their property. California may grant a conditional license to applicants with some defects in the application. However, California requires municipal approval prior to the issuance of a license, and many municipalities require a premises as a condition of local approval. own their premises must provide a statement from the landowner as proof that the landowner has acknowledged and consented to permit commercial cannabis activities to be conducted on their property. California may grant a conditional license to applicants with some defects in the application. However, California requires municipal approval prior to the issuance of a license and many municipalities require a premises as a condition of local approval.

⁴⁷ Proof or right to premise is required within 180 days for Illinois and within 30 days for New York.

IV. Key Findings: General Licensing Provisions

Proof of Capital Requirements for Applicants and Licensees

16

AR, CT, FL, DE, GA, HI, IL, MA, NV, NY, OH, UT, VT, WV, PA, MD

SE PROGRAM

Adult-Use

Application - 1
MA

Medical

Application - 2
MD, PA

NO SE PROGRAM

Adult-Use

Application - 1
NV

Medical

Application - 13
AR, CT, FL, DE, GA, HI, IL, MA, NV, OH, UT, VT, WV

License - 1
NY

Proof of capital requirements represent an additional barrier to entry that precludes many impacted individuals from entering the cannabis industry. “Proof of capital” refers to proof that an applicant is financially prepared to incur the cost of operating a compliant cannabis business. The amount of capital required ranges from \$100,000 (Utah) to \$2,000,000 (Connecticut, Georgia, Pennsylvania).

Currently, only Massachusetts and Nevada require proof of capital for both their adult-use and medical programs. Sixteen adult-use and medical programs require proof of capital to secure a license to operate a cannabis business. All but one of the 16 require proof of capital at the point of application. In contrast, most of the programs only require applicant proof of capital for their medical programs. Pennsylvania utilizes a bifurcated proof of capital requirement based on the license, which is \$2,000,000 for growers and processors and only \$150,000 for retailers. Similarly, Georgia requires Production I license applicants to provide proof of \$2,000,000 and Production II licenses proof of \$250,000. Alabama requires that applicants for vertically integrated licenses provide proof of at least \$250,000 in liquid assets.

Four states, Florida, Delaware, Maryland, and Vermont, do not require proof of a specific amount of capital. Instead, these states award points to potential applicants based on their ability to provide proof of adequate capital. In Vermont, part of the criteria applicants are graded upon is their ability to provide a detailed financial plan describing the amount and source of capital to demonstrate viability for the first three years of operation.

IV. Key Findings: General Licensing Provisions

Method of Application Selection for Licensure

LOTTERY

2

AZ, CT

The method by which states select applicants for a cannabis operator license varies. States currently use one of four different processes to grant cannabis licenses: merit, lottery, hybrid, or compliance.

Merit-based licensing is the most common selection for both state medical and adult-use programs. With a merit-based process, applications are scored on criteria including experience, viability, capitalization, operational, marketing, security, diversity and community reinvestment plans. Every application is rated using the same criteria, and the highest-scoring applicants are awarded licenses. The merit-based selection process has come under scrutiny for yielding unfair or inequitable results,⁴⁸ lacking objectivity in scoring,⁴⁹ and favoring applicants with greater initial capital investments and political connections.⁵⁰

MERIT

27

AL, AK, AR, CO, CT, DE, FL, HI, LA, ME, MD, MA, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OR, UT, VA, VT, WV

With the lottery selection process, potential licensees submit applications with the requisite fee. All applications that meet the basic application requirements go into a lottery. License winners are picked at random without consideration of the applicants' qualifications. While the intent is to create a fairer process, the lottery selection process has still favored highly capitalized applicants. Applicants with sufficient means can submit multiple applications to increase the odds of being awarded a license. While the application fees are generally lower with a lottery, the process of forming and managing distinct entities and teams to apply for each license is costly and beyond reach for most small operators. Additionally, there are concerns that lotteries do not necessarily grant licenses to the most qualified applicants.

HYBRID/ QUALIFIED LOTTERY

4

IL, NJ, RI, WA

A hybrid or qualified lottery selection system works like a regular lottery with qualifying applications chosen at random for licensure. However, the qualifications for the lottery are much more rigorous than the traditional lottery selection method. Concerns still arise about fairness when the criteria or lottery rules favor highly-capitalized applicants. Qualified lottery states include Illinois, New Jersey, Rhode Island, and Washington.

California, Michigan, and Oklahoma use compliance-based application review processes. A compliance-based application review requires that applicants meet a set of requirements for licensure. The criteria does not delve into the viability or quality of a business plan beyond what is needed for safety and compliance. None of the three states has state-level license caps.

COMPLIANCE MODEL

3

CA, MI, OK

New York, Virginia, and Connecticut have yet to release rules on the selection process for adult-use cannabis licenses. The three states currently use a merit-based program for selection of medical licenses. All three states currently have highly-limited medical markets with Connecticut having 15 distinct operators, New York just 10, and Virginia four. Alabama has yet to release rules on the selection process for its medical licenses.

