

Race-Specific Language to Benefit
African American, Latinx, and
Native American Communities in
Cannabis Equity Legislation

NuLeaf Project

In partnership with Willamette University Law School
Students for Sensible Drug Policy

Cannabis equity provides an opportunity to ensure communities most impacted by criminalization benefit from legalization. The direct and collateral consequences of cannabis prohibition caused major capital divestment from impacted communities, presenting a major barrier to entering the capital-intensive legal cannabis market. The result is a cannabis industry where only 2.7% of plant-touching businesses are Black-owned, and only 5.3% are Latinx-owned.¹

While states such as California, Illinois, and Massachusetts have already created equity programs to ameliorate this issue, these programs have fallen short in achieving equitable market participation. A major reason is the lack of legislative language that directly names the communities that suffered the most from prohibition and should benefit from cannabis equity programs. That is specifically: Black, Indigenous and Latina/o/x communities.

Policy makers have for the most part shied away from employing race-conscious language in crafting cannabis equity policy. This is due to the fact that conservative legal strategists often attack these programs via the Equal Protection Clause of the Fourteenth Amendment. Race-conscious language requires that legislatures satisfy two requirements: (1) show a compelling governmental interest, and (2) draft bill language that is narrowly tailored.

Given the discriminatory intent behind the War on Drugs and the lack of diversity currently in the cannabis market, cannabis equity provides a rare opportunity to employ race-specific legislative language to benefit disadvantaged communities. To right the wrongs of the past, federal and local legislation must experiment with race conscious policies. **This guide will show how to draft bill language that is narrowly tailored to survive the strict scrutiny standard under the Equal Protection Clause, and how to make the legislative findings needed to demonstrate the requisite compelling governmental interest.**

¹ Eli McVey, *Women & Minorities in the Marijuana Industry*, Marijuana Business Daily (2017), <https://mjbizdaily.com/wp-content/uploads/2017/10/Women-and-Minorities-Report.pdf>.

Summary of Compelling Governmental Interest & Narrowly Tailored

| <u>Compelling Governmental Interest</u> | <u>Narrowly Tailored</u> |
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| <ul style="list-style-type: none"> There are two possible compelling governmental interests that are applicable to cannabis equity: <ol style="list-style-type: none"> remedying past discrimination (i.e., the War on Drugs and disparate policing). a compelling interest in business diversity (this is analogous to the diversity interest in secondary education in the context of affirmative action). | <ul style="list-style-type: none"> A court reviewing race-based language will want to see that the legislature enacting the program made a good faith consideration of race-neutral alternatives. Thus, program drafting should start using racially neutral qualifiers, and then employ race-based qualification only when it is apparent that race-neutral language will be ineffective. |
| <ul style="list-style-type: none"> A legislative body must make findings, based on extensive data, that demonstrates there is in fact a compelling governmental interest at play. Policymakers are advised to create an all-encompassing report to capture these findings. This can be accomplished through a government commissioned report, or through independent research by policy makers and advocates. | <ul style="list-style-type: none"> An equity program that employs race-specific language is more likely to survive a court challenge if race is one of many factors considered in awarding licenses. Meaning that race should not be a dispositive qualification standing alone, and someone who is a part of a benefitting group should demonstrate an additional race-neutral criterion (ex. income). |
| <ul style="list-style-type: none"> In addition to showing disparate impact from prohibition, there must also be a finding of discriminatory intent. Quotes from Harry Anslinger can show intent at the federal level. Policy makers should also investigate State archives for evidence of discriminatory intent at the local level. | <ul style="list-style-type: none"> If race is used as a dispositive qualification, there must be other avenues for individuals who are not members of a favored minority group to qualify for the program, if that individual can demonstrate that they were specifically impacted by prohibition (ex. prior cannabis arrest or conviction). |
| <ul style="list-style-type: none"> Each benefitting race-group must be shown, independently, to have suffered a disproportionate impact from the War on Drugs and have been shut out from the legal cannabis marketplace. This specificity shows that the legislature did not select groups “arbitrarily.” This becomes critical in the case of Latinx populations, as many disparate impact studies misclassify Latinx arrest data. This can falsely lower the arrest numbers for the Latinx community and inflate the arrest rate for Whites. | <ul style="list-style-type: none"> A quota or set-aside system, where a percentage of licenses are designated exclusively for Black and brown businesses owners, is extremely difficult to sustain over a court challenge. Such a system may be possible if it is shown that a State’s existing cannabis industry or regulatory agency has discriminated against Black and brown owned businesses. This discrimination must be direct, measurable, and not simply incidental to general capital disparities. |
| <ul style="list-style-type: none"> Policymakers are encouraged to be creative and invoke other forms of governmental discrimination that have kept BIPOC businesses from entering the legal cannabis market. This can include discriminatory housing policy, as well as other governmental practice that has divested capital from Black and brown communities. | <ul style="list-style-type: none"> Use of race-based language must be limited in time and subject to review. This does not necessarily mean there must be a predetermined “sunset” date. Rather, there must be oversight and review of the equity program to determine if the market is becoming more diverse and determine if the use of race-based language is still necessary. |

