

Testimony of Dana Sussman
Deputy Commissioner for Policy and Intergovernmental Affairs
New York City Commission on Human Rights
Before the Committee on Public Safety jointly with the Committee on the Justice System,
the Committee on Civil and Human Rights, and the Committee on Consumer Affairs and
Business Licensing
February 27, 2019

Good afternoon Chairs Richards, Lancman, Eugene, and Espinal and committee members. I am Dana Sussman, Deputy Commissioner for Intergovernmental Affairs and Policy at the Commission on Human Rights. I am pleased to be here to testify on Intro. 1445, a bill that would prohibit New York City employers from requiring a prospective employee to submit to testing for the presence of any tetrahydrocannabinols (THC), the active ingredient in marijuana, in an prospective employee's system as a condition of employment under the City Human Rights Law.

Because the Commission has not had the opportunity to appear before the Committee on the Justice System previously, I'll briefly describe the work of the agency. By statute, the Commission has two main functions. The first is as a civil law enforcement agency, enforcing the City's anti-discrimination law, called the City Human Rights Law, one of the most comprehensive anti-discrimination and anti-harassment laws in the country. The Commission's Law Enforcement Bureau (LEB) investigates complaints of discrimination from the public, initiates its own investigations on behalf of the City, and utilizes its in-house testing program to help identify entities breaking the law. The law includes 24 categories of protection, most of which protect against discrimination and harassment in practically all areas of City living – employment, housing, public accommodations, on the streets, in transit, and other spaces.

Allegations of discrimination come to the Commission's Law Enforcement Bureau for investigation in several ways. Members of the public may file a complaint with the LEB about their own experience. A lawyer may file a complaint on a person's behalf. Service providers, community organizations, members of faith communities, elected officials, or any other individual may bring specific incidents or potential patterns of discrimination to LEB's attention, and LEB can initiate its own investigation. The Commission can obtain money damages for the complainant and require that the wrongdoer change policy, undergo training, complete community service, among other forms of affirmative relief, and pay civil penalties to the City of New York.

The second main function of the Commission is to perform community outreach and provide education on the City Human Rights Law and human rights-related issues, which is why the Commission also has a Community Relations Bureau comprised of Community Service Centers in each of the City's five boroughs. The Community Relations Bureau provides free workshops on individuals' rights and businesses, employers' and housing providers' obligations under the City Human Rights Law and creates engaging programming on human rights and civil rights-related issues.

The Office of the Chairperson focuses on policy, legislation, rulemaking, legal enforcement guidance, and oversees major Commission projects. In addition, the Office of the Chairperson, serves as the adjudicatory body for the Commission, hearing appeals from closed Law Enforcement Bureau matters and issuing final Decisions and Orders on cases that have been litigated through the Office of Administrative Trials and Hearings (OATH) process.

The Commission is supportive of the goals of Intro. 1445 and we look forward to working with the City Council and our partners in the Administration on this bill. Thank you for convening the hearing today on this important legislation and I look forward to your questions.



**Department of
Probation**

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**Statement to the New York City Council Committee on Public Safety jointly
with the Committee on the Justice System, the Committee on Civil and Human
Rights, and the Committee on Consumer Affairs and Business Licensing
By Ramon Cameron, Associate Commissioner
February 27th, 2019**

Good afternoon Speaker Johnson and Chairs Richards, Lancman, Eugene, and Espinal, and the members of the Public Safety, Justice System, Civil and Human Rights, and Consumer Affairs and Business Licensing Committees. I am Ramon Cameron, Associate Commissioner at the New York City Department of Probation. Today I will briefly testify on Intro 1427 by Council Member Richards in regards to marijuana testing conducted by the Department of Probation.

I want to begin by setting the stage regarding Probation's unique and important role in the community safety continuum. This is especially important as of late, as there has been a lot of focus on community corrections that often *incorrectly* conflates probation and parole. Probation is preventative; it is an alternative to incarceration, where a judge has determined that an individual who has been convicted of a crime may safely remain in the community under our supervision. Parole comes into play *after* incarceration, where a person is released from prison to complete the remainder of their sentence in the community under the jurisdiction of the State.

The job of Probation is to safely supervise the more than 27,000 people in our care over the course of a year in their communities, while helping them change their behavior and access opportunities, thereby *preventing* incarceration. To be comprehensive about achieving positive criminal justice outcomes, we need to leverage *both* risk management, i.e. the supervision or monitoring intensity, and risk reduction – the supportive elements of what gets people to change. That combination creates the individual accountability and behavior change needed for



**Department of
Probation**

someone to get out and stay out of the justice system. That is the critical role of this Department: *keeping youth and adults out of prison or jail, juveniles out of placement, and more people in their communities* through that balance of structure and support.

Having just recently joined the NYC Department of Probation, I am extremely honored and proud to be here today. Prior to DOP, I founded and ran a Queens based nonprofit called Project Hope – The New Direction, and have dedicated my entire career to helping young people in poverty develop their strengths, skills, and talents. And I've seen firsthand how NYC Probation is unlike any other jurisdiction in the country due to its forward thinking approach to community corrections and our development of new evidence generating programs and individualized approaches such as Arches Transformative Mentoring, Advocate, Intervene and Mentor (AIM), and NeON ArtsSM to name a few. This work has recently been the subject of several rigorous independent evaluations showing not only unprecedented criminal justice outcomes, but also the incredible impact towards **Strengthening Communities and Changing Lives** across the five boroughs of our City for both people on probation and the larger communities in which they reside.

Commissioner Ana Bermudez and the entire leadership at DOP are deeply committed to an evidence-informed "one-size-fits-one" approach to probation, which at its core necessitates an individualized method of case planning underpinned by a robust continuum of programming and other supports. Our current drug testing practices reflect this commitment and are already consistent with this legislation. Therefore, the NYC Department of Probation supports Intro 1427 as proposed by Council Member Richards. Thank you again to the Speaker, Chairs, and members of the City Council for convening today's hearing on this important issue.

Testimony of Jorge Camacho
Senior Associate Counsel
Chair of Law Enforcement and Social Justice Subcommittee of
The Mayor's Task Force on Cannabis Legalization
New York City Mayor's Office of Criminal Justice
Before the Committee on Public Safety jointly with the Committee on the Justice System, the
Committee on Civil and Human Rights, and the Committee on Consumer Affairs and Business
Licensing

February 27, 2019

Good afternoon Chairs Richards, Lancman, Eugene, and Espinal and committee members. My name is Jorge Camacho, and I am the Senior Associate Counsel for the Mayor's Office of Criminal Justice and served as Chair of the Subcommittee on Law Enforcement and Social Justice for the Mayor's Task Force on Cannabis Legalization. The Mayor's Office of Criminal Justice advises the Mayor on public safety strategy and, together with partners inside and outside government, develops and implements policies that promote safety and fairness and reduce unnecessary incarceration.

Over the past five years, this administration has remained committed to lightening the touch of cannabis enforcement through policy changes that have led to cannabis enforcement decline as crime in NYC has also declined. Beginning in November of 2014, the NYPD changed its policy to issue criminal summonses instead of arresting for possession of cannabis in open view. That policy led to a 37 percent decline in cannabis arrests from 2014 to 2015. Then, in September 2018, the NYPD began issuing criminal summonses instead of making arrests for cannabis consumption in public. Since this change in policy for public consumption enforcement, arrests are down 92 percent and summonses are down 31 percent.

Unfortunately, marginalized communities have continued to bear the brunt of enforcement and criminalization of cannabis. In 2013, approximately 86% of marijuana possession arrests were of Black or Latinx people. That number in 2018 was 89%. This disparity has persisted despite declines in arrests and despite evidence that rates of marijuana use are roughly the same for White and Black people. More work needs to be done and the legalization of cannabis provides an opportunity to redress impacts of past criminalization and to drive economic opportunity to historically marginalized communities.

Mayor de Blasio convened the Mayor's Task Force on Cannabis Legalization in July 2018 to identify the goals and challenges that should guide the City's preparations for potential legalization. The Task Force was coordinated by the Mayor's Office of Criminal Justice and

includes representatives of many relevant City agencies. The Task Force was divided into five subcommittees – focused on Licensing and Land Use; Economic Opportunity; Taxation and Finance; Law Enforcement and Social Justice; and Public Health, Social Services and Education – all of which met regularly to develop the recommendations reflected in a report issued by the Task Force. Members consulted with subject matter experts and community groups, and studied jurisdictions that have legalized and regulated the adult use of cannabis. In December, the Task Force published its report, *A Fair Approach to Marijuana: Recommendations from the Mayor's Task Force on Cannabis Legalization*, which called for a strong, public health-focused regulatory framework and the empowerment of local government to prevent corporate greed, foster small businesses, and meet the demands of diverse New York City communities. The report also places great emphasis on the need to ensure that any cannabis industry in New York redresses impacts of past criminalization and drives economic opportunity to historically marginalized communities.

Of course, much of the future of cannabis legalization and the way it takes shape in New York lies in the hands of the State and the legislation currently under debate in Albany. We as a City attempted through our Task Force to chart a vision for how State law and regulation can help ensure our City can best protect its communities and promote its goals. We summarize our priorities and goals below, and refer the Council to our full report for greater detail and information. Much hangs in the balance, and we hope the State legislation will allow the City to pursue these priorities. Indeed, the Task Force's head, MOCJ General Counsel Susan Sommer, could not be here today because she is attending the New York Conference of Mayor's Summit on Cannabis in Albany today to help advance the City's perspective.

The Task Force studied other jurisdictions to understand the challenges of cannabis legalization and gain insight into best practices. In states that have sought to legalize cannabis, racial disparities in arrests are still prevalent. We believe that legalization must allow the government to protect New Yorkers from the adverse impacts of cannabis legalization through robust regulations aimed at ensuring the safety and health of people in our City, particularly youth. At the same time, the new enforcement regime must be carefully tailored to avoid inequitably criminalizing the same communities that have already borne the brunt of cannabis criminalization and mass incarceration. Thus, it is critical that legalization in New York avoid creating new punitive structures and imposes civil rather than criminal penalties to violations of cannabis regulations to the greatest extent possible consistent with public safety. The City believes that the purchase and possession of cannabis should be limited to adults ages 21 and over, while public consumption should be prohibited unless at locally-regulated consumption

sites. Balancing public health and safety and impeding the illicit market, while easing the disproportionate burdens of criminalization, should guide legislative solutions.

The Task Force also recommended the automatic expungement of criminal records for past cannabis offenses that would be legalized – subject to notice and opportunity by District Attorneys’ Offices to raise objections in specific cases. It is imperative we create an easy pathway for citizens to end the collateral consequences from past convictions for cannabis related conduct that has later been legalized. Related recommendations include limiting cannabis testing for job applicants with exceptions for safety-sensitive jobs, treating cannabis consistently with alcohol in child custody determinations, and eliminating criminal penalties for minors.

Education of the public and of key professionals such as educators and health care workers is critical to ensuring safe cannabis use; some of the resources that adult-use legalization can produce should be directed to these areas. Other states have experimented with a range of approaches to achieve the most effective delivery of harm reduction education, and New York City would build on those experiments to craft comprehensive and persuasive campaigns.

There is no one-size-fits-all blueprint for implementing cannabis legalization in every New York community. Legislation should strike the right balance between State regulation establishing uniform statewide standards and resources, and local control to chart the course for the diverse communities throughout New York that will be directly impacted by legalization. Localities should be given broad discretion under State law to determine how to advance their communities’ public health, safety, and equity goals. For example, the Task Force calls for balancing State regulatory structures with local authority to permit licensed consumption sites, determine business density restrictions to avoid over-concentration and allow localities to permit or restrict home cultivation.

Also important will be sufficient time before new State law takes effect for careful planning and coordination by the State and City to ensure a sound foundation for the advent of legalized cannabis. New York City supports a regulatory framework for cannabis legalization that effectively protects the health and safety of all New Yorkers. Development of a regulatory structure and promulgation of specific regulations should be a measured process, allowing time for consultation and coordination between the State and localities.

Critically, legalization must promote a diversity of participants in the cannabis industry, assuring that communities disproportionately affected by past criminalization have an equitable stake. The

report makes recommendations to prevent big business from market domination through a licensing system that would create opportunities for small businesses—but the State legislation must give the City the leeway it needs to promote its goals. New Yorkers deserve an opportunity to build their own local cannabis industry, led by small businesses organized to benefit our whole diverse community. The new industry should be constructed to promote economic empowerment of those disproportionately harmed by criminalization, not profits for those seeking to benefit from legalization. This will require preferential licensing opportunities, as well as legislative and programmatic solutions to the challenges equity applicants will face, including lack of capital, information asymmetry, and the demands of commercial competition with large established businesses. This should also include mandated job opportunities for those most impacted by past criminalization.

The City would seek allocation of State funding to localities to provide technical assistance and access to capital through locally-administered equity initiatives.

We encourage the Council to review our full report which is available on our [website](#). We have also made copies available today¹. It's important that the City speaks as one voice to advance our goals in Albany. Current proposals fall short on providing for local control, and we have serious concerns about some of the criminal provisions. We hope that with the Council's support we can work with our State partners to advance our shared goals to see equity and opportunity for all New Yorkers. Thank you for your time and advocacy on this very important issue.



New York County District Attorney's Office

**Testimony before City Council Public Safety, Justice System, Civil and Human Rights, and
Consumer Affairs and Business Licensing Committees**

Oversight – Marijuana Legalization: Equity and Justice for NYC

February 27, 2019

Good Morning Chairmen Richards, Lancman, Eugene, and Espinal Jr., and members of the Committees on Public Safety, Justice System, Civil and Human Rights, and Consumer Affairs and Business Licensing. Thank you for the opportunity to speak today about my Office's decision to decline to prosecute most marijuana cases, vacate bench warrants for marijuana cases, dismiss open marijuana cases, and explain the detailed public safety study we recently conducted in anticipation of impending state legalization.

The dual mission of the Manhattan District Attorney's Office is a safer New York and a more equal justice system. The prosecution of predominantly black and brown New Yorkers for smoking marijuana serves neither goal. In 2017, for every three black New Yorkers arrested in Manhattan for marijuana, one white person was arrested. Nothing about this made our city safer. In fact, these prosecutions eroded public trust in law enforcement and frustrated our core mission. So, on August 1st of last year, we stopped prosecuting nearly all marijuana smoking and possession cases in Manhattan. My Office declines to prosecute marijuana possession and smoking cases under Penal Laws 221.10(1), a class B misdemeanor, or PL 221.05, a violation. What does this mean? It means my Office is essentially out of the business of marijuana prosecutions.

Between January 1st and February 26th of last year, we prosecuted 603 marijuana cases. Fast forward to this year and we have prosecuted just 13 cases year to date, meaning marijuana prosecutions have dropped by approximately 98% over the same time period (quarterly statistics can be found on the manhattanda.org website under the "[Reports](#)" tab).

Much has written about the demographics of these arrestees but that is just a part of what I'd like to focus on today. I want to talk about whether these are people who materially affect public safety in New York City. In 2017, we prosecuted a total of 5,453 marijuana cases.

- Of those 5,453 arrests, 315 people – less than 6% – had a violent conviction at any point in their lives.
- 55 of them – literally 1% - had a violent conviction within the past 5 years.

So this is not a particularly violent cohort. These aren't people whom we understand to be driving crime in their communities.

Next, we wanted to know what happened to those 5,423 arrests in 2017 once they went through the system. When the case came before a judge, less than 1% – 38 out of the 5,423 – were sentenced to

jail. After arrest, after fingerprinting, after court appearances, and after all the associated costs like police overtime, prosecutorial and judicial resources – after all of that, there was virtually never any punishment, except a lifelong criminal record.

To review, we had nearly 5,500 people arrested whose conduct did not materially affect public safety go through the criminal justice system. But for what purpose?

Next, we looked at the consequences in a person's life of an arrest versus some enforcement alternative outside the justice system, like summonses. We found that arrests were more disruptive to people's jobs, schooling, and families than summonses, and that once you disrupt those things, you actually end up with someone more likely to commit crimes that *do* affect public safety, because now they've lost their jobs, their schooling, or their families. In addition, these arrests carry collateral consequences relating to housing and even deportation.

We did not make the decision to cease prosecuting most marijuana cases casually or overnight. It was a major policy decision with potentially sweeping implications for public safety. For that reason, our office conducted a national review over the course of six months, meeting with and studying jurisdictions where marijuana is no longer criminally prosecuted. We spoke with law enforcement officials and other experts in seven different locations— California, Colorado, Massachusetts, Nevada, Oregon, Washington, D.C., and Washington state – and put out a comprehensive and thoughtful report, which you can read on our website, called [Marijuana, Fairness and Public Safety](#). I hope it can serve as a roadmap for New York lawmakers on how to safely legalize marijuana.

It is obvious to everyone that marijuana consumption is on the rise in New York, but a deregulated black market makes current usage unsafe. The average consumer in New York right now doesn't know what he or she is buying, what it could be laced with, or how potent it is. We are mindful of the effect that substance use has on individuals and their communities, which is why we created the Manhattan Hope program in 2018, a pre-arraignment drug diversion program modeled after Staten Island's pioneering HOPE program, but for a greater number of substances than opioids. It takes a harm reduction approach to substance usage, in keeping with emerging best practices in this area.

On top of valid concerns about drug quality and toxicity, black markets of all kinds obviously breed trafficking. The black market is also untaxed, meaning New York State is missing enormous tax revenue that is sorely needed and estimated to exceed \$300 million annually. Many different ideas have been floated on how this money could be best put to use, and there are many worthy funding priorities for this Council and our state legislators to consider.

According to a [Gallup poll](#) from October, two in three Americans now support legalizing marijuana. A [Quinnipiac University poll](#) from last May found that two in three New Yorkers support legalization. With so many states showing us that legalization can be achieved safely, I am recommending that New York State proceed thoughtfully, as Governor Cuomo has proposed. What does proceeding thoughtfully mean? It means thinking about issues like:

- marijuana and public health,
- marijuana-impaired driving,
- marijuana product packaging and labeling, in particular to discourage juvenile use, and
- the lingering black market following marijuana legalization.

While no two cities are alike – indeed, few have the density, verticality, and daytime population of Manhattan – there are valuable lessons to be learned from other cities relating to regulation and licensing.

Our goal in conducting in-depth interviews with practitioners around the country was to get a clear picture of how crime, in particular, has been affected as a result of legalization. In fact, while researching the report, a local representative from Colorado said, in essence, “Learn from our mistakes. Here’s your chance to get it right. There are things that we would have done differently at the outset if we could do it over again.”

Our research found virtually no public safety rationale for the criminal prosecution of pot smoking and certainly no justification for the racial disparities underlying enforcement. And the collateral consequences of a marijuana prosecution – it can ruin your job, your housing, your college application, or even get you deported – these consequences are simply not proportional to the offense. Especially when police officers could just as easily give someone a ticket instead, as they do for drinking in public. This is especially important at a time in U.S. history when convictions for low-level crimes carry the threat of deportation.

Mindful of those consequences, in September, I moved to dismiss and seal virtually every open marijuana case we had – more than 3,000, dating back to 1978. Of the defendants whose cases were dismissed:

- 79% are New Yorkers of color, and
- 46% were 25 years of age or younger at the time of their arrest.

Joined by our colleagues at New York County Defender Services and Neighborhood Defender Services of Harlem, this *en masse* dismissal helped prevent unnecessary future interactions with the criminal justice system for thousands of New Yorkers, removing collateral consequences and empowering these individuals to participate more fully in civic life.

Since our announcement last summer, several jurisdictions in New York and in other states have adopted aspects of our initiative, demonstrating that prosecutors can safely exercise their discretion and eliminate the needless collateral consequences associated with the criminalization of marijuana. But this shouldn’t be up to District Attorneys alone – only our legislature can do justice for all 62 counties in New York.

Looking ahead, I fully support expunging past marijuana convictions, and we are collaborating with public defender organizations on a project that would result in the automatic sealing of previous marijuana convictions. We expect to announce it in the coming weeks. The smartest and easiest way to expunge marijuana convictions, however, would be a permanent legislative fix, which is why I support statutory changes to achieve this.

Thank you for the opportunity to offer my perspective on this topic today. It is my view that marijuana legalization can be done safely, and it will bring us one step closer to right-sizing the criminal justice system.

Thank you for your continued support of my Office.

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MARIJUANA, FAIRNESS AND PUBLIC SAFETY

A Report on the **LEGALIZATION** *of* **RECREATIONAL**
MARIJUANA *in the* **UNITED STATES**

MAY 2018 | PUBLISHED BY

the **OFFICE OF MANHATTAN DISTRICT ATTORNEY** **CYRUS R. VANCE, JR.**



MARIJUANA, FAIRNESS, AND PUBLIC SAFETY:
A REPORT ON THE LEGALIZATION OF RECREATIONAL MARIJUANA
IN THE UNITED STATES

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Executive Summary

New Yorkers consume a large amount of marijuana, and they necessarily purchase it on an illegal black market. Our state's marijuana statutes conscript thousands of such consumers into the criminal justice system each year, at great cost to the state, and these arrests disproportionately affect communities of color. In the face of such facts, ten other states have already legalized the possession of recreational marijuana, and eight have also legalized its retail sale. Polls in New York have shown an increasing support for such reforms, and elected officials, advocates, health experts, and others have thus begun to consider changes to our state's marijuana laws as well.

Our office's belief is that such discussions are likely to lead in the foreseeable future to reforms that legalize and regulate the cultivation, distribution, sale, and consumption of marijuana in New York: reforms our office will support. The impact, of course, will be far reaching, as an entirely new industry will effectively be created with a single legislative stroke.

The recent legalization efforts in other states are of obvious relevance to the consideration of whether and how legalization should be pursued in New York. In particular, several states have already experienced the pitfalls of pursuing marijuana reform in the absence of sufficient input from prosecutors and law enforcement agencies in their jurisdictions. Without careful consideration of these stakeholder views, the resulting laws and regulations can create confusion about enforcement, and may impede a state's ability to combat black market violence and other risks to public safety.

With this in mind, our office has, over the past several months, gathered data and conducted interviews with dozens of prosecutors, regulators, and law enforcement representatives from states that have legalized the use of recreational marijuana. Our purpose was to understand the challenges that will need to be anticipated by lawmakers in our state. This work has yielded valuable insights into how responsibly to frame any future laws and regulations to avoid negative impacts on public safety. Our findings are discussed in this report, and our recommendations are summarized below. Having completed this effort, we stand ready to advise and assist any participant in the important ongoing discussions about legislative reform of our state's marijuana laws.

In the meantime, we have continued to study the impact our existing marijuana laws are having on the residents of New York City. Most notably, despite recent efforts by law enforcement, it remains the case that black and Hispanic individuals in low-income neighborhoods of color continue to be arrested for marijuana offenses at much higher rates than their similarly situated counterparts in predominantly white communities. Such arrests, of course, can have significant impacts on arrestees' jobs, schooling, families, and futures. On the other hand, the punishments imposed, after arrest, fingerprinting, and court appearances, are almost always minimal or non-existent. The result is that large numbers of our residents are becoming stigmatized and alienated from the police at a huge cost to the criminal justice system, for virtually no punitive, rehabilitative, or deterrent purpose.