⁴⁸ With Illinois' limited cannabis dispensary licensing system, the stakes are large for applicants who didn't achieve the total 252 points that would allow participation in the upcoming lottery for the award of the provisional applications. A group of applicants whodid not make the cut filed a lawsuit challenging the process and pointing out irregularities with the scoring process and questioning the fundamental fairness of the judging.

⁴⁹ Key assertions made in the Illinois applicants' complaint include statements about the Cannabis Regulation and Tax Act's requirements that applicants be given an opportunity to cure any deficiencies (410 ILCS 705/15-30(b)), that some of the plaintiffs did not receive deficiency notices, and that the IDFP's rules do not satisfy due process where they keep the applicants from challenging the decisions.

⁵⁰ Ounce of Hope. (2018, June 21). Rigging the \$75 Billion Legal Marijuana Industry. Retrieved November 19, 2021, from <https://www.ounceofhope.com/rigging-the-75-billion-legal-marijuana-industry/>

IV. Key Findings: General Licensing Provisions

Disqualification for Owners with Felony Convictions

Thirty-five of 36 medical cannabis programs currently prevent people with felonies from participating in the legal cannabis industry, with only four programs exempting qualifying cannabis convictions from exclusion. This means 31 state medical programs exclude individuals with prior cannabis convictions from owning a licensed cannabis business.

Fourteen out of the 18 adult-use cannabis programs explicitly exclude individuals with certain felony convictions from owning a cannabis business. Of those, nine exempt individuals with qualifying cannabis offenses from the ban on ownership, provided the sale was not to a minor. For example, in Nevada, offenses for conduct that would be immune from penalty under new adult-use cannabis laws are exempt—unless the conduct occurred before

Oct. 1, 2001 or was prosecuted by an authority other than the state of Nevada.

New Jersey, Alaska, Oregon, Montana, and Maine, adult-use markets with felony bans on ownership applicable to cannabis convictions, all have time-specific bans on ownership. The time-specific felony exclusions within these states range from three to 10 years after the completion of the related sentence. In the adult-use markets with felony bans not applicable to cannabis convictions, Massachusetts and New Mexico have a lifetime felony ban for certain convictions, while the other seven state programs have time-specific bans based on the type of felony. Time-specific felony exclusions within these states range from three to 10 years after the completion of the related sentence.

ADULT USE

DISQUALIFICATION FOR OWNERS WITH FELONY CONVICTIONS

14

- SE Program**
AZ, CA, CO, CT, MA, NJ, NM, NY, VA
- No SE Program**
AK, OR, MT, ME, NV

DISQUALIFICATION EXEMPTION FOR QUALIFIED CANNABIS OFFENSES

9

- SE Program**
AZ, CA, CO, CT, MA, NM, NY, VA
- No SE Program**
NV

MEDICAL

DISQUALIFICATION FOR OWNERS WITH FELONY CONVICTIONS

35

- AL, AK, AR, AZ, CA, CT, CO, DE, FL, GA, HI, IL, LA, MA, ME, MD, MI, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, UT, VA, VT, WV

DISQUALIFICATION EXEMPTION FOR QUALIFIED CANNABIS OFFENSES

4

- SE Program**
CA
- No SE Program**
AZ, MA, MO

DISQUALIFICATION FOR OWNERS WITH FELONY CONVICTIONS

34

AK, AL, AR, AZ, CO, CT, DE, FL, GA, HI, IL, LA, MA, ME, MD, MI, MN, MO, MT, ND, NE, NH, NJ, NM, NY, OH, OK, OR, PA, RI, UT, VA, VT, WV

SE PROGRAM Adult-Use

11

AZ, CO, CT, IL, MA, MI, NJ, NM, NY, VA, VT

Medical

2

MD, PA

NO SE PROGRAM Adult-Use

5

AK, ME, MT, NV, OR

Medical

32

AK, AL, AR, AZ, CO, CT, DE, FL, GA, HI, IL, LA, MA, ME, MI, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, RI, UT, VA, VT, WV

IV. Key Findings: General Licensing Provisions

Disqualifications for Employees with Felony Convictions

With the exception of California and Washington, all states require employees within the cannabis industry to undergo a background check and authorize the regulating agencies to deny a worker’s permission to work in the industry on the basis of certain convictions. Eleven of the 13 states with adult-use social equity programs require a background check prior to employment. These states include Arizona, Colorado, Connecticut, Illinois, Massachusetts, Michigan, New Jersey, New Mexico, New York, Virginia, and Vermont. Of the 11, only Arizona has a disqualification policy that is specifically inclusive of cannabis convictions. However, individuals with cannabis convictions may ask for a good cause exception to Arizona’s felony exclusion rule.

Colorado, Connecticut, Maine, Massachusetts, Michigan, and Nevada all have criminal history disqualification criteria that explicitly excludes cannabis convictions for activity no longer a felony under current adult-use statutes. In New Jersey, disqualifying convictions are convictions within the past five years that are “substantially related to the functions of the job.” While not all-inclusive, none of the convictions listed within the New Jersey statute as “substantially related” are cannabis convictions. Within Illinois, there is no explicit bar on employment for individuals with cannabis convictions, nor is there a carve out protecting this class of applicants. Notably, Illinois cannabis employers must comply with the state’s “Ban the Box laws,” which create protections for job seekers with convictions. These Ban the Box protections restrict employers from considering convictions that have been expunged.