Drafting Race-Specific Language that is Narrowly Tailored

At the federal level and in states that allow race-based classifications,² policy makers must decide what race-neutral qualification(s) to include. Using only a race-based qualification is extremely vulnerable to a court challenge. The more race-neutral factors included the more likely race-specific language will be upheld. Race-neutral factors in equity legislation include:³

1. **Prior Cannabis Conviction:** An individual who has been arrested for or convicted of any crime relating to the sale, possession, use, cultivation, manufacture, or transport of cannabis.
2. **Low Income:** An individual who currently lives in a household with household income that is less than 80% of the current fiscal year median family income for the county of residence.
3. **Member of an Impacted Family:** An individual who, in the previous tax year, had a parent, legal guardian, child, spouse or dependent of an individual who, prior to legalization, was arrested for or convicted of any crime relating to the sale, possession, use, cultivation, manufacture, or transport of cannabis prior to legalization.
4. **Resident of a Disproportionately Impacted Area:** An individual who lived for a minimum of [2-10] consecutive or non-consecutive year(s) in an area that experienced a disproportionately high number of cannabis arrests relative to population.

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| <p>Note on “MBE” and “Socially and Economically Disadvantaged” Qualification.</p> <p>Ohio’s medical marijuana program, the first equity program to employ race-specific language, was found unconstitutional in part because the program employed a race-specific “economically disadvantaged groups” designation.⁴ This qualification including groups such as Asian-Americans who did not suffer from disproportionate arrests. Policymakers should look closely at state and local cannabis arrest data to determine which groups were most impacted. Usually, this will be individuals who are Black, Indigenous and Latinx. Similarly, general MBE designation often includes minority groups who were not disproportionately impacted by cannabis criminalization.</p> |
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² At the time this guide is written, race-based language cannot be used at all in Arizona, California, Michigan, Nebraska, Oklahoma, and Washington.

³ Minority Cannabis Business Association, *Ten Model Municipal Social Equity Ordinances* (Jul. 1, 2019), <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/07/MCBAs-Ten-Model-Municipal-Social-Equity-Ordinances.pdf>.

⁴ *Pharmacann Ohio, LLC v. Williams*, No. 17CV10962, at 9 (Ohio Com. PI 2018).

Model Qualification Scheme Where Race is not Dispositive: Safest from a Court Challenge

To qualify for an equity license, the business must be 51% owned by an individual(s) who meets one of the following qualifications:

- (A) Arrested or Convicted for a crime relating to cannabis, and
 - (1) Is Black, Indigenous, or Latinx, or
 - (2) Qualifies as low-income according to average income of the county of residence.
- (B) Resident of a Disproportionately Impacted Area for 5 of the past 10 years, and
 - (1) Is Black, Indigenous, or Latinx, or
 - (2) Is a Member of an Impacted Family.