A similar evaluation in recent months led our office to announce a new policy whereby we now decline to prosecute the vast majority of theft of service (turnstile-jumping) arrests in Manhattan, which previously numbered nearly 8,000 per year. There, too, the arrests, after

processing and court appearances, produced no meaningful criminal justice outcome, other than to impede the future prospects of a predominantly minority cohort of defendants. Instead, these “farebeat” offenses (in the absence of an identifiable public safety risk) are now being handled through the issuance of a summons without an arrest, and there has been no apparent increase in subway crime. On the other hand, the elimination of thousands of cases from our Criminal Court dockets will result in an appreciable savings in criminal justice resources.

In the absence of immediate legislative change, we have now decided, for analogous reasons, to decline to prosecute those who are arrested for smoking or possessing small amounts of marijuana in Manhattan. (In 2017, the number of such arrests was 5,505.) As of August 1, 2018, any arrestee who has been issued a Desk Appearance Ticket (DAT) by the New York City Police Department for possession or smoking marijuana (90 percent of our current marijuana caseload) or who has been subject to custodial arrest (the remaining ten percent) will not be prosecuted by our office in the absence of an identifiable public safety risk. Instead, we believe such individuals, as in theft of services cases, should be issued summonses instead.

Of course, any more permanent and state-wide reform will have to come through legislation. As noted above, the purpose of this report is to provide a guide to lawmakers and others about lessons learned from other states’ efforts to date. A summary of those recommendations is as follows:

1. It is imperative that any serious discussion of marijuana reform include data and perspectives from law enforcement stakeholders who have been dealing with our marijuana laws and related public safety issues for decades. If anything, the enforcement issues that arise in the wake of legalization are likely to be more, and not less, complex than in the past. The experiences of other states suggest that, if lawmakers ignore the views of law enforcement in the drafting process, they do so at their constituents’ peril.

2. As in many other legislative areas, it is important to recognize the diversity of New York state, including in population density, topography, and culture. Localities should be given broad discretion to implement rules and regulations so they can tailor marijuana reforms to their particular needs and values. For example, localities should be able to establish their own ordinances about where and when marijuana can be smoked and sold, and whether and to what degree individuals can cultivate it on their properties or in their homes.

3. The state should anticipate that the illegal black market for the sale of recreational marijuana may continue. To limit such activity, legislators and regulators must carefully assess what taxes and licensing fees will be imposed on retail sellers: these should be high enough to bring in sufficient revenue to fund the huge regulatory burden of a newly licensed market, but not so high as to prevent legal suppliers from competing with black market sales. The state should also consider limiting the number of licenses it issues to market participants, to reduce the number of regulators and inspectors required to oversee compliance, and to discourage an oversupply that will make its way to the black market.

4. To better track and understand trends involving marijuana-impaired driving, state law enforcement agencies, toxicology labs, and the Division of Criminal Justice Services should begin

now to collect statistics from DUI arrests to specifically identify the substances that have been used by DUI arrestees. Also, absent a new forensic test that accurately measures marijuana impairment, state and local law enforcement agencies should increase the number of officers who are trained as drug recognition experts, to better anticipate a possible increase in marijuana-impaired driving.

5. The state should adopt strict regulations regarding marijuana product packaging and labeling, in particular to discourage juvenile use. Packaging should not be designed in ways that might appeal to children, and should not permit children to gain access to the product. To prevent accidental overdose in adults, package labeling should also include information about serving size and the time it may take for any psychoactive affects to be experienced by a consumer.

6. Other states have reported confusion among the public and members of the criminal justice community about post-reform distinctions between lawful and unlawful conduct. To avoid such confusion, New York should fully fund a wide-reaching educational campaign to help residents understand and comply with the new laws. The state should also establish and fund a campaign to educate parents and children about the health dangers of marijuana use by juveniles.

7. To address continued racial disparities in marijuana enforcement after any legalization, police and prosecutors in the state should continue to weigh carefully the costs and benefits of arrests for lower-level conduct that remains criminal. The experience of legalized states to date shows that disparate treatment is likely to continue, underscoring the ongoing importance of local discretion in policing and prosecution.

These are just some of the lessons learned to date from other states that have pursued the path of legalization. More information about that recent history is detailed below. Obviously, New York should continue to monitor and learn from other states' experiences as criminal justice policy in this complex area unfolds.

I. An Overview of Marijuana Laws and Regulations

Marijuana is classified as a Schedule I controlled substance under the federal Controlled Substances Act of 1970 (the “CSA”), making it illegal under federal law to sell, use, or transport the substance.¹ Over the past few decades, however, most states have passed laws that either:

- 1) decriminalize the personal use and possession of small amounts of recreational marijuana;
- 2) legalize the cultivation, distribution, sale, possession, and use of medicinal marijuana;
- 3) legalize the use and possession of recreational marijuana (but not the sale); or
- 4) legalize the use, possession, cultivation, distribution, and sale of recreational marijuana.²

Decriminalization of Personal Use

In states that have decriminalized the personal use of marijuana, it is a violation—a non-criminal offense—for an individual to possess for personal consumption small amounts of marijuana. It is still a crime in such states, however, to publicly consume it (or, in some states, to have it in public view); to possess marijuana in amounts exceeding the state’s prescribed limits; and/or to cultivate, distribute, and sell recreational marijuana.

For example, in New York, it is a violation—not a crime—to possess 25 grams or less of marijuana, with a penalty of not more than a \$100 fine.³ However, it is a class B misdemeanor crime to possess more than 25 grams but less than two ounces, or to possess any marijuana in a public place when it is burning or open to public view. It is a class A misdemeanor to possess more than two ounces or to sell marijuana, and a felony (the severity of which depends on the amount) to sell marijuana in larger amounts, or to possess it in larger amounts.⁴

Eight other states, like New York, have decriminalized, but not legalized, the personal use of recreational marijuana: Connecticut, Delaware, Illinois, Maryland, Mississippi, Nebraska, New Hampshire, and Rhode Island. Four states still classify personal use of marijuana as a criminal misdemeanor, but the offenses do not carry a threat of jail time: Minnesota, Missouri, North Carolina, and Ohio.

¹ 21 U.S.C § 801 et seq.

² As explained in the next section, decriminalization of recreational marijuana makes it a violation, and not a crime, to possess small amounts of marijuana for personal consumption. Legalization of recreational marijuana makes that conduct fully lawful. In states that have neither decriminalized nor legalized marijuana, it is still a crime to possess small amounts for personal use.

³ NY Penal Law § 221.05.

⁴ NY Penal Law §§ 221.05 to 221.55.

Legalization of Medical Marijuana

Forty-six states and the District of Columbia have laws legalizing some form of medical marijuana. These laws vary widely in scope and form. For example, some states only permit the use of cannabidoil (CBD oil), and some states only permit ingestion and not smoking, while other states permit the use of medical marijuana in all forms. There are also wide differences in individual states' laws pertaining to the cultivation and distribution of medical marijuana.

In New York, Governor Andrew Cuomo signed into law in July 2014 the Compassionate Care Act, legalizing medical marijuana.⁵ The law established five “Registered Organizations” (ROs) authorized to cultivate, distribute, and sell medical marijuana at a licensed dispensary, and prohibits medical marijuana from being smoked (so it must be in other forms such as capsules, pills, and oils).⁶ Each RO is permitted to have four dispensaries, so the law authorizes a total of 20 dispensaries statewide.⁷ Patients must be certified by practitioners registered with the Department of Health,⁸ and must have a “serious” condition as defined by the law, including cancer, AIDS, and Parkinson’s disease. (The law was later amended to add other qualifying conditions, such “severe or chronic pain” and severe nausea.)⁹

The Legalization of Recreational Marijuana to Date

As of April 2018, nine states and the District of Columbia have legalized the recreational use of marijuana for individuals 21 years old and over. The District of Columbia and Vermont have legalized the possession of recreational marijuana, but not the sale. Eight states have legalized the use, possession, cultivation, distribution, and sale of recreational marijuana: Alaska, California, Colorado, Maine, Massachusetts, Nevada Oregon, and Washington. These states have established (or are in the process of establishing) licensing, regulatory, and taxation schemes to govern the industry. They impose civil and criminal penalties for unlicensed activity and violations of regulations; for example, felony crimes still apply to the possession and sale of large amounts of marijuana without a license from the state. The laws differ with regard to the amount in which an individual may purchase, carry, privately possess, and privately grow marijuana plants, but public use, *e.g.*, smoking in public, is still banned.

⁵ Chapter 90 of the Laws of 2014 (NY).

⁶ NY Pub. Health L. §§ 3360, 3365.

⁷ NY Pub. Health L. § 3365.

⁸ NY Pub. Health L. § 3361.

⁹ NY Pub. Health L. § 3360.

	Effective date of recreational marijuana legalization	Start of commercial sale	Public possession by adults over 21 (in usable form¹⁰)	Penalties for public consumption	Home grow limits
Colorado	December 2012	January 2014	Up to 1 ounce	Criminal violation	Up to 12 plants (localities can pass stricter laws)
Washington	December 2012	July 2014	Up to 1 ounce	Civil violation	Home grow banned except for licensed medical use
Alaska	February 2015	October 2016	Up to 1 ounce	Civil violation	Up to 6 plants
Washington DC	February 2015	Sale is still unlawful	Up to 2 ounces	Criminal violation	Up to 6 plants
Oregon	July 2015	October 2016	Up to 1 ounce	Civil violation	Up to 4 plants
California	November 2016	January 2018	Up to 1 ounce	Civil violation	Up to 6 plants
Massachusetts	December 2016	Expected July 2018	Up to 1 ounce	Civil violation	Up to 12 plants
Nevada	January 2017	July 2017	Up to 1 ounce	Misdemeanor	Up to 6 plants
Maine	January 2017	Legislature still debating; no timetable	Up to 2.5 ounces	Civil violation	Up to 3 plants
Vermont	Goes into effect July 2018	Sale is still unlawful	Up to 1 ounce	Civil violation	Up to 6 plants

Conflicts with Federal Law

To address the increasing conflict between states' marijuana laws and the federal Controlled Substances Act, the Department of Justice under Attorney General Eric Holder issued a series of memoranda establishing guidelines for federal investigations and prosecutions of marijuana crimes. In 2009, Deputy Attorney General David W. Ogden issued a memorandum that gave U.S. Attorneys "guidance and clarification" on how to enforce the CSA in states that have legalized medical marijuana.¹¹ The Ogden Memo stated that the Justice Department, in exercising

¹⁰ Usable form is typically defined as dried marijuana flowers or leaves that are ready to be smoked or vaped. The states' laws also vary as to the amount an individual can possess in other forms, such as edibles and infused products, extracts, and concentrates.

¹¹ Memorandum of Deputy Attorney General David W. Ogden, US Dept. of Justice, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," Oct. 19, 2009, available at <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

its broad discretion, and being “committed to making efficient and rational use of its limited investigative and prosecutorial resources,” would not prosecute individuals who use marijuana for medical purposes, or their caregivers, so long as they act in accordance with their respective state’s laws. The Department, however, was to continue to make it a “core priority” to prosecute significant marijuana traffickers.¹²

Two years later, Deputy Attorney General James Cole sought to clarify the Ogden Memo. In a June 2011 memorandum to U.S. Attorneys, he noted that there had been a vast increase in the scope of commercial cultivation, distribution, sale, and use of marijuana for purported medical purposes, and that the Ogden Memo was never intended to shield large-scale, privately-operated industrial cultivation facilities. Cole directed U.S. Attorneys, in the exercise of their discretion and consistent with resource constraints, to bring federal enforcement actions against such operations. Pursuant to this directive, state laws and local ordinances were not to be viewed as a defense to civil or criminal enforcement of federal law, including enforcement of the CSA. Furthermore, Cole noted, “[t]hose engaging in transactions involving the proceeds of such activity may also be in violation of money laundering and other federal crimes.”¹³

After Colorado and Washington passed ballot initiatives legalizing the use and sale of recreational marijuana, Cole issued another memorandum to U.S. Attorneys on August 29, 2013, frequently referred to as the “Cole Memo.” In it, Cole reiterated that the Justice Department is committed to enforcing the CSA, but is also committed to using its limited resources to address the most significant threats. He then stated that the Department’s priorities with regard to marijuana enforcement were to prevent:

- Distribution of cannabis to minors.
- Cannabis revenue from funding criminal enterprises, gangs, or cartels.
- The diversion of cannabis to other states.
- State-authorized activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity.
- Violence and the use of firearms in the cultivation and distribution of marijuana.
- Drugged driving and the exacerbation of other public health effects.
- The growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands.
- Marijuana possession on federal property.¹⁴

Outside of these priorities, Cole wrote, “the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”¹⁵ In this regard, jurisdictions that had implemented strong and effective

¹² *Id.*

¹³ Memorandum of Deputy Attorney General James M. Cole, U.S. Dept. of Justice, “Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use,” June 29, 2011, available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>

¹⁴ Memorandum of Deputy Attorney General James M. Cole, U.S. Dept. of Justice, “Guidance Regarding Marijuana Enforcement,” Aug. 29, 2013, available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁵ *Id.* at p. 2.

regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana were to be viewed as less likely to threaten the Department’s priorities.¹⁶

In January 2018, Jeff Sessions, Attorney General under President Donald Trump and a vocal opponent of marijuana, rescinded the Cole Memo.¹⁷ Both Republican and Democratic legislators in states that had legalized marijuana strongly objected to the prospect of federal prosecutions, claiming a violation of their states’ rights.¹⁸ In particular, Colorado Republican Senator Cory Gardner said he would block all Department of Justice nominations unless he received assurance that his state’s marijuana industry would be safe from federal interference. On April 13, 2018, Senator Gardner announced that he had received such an assurance from President Trump, and that the President told him he will support “a federalism-based legislative solution to fix this states’ rights issue once and for all.”¹⁹ As of this writing, the future of federal enforcement of marijuana laws remains to be seen.

II. Continuing Enforcement Challenges in Legalized States

As discussed above, even in states that have legalized the recreational possession (and, in some cases, sale) of marijuana, it remains unlawful to possess the product in somewhat higher amounts, and to smoke it in public.²⁰ One question that arises in such states is whether and how legalization has affected enforcement at these slightly higher possession levels, and whether members of the public and law enforcement are able to understand and observe the somewhat indistinct line between non-criminal and criminal possession. Another question is whether legalization has reduced the much-discussed racial disparities that often arise in the context of marijuana enforcement. A sampling of state and local law enforcement experience with these issues follows.

Colorado

According to the Colorado Department of Public Safety, arrests for low-level criminal marijuana offenses have declined significantly since legalization in 2012. Between 2012 and 2015, the number of filings for misdemeanor marijuana-related offenses declined by 30 percent, and

¹⁶ *Id.*

¹⁷ Memorandum of Attorney General Jefferson B. Sessions III, US Dept. of Justice, “Marijuana Enforcement,” Jan. 4, 2018, available at <https://www.justice.gov/opa/press-release/file/1022196/download>.

¹⁸ See Josh Gerstein and Christiana Lima, “Sessions Announces End to Policy that Allowed Legal Pot to Flourish,” *Politico*, Jan. 4, 2018, available at <https://www.politico.com/story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020>; Jesse Paul, “Cory Gardner Says AG Jeff Sessions’ Decision to Rescind Marijuana Policy ‘Has Trampled on the Will’ of Colorado Voters,” *Denver Post*, Jan. 4, 2018, available at <https://www.denverpost.com/2018/01/04/cory-gardner-jeff-sessions-marijuana-policy/>.

¹⁹ See Seung Min Kim, “Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff over Judicial Nominations,” *Wash. Post*, April 13, 2018, available at https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.8a80847067ad.

²⁰ This section addresses possession cases involving quantities that exceed the legal limit for personal possession, but that do not support a case for intent to sell. Cases involving possession of large quantities with intent to sell are discussed in the “Black Market and Trafficking” section of this report.

filings for petty²¹ marijuana offenses declined by 89 percent.²² More specifically, filings for marijuana possession cases declined by 88 percent.²³ Prosecutors from the Denver and Boulder County District Attorney's Offices stated that, in their experience, judges and jurors have no appetite for prosecutions of possession offenses, even if a crime can be established. (In one Boulder County case, a jury acquitted a defendant accused of possessing more than two pounds of marijuana and later asked prosecutors why their time was being wasted.)²⁴

During this same period, there has been no significant change in the number of public consumption of marijuana citations issued since 2012.²⁵ (As noted above, every state that has opted to legalize and regulate marijuana still prohibits public consumption.)

Finally, although overall marijuana arrests have declined since legalization, marijuana enforcement in Colorado still disproportionately affects minorities. Based on data from the Colorado Department of Safety, the number of marijuana arrests since 2012 decreased by 51 percent for whites, 33 percent for Hispanics, and 25 percent for African-Americans. The marijuana arrest rate for blacks (348 per 100,000) was almost triple that of whites (123 per 100,000) in 2014.²⁶

Washington State

In 2003, Seattle voters passed Ballot Initiative I-75, instructing the police and the City Attorney to make adult marijuana possession cases the city's "lowest law enforcement priority."²⁷ In addition to following this voter directive, the Seattle Police Department deprioritized the ban on public consumption of marijuana because the offense carries a \$27 fine, while processing an arrest costs approximately \$150.²⁸ The Office of King County Prosecuting Attorney Dan Satterberg (whose jurisdiction includes Seattle) and the Office of Seattle City Attorney Pete Holmes are seeing fewer cases involving low-level marijuana offenses and have largely ceased prosecuting such cases.²⁹ Statewide, law enforcement incidents³⁰ involving marijuana decreased by 63 percent between 2012 and 2015.³¹

²¹ Colorado has three classes of offenses: petty, misdemeanor, and felony.

²² Division of Criminal Justice of the Colorado Department of Public Safety, Office of Research and Statistics, "Marijuana Legalization in Colorado: Early Findings, A Report Pursuant to Senate Bill 13-283," March 2016, at p. 24, <http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> (hereinafter Colo. Dept. of Public Safety 2016 Report).

²³ *Id.*

²⁴ Interviews with the Denver District Attorney's Office, March 19, 2018, and the Boulder County District Attorney's Office, March 20, 2018.

²⁵ Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 24.

²⁶ *Id.* at pp. 5, 21.

²⁷ Seattle Initiative Measure 75, available at <http://clerk.ci.seattle.wa.us/~public/initref/init75.htm>.

²⁸ Interview with the Seattle Police Dept., March 7, 2018.

²⁹ Interviews with the King County Prosecuting Attorney's Office and the Seattle City Attorney's Office, March 7, 2018.

³⁰ An "incident," as defined by the FBI and adopted by the Washington State Office of Financial Management, occurs when a law enforcement officer investigates a scene or situation, whether that investigation results in an arrest or not. *See* Forecasting and Research Division, Washington State Office of Financial Management, "Monitoring Impacts of Recreational Marijuana Legalization: 2016 Update," March 2017, at p. 4, http://www.ofim.wa.gov/reports/marijuana_impacts_update_2016.pdf (hereinafter Wash. State 2016 Update Report).

³¹ *Id.* at pp. 3-4.

According to King County Prosecuting Attorney Satterberg, based on anecdotal evidence, the decrease in police stops of individuals for public consumption of marijuana in Seattle has removed a flashpoint between law enforcement and communities that tend to have greater police presence, which has improved the relationship between police officers and the communities they serve.³²

Oregon

As in many other major cities, Portland's law enforcement agencies, since Oregon's legalization of marijuana in 2015, have not been aggressively enforcing the state's remaining low-level marijuana crimes and infractions.³³ Rather, their focus is combating the state's black market and trafficking of controlled substances, including of heroin, cocaine, methamphetamines, synthetic opiates, and to a lesser extent, marijuana.³⁴

Statewide, arrests of adults for marijuana possession dropped from 1,796 in 2010 (pre-legalization) to 540 in 2015 (post-legalization).³⁵ Again, however, while rates of marijuana arrests have declined among all adult race groups, the rate of arrests of black adults was still more than 50 percent higher than the rate of arrests among white adults in 2015.³⁶

Nevada

Unlike other states that have legalized recreational marijuana, public consumption remains a misdemeanor in Nevada rather than a civil infraction (unless that public consumption is on one's own property).³⁷ Nonetheless, enforcement of marijuana offenses is still a low priority for law enforcement, according to Police Director Chuck Calloway of the Las Vegas Metropolitan Police Department. Instead, Nevada law enforcement agencies are using limited resources to combat the state's methamphetamine and opioid crises.³⁸

Even where police issue citations for marijuana offenses, prosecutors from the Office of Clark County District Attorney Steve Wolfson, whose jurisdiction includes Las Vegas, stated that, in their experience, judges frequently dismiss such cases without input from the prosecutor.³⁹

³² Interview with King County Prosecuting Attorney Dan Satterberg, March 7, 2018.

³³ Convictions of an infraction, unlike a misdemeanor, is not a criminal conviction.

³⁴ Interviews with the Multnomah County District Attorney's Office, and Lt. Art Nakamura, Drugs and Vice Division, the Portland Police Dept., March 8, 2018.

³⁵ Oregon Public Health Division, "Marijuana Report: Marijuana Use, Attitudes, and Health Effects in Oregon," Dec. 2016, at p. 67, available at <https://apps.state.or.us/Forms/Served/1e8509b.pdf> (hereinafter Oregon Public Health Division 2016 Report).

³⁶ *Id.* at p. 69.

³⁷ The Las Vegas City Council is currently debating an ordinance to permit public consumption of marijuana. Because Las Vegas does not have alcohol open-container laws, many tourists are reportedly not aware that public consumption of marijuana is unlawful; furthermore, hotels and casinos ban marijuana from their properties, so many tourists have no lawful place to consume it.

³⁸ Interview with Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

³⁹ Interview with the Clark County District Attorney's Office, April 3, 2018.

California

Between 2004 and 2006, several California localities passed voter initiatives or City Council resolutions directing law enforcement agencies to make low-level marijuana offenses their lowest priorities. These jurisdictions include Oakland, Santa Barbara, Santa Cruz, San Francisco, Santa Monica, and West Hollywood.⁴⁰

According to law enforcement representatives in Los Angeles and San Francisco, public consumption and personal possession offenses have not been heavily enforced since California legalized medical marijuana in 1996.⁴¹ San Francisco District Attorney George Gascon has explicitly de-prioritized prosecuting marijuana-related cases that do not involve an element of public safety, and has eliminated his Office's Narcotics Unit. (Major drug-related cases are now handled by general felonies prosecutors.)⁴²

Notwithstanding the fact that many law enforcement agencies in California have deprioritized the enforcement of low-level marijuana offenses, statistics from 2012 to 2016 show that, where arrests were made for such violations, black individuals were twice as likely as white individuals to be arrested.⁴³

Massachusetts

The Office of Suffolk County District Attorney Dan Conley, whose jurisdiction includes Boston, prosecuted 65 marijuana possession cases against adults and two cases against minors in 2016. After Massachusetts legalized personal possession, the office prosecuted only 20 cases against adults and four cases against minors in 2017. But many of these cases (in both 2016 and 2017) involved other charges, such as domestic violence abuse or possession of other drugs; few, if any, involved solely a marijuana possession charge. During DA Conley's sixteen-year tenure as the district attorney, only five defendants have received a sentence of incarceration for marijuana possession, and all five of those defendants were sentenced concurrently for other crimes committed in the same transaction.⁴⁴

Like many areas of the country, Massachusetts is experiencing an epidemic of opioid-related overdoses and deaths. This crisis has forced police departments around the state to focus their limited resources on combating opioids rather than marijuana offenses. Additionally, even where police officers issue tickets for public consumption, which carry a civil fine of \$100,

⁴⁰ See Marijuana Policy Project, "Lowest Law Enforcement Priority Jurisdictions," available at <https://www.mpp.org/lowest-law-enforcement-priority-jurisdictions/>.