While Virginia rules have yet to be determined, its legalization legislation contained a “Ban the Box” provision prohibiting employers from requiring job applicants to disclose information related to simple marijuana possession convictions. Presumably, this law would also apply to the cannabis industry and would prevent employment denial on the basis of a cannabis conviction. Similarly, New York, New Mexico, and Vermont are still creating regulations surrounding employment within the adult-use sector.

Of the adult-use programs without social equity provisions, Alaska, Maine, Montana, Nevada, and Oregon require a background check as a prerequisite to employment. Of those, only Oregon and Alaska explicitly disqualify individuals with cannabis convictions within two and five years, respectively. Montana is currently in the process of creating regulations governing employee background checks.

Medical marijuana employment disqualification laws have proven even more stringent than adult-use laws, with 34 of 36 state programs disqualifying individuals with previous felonies from employment.

IV. Key Findings: General Licensing Provisions

Automatic or Priority Co-Location of Medical and Adult-Use Licenses for Existing Medical Operators.

17

AZ, CA, CO, CT, IL,
ME, MA, MI, MT, NV, NJ,
NM, NY, OR, VA, VT, WA

SE PROGRAM

Currently, all adult-use programs except Alaska provide for co-location of at least one adult-use license for every medical license held by a medical operator. In most states, “co-location” will allow an existing medical operator to receive at least one adult-use license for every medical license, provided the operator meets an abbreviated set of requirements and pays the necessary licensing fees. In all states but Maine, the adult-use license may operate in the same premises as the licensee’s medical operations. In Maine, adult-use and medical cannabis may not be dispensed from the same premises. In Connecticut, existing medical operators may only convert to co-located adult-use operations for a substantial fee.

13

AZ, CA, CO, CT, IL,
MA, MI, NJ, NM, NY,
VA, VT, WA

NO SE PROGRAM

Proponents argue that co-location is necessary to preserve continued access to medical cannabis. Four of the 18 adult-use states require or recommend that co-located adult-use and medical dispensaries set aside a certain amount of cannabis to ensure an adequate supply for medical patients. However, without requirements to maintain products, programs, and support for medical patients, little incentive exists not to shift resources to the more profitable adult-use market. Proponents also argue that co-location is necessary to ensure an adequate supply of cannabis at the outset of adult-use sales, as many medical cannabis cultivation licenses are owned by larger multistate operators with large-scale cultivation operations. Opponents counter that the same could be accomplished by increasing the total number of licensed cultivators.

4

ME, MT, NV, OR

IV. Key Findings: General Licensing Provisions

Early Adult-Use Market Access for Existing Medical Operators

11

AZ, CA, IL, ME, MI, MT, NJ, NM, NY, OR, VT

Eleven states provide medical operators with early access to adult-use licensure and sales. While many states explicitly provide approximately a year’s head start, the lead often exceeds two or more years due to administrative delays and legal challenges. In Illinois, medical operators gained access to the adult-use market in January 2020. In 2021, the state had awarded 118 social equity licenses. However, as of December 2021, no social equity retail businesses were permitted to open due to ongoing legal challenges.⁵¹

SE PROGRAM

8

AZ, CA, IL, MI, NJ, NM, NY, VT

The states with social equity programs that grant medical operators early access allow the operators to commence business before all other applicants regardless of any envisioned priority for social equity applicants and licensees. First-mover advantage typically enables companies to establish brand recognition and market share before competitors enter the market. The benefits of first-mover advantage increase where the market is significantly limited through market caps, costly and complicated application processes, and social equity provisions that often lead to legal challenges which delay the implementation of social equity programs and other licensees that follow the early market entrants.

NO SE PROGRAM

3

MT, ME, OR

⁵¹ Branfalt, T. G. (2021, December 9). Illinois Lawsuit Prevents New Social Equity Licensees from Starting Operations. Ganjapreneur.Com. Retrieved January 20, 2022, from <https://www.ganjapreneur.com/illinois-lawsuit-prevents-new-social-equity-licensees-from-starting-operations/>

IV. Key Findings: General Licensing Provisions

Vertical Integration

REQUIRED

13

AZ, DE, FL, HI, ME, MA, MN, MT, NH, NM, NY, VA, VT

Adult-Use - 0

Medical - 13

AZ, DE, FL, HI, ME, MA, MN, MT, NH, NM, NY, VA, VT

SE Programs - 0

Vertical integration is when a company controls or owns various operations within the supply chain from production to end sales.⁵³ Within the cannabis industry, this can include cultivation, processing, distribution, and sales. The economic argument for vertical integration is that it reduces costs and increases efficiency. However, access to this efficiency comes with a heavy startup cost and substantial investments required to secure and stand up multiple classes of license.