Model Qualification Scheme Where Race is Dispositive, but Not the Only Qualification Type

To qualify for an equity license, the business must be 51% owned by an individual(s) who meets one of the following qualifications:

- (A) Is Black, Indigenous, or Latinx.
- (B) Arrested or Convicted for a crime relating to cannabis, and
 - (1) Resident of a disproportionately impacted area for 5 of the past 10 years, or
 - (2) Qualifies as low-income according to average income of the county of residence.

Note on “Quotas” and “Set-Aside” Programs

The Ohio medical cannabis program was also found unconstitutional because it used a quota or “set-aside” program where 15% of licenses were exclusively for economically disadvantaged businesses. Employing a quota or set-aside is the least likely race-specific program to survive a court challenge. Despite this, there appears to be two ways to show the evidence necessary to create a set-aside.

- (1) For Existing Cannabis Markets: A percentage set-aside can be used if a “disparity study” shows that an existing cannabis industry or licensing agency has discriminated against minority businesses. The numerical goals of the set-aside must be associated with the relevant labor market to show that the set-aside percentage was not selected arbitrarily.
- (2) For Emerging Cannabis Markets: A disparity study should be completed to show discrimination and significant racial disparities in industries analogous to cannabis. Maryland completed such a study in 2018 that can serve as a template for other similar studies.⁵

⁵ Jon Wainwright, *2018 Medical Cannabis Analysis*, NERA Economic Consulting (Jan. 17, 2018), https://www.mdot.maryland.gov/MBE/2018_medical_cannabis_analysis.pdf.

Race-Based Qualification Scheme for Markets with License Caps

Cannabis markets that are capped and award licenses based on a point system can also incorporate race-specific language. It should be noted that in the context of affirmative action in secondary education, the Supreme Court has ruled that assigning pre-designated points to an application is unconstitutional.⁶ However, there is likely a good argument that using points in awarding equity licenses is a different story from college admission policies and thus constitutional if the points awarded to Black, Indigenous, and Latinx businesses do not make those businesses qualify essentially automatically.

| Criteria | Points |
|--|---------------|
| At least 51% owned by individual(s) who identify as Black, Indigenous, or Latinx. | 10 |
| Owned by individual(s) who were a resident of a disproportionately impacted area for at least 5 of the past 10 years prior to legalization. | 10 |
| Owned by individual(s) who lost honorable status due to a cannabis related offense. | 10 |
| Owned by individual(s) who qualify as low-income. | 10 |
| Owned by individual(s) who has been arrested for or convicted of any crime relating to the sale, possession, use, cultivation, manufacture, or transport of cannabis. | 10 |
| Owned by individual(s) who is a member of an impacted family. | 10 |
| Application includes a “social equity” plan that meets the requirements established by the cannabis commission. | 10 |
| Owned by individual(s) with experience running a business in a highly regulated industry, such as marijuana, liquor, banking, etc. with no history of violations or license suspensions or revocations. | 5 |
| Business plan includes one of the following: (1) Provide PTO (or vacation/sick time) and health benefits to employees, or (2) Provide at least one annual training around diversity, cultural awareness, sexual harassment, or workplace violence. | 5 |
| Annual contribution of 1% net profits as a restricted donation to the cannabis commission social equity fund. | 10 |
| | x/90 |

⁶ *Gratz v Bollinger*, 539 U.S. 244 (2003).

Narrowly Tailoring and Time Limitations

A court reviewing race-specific language will want to see that the use of the race-specific language is limited in time and subject to review. This doesn't mean that there must be a specific end date for the use of race-based language in an equity bill or ordinance. Rather, at a minimum, a legislative body or agency must track data on their specific cannabis market and determine whether the use of race-based language is still necessary to ensure equitable market participation, and whether the goal of equitable participation has been achieved so that race-based language can be abandoned in favor of race-neutral language. Such review language can be written as:

“[INSERT REVIEW BOARD NAME] as part of an all-encompassing annual Cannabis Equity Report, will review cannabis equity license program qualifications to ensure participants represent communities most impacted by cannabis prohibition and to ensure that the [NATIONAL, STATE, or CITY] cannabis market is becoming more inclusive.”