⁴¹ It is reportedly common practice for police officers to tell individuals to put out their marijuana cigarettes rather than issuing citations. Interviews with the Los Angeles County District Attorney's Office, Feb. 22, 2018, and the San Francisco District Attorney's Office, March 9, 2018. Furthermore, California law only bans the smoking of marijuana in public; it does not prohibit ingesting marijuana except in or upon the grounds of a school, day care center, or youth center while children are present. Cal. Health and Safety Code § 11362.3(a)(5).

⁴² Interview with the San Francisco District Attorney's Office, March 9, 2018.

⁴³ Data from the Cal. Dept. of Justice cited in Drug Policy Alliance, "From Prohibition to Progress, A Status Report on Marijuana Legalization," Jan. 2018, at p. 42, available at http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf (hereinafter Drug Policy Alliance 2018 Report).

⁴⁴ Interview with the Suffolk County District Attorney's Office, Jan. 18, 2018.

individuals are not required to show identification. Therefore, there is no way to ensure that the individual gives the officer his or her real name and will ever pay the fine, further disincentivising officers from enforcing the public consumption ban.⁴⁵

Washington, D.C.

According to statistics provided by the Office of the Attorney General of the District of Columbia, arrests in marijuana distribution and possession cases have dropped dramatically since D.C. legalized recreational marijuana use by adults in 2015, from 3,654 arrests in 2012 to 661 in 2017. However, arrests for public consumption have risen, from 99 arrests in 2014 to 266 in 2017.⁴⁶ Prosecutors report that, while it is clear to most residents that sale of marijuana is still unlawful, there is some confusion among the populace as to where they can legally consume. (Pursuant to D.C. law, consumption is only legal in one's private dwelling.)⁴⁷

As in other jurisdictions, statistics indicate that the enforcement of marijuana laws, notwithstanding legalization, still has a disparate impact on communities of color in D.C. Black individuals are twice more likely than individuals of other races and ethnicities to be arrested for marijuana offenses, and they are eleven times more likely to be arrested for public consumption of marijuana than white individuals. From 2014 to 2016, 82.8 percent of arrests for public consumption were of blacks, even though black residents only make up approximately 49 percent of D.C.'s population.⁴⁸

* * * * *

While many of the foregoing reports are anecdotal, several themes emerge. First, even after legalization, arrest and prosecution decisions still need to be made in cases involving lower-level marijuana possession, and the exercise of discretion will continue to be the responsibility of police and prosecutors, taking into account public sentiments and competing law enforcement resources. Second, the fact of legalization may inadvertently (but perhaps understandably) lull members of the public into believing that public consumption and possession of larger amounts are protected, when they remain illegal. (In other words, after legalization, some confusion should be assumed, and the question is how law enforcement should respond to any such ambiguities.) Finally, the problem of racially disparate enforcement will not necessarily be eliminated as a result of legalization. The number of arrests will decline, but the remaining cases may well continue the disparity apace.

⁴⁵ *Id.*

⁴⁶ Statistics provided by the Office of the Attorney General of the District of Columbia Karl Racine.

⁴⁷ Local D.C. officials, including Attorney General Karl Racine, have expressed their support for regulating and taxing recreational marijuana, but the U.S. Congress has prevented the District of Columbia from doing so. Interview with the Office of the Attorney General of the District of Columbia Karl Racine, Jan. 26, 2018.

⁴⁸ D.C. Metropolitan Police Dept. statistics cited in Drug Policy Alliance 2018 Report, *supra* note 43, at pp. 30-31, 50.

III. The Black Market and Trafficking in Legalized States

One justification often used for legalizing recreational marijuana sales is that it will eliminate the black market.⁴⁹ But nearly five years after the first recreational marijuana store opened in Colorado, a black market continues to thrive in legalized states.

The black market for marijuana has been a source of violent crime, often perpetrated against illegal growers and juvenile sellers. There also has been a rising number of explosions from the illegal production of butane hash oil, an extremely potent marijuana concentrate with high levels of tetrahydrocannabinol (or “THC”), the chemical responsible for physiological effects, which has been hugely profitable on the black market.

While the black market for marijuana has unique characteristics in each state, there are several common reasons why it persists:

- 1) **Overproduction:** Some states are permitting the cultivation of marijuana in amounts that far exceed what can be sold and consumed within their borders, and that surplus is being trafficked out-of-state.
- 2) **Out-of-state consumers will pay higher prices:** Traffickers can sell marijuana at far higher prices in states where marijuana is illegal. This is compounded by the fact that sellers in the legal, regulated market must pay high taxes, regulatory fees, and overhead costs that substantially cut into profit margins.
- 3) **Continuing markets for unlawful in-state sales:** It is still unlawful for juveniles to use and purchase marijuana, and some employers ban the use of marijuana by their employees. These restricted individuals, as well as those who do not want to pay taxes at licensed stores, are continuing to purchase marijuana on the black market in legalized states.
- 4) **The ease of cultivation:** Because cultivating marijuana is legal (albeit with proper licenses), the purchase and accumulation of equipment required to grow marijuana no longer raises suspicions. Additionally, many states permit adults to grow plants in their homes for personal use, and it is difficult for law enforcement to determine which homes are cultivating more than the maximum number of plants allowed by state law or city ordinances.
- 5) **Financing of illegal grow houses by foreign nationals:** Law enforcement representatives in Washington, Oregon, California, and Colorado have conducted raids of hundreds of homes illegally growing marijuana plants. The plants are often tended by foreign nationals, and law enforcement agents suspect that some of the individuals tending to the plants are human trafficking victims who have been forced to work in these illegal “grow homes.”

What follows is a more particularized discussion of these concerns.

⁴⁹ The black market is one in which marijuana is grown illegally and sold illegally. The gray market is one in which marijuana is grown legally but sold illegally. For ease in terminology, this report will refer to all illegal cultivation and sale as the black market.

Colorado

According to the Colorado Department of Safety, between January 2014 and August 2015, 65 percent of illegal drug interceptions that originated in Colorado involved marijuana, and almost all of those marijuana seizures (166 of 169) were destined for states outside of Colorado.⁵⁰ The Rocky Mountain High Intensity Drug Trafficking Area (HIDTA) reported that highway seizures of Colorado marijuana increased 43 percent in the four-year period since Colorado legalized recreational marijuana, compared to the prior four-year period; seizures of Colorado marijuana in the U.S. mail increased 844 percent in that same time period.⁵¹

Over the last several years, the Denver and Boulder County District Attorney's Offices have successfully secured a number of convictions against interstate marijuana traffickers. Although jurors generally have been unwilling to convict individuals for low-level marijuana offenses, they have convicted traffickers who are cheating the system by not paying taxes and following regulations. Prosecutors from the Boulder County DA's Office also noted that they aggressively prosecute individuals who sell marijuana to juveniles, but otherwise their marijuana enforcement efforts are primarily focused on large-scale trafficking.⁵²

Federally, the U.S. Attorney for the District of Colorado Robert Troyer believes that the marijuana black market is one of the state's most serious drug enforcement issues. His office has yet to bring a civil or criminal action against a licensed retail store or grow facility, because serious marijuana-related crimes, including violent crimes, are occurring almost solely on the black market. While burglaries of licensed facilities have fallen due to tighter security, robberies, burglaries, aggravated assaults, and homicides remain high in the black market for marijuana.⁵³

In Denver, seven homicides in 2017 reportedly involved the marijuana black market, and the Denver Police Department recovered approximately 140 guns in marijuana-related cases.⁵⁴ Additionally, there has been a rash of explosions in Colorado involving the production of butane hash oil. (In one Boulder County case in 2016, the defendant blew out the entire wall of a hotel during a hash oil extraction operation.⁵⁵)

Prosecutors and police officers from Denver and Boulder, as well as U.S. Attorney Troyer, believe that Colorado's black market will exist as long as marijuana remains illegal in other states, and as long as there is a demand by out-of-state consumers willing to pay far higher prices. Like other legalized states, Colorado is experiencing an overproduction of marijuana; growers and

⁵⁰ Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 37.

⁵¹ Rocky Mountain High Intensity Drug Trafficking Area, "The Legalization of Marijuana in Colorado: The Impact," Oct. 2017, at pp. 4-5, available at <https://www.rmhidta.org/html/FINAL%202017%20Legalization%20of%20Marijuana%20in%20Colorado%20The%20Impact.pdf> (hereinafter Rocky Mountain HIDTA 2017 Report).

⁵² Interviews with the Denver District Attorney's Office, March 19, 2018, and the Boulder County District Attorney's Office, March 20, 2018.

⁵³ Interview with U.S. Attorney for the Dist. of Colo. Robert Troyer, March 30, 2018.

⁵⁴ Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

⁵⁵ Interviews with the Boulder County District Attorney's Office and Sgt. Jeffrey Kessler, Boulder County Drug Task Force, Boulder Police Dept., March 20, 2018.

sellers (both legal and illegal) are offloading their supply to interstate traffickers at nearly double the price of the in-state legal market.⁵⁶

Washington State

Although growing marijuana in the home is illegal in Washington (unlike in other legalized states), large-scale “home-grow” operations have been discovered throughout the state, with much of the marijuana destined for the East Coast. As of January 2018, the King County Prosecuting Attorney’s Office had 30 pending cases involving illegal grow houses. Many of these cases involve multiple homes and thousands of plants. One case set for trial involves 17 houses, in which police seized more than 8,000 plants, more than \$700,000 in cash, and nine vehicles.⁵⁷

Many of these operations are reportedly controlled by foreign nationals, who purchase homes and staff them with low-level employees to cultivate the plants. They pay for the homes and utility bills in cash, so it is difficult to trace the operations back to the principals abroad. King County Prosecuting Attorney Satterberg said that the defendants in these cases have been more frequently opting to go to trial rather than pleading guilty and facing deportation, arguing that they did not know that such cultivation is unlawful in Washington. Jurors, moreover, have been generally unwilling to convict these low-level defendants unless there are other crimes associated with the unlawful marijuana cultivation. Even where there is a conviction, the maximum penalty for illegally growing 100 plants is six months in jail. Finally, according to Prosecuting Attorney Satterberg, some of the individuals tending to the plants may be human trafficking victims forced or coerced into working in the illegal grow homes.⁵⁸

In addition to out-of-state trafficking, Washington’s black market also thrives due to demand by in-state consumers, such as juveniles and individuals who want to pay lower prices, according to Chief of Police Carmen Best of the Seattle Police Department. Again, jurors have been generally unwilling to convict defendants accused of unlawful marijuana sales that do not rise to the level of major trafficking.⁵⁹

Alison Holcomb, an attorney with the American Civil Liberties Union and the primary author of Washington’s ballot initiative, said that state officials and members of the marijuana industry are working to determine the right tax rate and price point for products that better allow them to compete with the black market. The price point must be high enough for businesses to earn a profit, and the tax rate must be high enough for the government to bring in tax revenue. But the prices cannot be so high that legal sellers are undercut by unlawful sellers and distributors not paying licensing fees and taxes.⁶⁰

Seattle officials have been more successful in their efforts against unlicensed marijuana businesses. For example, the King County Prosecuting Attorney and the Seattle City Attorney

⁵⁶ Interviews with the Denver District Attorney’s Office and the Denver Police Dept., March 19, 2018; the Boulder County District Attorney’s Office and the Boulder Police Dept., March 20, 2018; and U.S. Attorney for the Dist. of Colo. Robert Troyer, March 30, 2018.

⁵⁷ Case information provided by the King County Prosecuting Attorney’s Office.

⁵⁸ Interview with King County Prosecuting Attorney Dan Satterberg, March 7, 2018.

⁵⁹ Interview with Chief of Police Carmen Best, Seattle Police Dept., March 7, 2018.

⁶⁰ Interview with Alison Holcomb, Director of Strategy, American Civil Liberties Union, March 7, 2018.

threatened to take civil action against unlicensed stores purporting to be legitimate medical marijuana dispensaries, and were successful in shutting them down. The Seattle City Attorney also brought criminal charges against illegal marijuana delivery drivers as a result of police sting operations, largely reducing those operations as well.⁶¹

Oregon

Oregon's climate, soil composition, and altitude makes the state particularly suitable for outdoor marijuana cultivation, and its crop yields are worth more than any other agricultural commodity. Furthermore, Oregon's legalization law did not set a cap on the number of licenses it grants, in part because it wanted to encourage participants on the black market to move into the legal market. Therefore, the marijuana production rate of Oregon, a relatively low-population state, has saturated its domestic market. The Oregon State Police estimate that the state may be producing more than one million pounds of marijuana per year than its residents are consuming.⁶²

Portland prosecutors report that the out-of-state diversion of marijuana has been a significant drug enforcement issue in Oregon since the state legalized medical marijuana. Compounding this problem is that there is little law enforcement presence in high-production regions of Oregon. In 2017, the Oregon State Legislature increased the state's ability to combat the black market by increasing funding for marijuana regulators and for the Oregon State Police to add cannabis enforcement positions.⁶³

California

Although most cities in California have not yet begun legal recreational sales, the state has had a robust medical marijuana industry for more than two decades, and with it, a robust intrastate and interstate black market. A study commissioned by the California Department of Food and Agriculture found that, in 2016, California produced 13.5 million pounds of marijuana, yet it only consumed 2.5 million pounds — resulting in a surplus of five times the amount consumed.⁶⁴ That surplus is being trafficked to other states. In 2016, federal, state, and local law enforcement agencies seized 5.3 million marijuana plants throughout the nation; 70 percent of those seizures were confiscated in California.⁶⁵ As in Washington State, law enforcement in California has discovered a large number of illegal marijuana grow operations financed by foreign nationals, with much of the contraband trafficked to the East Coast.⁶⁶

⁶¹ Interviews with the King County Prosecuting Attorney's Office and the Seattle City Attorney's Office, March 7, 2018.

⁶² Oregon State Police Drug Enforcement Section, "A Baseline Evaluation of Cannabis Enforcement Priorities in Oregon," January 2017, at pp. 7, 9-10, 11, available at https://mass-cannabis-control.com/wp-content/uploads/2017/12/A-Baseline-Evaluation-of-Cannabis-Enforcement-Priorities-in-Oregon_.pdf (hereinafter Oregon State Police 2017 Report).

⁶³ Interviews with the U.S. Attorney's Office for the Dist. of Oregon and the Multnomah County District Attorney's Office, March 8, 2018.

⁶⁴ Cal. Dept. of Food and Agriculture study cited in Patrick McGreevy, "As the Top Pot-Producing State in the Nation, California Could Be on Thin Ice with the Federal Government," *L.A. Times*, Oct. 1, 2017, available at <http://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html>.

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, U.S. Attorney's Office for the Eastern Dist. of Cal., "Sweeping Two-Day Operation Targets International Organized Crime in Sacramento Area Neighborhoods," Press Release, April 4, 2018, available at

Nevada

Because Nevada’s drug enforcement efforts are largely focused on the methamphetamine and opioid crises, its HIDTA and local police departments are not using significant resources to investigate and prosecute illegal marijuana grow operations and unlicensed sales. HIDTA’s few cases involving marijuana trafficking also involve firearms and other drugs. However, at the urging of the marijuana industry, law enforcement agencies have been dismantling and making arrests at “pop-up parties.” These unlawful sales events are advertised on social media without a precise location until shortly before the event, and many of them have been organized by marijuana growers in California looking to offload surplus in Nevada.⁶⁷

* * * * *

In short, an unintended consequence of legalization in a number of states has been an expansion of black market sales and related criminal activity that has taken advantage of a lack of foresight in state planning and regulation. Obviously, this should be studied and anticipated by any state that is responsibly considering the possibility of legalization in the future. As noted above, regional differences in geography, topography, and climate are all factors that have contributed to the causes and characteristics of each legalized state’s black market for marijuana.

IV. Derivative Crimes in Legalized States

In each of the states that have legalized marijuana sales, the most common derivative crimes—marijuana-related crime that does not directly involve trafficking, possession, sale, or consumption of marijuana—are robberies of stores and their customers, and burglaries of stores. The number of burglaries, however, have steadily dropped over the last few years to a point where many law enforcement agencies no longer view them as a major issue, primarily because business owners have heavily increased security at their stores. Local and state laws often now require facilities to install cameras, safes, and other security measures, and to lock cash and products in safes when stores are closed. Business owners have also increased security measures surrounding the transportation of cash and products.

Colorado

Colorado’s overall crime rate remained consistent after the state’s first recreational marijuana store opened in January 2014. However, in 2016, the state’s overall crime rate increased by five percent, while other states trended downward. Colorado’s violent crime in 2016 went up 12.5 percent, while violent crime nationwide increased by less than five percent. In Denver, violent crime increased by nine percent from 2013 to 2016, and overall crime increased by four percent.⁶⁸

<https://www.justice.gov/usao-edca/pr/sweeping-two-day-operation-targets-international-organized-crime-sacramento-area>.

⁶⁷ Interviews with the Clark County District Attorney’s Office, and Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

⁶⁸ Colo. Bureau of Investigation statistics cited in Scott McLean and Sara Weisfeldt, “Colorado Governor Won’t Rule Out Banning Marijuana Again. Here’s Why,” *CNN*, April 20, 2018, available at <https://www.cnn.com/2018/04/20/us/colorado-marijuana-and-crime/index.html>.

Furthermore, filings of felony complaints have increased in many jurisdictions, including in Boulder by 33 percent.⁶⁹

Although overall crimes rates in Denver have increased, the number of crimes related specifically to the marijuana industry remained stable and made up a small portion of overall crime.⁷⁰ As a result, Commander James Henning of the Denver Police Department said it is too soon to draw conclusions about any correlation between marijuana legalization and the increase in overall crime rates.⁷¹ Similarly, Colorado’s Department of Public Safety, in analyzing crime data from 2012 to 2015, stated that “it is too early to draw conclusions about the potential effects of marijuana legalization or commercialization on public safety, public health, or youth outcomes, and this may always be difficult due to the lack of historical data.”⁷² Governor John Hickenlooper, in a CNN story from March 2018, also said that the state’s increase in crime cannot be conclusively attributed to marijuana legalization.⁷³

Although most state and local government officials have not publicly blamed marijuana for Colorado’s increase in crime, the state has nonetheless increased law enforcement resources to focus on marijuana enforcement. The Denver Police Department has added more officers to combat the marijuana black market, and the state legislature in 2017 established a \$6 million fund to reimburse district attorneys and police and sheriffs’ departments for enforcement of marijuana laws.⁷⁴

Washington State

Chief of Police Carmen Best of the Seattle Police Department said that, prior to marijuana regulation, she was concerned there would be a high number of burglaries and robberies at or near licensed stores, but that has not occurred.⁷⁵ More generally, crime rates have remained steady in Washington, and continue on a downward trend after retail sales began in mid-2014. In 2015, violent crime increased by 3.9 percent, but property crimes decreased by 2.6 percent, as compared to the prior year.⁷⁶ In Seattle, violent crime increased 4.9 percent in 2016, but murders decreased 17 percent, as compared to 2015. During this same period, violent crime increased nationally by 4.1 percent and murder rates increased by 8.6 percent.⁷⁷ By way of comparison, data compiled by

⁶⁹ Interview with the Boulder County District Attorney’s Office, March 20, 2018.

⁷⁰ Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 26.

⁷¹ Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

⁷² Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 5.

⁷³ McLean and Weisfeldt, “Colorado Governor Won’t Rule Out Banning Marijuana Again. Here’s Why.”

⁷⁴ Interview with Commander James Henning, Denver Police Dept., March 19, 2018.

⁷⁵ Interview with Chief of Police Carmen Best, Seattle Police Dept., March 7, 2018.

⁷⁶ FBI Seattle, “The FBI Releases 2015 Crime Statistics for Washington State,” Press Release, Sept. 26, 2016, <https://www.fbi.gov/contact-us/field-offices/seattle/news/press-releases/the-fbi-releases-2015-crime-statistics-for-washington-state>.

⁷⁷ FBI 2016 Violent Crime Report, available at <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/violent-crime>, and cited in Sara Jean Green, “FBI: Violent Crime Up In Seattle and Washington in 2016, But Murders Specifically Down,” *The Seattle Times*, Sept. 26, 2017, <https://www.seattletimes.com/seattle-news/crime/fbi-violent-crime-up-in-seattle-and-washington-in-2016-but-murders-specifically-down/>.

the Washington Association of Sheriffs and Police Chiefs showed that violent crimes decreased slightly from 3.6 violent offenses per 1,000 residents in 2012 to 3.3 per 1,000 in 2016.⁷⁸

Oregon

Oregon's legalization law went into effect in July 2015 and the first stores opened in October 2016. FBI data shows that crime rates stayed largely the same between 2015 and 2016.⁷⁹ Prosecutors from the Multnomah County District Attorney's Office attributed most of Oregon's marijuana-related violent crimes to the black market rather than the legal market.⁸⁰

Nevada

According to the Clark County District Attorney's Office and the Las Vegas Metropolitan Police Department, marijuana stores were frequently burglarized after the state legalized recreational sales. Since then, stores have increased their security measures, and this has substantially decreased burglaries. Law enforcement representatives in Las Vegas also noted that, while violent crime rates have not increased due to marijuana laws, they also have not decreased as a result, as some proponents of legalization had projected.⁸¹

Other States

In California, recreational marijuana sales started in some cities in early 2018, including Los Angeles, but have not started in other major cities such as San Francisco. Sales have not yet started in Massachusetts and Maine. Therefore, it is too early in these states to assess marijuana-related crime and overall crime rates.

* * * * *

In short, while the available reports are largely anecdotal, there does not appear to be a basis to conclude that legalization of marijuana to date has resulted in any material increase in crimes related to the cultivation or sale of the substance. In Colorado, where crime rates have risen, law enforcement and other public officials have said that it is too soon to draw any conclusions about whether the state's increase in crime is a result of marijuana legalization.

⁷⁸ Wash. Assoc. of Sheriffs and Police Chiefs, "2016 Crime in Washington," available at <http://www.waspc.org/assets/CJIS/2016%20crime%20in%20washington.small.pdf>.

⁷⁹ FBI 2016 Release of FBI Uniform Crime Reports for Oregon, available at http://www.oregon.gov/cjc/SAC/Documents/2016_FBI_UCR_Oregon.pdf.

⁸⁰ Interview with the Multnomah County District Attorney's Office, March 8, 2018.

⁸¹ Interviews with the Clark County District Attorney's Office, and Chuck Calloway, Police Director, Intergovernmental Services, Las Vegas Metropolitan Police Dept., April 3, 2018.