Five state adult-use programs, and one state’s (Louisiana) medical program, prohibit vertical integration. In Alabama, the regulating authority may issue no more than five vertically integrated facility licenses, and 1/5th of all integrated licenses must be awarded to business entities that are at least 51% owned by members of a minority group. Despite efforts to ban vertical integration, there is no evidence that limiting vertical integration helps to increase Black and Brown ownership in the cannabis industry or prevent the proliferation of ownership by large multistate cannabis companies.

PROHIBITED⁵²

6

CA, LA, NJ, NY, VA, WA

Adult-Use

SE Program - 5

CA, NJ, NY, VA, WA

Medical - 1

LA

Conversely, 13 state medical programs require operators to vertically integrate. The vertical integration requirement has raised concerns that the barrier to entry created by the requirement creates “state-mandated oligopol[ies]” that limit product quality and availability.⁵⁴ New York and Virginia both require vertical integration for their medical programs but have implemented a ban on vertical integration with exclusions for microbusinesses, hemp processors, and medical licensees already operating vertically in the medical program. In Virginia, existing medical operators and hemp processors could engage in vertical operations by paying a \$1,000,000 fee and submitting a diversity and equity plan.

LIMITED

2

PA, VT

Adult-Use - 1

VT

Medical - 1

PA

⁵² Prohibited with limited exemptions.

⁵³ Vangst, blog post, The Pros and Cons of Cannabis Vertical Integration. Retrieved December 31, 2021, from <https://vangst.com/blog/vertical-integration-cannabis> Vertical integration is when a business owns every stage of its supply chain. Vertically integrated cannabis businesses means a single entity owns and controls the cultivation, lab, extraction, manufacturing, retail sectors of their business. Each vertical works in tandem to streamline the seed-to-sale process.

⁵⁴ <https://www.ganjapreneur.com/how-vertical-integration-is-ruining-medical-cannabis-in-florida/>

VI. Initial Conclusions

1 The Number and Efficacy of State Social Equity Programs Does Not Reflect the Expressed Commitment to Achieving Equity Through Cannabis.

Cannabis was first legalized for medical use in 1996.⁵⁵ Adult use then followed in 2012.⁵⁶ It was not until 2018 that the first state implemented a social equity program designed to promote social and economic justice through cannabis.⁵⁷ While cannabis has been legalized for medical or adult use in 36 states, only 15 states have social equity programs. Thirteen of the 18 adult-use states and two of the 18 medical-only legal cannabis states have social equity programs, and in one state, Virginia, the social equity program is currently under direct attack from Republican lawmakers.⁵⁸

From its inception, cannabis legalization has been driven in part by the desire to right the injustice of cannabis prohibition and address its disproportionate impacts on communities of color. In 2020, with the civil unrest surrounding the murder of George Floyd and others, the cannabis industry expressed a recommitment to achieving equity in and through the cannabis industry. However, the expressed commitments have, to date, not translated into universal acceptance of social equity as a cornerstone of cannabis legalization.

Some speculate political challenges to social equity programs might delay or prevent legalization initiatives in conservative states. However, this premise ignores the breadth and depth of the impact of prohibition and the synergies between communities disproportionately impacted by cannabis prohibition and communities disproportionately impacted by other social and economic issues, including the opioid crisis, exportation and automation of low-skill jobs, and inequitable access to education and healthcare.

Of the 15 state social equity programs, not one has resulted in an equitable cannabis industry on all four measures (industry, justice, community, and access). Once examined in totality, the failure of existing social equity programs can be attributed to a disconnect between commitment to the goal of equity and the execution to achieve equity. This disconnect is in large part the result of the contradiction between the stated priorities of large multistate operators and the actual priorities they put forth and support internally and at the state level. As such, without immediate action, the promotion of arbitrarily limited markets, high barriers to entry, and unearned advantages for existing medical operators entering the adult-use market will continue to undermine the efficacy of social equity programs.⁵⁹

⁵⁵ California Proposition 215, Medical Marijuana Initiative (1996). (2021, May 15). Ballotpedia. Retrieved November 19, 2021, from [https://ballotpedia.org/California_Proposition_215_Medical_Marijuana_Initiative_\(1996\)#Aftermath_of_Prop_215](https://ballotpedia.org/California_Proposition_215_Medical_Marijuana_Initiative_(1996)#Aftermath_of_Prop_215).

⁵⁶ Colorado Amendment 64 passed by voters on November 6, 2012 legalized recreational cannabis.

⁵⁷ In 2018, Massachusetts adopted the first-in-the-nation cannabis Social Equity Program regulated by the Cannabis Control Commission (CCC).

⁵⁸ Borchardt, D. (2022, January 10). Republicans Stripping Out Social Equity In Cannabis Legislation. Green Market Report. Retrieved January 20, 2022, from <https://www.greenmarketreport.com/replicans-stripping-out-social-equity-in-cannabis-legislation/>

⁵⁹ For example, according to its investor filings, Green Thumb Industries intentionally seeks - and has successfully secured and operates in - markets that are monopolistic or oligopolistic in nature, where there is limited supply and, thus, limited competition. Green Thumb Industries Investor Filing Listing Statement Form 2A, page 20, Retrieved January 1, 2022. https://webfiles.thecse.com/GREEN_THUMB_INDUSTRIES_LISTING_STATEMENT_FINAL_0.pdf?X6VmFosv9RCb355qeawp757sZGkn4.9Y=

VI. Initial Conclusions

2 The Use of Non-Race Criteria in the Social Equity Qualifications and Definitions Has Not Yielded Diverse Cannabis Markets.

