

How to Federally Legalize Cannabis Without Violating the Constitution or Undermining Equity and Justice



Parabola
Center

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I. Introduction: Why Federal Legalization Could Throw Equity and Justice Focused Cannabis Policy Under the Constitutional Bus

Inevitably, the federal prohibition of cannabis will end, likely by Congress removing cannabis entirely from the federal Controlled Substances Act (CSA).¹ When that day comes, regulation of cannabis will be permitted as both a potential medicine and as a federally-legal, age-restricted product, like alcohol or tobacco.

Federally de-scheduling cannabis will better align federal cannabis policy with state-level reforms and public opinion, behind which it has lagged for many years. However, it will also disrupt and force the transformation of existing intrastate cannabis markets. How the nation will shift from dozens of individual state cannabis markets to one national market, and the implications of that shift, is unknown but likely to be dramatic. It is also safe to assume that many advocates for federal de-scheduling are not aware of the consequences such a policy change portends for existing and entrenched state cannabis policies.

Because the possession and sale of cannabis is illegal under federal law, states that have chosen to legalize cannabis have had to do so by developing markets that are entirely intrastate. They can, and have, removed their own state law penalties, but the threat of federal law enforcement is both a theoretical and practical reality. In order to reduce the risk of federal enforcement interfering with legalized state regimes, states have followed federal Department of Justice (DOJ) guidelines, which promise to deprioritize enforcement if states restrict businesses from importing or exporting cannabis across state lines.² In some states, particularly states that produce much greater quantities of cannabis than their residents will consume, this federal guidance creates significant economic and regulatory problems.³

At the same time, many states have used the federal guidance to their advantage: to foster small businesses; to promote equitable ownership models; to create good, family sustaining jobs, with benefits and opportunities for advancement; to strengthen labor protections and workers' ability to organize; and to advance and protect specific justice-focused policy goals. For example, many states limit license ownership to state residents, and many social equity programs, aimed at increasing access to the cannabis market for people of color through both meaningful ownership and employment opportunity, use residency within a certain geographic area as qualifying factor for a social equity license. By restricting out of state business, a state can guarantee that a percentage of licenses or a percentage of the overall market will go to small businesses and social equity businesses, increasing the likelihood of their success. Separately, some states encourage or require cannabis business to adopt labor peace agreements to protect workers' organizing rights and job quality in the cannabis industry.

The open secret about these existing intrastate cannabis markets, however, is that they likely violate the constitution and are at risk of being struck down in the courts, especially if and when the federal government finally de-schedules cannabis. These intrastate systems, though an outcome of federal prohibition and the DOJ's own guidance, may very well violate the Commerce Clause found in Article I, Section 8, Clause 3 of the U.S. Constitution. This clause grants Congress the power to regulate interstate commerce. In broad strokes, the Commerce Clause limits the states' authority to restrict commerce across state lines.⁴

The animating principle behind the clause is that regulation of interstate commerce is the province of the Congress, lest states engage in protectionism that stifles the national economy. The Supreme Court has explained that in addition to allowing Congress to affirmatively regulate interstate commerce, the clause also prohibits states from discriminating against or unduly burdening interstate commerce – even when federal law is silent. This concept is called the “Dormant Commerce Clause.”

The Dormant Commerce Clause prohibits states from enacting laws that either directly discriminate against out-of-state businesses or indirectly burden interstate commerce in a way that is excessive or unreasonable. The existing patchwork of intrastate cannabis systems does exactly that.

Under federal prohibition, Dormant Commerce Clause challenges to intrastate cannabis markets have only recently gained traction. After all, states are only doing what the DOJ is telling them they have to do if they want to avoid federal cannabis raids or enforcement actions. But, when federal prohibition ends, and when cannabis is removed from the CSA, any existing doubt about the constitutionality of restricting interstate commerce will disappear. State protectionism, now all but required by DOJ guidelines, will likely be struck down as violative of Supreme Court precedent. Without federal prohibition as a justification, these small state-based markets would likely be forced to merge into one large interstate cannabis market. A small number of large companies will monopolize the market, consolidating and buying up small businesses, wiping out social equity businesses, and undermining the equity and justice focused goals of the state programs. If federal legalization is not coupled with explicit federal protections for state-based intra-state markets, everything will change once cannabis is de-scheduled. The world of legal cannabis will look nothing like it does now.

But this outcome is not inevitable. Congress can protect intrastate markets if it chooses to. Under its power to regulate interstate commerce, Congress can explicitly allow states to maintain existing state laws that prioritize in-state actors. In doing so, Congress can ensure that the Dormant Commerce Clause does not serve to undo all existing justice and equity efforts that states have enacted and implemented.

Some states have painstakingly worked over the past decade to develop and implement cannabis regulatory programs aimed at supporting small businesses and their employees, advancing labor protections, generating good, well-paying jobs, and creating access to the industry by those who were most harmed by cannabis prohibition and the war on drugs. This report presents a blueprint for Congressional reform of federal cannabis law that protect these programs and the businesses and workforces they have fostered. Cannabis policy reform presents a unique policy opportunity to build a cannabis industry that is grounded in justice, but will only happen if legalization on the federal level is crafted with careful attention to the Dormant Commerce Clause concerns.

II. State Efforts to Advance Social and Economic Equity

Voters and lawmakers who have liberalized cannabis laws within their states have done so for a variety of reasons. Motivations include increasing state revenues, preserving law enforcement and judicial resources, extending compassion to those with medical need, providing safer products to cannabis consumers, and providing a safer alternative to other substances, such as alcohol. An additional fundamental goal for some lawmakers, and the key driver for reform in a number of states, is not just to legalize cannabis, but to do so in a manner that creates a more equitable and just society by addressing the harm inflicted on communities of color by racially discriminatory cannabis law enforcement. These lawmakers have sought to create high quality and high paying jobs, and have promoted economic opportunity, diversity, and inclusion in the new cannabis industry.