A related time issue is the use of exclusive licensing for certain equity license types. Massachusetts recently created a special delivery license and social consumption license that will be available exclusively to equity licensees for two years.⁷ This program has been challenged in court for technical reasons unrelated to race-conscious language. It is difficult to predict how a court would rule on a durational set aside for equity licenses that use race-specific qualification. Therefore, policy makers should experiment with different programs to determine how long exclusive licensing can be used and what review needs to be incorporated.

⁷ Cannabis Control Commission, *Equity Programs*, Commonwealth of Massachusetts, <https://mass-cannabis-control.com/equityprograms/>.

Compelling Governmental Interests Supporting Race-Based Language

For race-specific language to survive strict scrutiny, the legislative body creating an equity program must show that their program advances a compelling governmental interest. A State's interest in remedying past discrimination is compelling when two conditions are met:

- (1) The discrimination that the State seeks to remedy must be specific, “identified discrimination”; and
- (2) The State must have had a “strong basis in evidence” to conclude that remedial action is necessary, before it embarks on an affirmative action program.⁸

Government Commissioned Disparate Impact Study

The best way to show a compelling interest to support the use of race-based preferences is to show discrimination within the jurisdiction’s own cannabis industry, or a study that shows that use of race-specific language is needed based upon evidence from other similar industries within the jurisdiction. Maryland commissioned such a report and is the best example of a study that endorses the use of race-based language in cannabis equity to ensure equitable market participation.⁹ Equity licensing will be most effective if these studies are completed before legalization, so that equity businesses from Black and brown communities can be first to market.

Legislative Report and Legislative History

When employing race-specific language, the legislative body making the program must be presented with the evidence needed to satisfy the compelling governmental interest requirement. In the case of a state commissioned study this can be accomplished by submitting the report to the legislative body. In the absence of a state commissioned report, policy makers can still make the necessary findings through their own report, supported by extensive testimony.

⁸ *Bush v. Vera*, 517 U.S. 952, 982 (1996).

⁹ *Wainwright*, *supra* note 5.

Legislative Report Drafting: Key Findings

a. Discriminatory Intent

In addition to showing the clearly disparate impact of prohibition, a legislative report must make a finding of discriminatory intent.¹⁰ At the federal level quotes from Harry Anslinger provides extensive evidence of discriminatory intent. One noteworthy quote comes from his testimony before the U.S. House Committee on Ways and Means: “[a] Negro raped a girl eight years of age. Two Negroes took a girl fourteen years of age and kept her for two days in a hut under the influence of marihuana. Upon recovery she was found to be suffering from syphilis.”¹¹

John Ehrlichman, President Nixon's aide on domestic affairs, is another important figure in showing discriminatory intent. Ehrlichman is alleged to have said, “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”¹²

State and municipal programs should research local archives and legislative history to see if there was discriminatory intent at the local level. Evidence of discriminatory intent in the creation of early local cannabis laws will go a long way in demonstrating the necessary discriminatory intent needed to employ race-specific remedial measures.

¹⁰ *Wash. v. Davis*, 426 U.S. 229, 242 (1976).

¹¹ Michael Vitiello, *Marijuana Symposium: Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 *Lewis & Clark L. Rev.* 789, 800 (2019), <https://law.lclark.edu/live/files/28624-lcb233article1vitiellowebsitepdf>.