V. Public Health Issues in Legalized States

In contrast to derivative crimes, the number of marijuana-related emergency room visits and calls to poison control centers have jumped markedly in states that have legalized marijuana. In a November 2017 article published in the American Journal of Health-System Pharmacy, physicians discussed common reasons for marijuana-related emergency room visits. One of the most frequent problems is marijuana consumption by children, particularly of high-potency edibles that children find in their homes. Hospitals have also seen an increase in “acute intoxication,” or overdosing due to the greater potency of marijuana, especially by patients who are unfamiliar with the differences between eating and smoking marijuana. Reportedly, patients who consumed too much marijuana were unaware that peak effects of edibles do not show up until about 30 minutes after consumption, whereas the effects of smoking are immediate.⁸² Additionally, patients with a long history of daily marijuana use can suffer from cannabis hyperemesis syndrome (CHS), which causes severe abdominal pain and vomiting.⁸³

In Oregon, marijuana-related calls to the Oregon Poison Center began to increase in 2015, coinciding with the state’s legalization of recreational use. The number of calls peaked in April through June 2016, corresponding with the start of legal sales of edibles and extracts. The number of calls has since dropped, but is still at a level higher than pre-legalization.⁸⁴ These calls were commonly from users experiencing racing heartbeats, drowsiness or lethargy, agitation or irritability, vomiting, and nausea.⁸⁵ The rate of emergency room visits in Oregon also increased after legalization.⁸⁶

The Oregon Health Authority noted that the state’s increase in marijuana-related emergency room visits may be due to a number of reasons: 1) a true increase in medical events; 2) patients’ increased comfort with disclosing their use of marijuana after legalization; or 3) increased screening or documentation of marijuana use by health care facilities after legalization.⁸⁷

Colorado and Washington experienced similar increases in marijuana-related health events with the start of retail sale. Colorado reported 1,879 marijuana-related hospitalizations and emergency room visits from 2010 to 2013; that number jumped to 3,369 from 2014 to 2015 (the two years after the start recreational sales).⁸⁸ Similarly, Washington reported a 70 percent increase in the number of marijuana-related calls to its Poison Center from the three years after regulation as compared to the prior three years.⁸⁹

⁸² American Journal of Health-System Pharmacy article cited in Jon Gettman, “Why Are People Going to the Emergency Room Because of Pot?” *High Times*, Jan. 25, 2018, available at <https://hightimes.com/health/people-going-emergency-room-pot/>.

⁸³ These patients’ symptoms reportedly can be relieved with hot baths or showers. See further discussion of CHS in Roni Caryn Rabin, “A Perplexing Marijuana Side Effect Relieved by Hot Showers,” *N.Y. Times*, April 5, 2018, available at <https://www.nytimes.com/2018/04/05/well/a-perplexing-marijuana-side-effect-relieved-by-hot-showers.html>.

⁸⁴ Oregon Public Health Division 2016 Report, *supra* note 35, at p. 50.

⁸⁵ *Id.* at p. 52.

⁸⁶ *Id.* at p. 54.

⁸⁷ *Id.* at p. 53.

⁸⁸ Colo. Dept. of Public Health 2016 Report, *supra* note 22, at p. 49

⁸⁹ Wash. State 2016 Update Report, *supra* note 30, at p. 10.

While there may be little conclusive evidence about the health impact of long-term marijuana use by adults,⁹⁰ the health dangers of marijuana use by juveniles are well-documented, particularly the drug's damaging effects on children's brain development.⁹¹ As noted above, more children are visiting emergency rooms due to the ingestion of edibles found in their home, but there is conflicting data regarding whether juveniles are more frequently consuming marijuana as a result of marijuana legalization. Much of the data collected on this topic has been through self-reporting surveys, and the results of these surveys vary widely. For example, a survey by the National Survey on Drug Use and Health showed that marijuana use by juveniles in Colorado dropped between 2013 and 2016.⁹² A survey by the Colorado Department of Public Health and Environment also showed declining use by high school students.⁹³ But the Rocky Mountain HIDTA found that youth usage in Colorado increased 12 percent in the three years after legalization (2013-2015) as compared to the three years prior to legalization (2010-2012).⁹⁴

Law enforcement agencies also reported a lack of resources and programs to enforce marijuana laws pertaining to juveniles. For example, Massachusetts requires juveniles under 18 charged with possession of less than one ounce to complete a drug diversion program within one year of the offense, and failure to complete the program may result in a delinquency proceeding. The state, however, has not established and funded such an education course, so this law has been unenforceable.⁹⁵

Law enforcement agencies and regulators also expressed a concern about the increased accessibility of marijuana to children, despite the ban on juvenile sales. Oregon's Office of Liquor Control Commission (OLCC) conducted a decoy operation to make sure that retail stores were checking for identification. In its first decoy operation in Portland, four out seven dispensaries sold to minors. Statewide, approximately 70 to 80 percent of the stores complied with identification requirements. In response, the OLCC increased the penalties for selling marijuana to minors at licensed stores, from a 10-day license suspension or \$1,650 fine for a first-time offense, to a 30-day suspension or a \$4,950 fine for subsequent offenses. Later decoy operations found 100 percent compliance.⁹⁶

⁹⁰ See, e.g., Patti Neighmond, "Marijuana's Health Effects? Top Scientists Weigh In," *NPR*, Jan. 12, 2017, available at <https://www.npr.org/sections/health-shots/2017/01/12/509488977/marijuanas-health-effects-scientists-weigh-in>.

⁹¹ See, e.g., Centers for Disease Control and Prevention, "What You Need to Know About Marijuana Use in Teens," <https://www.cdc.gov/marijuana/factsheets/teens.htm>; Kirsten Weir, "Marijuana and the Developing Brain," *American Psychological Association*, Nov. 2015, available at <http://www.apa.org/monitor/2015/11/marijuana-brain.aspx>; "Marijuana Use: Detrimental to Youth," *American College of Pediatricians*, April 2017, available at <https://www.acped.org/marijuana-use-detrimental-to-youth>.

⁹² Cited in Christopher Ingraham, "Following Marijuana Legalization, Teen Drug Use is Down in Colorado," *Wash. Post*, Dec. 11, 2017, available at https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.af20494fc977.

⁹³ Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 55.

⁹⁴ Rocky Mountain HIDTA 2017 Report, *supra* note 51, at p. 33.

⁹⁵ Interviews with the Suffolk County District Attorney's Office, Jan. 18, 2018.

⁹⁶ Interview with the Oregon Liquor Control Commission, March 8, 2018.

VI. Marijuana-Impaired Driving

Many law enforcement representatives report that their biggest concern regarding marijuana legalization is the danger of marijuana-impaired driving. However, it has been difficult to accurately determine whether more people are driving while under the influence of marijuana in legalized states; whether a driver is marijuana-impaired without sufficient evidence-based tests; and how to secure convictions without such tests at trial.

A. Testing for Marijuana Impairment

Law enforcement officers can determine whether a driver is under the influence of alcohol by measuring his or her blood alcohol concentration (BAC), or through a standard alcohol field sobriety test. Alcohol-impaired driving has been well-researched for more than 60 years, and the science behind BAC and alcohol field sobriety tests has long been validated by the scientific community and accepted by the courts. Researchers have shown through laboratory studies how alcohol consumption affects drivers' behavior, attention, and cognition. Studies also show that this impairment increases with rising alcohol concentration and declines with dropping alcohol concentration. This well-established correlation has supported the use of a driver's BAC level (through breathalyzers, blood draws, or urine tests) and the standard field sobriety test in Driving While Under the Influence (DUI) prosecutions.⁹⁷

There is no comparable scientifically-validated research that determines whether a user is impaired by marijuana based on the level of THC in his or her system. The absorption, distribution, and elimination of marijuana from a user's body, as well as the drug's effects on a user's behavior and cognitive functions, are very different than alcohol, and also vary widely from person to person. And, unlike alcohol, a user's impairment does not rise and fall uniformly based on how much THC enters and leaves the body.⁹⁸

Additionally, far fewer studies have been conducted regarding the impairing effects of marijuana as they relate to driving skills. As noted by the U.S. Department of Transportation, "[a] clearer understanding of the effects of marijuana use will take additional time as more research is conducted."⁹⁹ The lack of research into these issues is in part due to marijuana's classification as a Schedule I controlled substance, which imposes challenges on researchers' ability to obtain, store, use, and dispose of marijuana.¹⁰⁰

Nevada's DUI law uses a quantitative threshold as a measure of impairment: two nanograms of delta-9 THC (marijuana's primary psychoactive ingredient) per milliliter of blood drawn, or five nanograms of delta-11 THC (a marijuana metabolite that is also associated with

⁹⁷ See National Highway Traffic Safety Admin., U.S. Dept. of Transportation, "Marijuana-Impaired Driving, A Report to Congress," July 2017, at pp. 2-4, available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf> (hereinafter NHTSA 2017 Report).

⁹⁸ See *id.* at pp. 4-6.

⁹⁹ *Id.* at p. 6; see also Richard P. Compton and Amy Berning, "Drug and Alcohol Crash Risk," National Highway Traffic Safety Administration, Feb. 2015, available at http://www.nhtsa.gov/staticfiles/nti/pdf/812117-Drug_and_Alcohol_Crash_Risk.pdf.

¹⁰⁰ NHTSA 2017 Report, *supra* note 97, at p. 6.

cognitive impairment).¹⁰¹ Nevada's statute is a *per se* law that holds a driver strictly liable if his THC concentration meets or exceeds those levels. Prosecutors in Las Vegas said they have been successful in securing DUI convictions (unlike in other marijuana-related offenses) using this *per se* law because jurors recognize the dangers of drugged driving and believe these offenses warrant harsh penalties.¹⁰²

Washington State's DUI statute is also a *per se* law that uses five nanograms of active THC per milliliter of blood drawn as a measure of impairment.¹⁰³ The law requires that the concentration level be found in the user's body within two hours after driving, but it is often difficult for law enforcement to obtain a warrant for a blood draw in that period of time.¹⁰⁴ In 2016, the U.S. Supreme Court ruled that states may not prosecute suspected impaired drivers for refusing blood draws when they are arrested without obtaining a search warrant.¹⁰⁵ While the Court also ruled that states may require warrantless breath tests because such tests are less intrusive,¹⁰⁶ breathalyzers cannot be used to determine THC concentration levels.

Colorado uses five nanograms of active THC as a permissible inference of impairment. Anything at or above that concentration triggers a presumption of impairment, and a driver may rebut that presumption at trial with evidence of non-impairment.¹⁰⁷ Oregon does not use a quantitative threshold for marijuana and instead relies on police officers' observations.¹⁰⁸ The state currently employs approximately 200 drug recognition experts, but need far more, particularly in rural areas, to adequately handle the rising number of DUI stops.¹⁰⁹

Despite the use of THC concentration as a quantitative threshold by some states, there is no clear science supporting its use as an objective measure for marijuana impairment, unlike the well-established correlation between blood alcohol levels and impairment.¹¹⁰ Even if researchers do find a quantitative threshold that can be scientifically supported, a high THC concentration in a driver's blood may drop below that level before a test is administered. While alcohol metabolizes at a steady rate, the peak THC level occurs at the cessation of smoking and drops rapidly thereafter. After a short period—and often before law enforcement can obtain a warrant for a blood draw or

¹⁰¹ Nev. Rev. Stat. § 484C-110(4). Delta-9 and Delta-11 THC are the compounds in marijuana that create the psychoactive effects and leaves the bloodstream relatively quickly. Carboxy-THC, by comparison, is a non-psychoactive metabolite that resides in a user for varying lengths. Because THC is a fat-soluble drug, chronic users who have not smoked recently and are not impaired could still exhibit a high level of carboxy-THC in their system. As of July 2017, Nevada law no longer allows prosecutors to use carboxy-THC concentration to prove impairment.

¹⁰² Interview with the Clark County District Attorney's Office, April 3, 2018.

¹⁰³ Wash. Rev. Code § 46.61.502(1)(b).

¹⁰⁴ Interview with the King County Prosecuting Attorney's Office, March 7, 2018.

¹⁰⁵ *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2181 (2016).

¹⁰⁶ *Id.* at 2177-78.

¹⁰⁷ Colo. Rev. Stat. § 42-4-1301(6)(a)(IV).

¹⁰⁸ Or. Rev. Stat. § 813.10.

¹⁰⁹ Interview with Senior Assistant Attorney General Deena Ryerson, Traffic Safety Resource Prosecutor, Oregon Dept. of Justice, March 8, 2018.

¹¹⁰ See AAA Foundation for Traffic Safety, "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to Per Se Limits for Cannabis," May 2016, at pp. 2-3, <https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf>; NHTSA 2017 Report, *supra* note 97, at pp. 5-6.

the driver is transported to a hospital post-crash—only low or no active THC can be detected in the driver’s blood.¹¹¹

Without a reliable chemical test, some jurisdictions conduct the standard alcohol field sobriety test on drivers suspected of drug impairment. But marijuana affects a user’s cognitive and mobile functions differently than alcohol. The Massachusetts Supreme Judicial Court ruled in September 2017 that, in marijuana impairment cases, police officers can only testify to the results of a field sobriety test if they are specially trained to recognize drug impairment.¹¹² The Court stated that, because “the effects of marijuana may vary greatly from one individual to another, and those effects are as yet not commonly known, neither a police officer nor a lay witness who has not been qualified as an expert may offer an opinion as to whether a driver was under the influence of marijuana.”¹¹³ While an officer who is not specially trained in drug recognition could tell a jury that the driver smelled strongly of marijuana or seemed confused, that there was smoke in the car, or other such observations, the officer cannot use those observations to conclude that the driver was impaired.¹¹⁴ As a result of this ruling, Massachusetts law enforcement is in the process of training more drug recognition experts (DREs).¹¹⁵

A growing number of other jurisdictions are also increasing the number of DREs in their police and sheriff’s departments. In the 1970s, the Los Angeles Police Department developed the Drug Evaluation and Classification Program (DECP) after noticing that many individuals arrested for driving under the influence had very low or zero BAC levels, despite clear signs of impairment. In response, the LAPD worked with medical doctors, psychologists, and other medical professionals to develop a standard test to recognize drug impairment. DECP now trains law enforcement officers to become specially trained as DREs.¹¹⁶

B. Statistics Regarding the Frequency of Marijuana-Impaired Driving

There are also challenges to determining whether marijuana legalization has increased the number of marijuana-impaired drivers on the road. Opponents of marijuana legalization point to statistics indicating that the number of traffic crashes involving marijuana-impaired drivers have increased in the past few years. In a 2017 report, the Rocky Mountain HIDTA found that traffic deaths in Colorado where a driver tested positive for marijuana more than doubled from 55 deaths in 2013 to 123 deaths in 2016. Total marijuana-related traffic deaths increased 66 percent in the four-year average since Colorado legalized recreational marijuana (2013-2016), as compared to the prior four-year period.¹¹⁷

However, it is difficult to draw conclusions from these statistics because most DUI crashes involve poly-drug use, *i.e.*, the driver tested positive for two or more drugs, or for alcohol and

¹¹¹ NHTSA 2017 Report, *supra* note 97, at p. 7; *see also* Marilyn Huestis and Michael L. Smith, “Cannabinoid Markers in Biological Fluids and Tissues: Revealing Intake,” *Trends in Molecular Medicine*, Jan. 25, 2018.

¹¹² *Commonwealth of Mass. v. Gerhardt*, 477 Mass. 775 (2017).

¹¹³ *Id.* at 776-77.

¹¹⁴ *Id.* at 783-84.

¹¹⁵ Interview with the Suffolk County District Attorney’s Office, Jan. 18, 2018.

¹¹⁶ *See* Int’l Assoc. of Chiefs of Police, “The International Drug Evaluation & Classification Program,” <http://www.decp.org/about>.

¹¹⁷ Rocky Mountain HIDTA 2017 Report, *supra* note 51, at p. 1.

drugs.¹¹⁸ HIDTA’s statistics regarding the number of marijuana impaired-driving cases include cases where the driver was also impaired by alcohol and/or other drugs; therefore, HIDTA’s data may merely reflect the fact that more drivers are now being *identified* by law enforcement as being impaired by marijuana in addition to alcohol and/or other drugs. In recent years, Colorado has increased the number of officers trained to identify driving impairment by drugs other than alcohol, raising the number of officers trained as DREs from 129 officers in 2012 to 228 officers in 2015.¹¹⁹ Therefore, the increase in the number of drivers testing positive for marijuana may be the result of an increase in DREs called to the scene, as well as an increase of drivers’ samples sent to toxicology labs to test for marijuana.

Additionally, the dearth of statistics regarding marijuana-impaired driving prior to legalization calls into question the validity of comparing pre-legalization data to post-legalization data. Colorado’s DUI statute does not differentiate between drugs and alcohol, and there is no central database of toxicology results that would allow for analyzing trends.¹²⁰ The Colorado Task Force on Drunk and Impaired Driving only recently made it a goal to improve data collection on marijuana-impaired driving, and the Denver Police Department started collecting data on cases involving drug-impaired driving in 2013, after the state had already legalized recreational marijuana.¹²¹

In Washington State, which legalized recreational marijuana in December 2012 and started sales in July 2014, the frequency of drivers involved in traffic fatalities who tested positive for THC (alone or in combination with alcohol or other drugs) increased to 75 drivers in 2014, compared to the previous four-year average of 36 drivers per year.¹²² However, drug-only DUI arrests, which do not differentiate marijuana from other drugs, decreased 28 percent in 2015, as compared to 2011.¹²³ The largest increase in fatal crashes involved poly-drug cases, which saw a steady climb from 82 crashes in 2011 to 172 crashes in 2016.¹²⁴ From 2015 to 2016, alcohol impaired drivers involved in traffic fatalities increased by 20 percent and drug positive drivers increased by 10 percent, while marijuana positive drivers decreased by 5.2 percent.¹²⁵

Because Oregon’s DUI law does not use a quantitative concentration threshold, the state is training more law enforcement officers to identify marijuana impairment.¹²⁶ In Oregon, from 2010 to 2016 (pre- and post-legalization), drivers who tested positive for marijuana were involved in an

¹¹⁸ See Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 28; Wash. State 2016 Update Report, *supra* note 30, at p. 12; Oregon State Police 2017 Report, *supra* note 62, at p. 21.

¹¹⁹ Colo. Dept. of Public Safety 2016 Report, *supra* note 22, at p. 28.

¹²⁰ *Id.* at p. 27.

¹²¹ *Id.* at p. 29.

¹²² Washington State Traffic Commission, “Driver Toxicology Testing and the Involvement of Marijuana in Fatal Crashes, 2010-2014,” Oct. 2015, at p. 2, http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2015/10/Driver-Toxicology-Testing-and-the-Involvement-of-Marijuana-in-Fatal-Crashes_REVFeb2016.pdf.

¹²³ Wash. State 2016 Update Report, *supra* note 30, at pp. 3, 4, 12.

¹²⁴ Wash. State Traffic Safety Commission, “Washington State Traffic Safety Annual Report 2017,” Dec. 31, 2017, at p. 7, available at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2014/12/2017WTSCAnnualReport.pdf.

¹²⁵ *Id.* at p. 3.

¹²⁶ Interview with Senior Assistant Attorney General Deena Ryerson, Traffic Safety Resource Prosecutor, Oregon Dept. of Justice, March 8, 2018.

average of six fatalities annually. However, these statistics do not consider that nearly one-third of fatal crashes in Oregon are not subject to toxicology screening.¹²⁷

Further study is required to better understand what impact marijuana-impairment has on driving. As previously noted, many traffic fatalities that involve marijuana use are poly-drug cases, so there is no clear evidence in these cases that marijuana—rather than alcohol or another drug—was the cause of the crash.

VII. A Path Forward For New York

A. Recommendations for Legislators

As noted above, thousands of New Yorkers enter our criminal justice system each year for personal use of marijuana, at a time when polls show increasing support by New Yorkers for legalization. A Quinnipiac University poll released in May 2018 found that 63 percent of New Yorkers support legalization.¹²⁸ Other recent polls show similar results: a poll released in February 2018 by Siena College found 56 percent support by New Yorkers statewide, and 60 percent support in New York City.¹²⁹ Another poll released in November 2017 by Emerson College showed 62 percent of New York voters support legalization.¹³⁰ New York’s neighboring states, including New Jersey and Connecticut, have advanced marijuana legalization bills, with polls showing wide support by residents in those states.¹³¹

As a consequence, as in much of the nation, New York’s elected officials, advocates, and other stakeholders are assessing the pros and cons of marijuana legalization. If, as a result of these discussions, New Yorkers at some point choose to legalize the use and sale of recreational marijuana (a decision this office will support), the drafting and implementation of such laws should be informed by the lessons learned in our sister states. As discussed above, our Office’s conversations with prosecutors, law enforcement officers, and regulators in states that have legalized recreational marijuana to date have provided insights into how their states’ marijuana laws have impacted public safety and the criminal justice system in their jurisdictions. Their experiences and expertise form the basis of the following recommendations.

¹²⁷ Oregon State Police 2017 Report, *supra* note 62, at p. 21.

¹²⁸ Poll cited in Glenn Blain, “Poll Shows 63% of New York Residents Support Legalizing Marijuana,” *N.Y. Daily News*, May 3, 2018, available at <http://www.nydailynews.com/news/politics/63-new-york-residents-support-legalizing-marijuana-article-1.3970339>.

¹²⁹ Poll cited in Robert Harding, “Poll: NY Voters Support Legalizing Marijuana,” *The Citizen (Auburn)*, Feb. 13, 2018, available at http://auburnpub.com/blogs/eye_on_ny/poll-ny-voters-support-legalizing-marijuana/article_bdc98c0c-0f82-11e8-9400-8fceeb9d924b.html.

¹³⁰ Poll cited in Glenn Blain, “Majority of New York Voters Support Legalizing and Taxing Marijuana, Poll Reveals,” *N.Y. Daily News*, Nov. 27, 2017, available at <http://www.nydailynews.com/news/politics/majority-n-y-voters-support-legalizing-taxing-pot-poll-article-1.3660456>.

¹³¹ See, e.g., Matthew Ormseth, “Q Poll: Americans Oppose Sessions’ Bid to Crack Down on Pot-Happy States,” *Hartford Courant*, April 24, 2018, available at <http://www.courant.com/news/connecticut/hc-news-q-poll-pot-20180111-story.html>; Payton Guion, “Majority of N.J. Residents Want Legal Weed: Here’s What a New Poll Found,” *NJ.com*, April 19, 2018, available at http://www.nj.com/marijuana/2018/04/will_legal_weed_boost_njs_economy_heres_what_new_j.html.

1. Engagement in the Legislative Process by All Stakeholders

Every legalized state except Vermont passed its legalization laws through a voter ballot initiative rather than through the legislative process.¹³² Many law enforcement representatives interviewed for this report stated that the law enforcement community was not adequately consulted with, and that their positions were not adequately taken into account, in the drafting of their states' ballot measures. This left gaping holes and poorly drafted criminal justice provisions they are now struggling to address. For example, some initiatives did not consider important criminal procedure issues that would have been raised by criminal justice experts had they been consulted. As a result, some states are now litigating subjects such as what constitutes probable cause to search a person's home in states that allow for limited personal cultivation of marijuana; whether the police must return marijuana to its owner upon the close of an investigation (which may force an officer to violate federal law); and how to handle canines who are trained to detect for marijuana as a contraband. Some states' ballot initiatives also did not adequately define what constitutes unlawful behavior in certain instances. For example, it is unlawful in each of these states to consume marijuana while driving or riding in a vehicle, or to have marijuana unconcealed or in an open package in a vehicle. However, some of these statutes are unclear about what constitutes a "concealed" or "open package."