Efforts to center equity in cannabis law reform has increased in recent years. While early legalization states—Alaska, Colorado, Oregon, and Washington—did not include social equity programs or explicit equity focused policy, now the inclusion of social equity in legalization laws is the norm. In 2018, inspired by programs in Oakland and other cities in California, Massachusetts created the first social equity program that included the creation of a license type exclusively for social equity applicants and the provision of resources and technical support to provide an onramp into the new cannabis industry for people most harmed by the war on drugs. Following Massachusetts' lead, other states adopted expansive equity focused components as part of their state cannabis legalization laws, including Illinois, Virginia, Connecticut, New Jersey, and New York. At least 15 of the states that have legalized have some sort of social equity program.⁵

Additionally, a number of state legalization laws include novel policy provisions to directly protect and benefit the workers who would comprise their in-state industries. For example, numerous states⁶ cannabis statutes include, require, or encourage the adoption of labor peace agreements⁷ with the goal of protecting workers' organizing rights.⁸

Elected officials are seeing the benefits of talking about equity and job creation in the emerging industry. For example, upon signing New Jersey's cannabis reform into law, Governor Phil Murphy stated: "Today, we're taking a monumental step forward to reduce racial disparities in our criminal justice system, while building a promising new industry and standing on the right side of history."⁹ In Governor Murphy's 2022 State of the State address he said: "Many jobs await in the cannabis industry ready to take off."¹⁰ At the signing of the cannabis legalization bill in Illinois, Lt. Governor Juliana Stratton stated: "This legislation lives true to the promise to bring justice, equity and opportunity throughout our state."¹¹ New York State Senator James Sanders, Jr. said about New York's law: "We must ensure that companies that profit the most from the legalization of cannabis will contribute part of their profits back into the communities most harmed by the war on drugs."¹²

Various state laws include a combination of components to advance these justice and equity focused goals. For example, these laws include policies to: 1) reduce racial discrimination in arrests for cannabis; 2) expunge past cannabis records for individuals who have been convicted of low-level cannabis offenses that are no longer considered illegal under the new cannabis laws; 3) allocate tax revenue to reinvest in communities that have been disproportionately harmed, particularly through initiatives like job training programs, education, and healthcare; 4) establish social equity programs to create and advance economic opportunity by providing support, resources, and special license types to small businesses and businesses owned by people who are economically disadvantaged and people of color; and/or 5) ensure good jobs with full rights, health and safety protections, wage and hour protections, and the right to join a union.

State social equity programs generally draw from a number of criteria in determining who is eligible for the program's benefits, including requiring: 1) that the person or an immediate family member has a prior cannabis conviction to demonstrate direct harm from cannabis prohibition; 2) that the person qualifies as low income; or 3) that the person is a resident of the state or of a particular area within the state that is identified as having been particularly impacted by the war on drugs. Some states also include certain classes of people within their social equity programs, beyond those most harmed by prior cannabis law enforcement, who may still need additional support in entering the cannabis industry -- such as women, veterans, or distressed farmers. While some of the social equity licensing and program criteria do not require state residency, many of them do. Particularly, requirements that an applicant be a resident of a particular area within a city or state for a set period of time are akin to residency requirements that have been stuck down under the Dormant Commerce Clause in other contexts.

III. Federal Reform Proposals That Ignore the Interstate Commerce Problem

A majority of states over the past 25 years have removed state law penalties for medical and adult use and have established comprehensive state-level programs to license, regulate, and tax cannabis, all despite consistent federal prohibition. These state law reforms directly conflict with federal law, leading to myriad legal and practical problems for the states, the federal government, businesses, and individuals. Prior federal administrations have addressed the conflict by employing an approach of non-enforcement of federal law in states where marijuana is legal.¹⁴ But this non-enforcement strategy is an inadequate and untenable long-term solution.

Even with non-enforcement, complex problems plague regimes that are legal under state law. The threat of federal law enforcement, for example, looms large. Even if many actors in state systems choose willful blindness to their criminal liability, the fact remains that individuals and business who are acting lawfully under state law are, in all instances, breaking federal law and risking their livelihoods and freedom. Beyond threat of prosecution, federal restrictions on financial institutions working with cannabis-related businesses have resulted in a dearth of banking and financial services, and tax laws that prevent businesses from deducting standard business expenses create arbitrary obstacles to profit-making for state-based cannabis businesses. Additionally, because federal law prohibits transporting cannabis across state lines, states with legal cannabis markets cannot engage in interstate trade, limiting economic opportunity and market expansion.

In an effort to ameliorate these problems, the leading federal reform proposals in Congress generally focus on harmonizing state and federal law to permit federally the conduct that is legal under state laws, to ensure the cannabis industry has similar protections and obligations as other businesses under federal law, and to open up the existing intrastate cannabis markets to interstate activity through the complete removal of cannabis within the CSA. It seems likely that de-scheduling is the approach Congress will eventually take, not only because it ostensibly harmonizes federal and state law, but also because the scheduling of cannabis lacked a scientific basis from the beginning.¹⁵

Moreover, popular support for cannabis legalization has steadily increased over the past several decades, and it is currently one of a small handful of bipartisan issues that majorities of Americans support, in every state, and across political lines.¹⁶ In October 2022, President Biden directed the Secretary of Health and Human Services and the Attorney General to initiate the administrative process to review expeditiously how cannabis is scheduled under federal law and to evaluate its current classification in Schedule I of the Controlled Substances Act.¹⁷ This directive marked the first time a President has directed such a review.

Some of the leading federal reform proposals, such as the Cannabis Administration and Opportunity Act,¹⁸ also contain components that are focused on remediating the harms of past federal cannabis prohibition, particularly with respect to communities of color. These proposals generally seek to do this through the expungement of some federal cannabis convictions and the enactment of a federal cannabis tax. The purpose of the proposed tax is to raise revenue that will be used to incentivize states to expunge state cannabis convictions and to enact legalization that promotes social equity goals in the development of cannabis markets.

Much ink has been spilled on the advocacy for federal de-scheduling, and the equity proposals included in legislation such as the Cannabis Administration and Opportunity Act. But none of these proposals include meaningful provisions to protect and preserve states' efforts to advance economic and employment opportunity within their cannabis markets, especially when those efforts, as described in Section II above, rely on existence of intrastate markets and state protectionism to achieve these goals. To date, conversations about potential federal reforms are largely silent on the impact that the shift from protected intrastate markets to one large intrastate market will have on the ability of policy makers to achieve equity and economic justice centered goals.

Leading Reform Proposals to End Federal Cannabis Prohibition

Cannabis Administration and Opportunity Act (CAOA Act) was introduced in the Senate in 2022 by Sens. Chuck Schumer, Ron Wyden, and Cory Booker.

If enacted, the CAO Act would do the following:

- **Deschedule Cannabis:** Remove cannabis from the Controlled Substances Act but allow federal enforcement in states that choose to retain state prohibition.
- **Criminal Justice Reforms:** Eliminate federal criminal penalties for cannabis and allow for expungement and resentencing for prior non-violent federal cannabis convictions.
- **Regulation:** Replace the Drug Enforcement Administration as the main enforcement agency with the Food and Drug Administration (FDA) and the Alcohol and Tobacco Tax and Trade Bureau to create cannabis regulations similar to those for alcohol and tobacco.
- **Taxation:** Impose a tax on small and mid-sized producers that would begin at 5 percent and gradually increase to a maximum of 12.5 percent and imposes a tax on larger cannabis businesses that would begin at 10 percent and gradually increase to a maximum rate of 25 percent.
- **Funding:** Establish the Equitable Licensing Grant Program to provide states, tribes and localities funds to implement licensing programs that minimize barriers to cannabis licensing, and employment, for individuals adversely impacted by the War on Drugs.