Cannabis prohibition is rooted in racism.⁶⁰ As such, race-based solutions in state cannabis reforms are critical to remedying race-based harm. Of the 15 state cannabis equity programs, only three exist in states with laws that limit the use of remedial race classifications—Arizona, California, and Michigan. While not prohibited by law, many states with social equity programs use alternative non-race criteria despite the disparate impact of cannabis laws and enforcement on Black, Latino, and Indigenous Americans. The criteria includes the use of income, criminal conviction, and residency in a qualifying neighborhood or municipality.

Massachusetts makes individuals of Black, African American, Hispanic, or Latino descent eligible for resources and fee reductions. Both New York and New Jersey give minority business owners licensing priority, along with women, veterans, and others. Vermont has yet to codify social equity program definitions. However, current recommendations include the use of race criteria for the social equity program.

Despite many social equity programs citing intent to create diversity in the cannabis industry, and specifically provide opportunities to impacted individuals and communities, the data shows these efforts have been unsuccessful. A 2021 report found that while Black Americans represent 13% of the national population, they represent less than 2% of all cannabis company owners.⁶¹ Black people are six times more likely than white people to be incarcerated for drug offenses, despite equal rates of use.⁶² If the goal of state programming is to create equity within the cannabis industry, then representation of impacted individuals within the industry should be proportional to their representation in the criminal justice system as it relates to cannabis enforcement.

The Equal Protection Clause allows preferential treatment when a court determines it is justified by a compelling state interest and narrowly tailored to address an identified remedial need. To create constitutional compliant race-conscious programs, proponents must show (1) the public agency's purposeful discrimination against a certain group; (2) that the purpose of the program is to remedy that particular discrimination; (3) the policy is narrowly tailored; and (4) a race-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.⁶³

Ohio's failed attempt to create a social equity program presented a cautionary tale that wrongfully deterred states' use of race-based criteria. In *Pharmacann Ohio v. Ohio Dept Commerce*, the court held that Ohio's use of racial preferences in the awarding of state medical marijuana cultivation licenses violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁴ Specifically, the court held that Ohio's policy to issue not less than 15% of cultivation licenses to ethnic minorities, including Black, Hispanic, Native American, and Asian, was not sufficiently narrowly tailored to surmount strict scrutiny.

⁶⁰ John Ehrlichman, White House Counsel to President Nixon, once stated, "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." Baum, D., Bernstein, J., Quilty, A., & Gurland, H. (2016, March 31). [Report]: Legalize it all, by Dan Baum. Harper's Magazine. <https://harpers.org/archive/2016/04/legalize-it-all/>.

⁶¹ Leafly Jobs Report 2021 page 13: Stating only 1.2% to 1.7% of all cannabis company owners are Black.

⁶² NAACP, "Criminal Justice Fact Sheet" <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Nov. 28., 2020)

⁶³ Coral Constr., Inc. v. City & Cty. of S.F., 50 Cal. 4th 315, 337 (2010)

⁶⁴ *Pharmacann Ohio v. Ohio Dep't Commerce*. (C.P August 24, 2018) Vanderbilt Marijuana Law, Policy and Authority (2018). Accessed 21 December, 2021). <https://my.vanderbilt.edu/marijuanalaw/files/2018/11/Pharmacann-Ohio-v.-Ohio-Dept-Commerce-Summary-Judgment-Ruling.pdf>

VI. Initial Conclusions

2 The Use of Non-Race Criteria in the Social Equity Qualifications and Definitions Has Not Yielded Diverse Cannabis Markets.

First, the judge held the state had failed to demonstrate a compelling interest in using racial preferences to award marijuana licenses. The judge acknowledged that the state's asserted interest, "redressing past and present effects of racial discrimination... where the State itself was involved," could be compelling for constitutional purposes (PharmaCann, p. 7). However, the court was not convinced by the state's evidence that there was discrimination (past or present) against all members of a designated class (i.e., all the different racial groups included in the definition of "economically disadvantaged groups") in the relevant market (i.e., the Ohio legal marijuana industry). Additionally, the court found the state had not presented a strong relationship between the 15% numerical goals and the relevant labor market, thus, the policy was not narrowly tailored.