¹² Drug Policy Alliance, *Top Adviser to Richard Nixon Admitted that 'War on Drugs' was Policy Toll to Go After Anti-War Protesters and 'Black People'* (Mar. 22, 2016), <https://drugpolicy.org/press-release/2016/03/top-adviser-richard-nixon-admitted-war-drugs-was-policy-tool-go-after-anti>.

b. Disparate Impact

There is overwhelming evidence that cannabis prohibition was disproportionately policed against communities of color. The ACLU has shown in two different studies that Black and brown people have been arrested, primarily for simple possession offenses, at 3.5 times the rate of whites, despite health data showing all races consume cannabis at about the same rate.¹³ Both of these studies include state specific statistics that should be included in a legislative report to demonstrate disparate rates in cannabis arrests within the applicable jurisdiction.¹⁴

One issue that may arise in demonstrating disparate arrest rates is that many studies have not been able to accurately track Latinx arrest rates.¹⁵ Failing to account for Hispanics in White and Black estimates tends to inflate White proportions and deflate Black proportions of arrests. If possible, data should be requested from the appropriate agencies regarding arrest rates, and it should be asked in this request whether it is possible for the study to use an algorithm that takes into account the issue of misidentification of Latinx people in police arrest data.

Demonstrating disparities in incarceration rates for all drug offenses, and not just cannabis, can also be helpful to show. Numerous studies are available to cite for the proposition that the War on Drugs was and continues to be biased against people of color, which serves as a major barrier for Black and brown entrepreneurs wanting to enter the legal market.¹⁶ It may also be helpful to point to studies that show racism in the criminal justice system as a whole.¹⁷

¹³ ACLU, *The War on Marijuana in Black and White* (Jun. 2013),

https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf.

¹⁴ ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (Apr. 20, 2020),

<https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

¹⁵ Human Rights Watch, *Decades of Disparity, Drug Arrests and Race in the United Nations* (Mar. 2, 2009),

https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#_ftn7.

¹⁶ Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. Bus. & Tech. L. 235, (2020),

<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1318&context=jbtll>.

¹⁷ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

c. Collateral Consequences

Another important issue to highlight in a legislative report is the collateral consequences of the War on Drugs on communities and families most often targeted by law enforcement. Most of these collateral consequences have impacted community wealth, which is directly related to the capital disparities that have kept Black and brown entrepreneurs from entering the market:

- The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) banned convicted drug felons from receiving Supplemental Nutrition Assistance Program (“SNAP”) benefits.¹⁸
- Controlled substance offenses (except for the exception for simple possession of thirty grams of marijuana or less for one's own use) are a ground of deportability.¹⁹ In 2013, simple cannabis possession was the fourth most common cause of deportation for any offense and the most common cause of deportation for drug law violations.²⁰
- Children whose parents are involved in the criminal justice system often suffer from psychological strain, antisocial behavior, and economic hardship.²¹
- The Prison Policy Initiative found that formerly incarcerated people are unemployed at a rate of over 27% — higher than the total U.S. unemployment rate during any historical period, including the Great Depression.²²

¹⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §115, 110 Stat 2105, 2180 (1996).

¹⁹ INA § 237 (a) (2) (B) (i); 8 U.S.C. § 1227 (a) (2) (B)(i).

²⁰ Drug Policy Alliance, *The Drug War and Mass Deportation* (Feb. 2016), https://drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_The%20Drug%20War%20and%20Mass%20Deportation_%28Feb.%202016%29.pdf.

²¹ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, National Institute of Justice (Mar. 1, 2017), <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>.

²² Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, Prison Policy Initiative (Jul. 2018), <https://www.prisonpolicy.org/reports/outofwork.html#:~:text=Our%20analysis%20shows%20that%20formerly,period%2C%20including%20the%20Great%20Depression>.

- Nearly one in five families (18%) are denied housing or do not qualify for public housing once their formerly incarcerated family member returns home. 49% of these families struggled with meeting basic food needs and 48% had trouble meeting basic housing needs because of the financial costs of having an incarcerated loved one.²³
- Incarceration depresses the total earnings of White males by 2%, of Hispanic males by 6%, and of Black males by 9%. Serving time reduces hourly wages for men by approximately 11%, annual employment by 9 weeks and annual earnings by 40%. By age 48, the typical former inmate will have earned \$179,000 less than if they had never been incarcerated.²⁴
- Homeownership is one of the best ways for a community to build and maintain wealth. Due to a history of redlining, residential segregation, finance discrimination and gentrification, rates of homeownership for communities of color are much lower than the rate for White Americans. In 2016, only 41% of Black households and 45% of Hispanic households owned their homes, compared to 71% of White households.²⁵

Taking all of these forms of discrimination into account connects documented governmental discrimination to capital divestment from Black and brown communities. This divestment explains why entrepreneurs who are from Black, Indigenous, and Latinx communities have been shut out from the legal cannabis market. By connecting these findings to the discriminatory intent that was the genesis of cannabis prohibition, a court evaluating the use of race-based language may find a compelling governmental interest in remedying past discrimination.

