



## **Proposed Amendments and Alternatives to the Marijuana Opportunity, Reinvestment and Expungement Act of 2021**

### **I. The MORE Act Should Acknowledge the Challenges of Addressing Racial Inequity in the Existing Legal Cannabis Industry.**

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The congressional findings that form the basis of the MORE Act of 2021 are honest and frank: After 80 years of racially unjust cannabis prohibition enforcement and devastating collateral consequences, the same communities that have been most harmed by cannabis prohibition have so far benefited the least from the legal marijuana marketplace. We offer these amendments and alternatives to the MORE Act in the same honest and frank spirit, with appreciation for the bill's accurate recognition that Black and Brown communities are already being left out of what's become a multibillion-dollar market.

The MORE Act sponsors deserve full credit for their determination to address this, but the federal government's experience with cannabis until now has been exclusively limited to interdiction and prosecution predominantly targeting Black and Latino communities. It needs time to develop the tools and skills to regulate marijuana in a way that repairs the harms of the war on drugs. Similarly, despite clear progress over the past five years, states that have legalized cannabis have not yet developed clear competence to regulate the industry in an equitable way. In the eleven years since the first states legalized cannabis, no state or city has claimed to achieve the goal of repairing the harms of the war on drugs. Fewer than 20% of cannabis business owners nationally identify as minorities, and only about 4% are Black. State officials have emphasized that it has taken multiple attempts and adjustments over years to begin making progress toward their stated equity goals.

Pretending cannabis is the same as alcohol or tobacco is not a substitute for developing the competence to regulate marijuana. While superficial similarities exist, to equate the prohibition and regulation of alcohol to that of cannabis is legally and historically inaccurate. It is not a sound basis for detailed cannabis policy. Neither alcohol nor tobacco regulations have been developed to repair damage on the scale of that caused by the war on drugs. Further, neither of those regulatory models are ideal. As a country, we are still trying to undo the public health damage of letting Big Tobacco run wild.

Ultimately, if we are serious about creating a fair and equitable national industry, we must allow the federal government to develop its own core competency in cannabis regulation and prevent the domination of the market by a small number of corporations in the meantime.

## II. The MORE Act Should Take Measures to Prevent Corporate Consolidation That Would Undermine Racial and Economic Equity Measures Being Developed through State Cannabis Law and Regulations.

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The MORE Act's automatic expungement of cannabis offenses and reinvestment of tax revenue have rightfully earned attention for the positive impact these measures would have on communities disproportionately harmed by the drug war. But far less attention has been paid to the impact of marijuana's removal from the federal Controlled Substances Act (CSA), specifically the high likelihood that such removal will result in a handful of national cannabis firms rapidly dominating the market and putting most small cultivators and retailers out of business. This would undermine the core of many state equity efforts that seek to provide communities harmed by cannabis prohibition with sustainable economic opportunities.

Our concern is that, without an intentional regulatory structure to prevent it, this legislation will almost certainly encourage rapid corporate consolidation. Despite the MORE Act's provisions intended otherwise, this would likely block meaningful long-term Black and Brown participation in the cannabis industry. If the same pattern we've seen in the state-by-state rollout of cannabis legalization repeats itself at the federal level, no subsequent law or regulation will be able to reverse it.

But with foresight, this result is avoidable. We propose incorporating an incremental regulatory structure that allows the many states that have taken the lead in racial justice through the cannabis sector to continue to design, experiment, and measure their progress without immediately flooding the market with interstate sales.

As Vanderbilt Law School Professor Rob Mikos wrote in a Boston University Law Review article this year, “[I]f we want to limit industry consolidation or boost minority participation in the cannabis market or shape the cannabis market in other ways, it will likely take congressional legislation to get the job done. . . . As it stands, however, Congress does not even appear to recognize the impending rise of interstate commerce in cannabis and the challenges it will pose to state regulators.”<sup>1</sup>

With this understanding, the purpose of these amendments is to offer constructive alternatives to provisions in the MORE Act that would initially maintain the state borders for regulation as they currently exist. The approach would better prevent individual states from being overwhelmed or undercut by other state markets that have developed under entirely different regulatory regimes. In the meantime, federal lawmakers and administration officials should take steps to understand which state programs are working.

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<sup>1</sup> Mikos, Robert A., Interstate Commerce in Cannabis (March 2 2021). Boston University Law Review, Forthcoming, Vanderbilt Law Research Paper No. 21-09, Available at SSRN: <https://ssrn.com/abstract=3796262>

### III. Federal Legislation Should Clearly Support Existing and Emerging State Cannabis Equity Programs.

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The federal government and its citizens must acknowledge that developing the competency to address racial inequities in cannabis will take time and study. That process is necessary before opening the floodgates to interstate commerce and corporate domination.

Below are two alternative approaches to accomplish this. The first would create an independent Office of Cannabis Justice (OCJ) to regulate interstate commerce and enforce anti-cartel restrictions, preventing the creation of a national oligopoly similar to the state-level oligopolies that currently exist. The second is a cooperative federalism approach – an incremental solution that would exempt the limited possession, cultivation, and social sharing of cannabis from the Controlled Substances Act (CSA) while allowing states that meet certain criteria to opt out of the CSA with respect to marijuana. This would protect individual cannabis consumers from federal arrest and prosecution while allowing states to continue to experiment with different types of equitable commercial markets.