States Reform Act (SRA) is a Republican sponsored bill introduced in the House in 2021.

If enacted, the SRA would do the following:

- **Deschedule Cannabis:** Remove cannabis from the Controlled Substances Act.
- **Criminal Justice Reforms:** Eliminate federal criminal penalties for cannabis but only in states that legalize and regulate cannabis under state law, and automatically expunge federal nonviolent cannabis arrests and convictions within 1 year.
- **Regulation:** Designate the Alcohol and Tobacco Tax and Trade Bureau as the primary regulatory body for cannabis to create cannabis regulations similar to those for alcohol and tobacco. Cannabis businesses that receive a federal license will be allowed to engage in interstate commerce.
- **Taxation:** Impose a 3% excise tax on cannabis products.

IV. How the Dormant Commerce Clause Threatens to Undo State-Based Equity Efforts

A. The Development of Intrastate Cannabis Markets

Marijuana is big business these days. Twenty-three states, and the District of Columbia, have legalized cannabis for adult recreational use.¹⁹ At least thirty-eight states, the District of Columbia, and three territories²⁰ have legalized some form of medical cannabis under state law.²¹ Roughly 48% of Americans currently live in a jurisdiction where adult use cannabis is legal under state law and 74% live in a jurisdiction where medical cannabis is legal under state law.²² In 2022, businesses operating in these states sold a combined \$30 billion of cannabis.²³

However, because cannabis remains completely prohibited under federal law, the cannabis market in each of these states is entirely intrastate. It is nothing like, say, alcohol. Anheuser-Busch can brew and bottle beer in Missouri, put it in a truck that travels to a wholesale warehouse in Colorado, from which another truck picks it up and brings it to a supermarket in California, where it is sold to a resident of Oregon who happens to be in the state on vacation. None of that happens with cannabis, because cannabis cannot legally be transported across state lines to be sold by businesses in one state to consumers in another state. As a result, each state that has legalized cannabis has had to create an entirely intrastate market that operates in isolation from those in other states. These state laws typically include provisions that punish and prohibit the import or export of cannabis, and often limit licensure and ownership to state residents.

Some argue that these policies are designed to protect the local cannabis industry and ensure that economic benefits stay local and out of the hands of out of state businesses.²⁴ While this may be a practical motivation behind requirements such as those requiring residency for licensing, and while it may be true that the intrastate markets benefit some industry actors in some states, the reason all state markets are intrastate is that DOJ guidance all but requires them to be. And it is not true that intrastate markets for cannabis are always economically advantageous to the state.²⁵

Economic protectionism is not the driving justification for intrastate cannabis markets. The primary motivators for states to design their laws to restrict interstate commerce is adherence to guidance from the federal government that advised states to make their cannabis laws entirely intrastate if they wished to avoid federal enforcement. Following the adoption of the first state legalization laws by voters in Colorado and Washington in 2012, the Department of Justice issued guidance to United States Attorneys on the enforcement of cannabis laws in legalization states (“the Cole memo”). This guidance set forth several federal priorities that the federal government promised to protect through enforcement if state cannabis laws and regulatory programs placed them at risk.²⁶ These priorities included “preventing the diversion of marijuana from states where it is legal under state law in some form to other states.” The guidance does not specify that diversion only to states where cannabis remains *illegal* under state law is discouraged. The guidance appears to limit even diversion from one legalization state to another legalization state. “Other states,” means, it appears, any “other states.” As a result, each state that reformed its laws following release of the Cole memo specifically prohibited export from the state in an effort to reduce the risk of federal interference and enforcement. For example, Measure 91 that legalized cannabis in Oregon in 2014 stated as one of its purposes, to “[p]revent the diversion of marijuana from this state to other states.”²⁷ Most state laws contained similar restrictions.²⁸

The federal government's insistence on intrastate markets is further underscored by its guidance to financial institutions providing services to cannabis businesses. Following the Cole memo, the Financial Crimes Enforcement Network (FinCEN) issued guidance for financial institutions interested in providing services to cannabis businesses. The guidance included a list of "red flags" for financial institutions to watch out for that included cannabis businesses engaging in interstate activity or the owners or managers of a cannabis business residing outside of the state where the business is located.²⁹ For an industry already grappling with a lack of access to financial services, this directive further underscored the need for states to adopt residence requirements and to keep their cannabis markets strictly intrastate.

States are employing residency requirements as a tool to achieve certain fiscal policy goals. However, these goals are more complex than simple economic protectionism. They include protecting the cannabis industry in their states from being overrun by big businesses, creating and protecting high quality jobs and workers' ability to organize, preventing market consolidation, and allowing smaller, local businesses to establish themselves first.³⁰ Additionally, as discussed above, both state residency and narrower residency requirements within certain identified areas serve as the foundation for eligibility for many of the states' social equity programs.

B. The Dormant Commerce Clause

The Dormant Commerce Clause is a legal doctrine based on the Commerce Clause of the United States Constitution. The Commerce Clause gives Congress the power to regulate commerce among the states, but the Supreme Court has also explained that the provision prohibits states from discriminating against or unduly burdening interstate commerce – even when federal law is silent. This concept is called the "Dormant Commerce Clause."

The Dormant Commerce Clause prohibits states from enacting laws that either directly discriminate against out-of-state businesses or indirectly burden interstate commerce in a way that is excessive or unreasonable. The principle behind the Dormant Commerce Clause is that the Framers intended to ensure that the national economy is able to function smoothly and that businesses are able to operate without facing excessive or discriminatory state regulations.

The Supreme Court has used the Dormant Commerce Clause to strike down state laws that discriminate against out-of-state businesses or that place undue burdens on interstate commerce, unless Congress has specifically allowed the states to do so. For example, the Supreme Court has struck down laws that require a percentage of utilities purchases to be from an in-state supplier³¹ and laws that provide tax credits to fuel sellers for selling ethanol produced in the state.³² In cases where Congress is silent, the Court has developed a balancing test to determine whether a state law violates the Dormant Commerce Clause, weighing the state's interest in the law against its burden on interstate commerce. For example, the Supreme Court employed this balancing test to strike down an Arizona law that required that Arizona-grown cantaloupes advertise their state of origin on each package. The Court ruled that the Arizona statute imposed too great a burden on commerce to justify its benefits, and struck it down.³³

C. Application of the Dormant Commerce Clause to State Cannabis Residency Laws

The design of existing intrastate cannabis markets represents exactly the kind of markets that the Supreme Court has struck down under the Dormant Commerce Clause. Indeed, the Court has struck down state laws containing much milder forms of state protectionism than we see in state cannabis laws.