Others also recommend that any legalization law be passed as a statutory amendment rather than as a constitutional amendment. Colorado is now in its fifth year of retail sale, but many regulators, law enforcement officials, and members of the industry agree that the state is still suffering the "growing pains" of establishing a new market, despite having a medical marijuana system in place since 2000. Lawmakers are frequently unable to address problems as they arise because the state's law was adopted as a constitutional amendment. Advocates for legalization wanted the law to be part of the state constitution so a Colorado resident's right to use marijuana could not be easily repealed by a new governor and legislature. But this has made it difficult to amend provisions, even if stakeholders agree that certain changes are necessary.

2. The Importance of Local Control

The possession and smoking of marijuana in both public and private places remains a complicated issue in legalized states, as they struggle to balance quality of life concerns with the desire to reduce people's negative interactions with law enforcement. To address some of these concerns, localities should be given broad discretion that allows communities to tailor marijuana laws to their particular needs and values.

New York in particular is a diverse state with varying population density, culture, topography, and land use, and the impact of growing and consuming marijuana could vary widely, depending on the locality. For example, in suburban or rural areas, residents may not have concerns about indoor smoking by their neighbors. But in densely populated urban environments, residents may not want marijuana smoke circulating through their buildings' ventilation systems. Such localities might allow building owners to ban marijuana smoke in buildings, but allow for other forms of consumption such as vaping or ingesting edibles and beverages. These localities could

¹³² A state ballot initiative allows proposed legislation to be placed on a popular ballot to be approved or disapproved by registered voters.

also choose to permit outdoor smoking of marijuana as they do for tobacco, and make exceptions for parks, subway stations, and other specified locations.

The cultivation of marijuana inside homes also raises varied concerns, depending on the characteristics of a locality. Residents in densely populated urban areas, and even in suburbs, may choose to ban home cultivation because it can emit noxious odors and requires substantial use of water and electricity. Rural areas that are less densely populated may have fewer (or different) concerns.

3. The Black Market and Trafficking

As discussed above, the marijuana black market continues to thrive in legalized states because illegal sellers can earn a greater profit with untaxed, unregulated sales. Most marijuana retail stores are operating on slim or even negative profit margins because of high licensing fees and taxes, as well as the need to keep prices competitive with the black market. To control the black market, New York will have to carefully study the experiences of other states to determine the right tax rate and price point for products. Nicole Elliott, Director of San Francisco's Office of Cannabis, advises that states should consider initially imposing lower tax rates to help participants enter and stay in the market. A state can gradually increase tax rates as market participants begin to earn profits and meet the financial requirements associated with regulatory compliance.¹³³

New York should also carefully consider and limit the number of licenses it grants to market participants. States that do not cap the number of licenses are experiencing an oversaturation of the market. For example, Colorado currently has more than 500 recreational marijuana retail stores, compared to 322 Starbucks. In Denver, there are 169 recreational marijuana stores, compared to 80 Starbucks and 31 McDonalds.¹³⁴ This market saturation has required stores to lower prices in order to compete with each other and the black market. Oregon also does not limit the number of licenses they issue to market participants, and this has contributed to the state's vast overproduction of marijuana being diverted to the black market.

The enormous volume of licensed market participants has also made it difficult for regulators to properly inspect and ensure compliance by cultivation facilities and retail stores. Some legalized states are utilizing a "seed-to-sale" inventory tracking system that allows regulators, at any given moment, to know where a marijuana plant is during the cultivation process. One of the goals of the tracking system is ensure that legally grown marijuana is not diverted to illegal distributors and sellers. In order for such a tracking system to be effective, however, there must be enough analysts to review the data and look for anomalies, as well as enough facility inspectors to ensure the accuracy of the data being provided. Regulators in Oregon say they do not have enough analysts to adequately track the data or the number of inspectors to ensure compliance at facilities and stores.¹³⁵

¹³³ Interview with Nicole Elliott, Director of the San Francisco Office of Cannabis, March 27, 2018.

¹³⁴ See "How Many Dispensaries are in Denver, Colorado?," *My 420 Tours*, Feb. 28, 2018, available at <https://my420tours.com/many-dispensaries-denver-colorado>.

¹³⁵ See Andrew Selsky, "Oregon Marijuana: Lots of Data, Few to Analyze and Check It," *AP*, April 26, 2018, available at <https://www.cnbc.com/2018/04/26/the-associated-press-oregon-marijuana-lots-of-data-few-to-analyze-and-check-it.html>.

4. Marijuana-Impaired Driving

Should New York legalize marijuana, the state should prepare for a possible rise in marijuana-impaired driving by providing funding for the following:

- 1) Expanding the number of officers trained by the state's Drug Recognition Expert program.
- 2) Expanding the capacity of state toxicology labs.
- 3) Supporting scientific research to better understand the correlation between marijuana impairment and driving ability, as well as the correlation between impairment and THC concentration levels.

Additionally, to better understand statistical trends, district attorneys' offices, law enforcement agencies, and toxicology labs should start now collecting information from DUI cases regarding the specific substance(s) at issue in arrests. The lack of such data collection in legalized states has stymied their ability to analyze information comparing the prevalence of marijuana-impaired driving pre- and post-legalization.

5. Regulatory Requirements: Packaging, Labeling, and Security Measures

New York should also establish specific requirements for product packaging and labeling in order to prevent misuse. For example, edibles should not be in a form that may appeal to children (*e.g.*, gummies cannot be in the shape of bears or other animals), and products should be in tightly sealed packages that make it difficult for children to open. Product labels should include what constitutes a proper serving size, and approximately how long it takes for psychoactive effects to occur per serving size. Such steps are necessary to stem rising numbers of emergency room visits, hospitalizations, and calls to poison control centers by users who overdosed on high-potency marijuana after legalization. Retail stores should also be required to implement security measures to prevent burglaries and robberies. This includes security cameras, safes, secure walls and ceilings to prevent break-ins, and a requirement that all products and cash be locked in safes overnight.

Additionally, any legalization law should give localities enough time to establish and implement an effective, tightly controlled regulatory scheme. One frequent concern raised by regulators discussing legalization is the lack of time they had to properly develop and implement rules and regulations. Even in San Francisco, where a robust medical marijuana retail system has existed since 1996, retail sales have not yet started because the city requires more time to implement local regulations. California's marijuana law permitted retail sales to start in January 2018, but as of February 2018, only 14 percent of jurisdictions have completed their regulatory proposals.¹³⁶

¹³⁶ Interview with Nicole Elliott, Director of the San Francisco Office of Cannabis, March 27, 2018.

6. Public Education Campaigns

Finally, as discussed above, there remains confusion in legalized states among members of the public, judges, and law enforcement officials about the lines between legal and illegal possession and use. For example, members of the public often tell officers that they thought smoking marijuana in public is lawful because their state has now legalized recreational marijuana, and smoking tobacco in public is lawful. There is also much confusion about laws concerning cultivation. Washington, which has relatively permissive marijuana laws, bans the home cultivation of marijuana except for licensed medical use. Law enforcement officers frequently hear from members of the public that they assumed home grow is lawful because it is permitted in all other legalized states. To further add to the confusion, localities can pass their own ordinances related to marijuana. For example, Colorado state law permits the home grow of up to 12 plants, but localities can choose to pass stricter laws. States' laws and regulatory schemes also differentiate between recreational and medical marijuana.

In short, residents of these states have not been adequately educated about the new, often complicated, state laws and local ordinances pertaining to marijuana. In advance of any legalization, New York should fund and implement a wide-reaching public education campaign that informs residents about what conduct is lawful and what is still unlawful in their particular locality. The state should also establish and fund training courses for all members of the criminal justice system. Similarly, for the reasons discussed above, New York should also implement and fund a public education campaign regarding the health dangers of marijuana use by children.

B. Dealing with Racial Disparities in Enforcement

As noted above, the public debate about legalizing marijuana has been evolving amid the increasing recognition that criminal enforcement of laws against possession and use has overwhelmingly disfavored communities of color. For example, at a New York City Council hearing on February 26, 2018, City Council Members questioned the New York City Police Department (NYPD) about data showing racial disparity in marijuana arrests. In 2017, 16,925 people in New York City were arrested on the charge of Criminal Possession of Marijuana in the Fifth Degree. Of that total, 86 percent were people of color: 48 percent were black, 38 percent were Hispanic, and 9 percent were white.¹³⁷

The NYPD did not dispute these statistics at the hearing, but testified that the department has the obligation to respond to community complaints of open marijuana smoking, and that

¹³⁷ Statements of City Council Members Donovan Richards and Rory Lancman, NY City Council Hearing, "Oversight – Enforcing Marijuana Laws," Feb. 26, 2018, video available at <http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=593243&GUID=026A8759-3483-4DC6-BD2A-B8CD4396B412&Options=info&Search> (hereinafter NY City Council Hearing). See also NYPD statistics cited in Beth Fertig, "Still Too High? Marijuana Arrests Barely Budget in NYC," *WNYC*, Jan. 16, 2018, available at <https://www.wnyc.org/story/still-too-high-marijuana-arrests-barely-budge-nyc/>; NYS Division of Criminal Justice Services statistics cited in Brendan Cheney, "Racial Disparities Persist in New York City Marijuana Arrests," *Politico*, Feb. 13, 2018, available at <https://www.politico.com/states/new-york/city-hall/story/2018/02/13/racial-disparities-continue-in-new-york-city-marijuana-arrests-248896>.

officers make arrests based on where they receive 311 or 911 complaints.¹³⁸ However, 311 and 911 call data later produced by the NYPD to the City Council show that, of the five precincts where the most marijuana arrests occurred in 2017, only two were in the top five for the number of marijuana-related calls. In 2016, of the five neighborhoods with the most marijuana arrests, only one ranked in the top five for calls.¹³⁹

Politico analyzed this call data from 2017, and found that in El Barrio, a predominantly Hispanic community in East Harlem, there were 304 marijuana-related complaints made to 311 or 911, and 683 arrests were made. In the Upper East Side, a largely white neighborhood, there were 123 complaints, but only 63 arrests. Similarly, in the 113th precinct, a predominately black neighborhood in Jamaica, Queens, there were 281 marijuana complaints, and 280 arrests. In the 84th precinct, which includes wealthier neighborhoods like Brooklyn Heights and Boerum Hill, there were 136 complaints, but only 56 arrests.¹⁴⁰

The February 26, 2018 City Council hearing also cited data showing that racial disparities exist even within neighborhoods. In Forest Hills, a neighborhood in Queens, black and Latino individuals make up 16 percent of the population, but 80 percent of the arrests. In Flushing, Queens, they make up 19 percent of the population, but 71 percent of the arrests. Similar trends in Brooklyn were noted: in Greenpoint, black and Latino individuals make up 19 percent of the population, but 70 percent of the arrests; in Park Slope, they make up 24 percent of the population, but 73 percent of the arrests; and in Williamsburg, they make up 37 percent of the population, but 83 percent of the arrests.¹⁴¹

As noted at the outset of this report, these racial disparities become all the more intolerable in light of the fact that they produce no meaningful criminal justice outcome. In 2017, for example, 5,333 people were arrested in Manhattan for being in possession of a burning marijuana cigarette or having it in open view.¹⁴² Of that total, 4,297 arrestees were brought to the precinct, booked and fingerprinted, and issued a Desk Appearance Ticket to appear in Criminal Court at a date in the future. Our office declined to prosecute 163 of those cases at the outset and later dismissed without charges 17 cases prior to arraignment. Of the remaining cases, 2,596 received an Adjournment in Contemplation of Dismissal (ACD), which results, after a period of time, in a dismissal and a sealed record.¹⁴³ The remaining 924 pleaded guilty to a misdemeanor,¹⁴⁴ and of these, at least 96

¹³⁸ Testimony of Chief Dermot Shea, NYPD Crime Control Strategies Bureau, NY City Council Hearing, *supra* note 137.

¹³⁹ Data provided by NYPD to NY City Council cited in Erin Durkin, “New Data Raises Doubts on NYPD’s Claim That 911 Grips Lead to Pot Arrests Amid Racial Gap Criticism,” *NY Daily News*, Feb. 27, 2018, available at <http://www.nydailynews.com/new-york/nypd-claim-911-gripes-lead-pot-arrests-wrong-article-1.3845656>.

¹⁴⁰ Analysis of NYPD data by Brendan Cheney, “Data Don’t Show Link Between Marijuana Complaints and Arrests,” *Politico*, March 7, 2018, available at <https://www.politico.com/states/new-york-city-hall/story/2018/03/07/data-dont-show-link-between-marijuana-complaints-and-arrests-294825>. See also Noah Manskar, “NYPD’s Marijuana Arrest Claims Don’t Add Up, Figures Show,” *Patch*, Feb. 28, 2018, available at <https://patch.com/new-york/new-york-city/nypds-marijuana-claims-not-backed-complaint-figures>.

¹⁴¹ City Council Member Donovan Richards, NY City Council Hearing, *supra* note 137.

¹⁴² NY Penal Law § 221.10(1).

¹⁴³ Criminal Procedure Law § 170.15 permits a case to be dismissed or sealed, without any conviction, after a period of adjournment.

¹⁴⁴ Most, if not all, of the defendants who pleaded guilty were not offered an ACD because they had previously consented to an ACD for prior marijuana offenses.

percent either paid a fine, performed community service, were sentenced to time served, or received a conditional discharge.¹⁴⁵

Similarly, in the same period, 120 people were arrested for possessing more than 25 grams but less than two ounces of marijuana.¹⁴⁶ Of that total, 68 arrestees were brought to the precinct, booked and fingerprinted, and issued a DAT. Of those cases, three were dismissed without charges, and 55 received ACDs. Twenty-six pleaded guilty to a misdemeanor, and at least 96 percent of these paid a fine, performed community service, or were sentenced to time served.¹⁴⁷

In short, these arrests waste an enormous amount of criminal justice resources for no punitive, rehabilitative, deterrent, or other public safety benefit. And they do so in a racially disparate way that stigmatizes and disadvantages the arrestees and causes significant anger and distrust of the police in a large segment of our community.

It is for this reason that, as noted above, our office has decided no longer to expend our limited resources to criminally prosecute people who are arrested in Manhattan for smoking or possessing small amounts of marijuana. This is not to say that we believe individuals should be able to smoke marijuana in public or possess it with absolute impunity. It is simply that such conduct need not be addressed with the full weight and resources of our criminal justice system. Instead, as with quality-of-life and other infractions such as drinking alcohol in public, public urination, and – now – jumping the turnstile, low-level marijuana offenses should be dealt with through the issuance of summonses and appropriate public education campaigns.

Optimally, this result should be achieved through legislative reform that recognizes the policy logic and economic reality of this position. At the end of the day, our state should not have to rely solely on discretionary decisions by local police and prosecutors' offices to ensure that our laws are sensible and just. In the meantime, our office is indeed vested with the discretion to make such choices for the residents of Manhattan, which we will continue to do as fairly and thoughtfully as we can.

Finally, we should recognize that legalization itself will by no means eliminate the problem of racial disparity in the enforcement of lower-level marijuana offenses. Legalization would vastly reduce the number of people brought into the criminal justice system, but arrests would no doubt continue for some categories of conduct that the legislature decides to criminally prohibit. As the above survey of legalized states makes clear, such arrests may well continue to disproportionately burden communities of color. For this reason, police, prosecutors, and others involved in criminal justice throughout our state should continue to be mindful of these disparities, even in the wake of any legalization, because local discretion will continue to be a critical mechanism for achieving fairness and balance in our system.

¹⁴⁵ Of the remaining four percent, 11 individuals received jail time, and 30 individuals' sentencing data is unavailable.

¹⁴⁶ NY Penal Law § 221.10(2).

¹⁴⁷ Sentencing data is unavailable for the remaining four percent.

Conclusion

We recognize the complexity of the issues addressed in this report, and that there will continue to be serious disagreement and debate about the recommendations and positions advanced herein. We stand ready to assist in the effort to determine the fairest and most sensible way forward for the people of the state of New York.

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We are grateful to the individuals who shared their knowledge, experiences, and advice for the research and preparation of this report.

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February 27, 2019

FOR THE RECORD

**BRONX DISTRICT ATTORNEY DARCEL D. CLARK
STATEMENT TO CITY COUNCIL COMMITTEES ON PUBLIC SAFETY**

As legalization of marijuana approaches a reality in our state, I and my fellow prosecutors have worked to reform our criminal justice system, including reducing the harmful impacts that the criminalization of marijuana has had on individuals. At the same time, we must maintain public safety. This requires balancing the arc of justice while ensuring the rule of law.

I am mindful of the disproportionate impact of marijuana arrests on young people of color in the Bronx. In the fourth quarter of 2018 alone, approximately 90 percent of individuals arrested for marijuana possession in the Bronx were either Black or Hispanic.

As such, until a change in the Penal Law occurs, when an arrest is made for marijuana possession and burning cases, I have instructed Assistant District Attorneys in my Office to decline to prosecute the arrest when only a marijuana charge appears on the complaint, and then direct the police officer to issue a summons.

This policy carefully weighs the public safety concerns with the realization that far too often these prosecutions create undue obstacles on individuals and the community as whole.

When legalization occurs, I stand ready to work with all stakeholders –my fellow district attorneys, the City Council, the Mayor, and others – on successful implementation of legislation such as those pending before the City Council and expunging past misdemeanor marijuana convictions. This helps us move forward by improving public safety, reducing collateral consequences, and creating a fairer and more equitable criminal justice system.



FOR THE RECORD

**Testimony of Denise M. Richardson, Executive Director
The General Contractors Association of New York
Joint Hearing
Committees on Public Safety, Justice System, Consumer Affairs and
Business Licensing, and Civil & Human Rights
February 27, 2019
Into 1445**

Thank you for the opportunity to submit comments for the record on behalf of the General Contractors Association of New York ("GCA:"). It is imperative that the exemptions contained within Intro 1445 be modified to include all construction industry positions.

The GCA represents the unionized heavy civil and public works infrastructure contractors that construct New York City's mass transit, parks, water, wastewater, road, highway, and bridge networks along with the building foundations that shape the skyline and make New York a vibrant city.

With the combined efforts of our employer members and our unions, the GCA's safety training and employee compliance programs have resulted in a safety track record that is better than both national, state and general city construction incident rates. This accomplishment did not come easily, but our investment of time, resources and training assures our workforce, and the public, that every effort is being made to maintain a safe work site.

In 2017, after a series of construction industry incidents, the City Council engaged in thoughtful debate about the need for improvements in construction industry safety training and enforcement. That discussion resulted in Local Law 196 that now requires a minimum of 40 hours of intensive construction safety training. The GCA was, and continues to be, a strong supporter of the City's construction safety initiatives, as we firmly believe, that whether union or non-union, every

worker on every site has the right to the knowledge and training that will keep them from an unfortunate incident.

A key to a safe worksite is awareness, by everyone on the site, of their surroundings, the actions of their co-workers, and the public. In construction, situational awareness is not a fancy buzzword, it can mean the difference between preventing and experiencing an accident. Anything that could impair that awareness must be prohibited.

A prohibition of drugs and alcohol on every job site is a critical part of a contractor's safety program, and pre-employment drug and alcohol testing is the first step in creating a safe workplace.

Intro 1445 acknowledges the need to exempt construction industry positions that require the operation of heavy equipment, but that does not go far enough. All construction industry positions must be included in the exemption. Construction workers operate and handle tools, work around equipment, unload trucks, manage jobsite traffic, and equally important, protect the public as they access areas immediately adjacent to job sites. None of these positions can risk being performed by an individual using drugs or alcohol.

In New York, Labor Laws 240 and 241 ("the scaffold law") assign strict liability to employers for construction-related accidents. A failure to permit construction industry employers to screen their workforce for marijuana or other drug or alcohol use exponentially raises the employer's risk of a jobsite accident and later strict liability.

The scaffold law and Local Law 196 were enacted to assure both the construction industry workforce and the public that employers take seriously their construction site safety responsibilities. The City Council should not now seek to contradict that message by prohibiting an employer from conducting pre-employment drug testing.

No one should have to put their personal safety at risk because they are being asked to work with someone that uses impairing substances. The failure to exempt all construction industry positions from the provisions of Local 1445 will place thousands of hard-working individuals at risk of being the victim of a

worksite accident. This is an unacceptable position for a legislative body that purports to be concerned about construction industry working conditions.

The General Contractors Association strongly urges that the provisions of Intro 1445 include an exemption for all construction industry positions.

Thank you.



TESTIMONY

Oversight: Marijuana Legalization: Equity and Justice for NYC Council Chambers, City Hall

Presented to:

New York City Council Committee on Public Safety, Donovan Richards, Jr., Chairperson
New York City Council Committee on Justice System, Rory Lancman, Chairperson
New York City Council Committee on Consumer Affairs & Business Licensing, Rafael L. Espinal, Chairperson
New York City Council Committee on Civil & Human Rights, Mathieu Eugene, Chairperson

Wednesday, February 27, 2019

Prepared By:

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Good afternoon, distinguished members of the Committees on Public Safety, Justice System, Consumer Affairs & Business Licensing, and Civil & Human Rights.

My name is Julian McKinley and I am the Communications Director for the Democracy at Work Institute, the only national organization dedicated to building the field of worker cooperative development. Worker cooperatives are values-driven businesses that put worker and community benefit at the core of their purpose through worker-ownership and democratic control of the business. The Democracy at Work Institute was created by the US Federation of Worker Cooperatives (USFWC) to ensure that worker cooperative development in economically and socially marginalized communities is adequately supported, effective, and strategically directed.

Ensuring Cannabis Equity in NYC

The opening of this multi-billion dollar industry presents a tremendous opportunity for all New Yorkers. Without a strong equity agenda in place from the outset, however, those who paid the drug war's biggest costs—such as severely limited employment and educational opportunities as a result of overpolicing and mass incarceration—will continue to suffer the unjust consequences of outdated and unjust policy. Centering communities most detrimentally impacted by the drug war in all facets of legalization would bring about not just avenues for participation and a chance to thrive in this emergent industry but an opportunity for redressing past harms.

We support in general Resolution 744, which aims to remedy disparate burdens on people of color in the enforcement of marijuana prohibition by, amongst others, reinvesting tax revenue from legal marijuana sales. However, we want to highlight issues in implementation in other communities with similar practices, which we can learn from and improve upon by including more robust equity supports. A foundational element of the Oakland, California marijuana equity program is a \$3.4 million pool seeded through cannabis tax revenue. The pool is used for zero-interest loans of up to \$100,000 per business for equity licensees. Unfortunately, these loans have been delayed in disbursement by over a year or more, as they require the collection of tax revenue to seed it. Thus, equity licensees already at a capital disadvantage in comparison to venture-funded or otherwise well-resourced general licensees (licensees who do not come from communities that have been disproportionately impacted by marijuana prohibition) have had an even later start and a more difficult time competing and entering a crowded market, where timing and early entry are key to success.

We can learn and improve upon equity programs that exist in states with adult use of marijuana. For example, other states' equity programs lack incentives to create and enable worker-ownership as a means to level the playing field for communities most adversely affected by prohibition to enter and succeed in the marijuana industry. A marijuana equity program for New York City should include shared ownership through cooperative businesses, which can unlock opportunity and facilitate wealth creation in impacted communities.