While legal examples like *Phamacann*⁶⁵ demonstrate the challenges of creating race-based cannabis policy in line with the Constitution's Equal Protection Clause,⁶⁶ the Constitution, nonetheless, creates an affirmative duty for governments to "disestablish" the results of intentional discrimination.⁶⁷ Therefore, lawmakers must conduct disparate impact studies and gather data to support race-conscious programming within the parameters of the Constitution. Courts indeed have held that "where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury."⁶⁸

While race-conscious programming is necessary to create true equity in the cannabis industry, lawmakers must take steps to avoid legal challenges that threaten the existence and sustainability of social equity initiatives, including exploring the use of "disparate impact theory". Many states already use the "disparate impact theory" to prove purposeful discrimination within the employment context.⁶⁹ Disparate impact theory allows government agencies to prove racial discrimination based on the effect of a policy or practice rather than the intent behind it. To establish an adverse disparate impact, advocates must (1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish significant disparity; and (4) establish causation.⁷⁰

In any U.S. state, sufficient data evidence exists to achieve a disparate impact showing for discrimination in the creation and enforcement of cannabis policy and to illustrate the disparate harm of that discrimination on Black, Latino, and Indigenous communities as a result of that policy. Additionally, with that race-conscious, social equity programs can be narrowly tailored to remedy past harm to specific communities of color. As such, no legal need exists to avoid the use of remedial race classifications where such classifications are not prohibited by law.⁷¹

⁶⁵ *Pharmacann Ohio v. Ohio Dep't Commerce* held Ohio's use of racial preferences in the award of state medical marijuana cultivation licenses violated the Equal Protection Clause of the Fourteenth Amendment. Specifically the court held that Ohio's policy to issue not less than 15% of cultivation licenses to ethnic minorities, including Black, Hispanic, Native American and Asian, failed to demonstrate a compelling as there was not discrimination (past or present) against all ethnicities in the designated class. Additionally the court found the remedial policy was not sufficiently narrowly tailored to surmount strict scrutiny.

⁶⁶ The Equal Protection Clause is part of the first section of the Fourteenth Amendment to the United States Constitution. The clause prohibits any state from denying to any person within its jurisdiction the equal protection of the laws.

⁶⁷ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 568 (2000). Holding there is a constitutional based 'affirmative duty to desegregate', also referred to as the duty to "disestablish" the results of intentional discrimination.

⁶⁸ See *Id.*

⁶⁹ Title VII <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>

⁷⁰ DOJ guidance Proving Discrimination Disparate Impact

⁷¹ MCBA encourages lawmakers to use tools such as the NuLeaf Project's "Race-Specific Language to Benefit African American, Latinx, and Native American Communities in Cannabis Equity Legislation" which can serve as a helpful resource for constitutional compliance.

VI. Initial Conclusions

3 Many States Continue to Utilize State-Level License Caps to Limit State Markets Leading to a Lack of Diversity and the Proliferation of the Legacy Market.

Of the 36 legal cannabis states, 26 include state-level license caps that limit the number of licenses issued within the state. Limiting the number of licenses at the state level artificially inflates the value of the license due to limited competition within the legal market without accounting for competition from the legacy market or providing access or incentive for legacy operators to transition to the regulated market.

The general rationale is to prevent the over-proliferation of cannabis businesses leading to increased consumption and product diversion.⁷² In December 2020, the Circuit Court for Cole County, Missouri rejected arguments that caps on medical marijuana licenses were illegal under Missouri law.⁷³ Notably, the circuit court found that the caps on licenses were legal because they had a rational basis to a legitimate government interest by (1) limiting crime, (2) effectively regulating the medical cannabis market, (3) avoiding costs for excess regulation of excess licenses and excess cannabis, and (4) ensuring public safety. The court claimed that uncapped licenses would enable “unfettered [cannabis] production” which would, in turn, create excess supply that could be diverted to the black market.⁷⁴

Despite the concerns about increased crime, there is evidence that the presence of retail cannabis establishments does not actually increase crime.⁷⁵ Further, in states, including California where the legacy market accounts for an estimated 80% of the total cannabis transactions,⁷⁶ the greatest source of diversion comes from the legacy market, not an over-proliferation of legal businesses. Given the universal provision for some level of local control of cannabis businesses, localities provide the best means of limiting the over-proliferation of cannabis businesses based on local need. Local establishment concentration rules can provide a meaningful defense against overconcentration based on the demographics and market capacity of a given municipality. State caps provide no such protection.

Despite arguments of oversaturation, state-level license caps address retail outlet density or overconcentration in low-income neighborhoods,⁷⁷ as operators seek retail operations in population centers, or must operate in established “green zones.” License caps artificially inflate the license value,⁷⁸ due to limited competition within the legal market, without accounting for competition from the legacy market⁷⁹ or giving access or incentive for legacy operators to transition to the legal market.

Heavy competition for limited licenses leads to lawsuits⁸⁰ by unsuccessful applicants, often large operators. The lawsuits lead to significant delays or the elimination of an entire social equity program, and litigation surrounding social equity licenses presents a significant obstacle to minority operators and the viability of social equity programs.

⁷² *Sarcoxie Nursery Cultivation Center, LLC, et al. v. Williams, et al.*, No. 19-AC-CC00556 at page 24 (Cir. Ct. Cole County, Dec. 21, 2020). The Circuit Court for Cole County, Missouri, found allowing uncapped licenses would enable “unfettered [cannabis] production” which would create excess supply that could be diverted to the black market.