#### Approach #1: Regulation of Interstate Commerce

- The federal government does not have existing expertise or competence in regulating marijuana, but it has the capacity to develop it. This approach would revise the MORE Act to make the Office of Cannabis Justice autonomous and independent. The general structure is modeled after the Consumer Finance Protection Bureau, an autonomous agency within the Federal Reserve System.
- We consider regulation of the cannabis industry to be a civil rights and racial and economic justice concern. Therefore, instead of placing permitting authority under the Secretary of the Treasury, the sections and authority regarding permitting would be moved to the independent Office of Cannabis Justice, housed within the Justice Department as part of a comprehensive and unified regulatory structure centered on equity and justice.
- As with the original MORE Act of 2021, our proposal would create a federal permitting system. To allow smaller businesses to better compete with well-financed ones, we recommend the cost and barriers to a federal permit to be set as low as possible. The purposes of our proposed permit system are:
  - For the OCJ to enforce an anti-cartel restriction such that once marijuana is removed from the CSA, no person or corporation may own or control more than five cannabis enterprise licenses. Holders of excess licenses may devolve, sell, or spin off those excess licenses in a manner to be established by the OCJ through the regulatory process and as permitted by state law.
  - To prevent bad-faith actors from participating in the marijuana industry. We applaud the 2021 MORE Act’s sponsors for removing the felony exclusion provision in the previous version of the legislation. It should be replaced with a mandatory disqualification of applicants who have violated the RICO Act or engaged in substantial fraud, abusive labor practices, human trafficking, slavery, intentional failure to pay wages, substantial harm to public health, the

environment or an endangered species, terroristic actions, money laundering, misappropriation of public funds, and/or public corruption.

- We propose that the OCJ have exclusive jurisdiction over the permitting of interstate cannabis commerce and that the agency design a thoughtful, evidence-based approach to interstate sales as it studies existing state programs.
  - One possibility would be to allow for regional compacts, such as an agreement among West Coast or New England states to allow for limited interstate commerce, essentially creating pilot programs that can be studied and analyzed.
  - Another would be to allow only equity-licensed businesses to engage in interstate commerce, as proposed by the Craft Cannabis Alliance.<sup>2</sup>
- We recommend tying federal funds to clear racial justice benchmarks consistent with the findings and goals of the MORE Act. We incorporate into our recommendations the Marijuana Justice Act<sup>3</sup>'s model, which makes states with certain disproportionate arrest and incarceration rates ineligible for certain criminal justice funding. Within the federal tax structure established by the MORE Act, a percentage of federal tax revenue could similarly be reimbursed to states that reach racial justice benchmarks relative to marijuana sales and licensing that benefits communities most harmed by prohibition.

## Approach #2: Cooperative Federalism Approach

- This approach was adapted from a proposal in the UCLA Law Review by Erwin Chemerinsky, Jolene Forman, Allen Hopper, and Sam Kamin.<sup>4</sup> They suggested an incremental solution to empower experimentation with legalization in some states while allowing other states to remain under federal prohibition.
- Our adaptation creates an exception in the CSA for the limited possession, home cultivation, and social sharing of cannabis by adults and for state-legal medical use so that these activities are no longer crimes under federal law (in accordance with the CSA, neither the original MORE Act of 2021 nor our revision preempts state law<sup>5</sup>).
- This approach would allow states to opt out of the CSA as it pertains to cannabis. So long as a state follows federal guidelines, only state law would govern marijuana enforcement within the bounds of that state. The CSA would continue to govern states that have not opted out, as well as interstate trafficking.

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<sup>2</sup> Smith, Adam J (November 2019). Can Interstate Commerce Help Solve the Cannabis Industry's Equity Problems?, Merry Jane. Available at: <https://merryjane.com/culture/can-interstate-commerce-help-solve-the-cannabisindustrys-equity-problem>

<sup>3</sup> S. 597 – Marijuana Justice Act of 2019. Available at: <https://www.congress.gov/bill/116th-congress/senate-bill/597>

<sup>4</sup> Chemerinsky, Erwin and Jolene Forman, Allen Hopper, and Sam Kamin (January 2015). Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74. Available at: <https://www.uclalawreview.org/pdf/62-1-2.pdf>

<sup>5</sup> 21 USC 903 (Part F - General Provisions) of Subchapter I of the Controlled Substances Act provides expressly that the federal CSA does not preempt state law where there is no "positive conflict" between federal and state law such that "the two cannot consistently stand together."

- Other examples of federal and state cooperation include the Clean Water Act, Clean Air Act, and Patient Protection and Affordable Care Act.
- As envisioned by Chemerinsky and his co-authors, the federal guidelines would mirror the Cole memo. Our adaptation reflects those guidelines and adds racial justice-focused federal guidelines consistent with the findings of the MORE Act. States opting out would be required to maintain regulatory frameworks where the communities most harmed by marijuana prohibition benefit the most from the legal marijuana market.
- The benefit of this incremental approach is to allow state governments to continue their experimentation while giving the federal government time to understand those models and develop its own evidence-based cannabis policies.

*For the full text of the proposed amendments and alternatives, visit the [Parabola Center for Law and Policy](#) led by Shaleen Title and Richard Juang. The authors wish to thank Kayvan Khalatbari, Doug Berman, Cristina Buccola, Dasheeda Dawson, Jolene Forman, Beau Kilmer, Everest Lindesmith, Shanel Lindsay, Mike Liszewski, Rob Mikos, Pat Oglesby, Jason Ortiz, Dan Riffle, Steve Rolles, Julie Steiner, Jesse Stout, Justin Strekal, and Tamar Todd for their expertise and support.*