Worker-ownership has a strong, proven track record in New York City as a tool to economically advance low-income communities of color, thanks to the support of City Council and work led by the Worker Cooperative Business Development Initiative.

Democratically-managed, worker-owned businesses have a history in the U.S. and around the world as a means for working people to access business ownership, create better jobs, and build wealth in their communities.

Jobs at worker cooperatives—where the workers are the owners—tend to offer extensive training and opportunities for skill-building. They provide better wages and have greater participation than conventional companies. They see low turnover and high survival rates, and profits stay in the local economy.

A marijuana equity program for NYC that includes supports and incentives for cooperative ownership in the industry will undoubtedly create stronger points of entry and opportunity for economic inclusion for low-income communities of color locked out of the industry due to lack of resources and capital.

We recommend that City Council include worker cooperatives and shared ownership supports as part of equity legislation, including that proposed by Resolution 744. This can include zero-interest loan set-asides for businesses structured as worker-owned cooperatives owned by members of directly impacted communities. In addition, we recommend fast-track licensing with worker-owned businesses, especially cannabis testing laboratories, which the executive director of the state Office of Cannabis Management has the discretion to mandate and contract with. Also, preferred city and state contracting and procurement quotas for worker-owned ancillary businesses that are part of regulating the marijuana industry-- such as for video monitoring, compliance, and seed-to-sale traceability.

Conclusion

On behalf of the Democracy at Work Institute, I want to thank the City Council for the opportunity to testify. We support the call for cannabis equity through explicit equity provisions and advocate for the inclusion of shared ownership—especially worker ownership—in this effort so that New Yorkers who have disproportionately suffered from criminalization, especially those in low-income communities of color-- see justice and immediate and powerful avenues for participation in the industry.



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

**Jacqueline Caruana – Senior Trial Attorney, Criminal Defense Practice
*BROOKLYN DEFENDER SERVICES***

Presented before

**The New York City Council Committees on Public Safety, Justice System, Consumer Affairs &
Business Licensing, and Civil & Human Rights**

Public Hearing on Marijuana Legalization

February 29, 2019

My name is Jacqueline Caruana and I am a Senior Staff Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 35,000 clients in Brooklyn every year. This includes thousands of people arrested for marijuana possession or sale, or fighting deportation, eviction, or a loss of custody or parental rights due to marijuana-related allegations or convictions. I thank Chairpersons Donovan Richards, Rory Lancman, Rafael Espinal, and Mathiew Eugene, and members of their respective committees for the opportunity to testify on the legalization of adult marijuana use.

NEW YORKERS NEED AND WANT URGENT REFORM

There is broad popular support for marijuana legalization. Across the country, a large majority (64%) support full legalization of marijuana; this includes a slim majority of Republicans (51%).¹ A recent Emerson College poll showed two to one support for legalization among New York State residents.² Yet more than 800,000 people have been arrested for low-level marijuana possession over the past 20 years. The vast majority were people of color, despite government surveys showing equal or greater use by white people.³ Untold numbers of people are being detained and deported by ICE, losing their children to foster care, or suffering eviction from subsidized housing, in whole or in part, because of marijuana prohibition. Meanwhile, states with legal marijuana markets are benefiting from more than \$1 billion in new—or newly above-ground—economic activity and hundreds of millions of dollars in taxes and fees every year.^{4,5} The Governor’s public support of legalization has helped to expand momentum and we are hopeful that a comprehensive bill can pass this year.

BDS is proud to support the Marijuana Regulation and Taxation Act (MRTA), S.1747/A.3089 and the city council’s resolution urging the Governor to sign and enact the MRTA, **Reso 0075-2018**. The key components of the MRTA include:

- Allowing adult marijuana use and ending criminalization;
- Automatically vacating as many marijuana convictions as possible;
- Ending punitive responses to marijuana use or possession by child protective services agencies, absent clear and convincing evidence of unreasonable danger to children;
- Ending adverse housing impacts of marijuana use wherever possible;
- Creating an inclusive industry in which people who have been targeted under marijuana prohibition can use their experience and profit from legalization; and
- Reinvesting marijuana tax revenue in the communities that have been most harmed under prohibition.

Accordingly, BDS also supports and urges the coordination of the New York State Division of Criminal Justice Services (DCJS), the New York State Office of Court Administration, and the New York City District Attorneys to vacate the records of all city misdemeanor marijuana convictions, as proposed in **Reso 0641-2018**. Furthermore, BDS supports the City Council’s resolution calling on Congress and the President to sign the Marijuana Justice Act of 2017, so

¹ Justin McCarthy, *Record-High Support for Legalizing Marijuana Use*, U.S. GALLUP NEWS, Oct. 25, 2017, <http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx>.

² Marijuana Policy Project of New York & Drug Policy Alliance, *New Poll Shows 2 to 1 Support for Legal Marijuana Use in New York State* (2017), <http://www.drugpolicy.org/press-release/2017/11/new-poll-shows-2-1-support-legal-marijuana-use-new-york-state>.

³ Melissa Moore, *Lawmakers Must Legalize Marijuana in New York to Support Racial and Economic Justice*, N.Y. DAILY NEWS, Nov. 27, 2017 at <http://www.nydailynews.com/opinion/lawmakers-legalize-marijuana-new-york-support-justice-article-1.3661162>.

⁴ Tom Huddleston, Jr., *Colorado Topped \$1 Billion in Legal Marijuana Sales in 2016*, FORTUNE, Dec. 13, 2016 at <http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales/>.

⁵ Aaron Smith, *Colorado Passes a Milestone for Pot Revenue*, CNN MONEY, July 19, 2017 at <http://money.cnn.com/2017/07/19/news/colorado-marijuana-tax-revenue/index.html>.

long as this federal legislation comports with the protections and guarantees specifically outlined in the MRTA. (**Reso 0743-2019**).

We urge the city and the state to pass legislation that will automatically vacate all marijuana convictions, including felonies and violations, not just misdemeanors. However, before these convictions are vacated, there must be a procedure in place for someone who is an immigrant to challenge their marijuana conviction based upon procedural and substantive violations of their constitutional rights. The city and state must establish a framework for the automatic relief from prior marijuana convictions, because no one should ever have a criminal record for marijuana – past or future. It is critical that the MRTA and any future legislation by the city automatically vacate past marijuana convictions. It is paramount that marijuana legalization should mark an end to the host of consequences faced by New Yorkers who were previously swept into the criminal justice system for marijuana use.

RACIAL DISPARITIES IN MARIJUANA ENFORCEMENT ACROSS NEW YORK CITY

We know that one of the main reasons for marijuana legalization is that the laws were not being enforced equally. A report commissioned by the Drug Policy Alliance examining the 60,000 low-level marijuana possession arrests in New York City in the first three years of the de Blasio administration found that 86% involved Black or Latinx people—a racial disparity that has remained roughly constant for decades. This follows deliberate policing strategies targeting both neighborhoods in which people of color are a majority of residents and individual people of color within majority-white neighborhoods. In 2016, the New York Police Department (NYPD) arrested 362 people in West Harlem for this offense, yet only 14 in the Upper East Side, which has more than three and a half times as many residents. Of those 14 arrests, 50% involved Black and Latinx people, despite these groups making up only 10% of residents. Throughout Manhattan, Black people are 13% of the population and 45% of the people arrested for this offense, amounting to ten times the arrest rate for white people. In fact, more Black people were arrested for this offense in Manhattan than white people citywide. Across the East River, in the Mayor’s home neighborhood of Park Slope, Black and Latinx people comprise 24% of residents and 73% of those arrested for this offense.⁶

In reviewing data from 2017, a reporter found that, when white people were arrested, they were significantly more likely to have their cases dismissed by District Attorneys, and cases involving Black and Latino people were approximately twice as likely to end in a conviction compared to those involving white people.⁷ Of course, these disparities extend to arrests for allegations of marijuana sales. Of the 80 people arrested for the lowest-level marijuana sale charge (Criminal Sale of Marijuana in the 5th degree) in New York City in 2016, only 1 was white.

⁶ Harry Levine, *60,000 Jim Crow Marijuana Arrests in Mayor De Blasio’s New York* (Drug Policy Alliance & Marijuana Arrest Research Project 2017), https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.

⁷ Brendan Cheney, *For Non-white New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO, May 9, 2017 at <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807>.

94% of those arrested for the more common Criminal Sale of Marijuana in the 4th Degree were Black and/or Latinx, despite research showing users typically buy drugs from their peers.⁸

It is because of this systemic and disparate treatment, that BDS supports legislation that prioritizes individuals with prior marijuana convictions in issuing licenses and offering employment within the newly regulated marijuana industry as outlined in **Resos 0738-2019, 07341-2019, and 0744-2019**. It's imperative the individuals that we represent, the residents of New York City, that have been so harmed by the prohibition and illegalization of marijuana to have a meaningful opportunity to participate in this industry, to have business ownership, to obtain licenses, and to receive gainful employment.

MARIJUANA ENFORCEMENT AND COLLATERAL CONSEQUENCES

Eviction, Housing Instability, and Marijuana Prohibition

BDS' Civil Justice Practice assists clients with a wide range of consequences stemming from justice system involvement. Many of these individuals and families, disproportionately people of color, suffer diminished housing stability and future housing options by low-level marijuana arrests or convictions.

Currently, a mere arrest for marijuana possession will lead to NYCHA beginning a termination of tenancy proceeding against the head of household. The proceeding is brought quickly after arrest and NYCHA often forces the eviction proceeding to go forward before any related criminal proceeding has concluded. For this reason, tenants often end up being coerced into agreeing to be on housing probation, and permanently banning a member of their family from even visiting their home, all on the basis of marijuana charges alone. This means that even if the criminal case is eventually dismissed and sealed, a NYCHA tenant has already put their housing at risk.

Being on probation or having to permanently exclude a family member is incredibly risky for NYCHA tenants. A violation of probation, which could include paying your rent late, or forgetting to recertify on time, subjects you to a termination of your tenancy. Permanent exclusion is even more burdensome; tenants must allow NYCHA to randomly inspect their apartments, and if one specific room is not available for inspection at that time, for example a family member is sleeping and the inspectors are denied access to that room, NYCHA records a violation and the tenant can and often will be evicted. Not to mention, even a brief surprise visit from the excluded family member results in eviction.

Termination of tenancy proceedings based on marijuana charges are the most dangerous for NYCHA's most vulnerable tenants. If a tenant suffers from either mental or physical disabilities

⁸ Source: NYS Division of Criminal Justice Services

that might make it difficult for them to appear on their hearing date, that tenant is defaulted, which means their tenancy is terminated and they will be evicted. A tenant often does not even find out about this default until it is too late to appeal or re-open the default, and NYCHA regularly denies applications to re-open a default. This means that NYCHA's most vulnerable residents are most at risk for actually losing their low-income housing based merely on marijuana possession charges.

Equally as important is the fact that applications for NYCHA housing are routinely denied based on marijuana convictions, or even simply marijuana use. A question NYCHA asks as part of the admission interview is whether or not the prospective tenant has used marijuana. If the tenant admits that they have used marijuana any one time in the last one year, their application will be rejected. A conviction for criminal possession of marijuana in the fourth or fifth degrees results in an application being banned from eligibility for 3-5 years. Even a criminal case that results in a marijuana ACD will ban the applicant for the one year period prior to sealing.

For these reasons, BDS supports **Reso 0296-2018**, calling upon NYCHA to add unlawful possession of marijuana and criminal possession of marijuana in the fourth and fifth degrees to its list of "overlooked offenses," and stop considering these offenses as grounds for termination of tenancy. However, we urge the City Council to enact legislation that prevents NYCHA from using possession of marijuana as a basis for seeking termination or probation under any circumstances.

Probation, Parole, and ATI programs

Individuals on probation or parole stand the to lose the most from a low-level marijuana arrest, because they can be sent to jail or prison. Moreover, these individuals can have their probation or parole revoked if they test positive for smoking marijuana. If the MRTA and corresponding federal, state, and local legislation makes it legal for a person to smoke marijuana, than individuals on probation or parole should be treated no differently. BDS supports **Int 1427-2019**, as it proposes to amend the New York City administrative code in order to prohibit the department of probation from drug testing probationers for marijuana use. This proposed amendment, however, includes a provision that would allow probation to test for marijuana use under certain circumstances. BDS urges the City Council to prohibit the department of probation from drug testing for marijuana under ANY circumstance. Moreover, BDS urges the City Council to call for the same prohibition for parolees.

It is important for the Council to note that many individuals involved in the criminal justice system in Brooklyn, and throughout the City, are participating in programs called ATI's, or Alternative to Incarceration programs. These programs are essential for assisting individuals with job training, education, and counseling in order to provide the best chance of avoiding incarceration, rearrest, and/or a permanent criminal record. Many of these programs consistently drug test their participants for marijuana use and a positive test result can cause a participant to be discharged from the program and potentially serve time in jail or prison. BDS urges the Council and the Courts to be consistent when responding to the new cultural

understanding of marijuana use and encourage ATI programming to stop drug testing participants for marijuana.

THE VIEW FROM KINGS COUNTY CRIMINAL COURT

Our criminal defense attorneys meet their clients on the brink of crisis, generally within 48 hours of an arrest. The most common cases they handle include allegations of turnstile jumping, possession of a crack pipe, driving on a suspended license, stealing essentials like a bar of soap, trespass (often shelter-seeking) or, despite years of pronouncements by policymakers and prosecutors to the contrary, low-level marijuana possession. The Brooklyn District Attorney's office received a lot of attention for announcing that it would decline to prosecute most low-level marijuana possession cases in 2014; in reality, the office prosecuted 83% of these cases in 2016. Finally, earlier this year, Brooklyn prosecutors began declining to prosecute the majority of low-level marijuana possession cases and dismissing those that come into court via Desk Appearance Tickets.

However, we are now seeing an increase in arrests and prosecution for the possession of so-called vape pens, or electronic smoking devices, as Criminal Possession of a Controlled Substance in the Seventh Degree (CPCS7). This charge is typically reserved for possession of non-marijuana drugs, or drug residue, and is often treated more harshly, even though vaping may create less of a public nuisance than smoking. (Under the Penal Law, concentrated marijuana products used in vape pens can be charged as either CPCS7 or Criminal Possession of Marijuana in the Fifth Degree.) The fact that a person is in possession of THC oil as opposed to the marijuana plant should not make any difference in whether a person is arrested or prosecuted. This practice makes no sense. Ironically, one of the exceptions in the Brooklyn DA's policy is to continue prosecuting marijuana where the police say a person is 'creating a genuine nuisance,' but THC oil and vaping are actually the least intrusive method of consumption." BDS represented 23 individuals arrested for possession of THC oil, charged as Criminal Possession of a Controlled Substance, between Sept. 4 and Nov. 12 of 2018.

As such, BDS supports **Reso 0745-2019**, which calls upon the State Legislature to pass, and the Governor to sign, legislation related to the reclassifying of THC and all other marijuana based products from a controlled substance to the equivalent of flower marijuana.

Additionally, BDS also supports the legalization of synthetic cannabis. While the legislature contemplates legalizing marijuana, BDS wants to encourage elected officials not to exceptionalize flower marijuana as the only socially acceptable recreational drug. Synthetic Cannabis is also being prosecuted as a controlled substance, in much the same way as THC oil is being prosecuted.

The gulf between the rhetoric of policymakers and the reality we see in court underscores the need for legislative action. Moreover, the statutory criminalization of marijuana, not just its enforcement, drives discriminatory broken windows policing. The oft-claimed "odor" of marijuana and the alleged observation of a flicked marijuana cigarette are two of the most

common pretexts officers use to justify unconstitutional stops and frisks, or turn car stops into full blown searches. Much like allegations of failure to signal, odor of marijuana is notoriously difficult to disprove in court, hence the commonality of its use as a pretext. All that said, simply ending all arrests and summonses for marijuana spare thousands of New Yorkers the trauma and burden of criminal court involvement, fines, and countless consequences.

Once in court, most low-level marijuana possession cases across New York City resolve with no criminal sentence. This is why court watchers often say “the process is the punishment.” After formally charging people, prosecutors generally do not seem to care about marijuana. However, the absence of a criminal sentence does not mean there is no additional punishment. Beyond the harm that can happen between arrest and arraignment, cases that result in an Adjournment in Contemplation of Dismissal (ACD), remain open and visible to prospective employers and landlords for six months to a year.⁹ Cases that result in non-criminal violations trigger costly court surcharges and erect legal barriers to civil lawsuits for police misconduct. Cases that result in misdemeanor convictions result in even steeper surcharges and often permanent criminal records. Children who are removed from their parents during an arrest, even for short periods of time, must deal with the known trauma of removal, and families bear the burden of mending this harm over many months and years.

Importantly, I can only speak to marijuana cases in Brooklyn; in other parts of the state, where jail populations have doubled while that of New York City jails has shrunk by half, people may be much more likely to suffer pre-trial detention on bail or Misdemeanor jail sentences.

Client Stories

[Note: All client names have been changed]

Mr. P was stopped by police as he left the NYCHA building where he lives as a tenant of record based on an outdated trespass notice issued 11 years earlier. Police found a small amount of marijuana on him and arrested him for trespass and marijuana possession. He was detained overnight. The case resolved with an ACD but Mr. P was forced to do a day of community service. Mr. R is Black and 38 years old.

Ms. R was illegally searched and found to have a small amount of marijuana. She also had an open summons warrant for having an open container of alcohol that she had failed to pay. Police arrested her and detained her overnight. Her BDS attorney was able to secure an ACD, but the case was slated to remain open for a year. Recently, Mr. R learned that the company for which she works conducts random background checks and she is at serious risk of losing her job. Now, her attorney is working to get the ACD immediately sealed, but it is unclear whether the court will grant it. Ms R. is South Asian and 22 years old.

⁹ Source: NYS Division of Criminal Justice Services

Mr. J was in the hallway of his apartment in Brooklyn, a NYCHA building, where he lives with his family. That evening the warrant squad came into the building and arrested Mr. J. Earlier in the year, Mr. J received a summons for possession of marijuana in the Bronx. Mr. J did not have the money to pay the summons so a warrant was issued for his arrest. Mr. J had to spend a night in jail and when he appeared before the judge, the District Attorney dismissed the case. Mr. J is black and 19 years old.

Mr. M was arrested by an undercover officer and charged with a felony for selling synthetic cannabis to this undercover officer. Approximately 3 months later, his charges were dismissed because a lab report confirmed that the substance he was accused of selling wasn't in fact synthetic cannabis. It is worth noting that the District Attorney's office had access to the NYPD lab report in this case 6 days after Mr. M was arrested but did not disclose the report for 3 months. Mr. M is black and 32 years old.

MARIJUANA PROHIBITION AND RESOURCE ALLOCATION

As a public defense organization, Brooklyn Defender Services is principally concerned with the direct impacts of drug laws and enforcement on the people we represent and their families and communities. That said, we recognize that the fiscal and economic impacts of drug policy also play a major role in their daily lives. For example, most of our clients or their children attend or attended public schools with inadequate funding. According to the New York State Board of Regents, schools are owed billions of dollars in funding under the Campaign for Fiscal Equity ruling, with the majority owed to schools with high populations of Black, Latino and immigrant students.¹⁰ Without the resources for a State Constitutionally-mandated "sound basic education," many of our public schools have infamously become pipelines to prisons and jails. If funds currently spent on drug enforcement were instead reinvested in school-based mental health clinics and restorative justice programs, school environments would improve and administrators and teachers would be better able to address any behavioral problems without calling 911 or issuing suspensions and expulsions. If funds currently spent on overtime for police officers who make low-level marijuana possession arrests near the end of their shifts were instead reinvested in making addiction treatment more widely available and accessible, perhaps overdoses would decline rather than increase or plateau at record-high levels.

The fact that marijuana and other drug prohibition is the status quo should not exempt it from close scrutiny. This hearing is a critical example of such scrutiny and the upcoming State budget negotiations provide ample additional opportunities for reconsideration of existing funding choices. While the City and State have together spent tens of millions of dollars every year criminalizing mostly people of color for low-level marijuana possession, the State has provided more than \$15 million dollars in *subsidies* to mostly or all white-owned craft wineries,

¹⁰ *Brennan Ctr. for Justice, Campaign for Fiscal Equity V. State of New York* (2006), <https://www.brennancenter.org/legal-work/campaign-fiscal-equity-v-state-new-york>.

breweries, distilleries and cideries in recent years.^{11,12} These resource allocations expand the disparities in health, economic success, and liberty in our society. In addition to simply legalizing and regulating adult marijuana use, the MRTA would foster significant economic growth and meaningfully shift the balance toward justice and equality.

Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact our clients. If you have any questions, please feel free to reach out to Jared Chausow, our Senior Policy Specialist, at 718-254-0700 ext. 382 or jchausow@bds.org.

¹¹ Robert Harding, *Regulatory Reforms, Tax Credits Help NY Craft Beverage Producers Save \$15M*, AUBURN CITIZEN, May 9, 2017 at http://auburnpub.com/blogs/eye_on_ny/regulatory-reforms-tax-credits-help-ny-craft-beverage-producers-save/article_a593fbb4-0433-11e7-b486-5b9c7090db7a.html.

¹² Marijuana Arrest Research Project, Loren Siegel & Harry G. Levine, *\$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests* (Drug Policy Alliance 2011), <http://marijuana-arrests.com/docs/75-Million-A-Year.pdf>.

**New York City Council
Committee on Public Safety Jointly with the Committee on Justice System,
the Committee on Civil and Human Rights and
the Committee on Consumer Affairs and Business Licensing**

Hearing re: Marijuana Legalization: Equity and Justice for NYC.

February 27, 2019

Written Testimony of The Bronx Defenders

By Eli Northrup, Associate Special Counsel to the Criminal Defense Practice

Chairmans Richards, Lancman, Eugene, and Espinal, my name is Eli Northrup and I am Associate Special Counsel of the Criminal Defense Practice at The Bronx Defenders. The Bronx Defenders (“BxD”) has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 28,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, the loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

I. Marijuana Legalization Must Address Past Harms

As a holistic defense organization we have seen the ways that the disparate enforcement of marijuana laws have hurt our clients—not only in criminal court, but in family court, housing court, civil proceedings, and especially in immigration proceedings. We are encouraged that lawmakers are finally acknowledging what we have known for a long time: that despite similar rates of marijuana usage across racial lines, marijuana enforcement overwhelmingly and disproportionately targets only certain people for arrest—namely black and hispanic men.¹

¹ *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio’s New York*, Drug Policy Alliance and Marijuana Arrest Research Project, July 2017 (https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf) (“*To sum up: In New York City neighborhoods with low rates and numbers of arrests for marijuana possession, and with relatively few black and Latino residents, blacks and Latinos were most of the people police arrested in 2016 for possessing marijuana. And in neighborhoods with high rates and numbers of arrests for marijuana possession, and with high percentages of black and Latino residents, nearly all of the people arrested for possessing, marijuana were blacks and Latinos.*”)

Let's just be honest here: Marijuana has effectively been legal for white people in New York City for years. As referenced in the New York State Department of Health's Regulated Marijuana Impact Assessment, submitted to Governor Cuomo in July of last year, in 2017 alone 86% of people arrested for misdemeanor possession of marijuana were people of color.² And white people who were arrested for marijuana offenses were 50% more likely to resolve their case with an adjournment in contemplation of dismissal than black defendants. In large part, the recognition of this racial bias is what finally led to this legalization effort. But simply changing the law to make it legal to possess and smoke marijuana going forward is not enough. Any reform must be restorative—it must repair the harm caused by decades of racially disparate enforcement.