For example, in 2019, the Supreme Court invalidated a residency requirement for Tennessee retail liquor store licenses in *Tennessee Wine and Spirits Retailers Association v. Thomas*.³⁴ The Tennessee law imposed a series of durational-residency requirements on all people and businesses seeking to obtain or renew a license to operate a liquor store in Tennessee. The Court first articulated the general constitutional principle: “[I]f a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose.”³⁵ The Court then applied that principle to the case at hand, and found that Tennessee’s durational-residency requirements plainly favored Tennesseans over nonresidents. The Court found that the law was not “narrowly tailored” to advance a legitimate local purpose and invalidated Tennessee’s residency requirements as unconstitutional.

The Dormant Commerce Clause generally dictates that states must treat in-state and out-of-state businesses equally, and that they cannot use their regulatory powers to create barriers to interstate commerce. However, the application of this principle to cannabis is not that simple. All cannabis commerce remains illegal under federal law and the economic protectionism of the states is largely the result of attempts by the states to appease the federal government. With cannabis, the question is not simply whether states are prohibiting market participation from out of state residents. They clearly are, and with a more typical commodity – say, beer, or cookies – such prohibition would surely run afoul of the Dormant Commerce Clause. With cannabis, the trickier legal question is whether the Dormant Commerce Clause also prohibits states from restricting out of state businesses from a federally illegal, drug trafficking enterprise?

The legal answer is not clear; the application of the Dormant Commerce Clause to, for example, residency requirements for cannabis businesses is still being litigated. Several courts have struck down residency requirements as unconstitutional,³⁶ while others have upheld them. Courts have held that residency requirements for cannabis licensing in Maine, Michigan, Missouri, and New York unconstitutionally hinder interstate commerce in violation of the Dormant Commerce Clause. On the other hand, a federal district court in Washington recently upheld the state’s residence requirement on the theory that the Dormant Commerce Clause does not apply to federally illegal markets.³⁷

While the application of the Dormant Commerce Clause under federal prohibition is unclear, it is only unclear because of federal prohibition. In other words, if and when cannabis becomes legal under federal law, many provisions of existing state cannabis laws -- such as those that restrict licenses to residents, prohibit commerce from out of state, and prohibit the import and export of cannabis for sale across state lines -- will almost certainly be struck down.

D. Application of the Dormant Commerce Clause to Social Equity Programs

Social equity programs aim to promote economic justice and equitable opportunity in the cannabis industry. The programs recognize that some individuals and communities were harmed disproportionately by cannabis prohibition and enforcement, and they aim to remediate that harm through investing resources and creating economic opportunity for individuals from those same communities. Many social equity programs have struggled to fully achieve their goals and policymakers are continually working to amend and improve the programs and to incorporate the lessons from what other states have tried.³⁸

One challenge for states in crafting effective social equity programs is establishing the eligibility criteria to determine who should have access to the program's benefits. Although data shows extreme racial disparities in cannabis arrests in every jurisdiction, states have generally shied away from using race in establishing eligibility criteria for social equity programs out of concern that an overreliance on race will render the programs legally vulnerable. Some laws that explicitly rely on race have been struck down.³⁹ Most states and local jurisdictions adopt approaches that use a variety of race-neutral criteria to identify those individuals who were likely disproportionately harmed by previous cannabis policy and who therefore deserve special consideration now.

The most common factor state legislators include in their eligibility criteria is residency in a specific geographic area or neighborhood that was disproportionately harmed by the war on drugs⁴⁰ through heightened law enforcement, disproportionate rates or arrest and incarceration, or is economic distress. However, while the use of residency avoids the legal risk of using race as an explicit criterion for eligibility, it is vulnerable on Dormant Commerce Clause grounds.

Detroit offers a cautionary tale. Following the legalization of cannabis in Michigan in 2018 via state ballot initiative, Detroit enacted a program for licensing within the city that gave preferential treatment to "Detroit legacy" applicants. The stated purpose of the local program was "to promote equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities and to address the disproportionate impacts of the War on Drugs in those communities." To qualify as a Detroit legacy applicant, one had to have lived in Detroit for the past ten years. A prospective license applicant challenged this criterion in federal court on the ground, among others, that it violated the Dormant Commerce Clause. The court granted a preliminary injunction to enjoin licensing, finding that "the Ordinance's facial favoritism toward Detroit residents of at least 10-15 years embodies precisely the sort of economic protectionism that the Supreme Court has long prohibited."⁴¹

A federal judge in New York issued a similar injunction barring licensing in New York based on the likelihood that New York's social equity eligibility requirement that an applicant have a prior cannabis conviction in New York State and have significant ties to New York violates the Dormant Commerce Clause.⁴²

Additionally, a component of some state equity programs is to guarantee social equity licensees a set percentage of the total licenses issued within a state and to make certain classes of licenses available only to social equity applicants. Massachusetts and New York both have license categories that are only available to social equity applicants thereby guaranteeing access to that segment of the market. Connecticut requires that 50% of all licenses be awarded to social equity applicants. And Massachusetts requires state residence to own a microbusiness license. These provisions are designed to favor a subset of in-state licensees over out of state business, a potential fed flag under the Dormant Commerce Clause.

E. Potential Monopolization of the Market When Federal Prohibition Ends

Without protection for small businesses, a shift from fragmented intrastate markets to one large intrastate market through the end of federal prohibition and the demise of interstate barriers will likely lead to consolidation of the cannabis industry⁴³ and a monopolization of the market by large cannabis companies. Additionally, large corporations currently operating in other areas will enter the cannabis market once the risks and constraints of federal prohibition are removed.

One large intrastate market will favor economies of scale. Large producers from favorable agricultural climates will grow cannabis better and cheaper for consumers throughout the nation. The largest cannabis businesses will buy up smaller businesses across all the states and consolidate the number of cannabis businesses operating nationwide. Other large corporations, such as tobacco companies, alcohol companies, or Amazon, may decide to enter the cannabis market once doing so will no longer require violating federal law and buy up cannabis businesses large and small.