²³ Who Pays? The True Cost of Incarceration on Families, <http://whopaysreport.org/key-findings/>.

²⁴ Pew, *Collateral Costs: Incarceration's Effect on Economic Mobility* (2010), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

²⁵ Dedrick Asante-Muhammed, et. al., *The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, *Prosperity Now*, 7 (Aug. 2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf.

d. Non-Remedial/Prospective Interest: Increasing Diversity

The other compelling governmental issue that could be claimed in defending the use of race-based language is the compelling governmental interest in diversity. The Supreme Court's decisions in *Bakke*, *Grutter*, and *Fisher*, focused on the *prospective* benefits of diversity. While the diversity interest has only been applied in the United States in the context of affirmative action in secondary education, there is international support that may serve as a model for expanding the diversity interest to cannabis equity programs and economic development.²⁶

Supreme Court cases affirming the use of the diversity interest have essentially adopted what scholars have referred to as “modern diversity practice.” Essentially, this theory posits that diversity is necessary to succeed in an increasingly global economy, and businesses that fail to increase their diversity will fail to thrive in the new world economy.²⁷

A legislative report attempting to invoke the governmental interest in diversity should cite the lack of diversity in the local cannabis industry and nationwide, and then present statistics regarding the economic benefits that flow from increased diversity. According to McKinsey & Company, “Companies in the top-quartile for ethnic/cultural diversity on their executive teams were 33% more likely to have above-average profitability than companies in the fourth quartile. Companies with the most ethnically/culturally diverse boards worldwide are 43% more likely to experience higher profits.”²⁸

²⁶ European Commission, *Practical Guide to Launch and Implement a Diversity Charter* (2015), <https://op.europa.eu/en/publication-detail/-/publication/d757b218-6302-4ff6-a11a-f24133b3305b>. The European Commission and the EU Platform of Diversity Charters have created model Diversity Charters that advocate for expanding diversity in business. Public funding has been made available for programs that follow the guide through the European Social Fund (ESF), which funds 50 to 85% of the total cost of projects.

²⁷ Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 Colum. J. Race & L. 75, 77 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926334.

²⁸ McKinsey & Company, *Delivering Through Diversity*, 13 (Jan. 2018), https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20throug%20diversity/delivering-through-diversity_full-report.ashx.

Additionally, it would likely be helpful to cite studies that show the economic dead loss attributable to the lack of business diversity. These statistics will minimize the “third party” impact felt by groups not entitled to qualify for the cannabis equity program. As increased market diversity will help the entire industry and increase revenue for the market as a whole:

- A 2011 study by Forbes surveyed 321 companies with more than \$500 million in revenue. 85% of these companies agreed or strongly agreed that diversity is key to encouraging different perspectives and ideas that foster innovation.²⁹
- If the number of people-of-color firms were proportional to their distribution in the labor force, people of color would own 1.1 million more businesses with employees. These firms would add about 9 million jobs and about \$300 billion in workers’ income to the U.S. economy.³⁰
- A 2019 report by McKinsey & Company estimated that the effect of the racial wealth gap will cost the US economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.³¹
- A 2020 study completed by Citi found that if the racial wealth gap were closed 20 years ago, \$16 trillion could have been added to the U.S. economy; and if the gap were closed today, \$5 trillion can be added over just the next half decade.³²

²⁹ Forbes, *Global Diversity and Inclusion Fostering Innovation Through Diverse Workforce* (2011), https://www.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf.