A. Criminal Records Must be Automatically Sealed

We support Resolution 0641-2018 which calls on the coordination of the New York State Division of Criminal Justice Services (DCJS), the New York State Office of Court Administration, and New York City District Attorneys to expunge the records of all city misdemeanor marijuana convictions. No one should ever have a criminal record for marijuana possession—either in the past or the future. It is critical that any legislation legalizing marijuana also automatically seals past marijuana convictions. Otherwise the disparity in enforcement from the past will continue to haunt people in the future. Marijuana legalization should mark an end to the host of collateral consequences faced by New Yorkers who were previously swept into the criminal justice system for marijuana use. Having a criminal record can lead to loss of housing, employment opportunities, and the ability to get student loans.

Moreover, expungement must be automatic to ensure that all New Yorkers with past marijuana convictions benefit from criminal record clearing. If expungement is not automatic, only a fraction of the population eligible for expungement will benefit from it. It is also vital that these sealing provisions be crafted to ensure immigrant New Yorkers can also benefit. To protect immigrant New Yorkers, marijuana reform legislation must preserve the right to challenge the constitutionality of marijuana-related convictions. Convictions that are vacated solely for rehabilitative or policy reasons or sealed by the state are not eliminated for immigration purposes.³ The sealing language proposed in the Marijuana Regulation and Taxation Act has been carefully crafted to address these concerns.

The impact of a marijuana possession conviction can be devastating for non-citizen New Yorkers, even green card holders. For example, a green-card holder with a *single* marijuana violation could be held at the airport after returning from a trip abroad, placed in removal proceedings, and detained for months or years while those proceedings are resolved. We have

² *Assessment of the Potential Impact of Marijuana in New York State*, New York State Department of Health, July 2018 (https://www.health.ny.gov/regulations/regulated_marijuana/docs/marijuana_legalization_impact_assessment.pdf).

³ *Effective Marijuana Reform: Challenging the Constitutionality of Convictions After Automatic Expungement*, Immigrant Defense Project, Marie Mark, accessed February 26, 2019 (<https://www.immigrantdefenseproject.org/blog-0005/>).

seen this happen. Clients who have lived lawfully in the United States for years, who have a family here, and just traveled back to visit their home country briefly are detained and placed in ICE custody.

But we don't have to wait for any sort of legislation to pass to start this process. While the District Attorneys of Manhattan and Brooklyn have held events in their boroughs to vacate past misdemeanor marijuana convictions, our District Attorney Darcel Clark has thus far been unwilling to take this step. If she is serious about providing justice to the citizens of the Bronx, she should take action and clear the records of thousands of citizens of the Bronx who have been targeted for marijuana enforcement because of where they live and the color of their skin. We are calling on DA Clark to use her power to ameliorate these harms.

B. Tax Revenue Must be Reinvested in the Communities Most Affected

We are troubled by reports that came out yesterday indicating that there is an agreement between Governor Cuomo and Mayor De Blasio that a portion of the tax revenue derived from the legalization of marijuana will be going to fund the MTA. This money should go back to the communities that have been most targeted and affected by decades of racially discriminatory marijuana enforcement.

This is in line with the recommendations of a December 2018 report prepared by the Office of the New York City Comptroller which concluded that

the neighborhoods most impacted by prohibition are among the most economically insecure and disenfranchised in the city. It is precisely these New Yorkers then—those to whom the benefits of legalization should be targeted—who are most likely to face barriers to accessing opportunities in the industry, in particular financing. In addition to reinvesting tax revenue from legalization in these disproportionately impacted communities, steps should therefore be taken to equip those impacted by prohibition to secure the funding and other resources needed to become cannabis licensees.⁴

Many of these neighborhoods are in the Bronx. According to the report, four out of the eight neighborhoods in New York City with the highest marijuana-related arrest rate between 2010 and 2017 were in the Bronx.⁵ Given the legacy of immense harm caused by marijuana prohibition in New York — nearly one million New Yorkers have had contact with the criminal justice system under the marijuana arrest crusade — any effort to legalize the substance must be responsive to the damage perpetrated on individuals and help communities and fund their recovery.

⁴ *Addressing the Harms of Prohibition: What NYC Can Do to Support an Equitable Cannabis Industry*, New York City Comptroller Scott M. Stringer, December 2018 (<https://comptroller.nyc.gov/wp-content/uploads/documents/Marijuana-justice-brief.pdf>).

⁵ *Id.*

II. If Marijuana is Legalized, Criminal Penalties Must be Removed

The Bronx Defenders supports Resolution 0075-2018 which calls on for the passage of the MRTA. Unfortunately, the current version of the Cannabis Regulation and Taxation Act (CRTA) which was proposed by the Governor suffers from some serious flaws, especially when it comes to criminal penalties.

Although the proposed framework of the CRTA legalizes marijuana in certain circumstances, in other situations the criminal penalties are *harsher than when it was illegal*. This is a backwards move that undermines the critical opportunity for racial justice through legalization. We know that one of the main reasons for marijuana legalization is that the laws were not being enforced equally. This same racism is going to persist for these new classes of harsher crimes that are created under the CRTA.

For instance, currently, it is a misdemeanor to sell a small amount of marijuana to anyone over 18 years of age. Under the CRTA the age for criminal sale to a minor pursuant to P.L. § 221.50 would be raised from 18 to 21 and the penalties would be harsher than under the current law. Thus, under the Governor's proposal, it would be a Class D felony for two 20 year-olds to pass a joint between each other. Why should this behavior be punished more harshly when marijuana is legalized than it was when it was illegal?

This is especially troubling in light of a recent report by The Data Collaborative for Justice at John Jay which found that between 1990-2017, 18-20 year olds were arrested for marijuana offenses at a much higher rate than any other age group.⁶ We have found this to be true in our own practice as well. In 2016, 17% of our clients arrested on marijuana charges were under the age of 21. In 2017 the number was 17%, and in 2018 it was 14%. This harsher penalty, likely meant to discourage use by and sale to minors, will only impact racially and economically marginalized people.

We must also prevent law enforcement from using the odor of marijuana as a pretext to stop and search people on the street. We're not talking about people who are smoking marijuana in public. We're talking about people who the police claim "smell" like marijuana. This practice is de facto stop and frisk. As public defenders, we know that the "odor of marijuana" is one of the most common rationales police officers give for approaching and searching our clients. As the body that oversees the NYPD, this Council should enact legislation that states that if marijuana is legalized, its mere "odor" does not provide law enforcement with reasonable suspicion to search or arrest someone except in investigations of use in DWI cases

⁶ Trends in Marijuana Enforcement in New York State, 1990 to 2017, The Data Collaborative for Justice, John Jay College of Criminal Justice, February 2019 (http://datacollaborativeforjustice.org/wp-content/uploads/2019/02/MARIJUANA.REPORT.FINAL_.pdf) ("In 2017, in New York City and the Rest of the State, 18-20 year-olds had the highest arrest rate for marijuana possession, followed by 21-24 year-olds, relative to other age groups (i.e., 16-17, 25-34, and 35-65 year-olds). The arrest rate for 18-20 year-olds was 1,003 per 100,000 in New York City").

While it's true that marijuana arrests are down since last year following the Mayor's policy change, the racial disparities in enforcement still persist, confirming that the easiest way to be arrested for marijuana or receive a criminal summons for it is to be Black or Latinx.

III. Conclusion

The truth is that marijuana enforcement is rarely about marijuana. It has always been a vehicle for policing and surveillance and social control of certain communities. If we want to get to heart of problem, we need to address these issues. Our clients have long been targeted by the NYPD for marijuana enforcement based on their race and socioeconomic status. The legalization effort must take this into account and make them whole. Anything short of this is unacceptable.

Finally, we must recognize that the disparate enforcement of marijuana laws is equally problematic in the Family Court system—where mothers of color get charged with child abuse or neglect based solely on even limited marijuana use. We understand that the Council will be taking this issue up on March 4 and we look forward to providing further testimony at that time.

Thank you for your consideration.



FOR THE RECORD

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February 27, 2019

Committee on Civil and Human Rights
Committee on Justice System
Committee on Consumer Affairs and Business Licenses
Committee on Public Safety
New York City Council

Re: Intro 1445-2019

Dear Council Members:

I am the Managing Director of Building Contractors Association, Inc. ("BCA") (see enclosed "Who Are We" document). The BCA and its contractor members have reviewed Intro 1445-2019 and oppose this proposal. I have enclosed a Statement in Opposition to Intro 1445-2018 for the Councils' review.

The BCA appreciates your anticipated consideration of our position on Intro 1445-2019. We are always willing to meet with the City Council to discuss any and all issues related to New York City's construction industry. If you have any questions, please feel free to call.

Yours truly,

John O'Hare
Managing Director



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BUILDING CONTRACTORS ASSOCIATION, INC.

STATEMENT IN OPPOSITION TO INTRO 1445-2019

The Building Contractors Association, Inc. (“BCA”) is Metropolitan New York’s leading membership association of construction contractors. Since its formation in 1933, the BCA has represented and promoted the general welfare and interests of its construction industry employer members. Among its stated purposes, the BCA has historically provided the unified contractor voice needed to address and enter equitable long-term labor-management relationships.

The BCA and its 200 plus member construction contractors **oppose** Intro 1445-2019.

The BCA needs to point out the outright contradictory messages being sent by the City and State of New York regarding construction site safety and legalized recreational use of marijuana. The industry mantra of “safety first” as represented by the City of New York’s Local Law 196 of 2017 construction site safety training law, is seriously undermined by proposals that legalize recreational marijuana use and prohibit employee drug testing policies. The Department of Building’s Local Law 196 site safety training curriculum includes a drug and alcohol awareness class.

There is no argument that the construction work can be dangerous. Contractors and trade groups spend considerable time and money on safety training. The exceptions included in Intro 1445-2019 do not go far enough to protect construction job site safety. The City Council should promote a drug free industry. If you wish to work as a construction worker in New York, you must choose a drug free lifestyle. To do otherwise puts every worker on every jobsite at risk.

This position is not punitive, it addresses the needs to maintain the highest degree of safety on construction sites. It should be noted that most, if not all, labor unions with which the BCA signs collective bargaining agreements have drug and alcohol treatment programs to help workers in need. We are not in the business of punishing workers. Quite the opposite. However, the dangerous nature of the construction industry necessitates a zero tolerance policy.

The BCA supports sensible efforts to address problems associated with permit or code violations. The BCA does not, however, support the proposals set forth in Intro 1445-2019.

The BCA **opposes** Intro 1445-2019.



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BUILDING CONTRACTORS ASSOCIATION, INC.

Who Are We?

The Building Contractors Association, Inc. (“BCA”) is Metropolitan New York’s leading membership association of unionized construction contractors. Since its formation in 1933, the BCA has represented and promoted the general welfare and interests of its construction industry employer members. Among its stated purposes, the BCA has historically provided the unified contractor voice needed to address and enter equitable long-term labor-management relationships.

The members of the BCA represent the finest of New York’s builders. One quarter of the Metropolitan areas largest construction firms are BCA members.¹ Some are multi-generational family owned businesses, one reaching back over 125 years. Others represent the new growth of minority and women owned construction firms. Their projects line the streets and skyline of the City of New York. They have employed generations of unionized construction workers providing solid, well-paying jobs to thousands of New Yorkers. They represent the proud tradition of New York’s quintessential construction industry.

Studies show that New York City’s construction industry generates approximately \$66.3 billion in total spending with expectations that that number could reach \$127.5 billion by the end of 2018.² New York City’s construction industry is an economic machine.

BCA members are actively interested in promoting and protecting the varied interests and issues related to New York’s building and construction industry. The BCA is committed to the strength of the City of New York.

What we believe:

- Continued commercial and residential development is critical to maintaining the City of New York as the world’s greatest city
- City and State support for public works projects is essential
- Stable labor-management relationships are essential to the well-being of the construction industry
- Construction industry is fully committed to safety first
- Developers, contractors and labor must work together to address high costs of construction work
- Opportunity is the gateway to success

¹ Crain’s, 2017 List of NY Area’s Largest Construction Firms, July 10-23, 2017, pages 11-12.

² New York Building Congress 2017 report.



Testimony of

The Legal Aid Society

Before the Committee on Public Safety jointly with the Committee on Justice System, the Committee on Civil and Human Rights and the Committee on Consumer Affairs and Business Licensing regarding Marijuana Legalization

February 27, 2019

Presented by:

Anthony Posada, Esq.
Supervising Attorney, Community Justice Unit
Criminal Defense Practice
Prepared with the Criminal Defense Practice
Special Litigation Unit

Oversight- Marijuana Legalization: Equity and Justice for New York City

Res 75 - Resolution calling on the New York State Legislature to pass the Marijuana Regulation and Taxation Act and the Governor to sign such legislation into law, which would legalize, regulate, and tax the sale of marijuana in New York State.

Marijuana Regulation and Taxation Act (MRTA) -Racial Justice, Economic Justice and Community Reinvestment

The Legal Aid Society supports the Marijuana Regulation and Taxation Act (MRTA), A.3506-B as this is an opportunity for racial justice, economic justice, and community reinvestment, especially for communities of color who were swept in the marijuana arrest crusade. The MRTA will help New Yorkers by eliminating criminal penalties to protect against the continued criminalization of people of color, by addressing past harms of criminalization through criminal record clearing, and by front-loading marijuana revenue for restitution into impacted communities including building educational programs that will assist with opioid addiction,¹ among many treatment initiatives.

¹ From Prohibition to Progress: A Status Report on Marijuana Legalization; Amanda Geller and Jeffrey Fagan, "Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing," *Journal of Empirical Legal Studies* 7, no. 4 (n.d.): 591–633, <https://doi.org/10.1111/j.1740-1461.2010.01190.x> ; Christen L. Spears et al., "Crime in Alaska: Uniform Crime Reporting Program Annual Report" (Department of Public Safety, 2016), <https://dps.alaska.gov/getmedia/d31723ba-5195-432b-854f-9991025f25b4/ciak2016-for-publication-rev-09-06-17.aspx> ; Ojmarrh Mitchell and Michael S. Caudy, "Examining Racial Disparities in Drug Arrests," *Justice Quarterly* 32, no. 2 (March 4, 2015): 288–313, <https://doi.org/10.1080/07418825.2012.761721> .

The MRTA takes a criminal justice reform approach to the legalization of marijuana.

The MRTA establishes a significantly more comprehensive policy approach to marijuana legalization than the Governor's proposed Cannabis Regulation and Taxation Act (CRTA). The MRTA legalizes marijuana as opposed to the CRTA, which actually creates harsher criminal penalties for use and possession than when it was illegal. For example, under the MRTA, possession of over 2lbs of marijuana is treated as a violation subject to a fine. The CRTA makes Criminal Possession of marijuana in the first degree, an E felony. Similarly, under the CRTA the age for criminal sale of marijuana to a minor is raised from 18 to 21 and the penalties here are harsher than the current penal law that addresses these offenses. The MRTA takes the approach of treating the unlawful possession of marijuana for persons under 21 the same as alcohol, which means subject to confiscation and a fine of up to \$50 with the requirement of attending community service or a drug awareness program. The CRTA takes the harsher approach of treating underage possession of marijuana more harshly than alcohol. The penalties vary based on the amount but they begin with a violation, misdemeanor and then an E felony and none of the provisions allow for community service or a program, only a fine and incarceration. Therefore, the MRTA reforms the existing criminal penalties for marijuana possession and use that will not keep New York in its current failed and destructive approach.

The MRTA will help end the disparate impact that marijuana policing continues having on New Yorkers by establishing criminal record clearance through expungement or vacatur.

The movement to legalize marijuana is rooted in the racist history of the war on drugs. Decades of racially discriminatory marijuana possession arrests have devastated Black and Brown communities while leaving thousands of people stigmatized with criminal records. The CRTA does not automatically expunge past marijuana convictions and the process it proposes is one for sealing and re-classifying sentences and the onus is on the accused persons to avail themselves of this through an application process. As a result, only a fraction of the population will benefit from it. The MRTA, on the contrary, establishes an automatic process to ensure that all New Yorkers with past marijuana convictions benefit from criminal record clearing. Expungement must be available to New Yorkers as part of any marijuana legalization.

The MRTA establishes an end to the host of collateral consequences faced by New Yorkers swept by the marijuana arrest crusade.

The Legal Aid Society has represented thousands of New Yorkers each year in Criminal and Supreme courts who are facing marijuana-possession charges. Each one of those arrests has deep-reaching collateral consequences, which include: deportation, eviction, monetary fines and surcharges, negative impact on financial aid, license suspension and work opportunities. The CRTA does not explicitly state that it is the intent of New York that marijuana arrests and use not be used to negatively impact any individual's access to housing, employment, parole, probation, family unity or parental rights, or immigration status. The MRTA would establish a

prohibition on assisting federal government in enforcing federal controlled substances act regarding marijuana and also explicitly states that there be no adverse employment action unless use impairs ability to perform job, and no punishment for those on parole and probation. Through the MRTA, criminal penalties associated with marijuana use and possession will be reformed to violations and misdemeanors prioritizing community service and fines as opposed to the failed approach of more cages and shackles.

The MRTA directs specific amounts of marijuana revenue for community reinvestment.

Any legislation truly concerned with correcting past harms of marijuana prohibition must call for community-led reinvestment and be responsive to the harms caused by criminalization to the impacted communities. The MRTA directs 50% of revenue after program costs to a Community Grants Reinvestment Fund that promotes job training, adult education, youth development programming, expanded community centers, re-entry services for formerly incarcerated people and otherwise supports community-focused programming in communities that have been disproportionately impacted by the drug war. In light of the fact that Black and Latino New Yorkers account for 86% of those arrested for marijuana, despite similar rates of use with White people, we would go further to include a proposal that calls for 86% of new tax revenue to be directed to communities harmed by this drug war. The CRTA does not define any specific amount or percentage to be directed for community reinvestment and while it does establish a NY Cannabis Revenue Fund it does not explicitly center communities who have borne the brunt of marijuana criminalization and this is a missed opportunity to meaningfully address those past harms.

Res 296 – *Resolution calling on the New York City Housing Authority (NYCHA) to add unlawful possession of marijuana and criminal possession of marijuana in the fourth and fifth degrees to its list of “overlooked offenses,” and stop considering these offenses as grounds for termination of tenancy.*

Adding criminal possession of marijuana in the 4th and 5th degrees to the list of overlooked offenses will expand access to housing and protect people from facing eviction for this.

Including marijuana possession in the 4th and 5th degree as “overlooked” offenses is going to ensure greater access to housing for those who do not have a violent felony conviction. This is a great opportunity for New York City as many organizations have been calling on NYCHA to do this for a long time. In addition, what we do see quite routinely is people who are currently living in NYCHA and then seek to succeed to a tenancy (when the tenant of record dies or moves out) are found ineligible for a lease as a result of such convictions- which is backwards given that they are currently residing in NYCHA with no problem. This discrepancy must be reconciled so that in succession of tenancy proceedings people have a fair opportunity of staying in their apartments.

Res 742 - *Resolution calling upon the New York State legislature to pass, and the Governor to sign, legislation allowing localities to establish any prohibition on public consumption of marijuana and any related civil penalties.*

New York City must be able to pass laws and guidelines to ensure fairness so that marijuana does not remain a biased tool of criminalization.

Over the last four decades, the Legal Aid Society has represented thousands of New Yorkers for low-level marijuana possession and each one of them carried a number of devastating consequences both for the clients and the communities that they belong to. With this extensive range of representation for marijuana possession citywide, we have seen first-hand how marijuana has been used as a tool of mass criminalization with deep racial disparities. Our clients are not enjoying the luxury and privilege of smoking in their private homes because the vast majority of them live in apartment buildings with strict codes, which forces them to go into the streets where they are subjected to arrest and prosecution for smoking in public. Although there has been a significant decrease in the number of people arrested for low-level marijuana possession in the last three quarters, the racial disparities have not only persisted but they have actually increased. The significant drop in marijuana arrests in New York City is something that strengthens our communities and makes our city healthier, but as long as racial disparities remain, our justice system is undermined and the divide between the community and the police widens. Localities must have the ability to fairly regulate the public consumption of marijuana and any related civil penalties.

The power to regulate and determine public consumption spaces must help end the practice of using marijuana laws as an excuse to surveil and control people of color.

The odor and sight of marijuana must not continue to be used as a pretext for police

harassment, stop, and search of Black and Latinx New Yorkers and others, except in investigations of use in DWI cases. For far too long, the mere smell and sight of marijuana has been used by the police as a pretext for frisks and searches that were overwhelmingly racially disparate. In 2016 and 2017 alone, 85% of the thousands of people arrested for marijuana possession in NYC were Black and Brown New Yorkers. As previously mentioned, in 2018, following the Mayor's policy change, marijuana arrests were significantly down but the racial disparities in enforcement still persisted confirming that the easiest way to be arrested for marijuana or receive a criminal summons for it was to be Black or Latinx.

Int. 1427 – *A Local Law to amend the administrative code of the city of New York, in relation to drug testing not permitted by the department of probation.*

Marijuana Prohibition Impacts Parole, Probation and Contributes to Recidivism

Marijuana prohibition continues to be a tool of criminalization that significantly contributes to recidivism in the supervised release context because use continues to be a violation for parole and probation. (Exhibit 1). For New Yorkers looking to re-enter society and move past the criminal justice system this tool of criminalization continues to hold them back in the process.

The Parole Revocation Unit of the Legal Aid Society gathered data on parole violations for marijuana that show that marijuana was involved in more than 20 percent of parole violation charges in New York City in the first half of 2017. In these cases, alleged use of marijuana was charged and played a major factor in the parole violation case and the

client's continued detention in the parole violation. In some cases, use of marijuana is the sole charge for violation of parole, which can result in a significant time in custody.

People use marijuana often to self-medicate for pain and untreated trauma and using it is not an accurate depiction of someone's rehabilitation process.

Int. 1445 - *A Local Law to prohibit drug testing for marijuana as part of the job application process, except for positions involving the use of heavy machinery or driving.*

Preventing Drug Testing for Marijuana is Good But We Should Not Create an Overly Broad Exception.

Although this is a good first step for prospective employees, there are several weaknesses that will remain as a result of this law. First of all, the law does not apply to drug-testing of current employees. More importantly, the exception in 30(c)(1)(B) is overbroad. An enormous number of jobs in NYC require security clearance under NYS law, especially jobs filled by low-wage workers. This includes security guards, home health aides, certified nurse aides, most government jobs, most jobs involving childcare or education. There is no need for the exception at 30(c)(1)(B), because the bill already creates an exception for any federal or state statute, regulation or order that requires drug testing of prospective employees at 30(c)(2)(B). Therefore, Int. 1445 is a positive step that will help prospective employees from being drug tested, but we should not create an exception for every single person who needs to submit to a security clearance from the State and Federal level as that would apply to a large amount of people who would not be covered by this law.

Res 641 - Resolution calling on the coordination of the New York State Division of Criminal Justice Services (DCJS), the New York State Office of Court Administration, and New York City District Attorneys to expunge the records of all city misdemeanor marijuana convictions.