While a consolidated interstate market may have benefits, the cannabis industry would quickly become like many other industries, dominated by a handful of powerful corporations that control the vast majority of the market and profits. Only ten companies control nearly every large food and beverage brand in the world.⁴⁴ Four or fewer firms control more than 40% of the grocery market. PepsiCo alone controls 88% of the dip market, and three companies control 93% of the soda market.⁴⁵

By contrast, currently, the six largest cannabis companies combined own about 20% of the cannabis market, with no single company owning more than 5% of total revenues. Approximately 9,900 smaller companies are responsible for over 60% of total cannabis sales.⁴⁶

Whatever one thinks of the benefits of a consolidated interstate cannabis market, it is clear that such a market is unlikely to prioritize the social equity goals that have driven many states' existing policies. Without specific efforts by Congress to protect state-level cannabis equity programs, and to limit market consolidation and monopolization, state efforts to create an equitable and inclusive industry will be wiped out. Not only will these small, equity-owned businesses no longer be able to compete against large multi-state and multi-national corporations, but the application of the Dormant Commerce Clause will invalidate the components of the state laws designed to protect small and equity owned businesses. Out of state corporations and multi-state businesses will use the Dormant Commerce Clause to challenge state cannabis laws that burden interstate commerce through residency requirements, or any other state protectionist measures that aim to control the size, scale, or make-up of the intrastate cannabis market.

New York's Cannabis Law: An Explainer

Overview

On March 31, 2021, New York State legalized adult-use cannabis by passing the Marijuana Regulation & Taxation Act (MRTA). The legislation creates a new Office of Cannabis Management (OCM) governed by a Cannabis Control Board to oversee and implement the law (collectively referred to as "the OCM"). The OCM will issue licenses and develop regulations outlining how and when businesses can participate in the new industry. A major focus of the MRTA is social and economic equity. The MRTA incentivizes participation in the new industry for individuals disproportionately impacted by cannabis prohibition, automatically expunges an individual's past marijuana convictions, and invests 40% of the adult-use cannabis tax revenue toward rebuilding communities harmed by the War on Drugs.

Goals of the Social and Economic Equity Program

- Promote applicants from communities disproportionately impacted by cannabis prohibition, and promote racial, ethnic, and gender diversity when issuing licenses for adult-use cannabis related activities, including prioritizing applicants who are members of communities disproportionately impacted by the enforcement of cannabis prohibition or who qualify as a minority or women-owned business, distressed farmer, or service-disabled veteran.
- Create an incubator program to encourage social and economic equity applicants to apply for licensure and to provide direct support in the form of counseling services, education, small business coaching, financial planning and compliance assistance.
- Establishes a goal to award 50% of all adult-use licenses to social and economic equity applicants.

MRTA Market Structure Designed to Benefit Social Equity

The MRTA establishes a two-tier market structure which prohibits licenses from being vertically integrated and owning the majority of the market.

- Establishes license types, such as adult-use microbusiness, cooperative, on-site consumption and delivery license types, that are low barrier-to-entry, which are prioritized for social and economic equity applicants.
- Licenses issued under the social and economic equity plan cannot be transferred or sold within the first three years of issuance, except to another qualified social and economic equity applicant with approval from the Cannabis Control Board.
- All non-equity licensees are required as part of the application process, to develop and implement a social responsibility framework, which is designed to contribute to communities disproportionately harmed by cannabis prohibition.

Extra Priority Given to An Applicant Who:

- Is a member of a community disproportionately impacted by the enforcement of cannabis prohibition;
- Has an income lower than eighty percent of the median income of the county in which the applicant resides; and
- Was convicted of a cannabis-related offense prior to the effective date of this chapter, or had a parent, guardian, child, spouse, or dependent, or was a dependent of an individual who was convicted of a cannabis-related offense.

Disproportionately Impacted Communities

"Communities disproportionately impacted" means, but is not limited to, a history of arrests, convictions, and other law enforcement practices in a certain geographic area, such as, but not limited to, precincts, zip codes, neighborhoods, and political subdivisions, reflecting a disparate enforcement of cannabis prohibition during a certain time period, when compared to the rest of the state.

Labor Protections

- Protects most workers by prohibiting employers from disciplining employees for engaging in cannabis activities legal under state law while off duty and ensuring safe workplaces.
- Requires all applicants for a license to grow, process and manufacture, distribute, deliver or sell cannabis products to enter into and maintain a labor peace agreement with a labor union that either represents, or is trying to represent, that applicant's workers.

V. Policy Solution: Federal Reform That Advances Economic Justice and Equity – And Doesn't Violate the Constitution

The Constitution gives Congress the power to regulate interstate commerce however it chooses. The Dormant Commerce Clause only comes into play when Congress is silent, and a state's laws or regulations discriminate against out of state interests directly or through their practical effect. Because, as explained, state cannabis laws and many state equity programs both facially and practically discriminate, they will likely not survive a Dormant Commerce Clause challenge, especially when the federal government eventually de-schedules cannabis. But Congress does not have to be silent.

The sponsors of a number of proposed federal reforms claim to place equity and economic and reparative justice as the primary goal of the reform. However, these goals cannot be achieved if the issue of interstate commerce is not proactively addressed as part of the reform. Congress can and should use its power to prevent application of the Dormant Commerce Clause by explicitly addressing and limiting interstate commerce in a manner that will protect social equity programs and advance the development of a national market grounded in those principles.

Federal reform should be grounded in a concrete set of articulable core policy goals that are stated and advanced by Congress. The goals should include:

- Create clarity and consistency between state and federal policy while protecting existing state and local cannabis regulatory programs;
- Support social and economic equity programs by allowing those businesses to engage in interstate commerce; and
- Advance labor protections and public health and safety through limitations on large corporations, corporate consolidation, and monopolization.

Below are specific policy components aimed at advancing these goals that should be included as a component of federal cannabis legalization legislation.

Proposal #1: Explicitly allow existing state cannabis laws to operate as designed and without disruption.

Congress should specifically state that it does not intend to preempt, prohibit, or otherwise limit any state law, regulation, or requirement regardless of whether the state law affects interstate commerce or favors in state interests. This will allow state programs aimed at fostering equity, protecting workers' ability to organize, including requiring labor peace agreement, and supporting small businesses and their employees, to continue.

Proposal #2: Allow bona-fide social equity businesses, small businesses, and worker-owned businesses to engage in interstate commerce.

Congress should establish an interstate cannabis commerce registration. The registration should only be available to entities licensed under state law programs aimed at: 1) creating diversity in the cannabis industry; 2) providing support and opportunity to economically disadvantaged individuals, veterans, or individuals and communities most affected by cannabis prohibition and enforcement; or 3) protecting workers, the ability of workers to organize, and worker-owned businesses. This will give an advantage to these entities by allowing them to engage in interstate commerce.

Proposal #3: Limit Large Corporations.

Congress should include a number of mechanisms to reduce the number of large business and the prevention of market consolidation and monopolization of the market, including restrictions on size and ownership to prevent excessive consolidation through mergers and acquisitions; anti-monopoly provisions; and limitations on tax deductions and credits for advertising and marketing expenses.

DRAFT LANGUAGE

The draft bill language below is intended to stimulate discussion and provide policy ideas related to the issues discussed in the report. The language included here is conceptual in nature, aiming to outline the foundational concepts and themes of what could eventually become part of a broader, more comprehensive federal legislative proposal. This draft language does not intend to be exhaustive or final. Its purpose is to foster discussion, feedback, and further development before any official legislative draft is prepared and presented for consideration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION X. DECLARATION OF POLICY.