³⁰ Algeron Austin, *The Color of Entrepreneurship, Why the Racial Gap among Firms Costs the U.S. Billions*, Center for Global Policy Solutions, 4 (Apr. 2016), <http://globalpolicysolutions.org/wp-content/uploads/2016/04/Color-of-Entrepreneurship-report-final.pdf>.

³¹ McKinsey & Company, *The Economic Impact of Closing the Racial Wealth Gap* (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>.

³² Citi GPS: Global Perspectives & Solutions, *Closing The Racial Inequality Gaps The Economic Cost of Black Inequality in the U.S.* (Sep, 2020), <https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVOM%3D>.

e. Taking into Account Race-Neutral Alternatives

A court reviewing a race-conscious equity program will want to see that legislators considered race-neutral language. If it becomes clear after a good faith consideration that race-based language is needed, policy makers should then discuss in their report all pertinent race-neutral alternatives and explain why they decided to forgo those qualifications or factors.

| <u>Race-Neutral Factors</u> | <u>Reasons for foregoing each race-neutral qualification</u> |
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| Low-Income | This factor is biased against Black and brown communities as White individuals generally have more wealth than Black and brown individuals who make the same annual income. A cannabis equity program that foregoes use of a low-income qualifier should cite statistics such as: “White households in the middle-income quintile (those earning \$37,201-\$61,328 annually) own nearly eight times as much wealth (\$86,100) as middle-income Black earners (\$11,000) and ten times as much wealth as middle-income Latino earners (\$8,600).” ³³ |
| Member of an Impacted Family | This qualification essentially takes the race neutral factor of “prior cannabis arrest or conviction” and multiplies it by including all closely related family members. In a State with a low minority population, the result can be the overinclusion of non-BIPOC applicants whose communities traditionally have more capital and greater access to market. |
| Resident of Disproportionately Impacted Area | Gentrification and the disparate impact of COVID-19 has made Black and brown communities more susceptible to residential instability. Use of this factor could therefore give qualification to wealthy residents living in areas that were over-policed only in the past. In Oakland, California, 86% of the equity applicants qualify for the equity program based on residency in census tracts designated as being impacted by the War on Drugs. ³⁴ |

³³ Dedrick Asante-Muhammed, et. al., *The Road to Zero Wealth How The Racial Wealth Divide is Hollowing out American’s Middle Class*, Prosperity Now, 5 (Sep. 11, 2017), https://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf.

³⁴ Aly Bonde, *Engineering Equity in Oakland’s Cannabis Market*, Berkeley Public Policy Journal (Apr. 18, 2020), <https://bppj.berkeley.edu/2020/04/08/spring-2020-journal-engineering-equity-in-oaklands-cannabis-market/>.

Conclusion

While difficult to accomplish, race-specific language in cannabis equity policy may be the most important development to ensure equitable market participation for Black and brown business owners. Before being found unconstitutional, Ohio's medical cannabis market's use of race-based language resulted in 16% of the market being minority owned. This guide seeks to take the lessons learned from Ohio's failed effort and provide a template for other states to experiment with race conscious policies that will ensure cannabis legalization helps the communities most negatively impacted by the War on Drugs.

Beyond race-specific language, there are several ways in which cannabis legislation can be written to address the capital disparities that have kept Black and brown entrepreneurs out of the market:

- (1) Significantly lowering license fees and other regulations that increase the costs of entering the market.
- (2) Offer shared kitchen licenses and other licenses that can be used by multiple businesses.
- (3) Streamlining the license process to lessen wait periods that increase capital costs and/or allow temporary license approval without satisfying real estate requirements.

The information cited in this guide will not be enough standing alone to make the legislative findings necessary to satisfy the compelling governmental interest finding needed to support race-based equity license qualification. While policy makers and state commissioned studies will be needed to provide additional evidence, this guide should serve as an effective outline for all of the necessary findings. Policymakers will also need to experiment with different qualification schemes and different race-neutral factors to determine what race-conscious equity program is most likely to adequately serve communities most impacted by the War on Drugs.