⁷³ *Sarcoxie Nursery Cultivation Center, LLC, et al. v. Williams, et al.*, No. 19-AC-CC00556 (Cir. Ct. Cole County, Dec. 21, 2020)

⁷⁴ *Id.* at 24

⁷⁵ Not in my backyard? Not so fast. The effect of marijuana legalization on neighborhood crime. (2019, September 1). ScienceDirect. Retrieved January 20, 2022, from <https://www.sciencedirect.com/science/article/abs/pii/S016604621830293X>

⁷⁶ Two Years in, California's Legal Marijuana Businesses Struggle with Financial Woes as They Battle Illicit Market. (2020, December 17). MJ Biz Daily. <https://mjbizdaily.com/californias-legal-marijuana-market-struggles-with-financial-woes-as-it-battles-illicit-market/>

⁷⁷ McVey, E. (2021, December 18). Chart: Recreational marijuana stores are clustered in low-income areas of Denver, Seattle. MJBizDaily. Retrieved January 20, 2022, from <https://mjbizdaily.com/chart-recreational-marijuana-stores-clustered-low-income-areas-denver-seattle/>

⁷⁸ “Limiting market access and maintaining artificially high prices will enhance the power of buyers; they will seek other sources and/or grow marijuana for themselves and others.” Gettman, J., & Kennedy, M. (2014). Let it grow—the open market solution to marijuana control. *Harm Reduction Journal*, 11(1), 32. <https://doi.org/10.1186/1477-7517-11-32>

⁷⁹ Two Years in, California's Legal Marijuana Businesses Struggle with Financial Woes as They Battle Illicit Market. (2020, December 17). MJ Biz Daily. <https://mjbizdaily.com/californias-legal-marijuana-market-struggles-with-financial-woes-as-it-battles-illicit-market/>

⁸⁰ At least 11 of 26 limited license states have experienced litigation brought by unsuccessful licensure applicants, including AR, AZ, FL, IL, MD, MO, NV, OH, PA, UT, WA

VI. Initial Conclusions

4 Among The Few Social Equity Programs That Provide Funding For Social Equity Applicants And Licensees, Fewer Still Provide Access To Timely Funding To Support Minority Operators' Market Entry And Participation.

Economic and wealth disparities are among the many collateral consequences of cannabis prohibition and the broader War on Drugs. Despite this, only six of 15 state social equity programs (California, Colorado, Connecticut, Illinois, New York, and Virginia) provide funding to social equity applicants and operators beyond fee reductions and waivers. Of the six states that provide funding for their social equity programs, all but California provide or will provide funding from adult-use tax revenues or from other monies collected from adult-use operations.

The lack of timely and effective funding means that financial resources are often unavailable to social equity program participants at the first round of applications or at the time of startup. Entry into the cannabis industry remains out of reach for the individuals most impacted by cannabis prohibition without funding to cover the extraordinary⁸¹ cost of the pre-application process, application process and fees, and compliance with premises and capitalization requirements. Some “fortunate” individuals find partners who deprive the social equity operators of all meaningful rights of ownership.⁸²

⁸¹ For example, the cost of opening a cannabis dispensary ranges from \$150,000 to \$2,000,000. Way of Leaf. (2021, November 2). How Much Does It Cost to Set Up a Cannabis Dispensary? Last accessed January 20, 2022 at <https://wayofleaf.com/blog/how-much-does-it-cost-to-set-up-a-dispensary>.

⁸² Elmahrek, A. (2020, June 23). L.A.'s "social equity" program for cannabis licenses under scrutiny. Los Angeles Times. <https://www.latimes.com/california/story/2020-06-23/cannabis-licenses-social-equity-4th-mvmt>

VI. Initial Conclusions

5 Requirements To Secure Premises Prior To Issuance Of A License Or Conditional License Continue To Present A Significant Barrier To Entry For Social Equity Operators.

With the high cost of commercial real estate⁸³ and the premium price of “green zone” properties,⁸⁴ pre-application premises requirements render ownership in the legal cannabis industry beyond reach for many. Twenty-three states require an applicant or licensee to secure a premises to operate a cannabis business prior to obtaining a license. Eleven adult-use programs and 12 medical programs require applicants to obtain the premises as part of the application process, despite the minimal chance of securing a license in highly-limited and competitive markets. The requirement to obtain property at the time of application is more prevalent within state adult-use programs (11 out of 18) than medical programs (12 out of 36). Compounding the challenge, the premises requirement is more prevalent among social equity programs (7 of 13 adult-use and 1 of 2 medical) social equity programs.

When administrative delays and legal challenges to social equity programs postpone the awarding of cannabis business licenses, applicants are left paying rent on empty spaces without assurance of return on their investments. Additionally, during prolonged delays, investor relations may sour or investors may become insolvent during the process. The extraordinary cost to secure and maintain a premises during the lengthy application process results in minority-owned businesses going out of business before even beginning operations.