Congress hereby declares that:

- (a) The continued regulation and taxation by the several States of the business of cannabis is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
- (b) Cannabis should be regulated and taxed in a manner that fosters social and economic equity in the cannabis industry and that protects and prioritizes the interests of workers and small business.
- (c) Cannabis should be regulated in a manner that ensures that the people who work in the cannabis industry have good, family sustaining jobs and benefits, with opportunities for advancement, and that workers' ability to organize is protected.
- (d) All cannabis employees shall be afforded the full rights and protections of the National Labor Relations Act and Fair Labor Standards Act, including the right to join a union as well as wage and hour protections.
- (e) State cannabis regulatory and licensing programs that are designed to advance social and economic equity and that protect workers and small businesses should be protected.
- (f) It is Congress's intent to use its Commerce Clause power under Article 1, Section 8, Clause 3 of the U.S. Constitution to permit state laws and regulations to restrict and limit interstate commerce between the states as directed by this Act.
- (g) Limiting market consolidation and the size and scale of businesses that are allowed to operate in the cannabis industry will advance health, safety, labor, and equity.
- (h) Labor peace agreements that are required or permitted by state or local cannabis laws for entities operating in the cannabis industry are permitted, even when the state or locality is not acting as a market participant.

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SECTION X. LEGISLATIVE FINDINGS.

Congress hereby finds that:

- (a) Cannabis legalization and regulation should be grounded in repairing the harm caused by cannabis prohibition through the advancement of community and individual health and economic equity.
- (b) For the past 50 years, the prohibition of cannabis and the criminalization of people who use cannabis has disrupted the lives of millions of people and contributed to the devastation of communities that bear the brunt of cannabis law enforcement.
- (c) Approximately half a million people are arrested for cannabis every year under state or federal law.
- (d) A Black person is 3.7 times more likely to be arrested for a cannabis possession offense than a white person even though the two groups possess and use cannabis at similar rates.

- (e) A marijuana arrest and conviction carry lifelong collateral consequences that can limit an individual's ability to obtain employment, housing, education, public assistance, a driver's license, and credit.
- (f) Disproportionate and racially biased arrests and conviction make it more difficult for Black and Brown people to enter the cannabis industry as many states bar people with criminal records from obtaining cannabis licenses as they do for many types of business and professional licenses.
- (g) Additionally, limited licenses, high licensing fees, the need for capital in the face of limited banking services, and heightening risk due to continued federal prohibition create barriers that make it difficult for many to enter the cannabis industry, especially people from Black and Brown communities subject to high levels of enforcement, small businesses and their employees, and economically disadvantaged individuals.
- (h) Thirty-seven states, the District of Columbia (DC), Puerto Rico, Guam, and the U.S. Virgin Islands have comprehensive laws and policies allowing for the medicinal use of cannabis. Ten additional states allow for "limited-access medical cannabis," which refers to low-THC cannabis or cannabidiol (CBD) oil. Idaho, Kansas, Nebraska, and American Samoa do not allow for the use of medical marijuana or low-THC cannabis.
- (i) Twenty-three states, the District of Columbia, Guam, and the Northern Mariana Islands have enacted laws allowing for the adult use of cannabis and establishing state-administered regulatory schemes for the production and sale of cannabis.
- (j) These states have designed complex licensing and regulatory schemes to license and track the production, manufacture, testing, transporting, and selling of cannabis as an intra-state market within the borders of each state.
- (k) Approximately fifteen states have enacted social equity programs as part of their cannabis regulatory systems to increase diversity within the cannabis industry and provide opportunity to the individuals and communities most affected by cannabis prohibition and enforcement.
- (l) Approximately six states have enacted labor peace agreements requirements as part of their cannabis laws.

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SECTION X. DEFINITIONS.

- (a) "Federal interstate cannabis commerce registration" means a federal permit that allows an entity licensed under its state cannabis law to engage in interstate commerce.
- (b) "Labor peace agreement" means an agreement between an entity (employer) and a bona-fide labor organization that, at a minimum, protects the State's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the entity.
- (c) "Small business" means a business that meets the requirements of a small business concern as set by the Small Business Administration and, if applicable, qualifies under the licensing structure of its state cannabis law as a small business.
- (d) "Social equity business" means a business that qualifies under its state cannabis law for participation in a program designed to provide support and opportunity to economically disadvantaged individuals, veterans, or individuals and communities most affected by cannabis prohibition and enforcement, or a program designed to create diversity in the cannabis industry in a way that repairs harm caused by past enforcement of cannabis laws.
- (e) "State cannabis law" means a state or local cannabis law that establishes a system to license and regulate cannabis related commercial activity within that jurisdiction.

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SECTION X. PROTECTION OF STATE CANNABIS LAWS.

- (a) Nothing in this Act or any other provision of law, including Article 1, Section 8, Clause 3 of the U.S. Constitution, shall be construed to preempt, prohibit, or otherwise limit the authority of a state to directly or indirectly, to establish or continue to affect any law, regulation, or requirement relating to its state cannabis law.
- (b) The business of cannabis, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

SECTION X. INTERSTATE COMMERCE.

No person shall cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale or other distribution after shipment in interstate commerce any cannabis or cannabis product unless the person holds a valid federal interstate cannabis commerce registration.

SECTION X. FEDERAL REGISTRATION.

The [federal regulatory agency] shall issue federal interstate cannabis commerce registrations to persons who meet these following criteria:

- (a) The person holds a valid license issued under a state cannabis law;
- (b) The person qualifies as a social equity business, a small business, or an employee-owned business; and
- (c) The person satisfies all labor, worker protection, labor peace agreement, and workforce requirements under the state cannabis law and all other applicable state and federal laws, for which it holds a license.

SECTION X. LIMITATIONS ON LARGE CORPORATIONS.

- (a) The [federal regulatory agency] shall deny a federal cannabis license or a renewal application to an applicant or licensee that:
 - (1) Has an ownership interest in more than 5 entities licensed per state under any state cannabis law;
 - (2) Has an annual gross revenue of over \$1,000,000,000; or
 - (3) Is owned or controlled by a tobacco company found to have violated the Racketeer Influenced and Corrupt Organizations Act.
- (b) The [federal regulatory agency] shall deny a federal cannabis license or a renewal application to an applicant or licensee if it or other designated agency determines that issuance of the license or a renewal of the license could:
 - (1) Allow for unreasonable restraints on competition by creating unlawful monopoly power;
 - (2) Lead to market consolidation by reducing the economic opportunity of small businesses and their employees; or
 - (3) Negatively impact the ability of social equity businesses to successfully participate in the cannabis market.

SECTION X. NO TAX DEDUCTION OR CREDITS FOR ADVERTISING AND MARKETING EXPENSES.

No tax deduction or credit shall be allowed under United States Code Title 26 for any amount paid or incurred during the taxable year for any expense related to the advertising or marketing of cannabis, cannabis products, or cannabis-related services.

¹ Currently, cannabis is a Schedule 1 controlled substance under the federal Controlled Substances Act which means that it is considered to have a high potential for abuse and no accepted medical use. It remains completely illegal to possess, use, sell, distribute, or cultivate cannabis under federal law, regardless of whether the cannabis is for medical or recreational purposes or is legal under state law.

² See August 29, 2013 Department of Justice Memorandum for all United States Attorneys, "Guidance Regarding Marijuana Enforcement," stating a federal enforcement priority to be: "Preventing the diversion of marijuana from states where it is legal under state law in some form to other states..."

³ See Sophie Quinton, "Oregon Marijuana Surplus a Cautionary Tale for Other States," Stateline, July 11, 2019; Chris Roberts, "It's Gonna Be A Bloodbath: Epic Marijuana Oversupply Is Flooding California, Jeopardizing Legalization," Forbes, August 31, 2021.

⁴ See Robert Mikos, "Interstate Commerce in Cannabis," 101 Boston University Law Review 857, 863-864 (2021) (arguing that existing restrictions on interstate commerce for cannabis are constitutionally suspect.)

⁵ Minority Cannabis Business Association, "MCBA National Cannabis Equity Report," 2022 <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf>

⁶ For example, California, Connecticut, Delaware, Minnesota, New Jersey, New York, and Rhode Island have labor peace agreement language in their adult-use cannabis legislation. Illinois has merit-based licensing that includes labor peace agreements for adult-use. New Mexico has merit-based licensing that encourages labor peace agreements for adult-use. Pennsylvania has merit-based licensing that includes labor peace agreements for medical use.

⁷ A labor peace agreement is an agreement between an employer and a bona-fide labor union by which the employer agrees to not interfere or undermine the union's ability to organize the workforce and the union agrees not to strike, picket, or otherwise disrupt the employer's business operation, in order to protect a state's proprietary interest in the business. Some legal scholars argue that state law labor peace requirements for cannabis businesses are preempted by the National Labor Relations Act because the state is acting solely as a regulator, rather than as a purchaser or a proprietor. See Jenna Fletcher, "Labor Protections Under Federal Cannabis Prohibition and the Future of Cannabis Unions," Ohio State Legal Studies Research Paper No. 738, Drug Enforcement and Policy Center No. 59, November 2022. To the extent that federal preemption poses a threat to existing state law labor peace agreement requirements, federal cannabis legislation presents an opportunity to address and remedy supremacy clause issues related to labor peace agreements required under state law.

⁸ David Cooper and Sebastian Hickey, "Ensuring the High Road," Economic Policy Institute, September 20, 2021.

⁹ Governor Phil Murphy February 22, 2021 Press Release <https://www.nj.gov/governor/news/news/562021/20210222a.shtml>

¹⁰ Governor Phil Murphy January 11, 2022 State of the State Address <https://www.nj.gov/governor/news/news/562022/approved/20220111e.shtml>

¹¹ Jerry Nowicki, "Pritzker signs 'most equity-centric' marijuana legalization bill in nation," Capitol News Illinois, June 25, 2019.

¹² April 20, 2022, "Mayor Adams Announces Steps to Welcome equitable Cannabis Economy to New York City," The Official Website of the City of New York. <https://www.nyc.gov/office-of-the-mayor/news/225-22/mayor-adams-steps-welcome-equitable-cannabis-economy-new-york-city>

¹⁴ For example, they used Department of Justice (DOJ) guidance memos (adopted by the Obama Administration and then revoked but still generally followed by the Trump Administration and the Biden Administration) as well as language included in appropriation bills that prohibit the use of DOJ funds to interfere with state medical marijuana laws.

¹⁵ When the CSA was adopted, President Richard Nixon established the Shafer Commission, officially known as the National Commission on Marijuana and Drug Abuse, to study the effects of cannabis use in the United States. It conducted an extensive review of existing research. It concluded that cannabis did not cause significant physical or mental harm and that criminalizing cannabis possession and use was causing more harm than the drug itself. The report recommended that cannabis be decriminalized at the federal level. Despite the Shafer Commission's findings, the Nixon administration chose to prohibit cannabis entirely and keep it in Schedule 1.

¹⁶ Ted Van Green, "Americans overwhelmingly say marijuana should be legal for medical or recreational use," Pew Research Center, November 22, 2022 (overwhelming share of U.S. adults (88%) say either that marijuana should be legal for medical and recreational use by adults (59%) or that it should be legal for medical use only (30%); 45% of Republicans and Republican-leaning independents favor legalizing marijuana for both medical and recreational use, while an additional 39% say it should only be legal for medical use.)

¹⁷ President Biden's October 06, 2022 Statement on Marijuana Reform. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>

¹⁸ The Cannabis Administration and Opportunity Act was introduced in 2022 by Senators Booker, Schumer, and Wyden to "end federal cannabis prohibition by removing cannabis from the Controlled Substances Act; empower states to create their own cannabis laws; ensure federal regulation protects public health and safety; and prioritize restorative and economic justice." See July, 2022 Cory Booker Press Release <https://www.booker.senate.gov/news/press/booker-schumer-wyden-introduce-cannabis-administration-and-opportunity-act>

¹⁹ Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. (Voters in South Dakota passed a legalization law in November 2020, but it was overturned in court.) See Marijuana Policy Project, Cannabis Legalization <https://www.mpp.org/issues/legalization/>

²⁰ See NORML <https://norml.org/laws/legalization/> (Guam, Northern Mariana Islands, and U.S. Virgin Islands.)

²¹ State Medical Cannabis Laws, National Conference of State Legislatures, Updated April 17, 2023 <https://www.ncsl.org/health/state-medical-cannabis-laws>

²² Katherine Schaeffer, Pew Research Center, "7 facts about Americans and marijuana," April 13, 2023 <https://norml.org/laws/legalization/>

²³ MJBiz daily, "U.S. Cannabis Economic Impact," Updated April 2023. <https://mjbizdaily.com/us-cannabis-sales-estimates/>

²⁴ See Robert Mikos, "Interstate Commerce in Cannabis," 101 Boston University Law Review 857, 862-863 (2021) (arguing that states designed intrastate markets for their economic benefit.)