⁸³ How Real Estate Affects the Value of a Marijuana License. Cannabiz Media. (2021, December 17). [www.mjbizdaily.com](https://www.cannabiz.media/blog/real-estate-value-marijuana-license). Retrieved January 20, 2022, from <https://www.cannabiz.media/blog/real-estate-value-marijuana-license>

⁸⁴ See Id.

VI. Initial Conclusions

6 Bans On Ownership For Individuals With Past Cannabis Convictions Remain Prevalent In State-Legal Cannabis Programs.

Lawmakers, advocates, and industry alike claim redressing the injustice of cannabis prohibition is a cornerstone of cannabis policy reform. Nowhere is the injustice more apparent than in the disproportionate, and ongoing, arrest and incarceration of Black, Latino, and Indigenous people for cannabis activities now legal and profitable in many states. The exclusion of individuals previously incarcerated for felony cannabis offenses from participating in the legal cannabis industry perpetuates that injustice.

Thirty-four of 36 medical cannabis programs currently prevent people with felonies from participating in the medical cannabis industry, while only four medical programs provide exemptions for individuals with qualified cannabis convictions. Currently, a total of 14 of the 18 adult-use programs have explicit disqualifications for licensure due to certain felony convictions. Five adult-use states (New Jersey, Alaska, Oregon, Montana, and Maine) still bar potential applicants from ownership due to previous cannabis convictions. The remaining nine states (Arizona, California, Colorado, Connecticut, Massachusetts, New York, New Mexico, Virginia, and Nevada) have carve-outs which exempt individuals with qualifying cannabis offenses from the ban on ownership in the adult-use market.

While many adult use programs have moved away from such rigid conviction disqualifications, the inequities caused by felony exclusions in the medical market seep into the adult-use market by allowing for the co-location of adult-use and medical licenses under one owner and the commingling of business operations without first remedying the issue within the medical program.

VI. Initial Conclusions

7 Inequities In Existing Medical Markets Create Inequities In Adult-Use Markets.

An equitable adult-use cannabis industry cannot be built on an inequitable foundation. State medical programs include significant barriers to entry to both ownership and employment that carry from the medical to adult-use market, along with significant advantages for medical operators seeking adult-use licenses. The common advantages include automatic co-location of an adult-use license with medical licenses, early market access, and opt-out and land use exemptions. These advantages, along with barriers to entry, create significant inequities and perpetuate oligopolies in state adult-use cannabis markets.

All but one of the states that transitioned from medical-only to include adult use have provided for the co-location of at least one adult-use license for each existing medical license held, including 13 of the 14 states with social equity programs. Eleven of the 17 adult-use programs, including eight with state social equity programs, have provided the medical operators with the additional advantage of early access to the market ahead of all other licensees, including social equity licensees. Medical operators' expressed period of exclusivity generally ranges from 1-2 years. However, the time period is often greatly extended through litigation and administrative delays that can double or triple the time the medical operators enjoy first-mover advantage. For example, Illinois medical operators could commence adult-use sales as of January 20, 2020. As of January 20, 2022, no social equity retail licensees had commenced operations due to litigation.⁸⁵

Further compounding medical operators' advantage in adult-use markets, several states provide medical operators entering the adult-use market with exemptions from the opt-out, opt-in, and local land use limitations that apply to all other adult-use cannabis businesses. The lack of access to local markets perpetuates monopolies and oligopolies where medical operators may operate adult-use cannabis businesses in some localities to the exclusion of all other operators. In addition to creating monopolies and oligopolies, the opt-in/opt-out and land use exclusions undermine the benefits and value of social equity licenses by making the process of securing a location costly and time consuming if not impossible.

Currently, only one state (Louisiana) prohibits vertical integration for medical cannabis operators, while 13 states require it. The start-up and operational costs associated with the vertical integration requirements provide additional economic barriers to entry into the medical market that impact small and minority operators' abilities to participate and potentially enjoy the first mover advantages afforded to medical operators in emerging adult use markets. Conversely, five adult-use states, including New York and Virginia, look to bans on vertical integration as a means to control the capture of the market by large firms. However, the bans provide exclusions for microbusinesses and licensees already operating vertically in the medical market. In Virginia, existing medical operators and hemp processors that pay the \$1,000,000 fee and submit an equity and diversity plan could run vertically integrated operations. This gives operators a distinct advantage over all other competitors.

The barriers to entry into the medical market remain high for the individuals most impacted by cannabis prohibition. Currently, all but two of the 36 medical programs exclude individuals with previous felonies from holding or investing in a medical cannabis business. In addition to excluding the individuals most impacted from ownership, the exclusions extend to employment of individuals with felony convictions in medical cannabis businesses. These exclusions carry over to the adult-use market through co-located medical and adult-use licensed businesses. Barring people with previous cannabis convictions from participating in the legal cannabis industry contradicts one of the critical goals of legalization: no longer penalizing people disproportionately affected by cannabis prohibition.

⁸⁵ Illinois Lawsuit Prevents New Social Equity Licensees from Starting Operations. TG Branfalt. Gangapreneur. December 9, 2021. <https://www.gangapreneur.com/illinois-lawsuit-prevents-new-social-equity-licensees-from-starting-operations/>

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