²⁵ For some states, especially high producing cannabis states, such as California and Oregon, the intrastate market restriction causes significant economic and regulatory problems. These states produce far more cannabis than their residents can consume, artificially limiting the economic opportunity for cannabis producers in those states, allowing cannabis that cannot be sold in state to feed the unregulated cannabis markets both inside and outside the state, and depriving the state of the revenue from significantly more product if California growers could export cannabis for sale in other states. Over a third of the vegetables and three-quarters of the fruits and nuts in the U.S are grown in California. See California Agriculture Statistics, California Department of Food and Agriculture <https://www.cdfa.ca.gov/Statistics/>. In other words, much of the crop grown in California is sold to businesses and consumers in other states. This could be true of cannabis as well, but for the intrastate limitation. As a result, several large cannabis producing states enacted legislation that would allow for the development of interstate commerce agreements with other state where cannabis is legal to address supply and demand issues plaguing many businesses. See Michelle Minton, "Let the legal cannabis industry work across friendly state lines," Reason Foundation, April 3, 2023. But it is unclear whether in the face of continued federal prohibition these new laws will be implemented. Another disadvantage to intrastate cannabis industries of the current situation is that residency restrictions on out of state investment have resulted in a lack of capital for some business. Residency restrictions reduce the number of potential investors available to cannabis businesses. Out-of-state investors, who may have significant financial resources and expertise in the industry, are often excluded from investing or holding substantial ownership stakes. This narrows the investor pool, making it more challenging for cannabis businesses to secure the funding. This compounds the problem of there being limited banking available to the industry because cannabis remains federally prohibited. See Allie Howell, "Residency Requirements for Marijuana Businesses," Reason Foundation, January 2019. <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf>.

- ²⁶ August 29, 2013 Memorandum for All United States Attorney re: Guidance for Marijuana Enforcement. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>
- ²⁷ Oregon Measure 91, Section 1(c): <https://www.oregon.gov/olcc/marijuana/documents/measure91.pdf>
- ²⁸ A lawsuit filed by Oklahoma and Nebraska against Colorado based on claims of Amendment 64 in Colorado negatively affecting their states by cannabis coming in from Colorado may have further encouraged states to require entirely intrastate markets. See Jack Healy, “Nebraska and Oklahoma Sue Colorado Over Marijuana Law,” *New York Times*, December 18, 2014.
- ²⁹ Allie Howell, “Residency Requirements for Marijuana Businesses,” Reason Foundation, January 2019. <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf>
- ³⁰ Allie Howell, “Residency Requirements for Marijuana Businesses,” Reason Foundation, January 2019. <https://reason.org/wp-content/uploads/residency-requirements-marijuana-licensure.pdf>
- ³¹ *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).
- ³² *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).
- ³³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- ³⁴ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). See also Granholm v. Heald, 544 U.S. 460 (finding that laws in New York and Michigan that permitted in-state wineries to ship wine directly to consumers but prohibited out-of-state wineries from doing the same were unconstitutional).
- ³⁵ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).
- ³⁶ *Northeast Patients Group v. United Cannabis Patients and Caregivers of Maine*, 45 F. 4th 542 (1st Cir. 2022); *Toigo v. Department of Health and Senior Services*, 549 F. Supp. 3d 985 (W.D. Mo. 2021); *Lowe v. City of Detroit*, 544 F.Supp.3d 804, 806 (E.D. Mich. 2021).
- ³⁷ *Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, CASE NO. C20-5661 BHS, 2023 WL 1798173 (W.D. Wash. Feb. 7, 2023).
- ³⁸ Shaleen Title, “Fair and Square: How to Effectively Incorporate Social Equity Into Cannabis Laws and Regulations,” The Ohio State University, Drug Law Enforcement Policy Center.
- ³⁹ See Laura Hancock, “Judge strikes down racial quotas in Ohio medical marijuana dispensary case,” <https://www.cleveland.com/open/2019/11/judge-strikes-down-racial-quotas-in-ohio-medical-marijuana-dispensary-case.html>
- ⁴⁰ Shaleen Title, “Fair and Square: How to Effectively Incorporate Social Equity Into Cannabis Laws and Regulations,” The Ohio State University, Drug Law Enforcement Policy Center.
- ⁴¹ *Lowe v. City of Detroit*, 544 F. Supp. 3d 804, 816 (E.D. Mich. 2021).
- ⁴² *Variscite NY One, Inc. v. State of New York*, No. 1:22-cv-1013 (GLS/DJS) (N.D.N.Y. Nov. 10, 2022).
- ⁴³ See Robert Mikos, “Interstate Commerce in Cannabis,” 101 *Boston University Law Review* 857, 889 (2021) for a discussion of this point.
- ⁴⁴ Kate Taylor, Insider, “These 10 companies control everything you buy,” April 4, 2017 <https://www.businessinsider.com/10-companies-control-food-industry-2017-3>
- ⁴⁵ Nina Lakhani, Aliya Uteuova, and Alvin Chang, “Revealed: the true extent of America’s food monopolies, and who pays the price,” *The Guardian*, July 14, 2021 <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation>
- ⁴⁶ Viridian Capital Advisors, “Chart: Consolidation is Inevitable in the Fragmented Cannabis Industry,” November 7, 2022 <https://www.benzinga.com/markets/cannabis/22/11/29599061/consolidation-is-inevitable-in-the-fragmented-cannabis-industry>



ABOUT PARABOLA CENTER FOR LAW AND POLICY

Parabola Center is a nonprofit, nonpartisan think tank of legal professionals and drug policy experts that advocates for legalizing cannabis in a manner that protects people, not corporations. Our board of directors is comprised of women of color who are cannabis experts and attorneys – each with a deep history of activism, entrepreneurship, and experience serving as a government-appointed regulator or advisor. Our mission is to provide everyone with the education, access, and expertise to support cannabis policies that put communities and small businesses first. Learn more about us and check out our other educational materials at ParabolaCenter.com, and follow @ParabolaCenter on Twitter and Instagram for policy updates and other resources.



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Tamar Todd is an experienced attorney with expertise in policy advocacy, legislative drafting, statewide political campaign strategy, regulatory implementation, and non-profit management in the areas of drug law reform, cannabis law and policy, public health, and criminal justice. She is also a lecturer at U.C. Berkeley School of Law, where she teaches a course on cannabis law and policy. She is the former legal director of the Drug Policy Alliance, where she was responsible for developing and overseeing the organization's legal work as it related to legislative drafting, policy advocacy, litigation, and public education in local, state and federal jurisdictions. Tamar received her B.A. from the University of Vermont and her J.D. from the Georgetown University Law Center. After law school, she clerked for the Hon. Emmet Sullivan on the U.S. District Court for the District of Columbia, and she spent several years representing death row inmates as a staff attorney with the Southern Center for Human Rights in Atlanta. She serves as Parabola Center's advisor on legislative drafting.