Expunging Marijuana Records is An Opportunity to be Proactive Towards Achieving Racial Justice and It Should Not Be Limited to Misdemeanors.

The expungement for marijuana convictions will start to alleviate some of the harms that the War on Drugs created in communities of color. Although the governor's office has expressed that they would like to implement automatic sealing of certain marijuana convictions that will likely become legalized, we would prefer that (a) old convictions are expunged instead of sealed and (b) the number of convictions that can be expunged be as broad as possible. This proposal must be expanded beyond marijuana misdemeanors and include violations and felonies. Right now, violations are only sealable after 3 years and there is no mechanism for expungement, which mean they will remain visible during background checks and used to discriminate against people in a variety of settings. We must make sure that records are truly expunged in a way that remediated the harm that they have caused.

It is crucial that New York seize this opportunity to provide expungement, rather than sealing. New York's current 'sealing' law provides as much or more relief than many other states' 'expungement' laws. Nevertheless, New Yorkers are currently disadvantaged

by not being able to say that their record has been expunged. For example, at least one federal agency explicitly exempts expunged convictions from consideration. New York State should bring itself in line with other states and make expungement available to New Yorkers as part of legalization.

The MRTA proposes that automatic expungement does not affect any legal remedies otherwise available to New Yorkers. Individuals who received a marijuana conviction in violation of their constitutional rights must still be able to challenge their underlying conviction in criminal court. Such vacatur may be necessary in collateral matters, despite the state expungement.

The legalization of marijuana in New York City must be guided by the devastating impact created in communities of color who were over-criminalized with shackles, cages, fines, and inherently dangerous police-civilian interactions. This is an opportunity to address the multi-layered harms of prior criminalization, to provide relief to people who have been saddled with prior convictions by expunging their criminal record, and to create meaningful community reinvestment opportunities in the forms of grants, programs and industry access to those most impacted by this failed War on Drug policy. The MRTA has this community-centered framework that truly opens a comprehensive way to address the costly and biased enforcement that has defined marijuana prohibition in New York City. The communities and clients we serve have waited and suffered for too long and we cannot revert to cycles that perpetuate harm to racially and economically marginalized people.

The Legal Aid Society

The Legal Aid Society is the nation's oldest and largest not-for-profit legal services organization. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's law reform/social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 1,900, including more than 1,100 lawyers working with over 700 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. The Legal Aid Society operates three major practices — Criminal, Civil and Juvenile Rights. The Society's Pro Bono program coordinates volunteer help from law firms, corporate law departments and expert consultants.

The Society's Criminal Defense Practice is the primary public defender in the City of New York. During the last year, our Criminal Defense Practice represented over 230,000 indigent New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice the Society represents people accused of crimes from their initial arrest through the post-conviction process. Many thousands of our clients with criminal cases in Criminal Court and Supreme Court are teenagers who are treated as if they are adults. The Criminal Defense Practice has a specialized unit of lawyers and social workers dedicated to representing many of our youngest clients prosecuted in the criminal system.

FOR THE RECORD

**TESTIMONY PRESENTED TO
NEW YORK CITY COUNCIL
COMMITTEE ON LABOR**

FEBRUARY 27, 2019

**Submitted By:
Building Trades Employers' Association
Louis J. Coletti, President and CEO**

Good morning Chairs and members of the Committee, I am Donald Ranshte, Senior Vice President of the Building Trades Employers' Association, (BTEA), testifying on behalf of Louis Coletti, President and CEO, who was unable to attend the hearing today. The BTEA is a trade association representing 26 contractor associations, and 1,200 contractor members responsible for over almost \$60 billion (that's billion, with a "B") dollars in economic activity in New York City. Thank you for allowing me the opportunity to testify today on proposed Intro 1445, in relation to prohibition of drug testing for pre-employment hiring procedures.

The bill, in its current form, would prohibit the testing of potential job candidates to "pre-hire" drug testing. In terms of the exemption listed in Section 120.2.(d) "Collective Bargaining Agreements", at first glance appears it would that covers

the construction industry. However, some issues: some CBA's may not have testing clauses. Also, drug testing programs in construction are a contractual obligation between owner and contractor. We believe that the exemption listed in (d) could not necessarily apply in that contractual agreement.

Therefore, we suggest the following amendments:

- While we appreciate Intro 1445 calling out a drug testing policy in “a collective bargaining agreement between an employer and a labor organization representing employees and prospective employees of such employers” we would prefer specifically amending the legislation to add subsection (e) to include language that lists “construction work(ers)”.
- Adding another provision for working at heights 10 ft above street level in an unenclosed site.

Construction contractors fear a prohibition on pre-hire testing could undermine efforts to cut down on workplace accidents, enforce site safety rules, delegitimize private drug policy testing protocols and flies in the face of the Construction Worker Safety Training Act, known as Local Law 196.

Construction work in New York City's dense vertical environment makes it a work separate from almost all others, and, makes it inherently dangerous. Construction contractors and their employees must be exempted from laws requiring a limit on testing of workers for pre-hire drug use. One major problem we see when applying the this proposed law to construction: unlike alcohol, there is no standard to detect and measure cannabis impairment, only a test that detects use. This, in fact, hinders a relaxation on use, because psychoactive effects usually last a relatively short period of time, the rate at which cannabis leaves the system varies, in some cases, taking weeks.

Drug or alcohol impairment is a safety issue, contractors must be allowed to keep a carefully crafted and explicitly worded anti-drug policies. However, companies and job sites that have a drug testing policy fire very few employees for testing positive this is because many of the CBA's with union workers contain drug intervention and treatment coverage. Recent changes in the NYC Construction Code, and criminal law precedent, makes certain supervisory positions within the construction industry personally responsible in case of a serious accident or fatality. Allowing workers on a site who may be impaired could theoretically cause a chain of events that leaves a supervisor in the cross hairs of being charged with criminal conduct. Most companies, contractors included, don't want to be in the

business of deciding how their employees spend their time off work. However, contractors have a legal obligation to make sure their workers are sober when on the job — especially if that's a jobsite with heavy equipment, numerous hazards, power equipment and working at heights. Insurance carriers will likely charge more for general liability, workers' compensation or other forms of business insurance (already about 10% of total costs) if a construction employer chooses not to perform pre-employment drug testing where one exists.

In Colorado, a state with some of the most liberal use laws, courts have upheld an employer's right to zero-tolerance policies in construction. In addition, contractors working on federal projects, of which there are many in NYC, have no option but to maintain a drug-free workplace. For all these reasons we recommend exempting construction employers, contractors and workers.

Thank you, and I'd be glad to answer any questions you may have.

green revolution



CANNABIS & ENTREPRENEURSHIP

As NYS prepares to move forward with legalization, it's imperative that legislation reflects economic justice for the **BLACK COMMUNITY**.



PROTECTED COMMUNITIES

These are the Protected Areas Most Harmed by the War on Drugs as identified in Eddie Ellis' "The 7 Neighborhood Study Revisited".

*Read the study at: hbany.org/ellisstudy

Harlem
Lower East Side

South/Central Bronx
Bedford Stuyvesant
Brownsville

East New York
South Jamaica

AND Black communities in Buffalo, Syracuse, Rochester, Albany, Poughkeepsie, Beacon, Newberg, Westchester County & Long Island.



EQUITY APPLICANTS

Strictly Defined As : 1) An individual or a family member of an individual who was arrested, convicted, or incarcerated for possession of marijuana OR 2) resided in a protected area* prior to 2000

DAY 1 NYS FUNDING

Sufficient funding (\$500 Million +) for the start up & development of Equity Applicant businesses and reinvestment into protected areas*

TAX REVENUE

Tax revenues (generated on gross revenue) from non-Equity licensees should be solely dedicated for long-time residents in protected areas*

VACATE CONVICTIONS

Automatic & complete vacating of all marijuana-related convictions. No restrictions to owning or operating cannabis businesses by Equity Applicants with prior non-violent convictions

EQUITY INCUBATORS

Culturally sensitive & competent Community-Based Organizations with roots within protected areas* should be the exclusive organizations funded

GESTATION/LEVELING PERIOD

3-year gestation period of exclusive licensing opportunities/resources for Equity Applicants. 10-year leveling period of exclusive rights to start and operate a business within the Protected Communities.



Founded in 1980, the Harlem Business Alliance is a 501(c)(3) nonprofit dedicated to enriching the local Black business community through education, support and advocacy. We believe local businesses create better communities; we inspire the Harlem business community to grow their roots not just locally but globally.

Contact Regina Smith to get Involved: rsmith@hbany.org 212-665-7010

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We Rise To Legalize Campaign Pillars

- 1. Reinvest tax revenue into communities of color.**
- 2. Expand Access to Medical Marihuana for communities of color.**
- 3. Provide job opportunities and capital investments to Women and Minority owned businesses.**
- 4. Create a sustainable workforce in the new marihuana industry through continued workforce development, job training and workers protection.**
- 5. Develop community based education and abuse programs.**
- 6. Expunge all non-violent marijuana convictions and expand reentry programs.**

As our elected officials in Albany debate the legalization of adult-use cannabis we give this testimony to clearly state the needed inclusion of several aspects of this proposed law to ensure a fair and equitable program is put into place on “day one” of implementation. We will not accept a phased in equity program similar to other states that have only ended in failure.

For decades black and brown people have been subjected to incarceration for cannabis use at a substantially higher rate than white people, despite the clear statistic that there is little difference in use. In fact, it is often reported that white people use cannabis at a higher rate than black and brown people.

An adult-use cannabis program in New York must make amends for the years of discrimination that we have seen.

The first step is automatic expungement of criminal records for those who have been charged with cannabis related crimes. We will not accept sealing of records, especially if the person must petition for sealing themselves rather than through an automatic method. All non-violent cannabis conviction must be immediately automatically expunged and reentry programs should be expanded.

We have also seen wide ranging estimates for the amount of tax money that legalization will bring in to our government. This money must be invested back into the communities that have been damaged by the War on Drugs.

We demand funding for our schools, for better access to transportation, and for substance abuse programs to help those in recovery. And of course we expect there to be education programs on the risks associated with cannabis and alcohol use as well as other drugs through this funding stream.

There have also been estimates on the number of jobs that will be produced from legalization. We demand that an adult-use program provides opportunities for minority and women owned business enterprises so that the communities most affected by prohibition are able to take part in this area. There also cannot be barriers like vertical integration that keep black and brown people from having the opportunity to own businesses in this new sector. Also included in this should be a job training program that will develop the cannabis workforce and also create protections for workers so that their work environments are safe.

Another important point that is overlooked is the current difficulty of being able to access medical cannabis in communities of people of color. There must be changes made to the medicinal program as well that will allow greater proximity to medical cannabis.

There is great opportunity for our communities to recover from the decades of abuse at the hands of racist and discriminatory politicians who used a plant to put black and brown people in jail. But without these important provisions included in the bill, there is no way for us to provide support for it.

I hope that those crafting this legislation listen to our concerns and take them seriously.

Included are our six pillars and our current analysis of the proposed statewide programs.

Thank you.

February 27, 2019



To: NYC Council Committee on Public Safety jointly with the Committee on Justice System, the Committee on Civil and Human Rights, and the Committee on Consumer Affairs and Business Licensing

From: Melissa Moore, New York State Deputy Director, Drug Policy Alliance

Testimony for February 27 Hearing on *Marijuana Legalization: Equity and Justice for NYC*

My name is Melissa Moore and I am the New York State Deputy Director for the Drug Policy Alliance, the nation's leading organization working to advance policies and attitudes to best reduce the harms of both drug use and drug prohibition.

The Drug Policy Alliance appreciates the opportunity to submit testimony to the New City Council and thank the members for coordinating this joint hearing.

The Drug Policy Alliance and the Start SMART campaign—Sensible Marijuana Access through Regulated Trade—believe that it is time to stop the ineffective, racially biased, and unjust enforcement of marijuana prohibition in New York and to create a new, well-regulated, and inclusive marijuana industry that centers equity, is rooted in racial and economic justice, and reinvests in communities that have been the most harmed by marijuana criminalization.

We have worked with many of your offices over the years as Council has exercised oversight around marijuana arrests and now that New York is on the precipice of legalizing marijuana we look forward to continuing to work together with City Council to ensure that the framework for legalization centers justice.

There is an existing bill in the Legislature, the Marijuana Regulation and Taxation Act, and in his annual budget, Governor Cuomo presented his marijuana legalization proposal, the Cannabis Regulation and Taxation Act. As negotiations continue at the state level, it is clear that there are multiple ways in which NYC can take action now to address past harm and create an equitable framework going forward that is rooted in racial and economic justice.

Why do we need marijuana justice?

More than 800,000 people have been arrested across New York in the last 20 years alone—despite the state legislature decriminalizing low-level marijuana possession 40 years ago. Clearly decriminalization has failed New Yorkers.

These arrests are also extremely racially biased: Although drug use occurs at similar rates across racial and ethnic groups, Black and Latino individuals are arrested for possessing marijuana at vastly disproportionate rates. Over the last 30 years, Black and Latino New Yorkers have comprised 86 percent of arrests for low-level marijuana possession in NYC.

More than just arrests

Removing prohibition is important but does not necessarily address collateral consequences people face from prior criminalization. We have to intentionally and specifically address impacts in the fields of immigration, family law, and discrimination in housing and employment based on a prior marijuana arrest.

Housing

An individual seeking to attain or maintain access to public housing following a marijuana possession arrest or conviction can disqualify an individual from living in NYCHA developments for three years at minimum or cause them to face permanent exclusion policies.

Permanent exclusion has forced thousands of residents to choose between permanently barring loved ones from stepping foot inside of their homes and having their entire families evicted.^{1, 2} NYCHA's permanent exclusion policies allow the Authority to terminate the tenancy of any resident deemed to be connected to drug-related activity regardless of whether the resident has knowledge of the activity or if the activity did not occur at the NYCHA residence.³

Despite the severity of this type of action, these regulations do not require that a resident be found guilty of a crime or that the activity take place on NYCHA property. Nor do they require that the person who is arrested actually live with the tenant being threatened with eviction or that the tenant have knowledge of the activity. Rather, an arrest alone—absent proof of guilt—is enough to trigger eviction proceedings if the person being arrested lists a NYCHA address as their residence.⁴ When eviction proceedings begin, a tenant may be presented with the option of permanently barring the arrestee from their home—even if they are the person's legal guardian—and agreeing to be subject to indefinite compliance inspections in order to avoid being thrown out of their home. Unfortunately, many people enter these agreements without adequate legal representation.⁵

Although marijuana possession was removed from NYCHA's eviction and permanent exclusion offense list in 2014, thousands of people arrested before this decision still face a difficult and often unclear process for having their bans lifted.⁶

Now the enforcement of smoke free policies could result in evictions for tenants that do not adhere to the policy or continue to smoke in their unit as all residents must sign the lease amendment(s) as a condition of their continuing occupancy.

This makes provision allowing social consumption places particularly important as the federal public housing authority has banned all smoking in public housing.

Employment

An individual can begin experiencing the adverse effects of a marijuana arrest well before a judge decides their case. This is largely due to the processing and data collection that occurs immediately after an individual is taken into custody. Fingerprints taken during booking are used to create records that are maintained by dozens of agencies including the New York State Division of Criminal Justice Services (DCJS), the Office of Court Administration (OCA), the state police, and local law enforcement.⁷

DCJS automatically notifies most public employers and licensing agencies of an arrest, which can lead to automatic notifications can lead to immediate suspension in many employment fields.⁸

Occupational licenses issued by state agencies—which include the NYS Department of State, the NYC Department of Education, the NYC Taxi & Limousine Commission, the New York City Department of Consumer Affairs, and the NYS Department of Health—can be suspended or revoked following a marijuana conviction.⁹ This now happens much more swiftly due to

technological tools like eJustice NY, which is as a single point of access to computerized information within and beyond New York State, and automated transfer of information including arrest notifications to dozens of public employers.^{10, 11}

However, a person does not have to be convicted for their employment status to be threatened. Upon arrest, individuals in some occupations, such as teachers, face automatic dismissal from their positions; and for many others, work time missed because of an arrest cycle could potentially result in loss of employment.¹² Additionally, most public employers are entitled to terminate or suspend employees based on any “immoral conduct,” giving them a great deal of discretion in how they handle a reported marijuana arrest.

State-issued occupational licenses that allow many New Yorkers to earn a living working in positions related to medical services, childcare and education, security, and taxi and limousine service can all be subject to revocation or denial as a result of a marijuana arrest.¹³ These policies inflict a disproportionate amount of harm relative to the offense by stripping individuals of their means of survival for what is most often a minor offense. They also keep thousands of New Yorkers from performing the jobs they love and providing the services that other New Yorkers depend on and need.

Automatic Dismissal

Individuals occupying certain positions, such as teachers and Taxi & Limousine Commission (TLC) license holders, must report an arrest immediately and face potential automatic dismissal. In many cases, an automatic dismissal does not even require proof that an individual was using a substance on the job – or at all. In one instance, a beloved teacher in NYC lost his job following an arrest for smoking a cigarette the police had wrongfully assumed contained marijuana.¹⁴ Any arrest – regardless of outcome – has proven sufficient for disqualification.¹⁵

Probation

Data gathered by the Legal Aid Society’s Parole Revocation Defense Unit show that marijuana was involved in more than 20 percent of parole violation charges in New York City in the first half of 2017.¹⁶ In these cases, alleged use of marijuana was charged and played a major factor in the parole violation case and the client’s continued detention in the parole violation. In some cases, use of marijuana is the sole charge for violation of parole, which can result in a significant time in custody.

We would say that the department of probation should not require individuals on probation to submit to marijuana testing unless expressly required by a court as a term of probation.

Immigration

Many noncitizen immigrants now face deportation because of an arrest for low-level marijuana possession years ago.¹⁷ This points to the larger issue of simple marijuana possession being the fourth most common offense among people who were deported nationally, and the most common offense among people deported with drug law violations. Just this year, we have seen that New Yorkers may face deportation for marijuana misdemeanors regardless of how old a conviction may be and that plainclothes ICE officers have greatly expanded their efforts and are now showing up in courtrooms to arrest immigrants 1,200% more than in prior years.¹⁸

What does legalization need to include?

Legalization will inherently eliminate one of the top misdemeanor arrests from the state's penal law, but there are broader implications for criminal justice reform as well.

- **Beyond clearing criminal records**, either through sealing and vacatur or expungement, legalization must also address the devastating impacts of prohibition in **immigration and family law/child welfare**, and protect **against discrimination in housing and employment** based on prior marijuana arrest or off-the-clock marijuana use
 - Nearly one million New Yorkers have had contact with the criminal justice system as a result of marijuana prohibition, and the collateral consequences of a marijuana arrest under current New York law are significant any effort to legalize must be responsive to this legacy of immense harm.
- Expand **resentencing and reclassification of crimes for people previously convicted** for marijuana, increasing opportunity for thousands of New Yorkers; and remove a positive marijuana test as justification for violating a person's **parole or probation**
- Protect **against continued criminalization of youth** and **help people transition** from the illicit to the legal market
- Remove marijuana as a reason to revoke probation/ parole or add penalties.
- New York must end the practice of using marijuana laws as an excuse to surveil and control people of color. The legislation proposed by the Governor to legalize must explicitly ban the practice of relying on marijuana odor as a pretext for a stop and search.

Community Reinvestment

Because Prohibition and targeted, biased enforcement has harmed communities of color and low-income communities, legalization must be as comprehensive as the damage that has been done throughout the state. As the Comptroller highlighted in his December report, 7 of the 10 lowest-income neighborhoods in NYC fall among the top 10 for marijuana-related arrest rate).

Legalization must:

- **Make revenue available as restitution to communities** most harmed by prohibition for job training, economic empowerment, and youth development.
- A number of parties who view legalization as a revenue windfall are actively working to siphon off revenue that should rightfully be earmarked to atone for the debt owed to New Yorkers who were targets of biased enforcement, which still disproportionately affects Black and Latino New Yorkers.
- This reinvestment must be community-led, responsive to the harms caused, and accountable to communities.

Equity

Legalization--in terms of both tax revenue reinvestment and direct ownership/employment--can positively impact economic stability in communities that have traditionally struggled economically because of structural factors--but only if the Legislature establishes regulations and enacts policies that intentionally center equity. This is vital to prevent the marijuana industry from propagating inequality.

We must remove barriers to access like capital requirements and eliminating prohibitions on licensing to people with prior drug convictions

It is crucial that the state legislation ban vertical integration (aside from microlicenses for home-scale businesses) to provide the maximum amount of space for new companies to develop and contribute to a New York-focused market.

New York must also creating a **social equity program on day one**, offering priority licensing for individuals and communities impacted by prohibition, including people impacted by prohibition (living in neighborhoods with high arrests/racial disparities, people with a conviction, and people with an income lower than 80% of the state median income.

Additionally, we must create a licensing structure favorable for small businesses and small-scale cultivators, so that there are entry points for small businesses and individuals to participate in the market and build ownership and wealth in communities that are traditionally sidelined.

This includes a **microlicense structure**, similar to New York's rapidly growing craft wine and beer industry, that allows small-scale production and sale plus delivery to reduce barriers to entry for people with less access to capital and traditional avenues of financing; this can also provide a transition point for people currently operating in the illicit market

Creating a **co-op license** to encourage and support small farmers and other entrepreneurs for whom access to capital is a barrier

Allowing **delivery licenses and social consumption** (also called on-site consumption), which provide entry points into the industry that are not as capital-intensive.

Incubator

Further, due to a number of factors—including continued lack of broad access to financing options--it is imperative to provide additional support to small-scale entrepreneurs, particularly aspiring business owners of color, if a goal of legalization is to build a diverse and inclusive market.

Any legislation to legalize marijuana in New York State should establish a small business incubator program to provide direct support to small-scale operators who are marijuana license holders. The incubator program should provide direct support in the form of counseling services, education, small business coaching, compliance assistance, and funding in the form of grants or low- or zero-interest loans.

Conclusion

As we gather here in the marijuana arrest capital of the country, repairing the damage done by marijuana prohibition and ensuring that the communities most harmed can participate in the industry absolutely must be centered.

The Drug Policy Alliance and our partners believe that while legalizing marijuana for adult use will not alleviate all the challenges faced by those communities who are most criminalized, it will remove a tool that has been used to harm them. That's why the Start SMART NY campaign—Sensible Marijuana Access through Regulated Trade—to legalize marijuana is a racial justice campaign. We believe that it is time to stop the ineffective, racially biased, and unjust enforcement of marijuana prohibition and to create a new, well-regulated, and inclusive marijuana industry that is rooted in racial and economic justice.

It's up to us to ensure that the adult-use marijuana framework in NY does not benefit large corporate players over the communities that have been ravaged by overpolicing and the many small businesses and individuals from impacted communities who are poised to participate in the market.

Legalization can be an economic engine driving wealth and equity in marginalized communities and providing space for alternative economic systems—if we work intentionally.

We look forward to further conversations with the Council regarding the implementation of these recommendations.

Thank you for your time.

¹ Batya Ungar-Sargon, *City Limits*, "NYCHA Questioned on Policy of Banning Arrested Residents" (June 2, 2015). Retrieved from <http://citylimits.org/2015/06/02/nycha-questioned-on-policy-of-banning-arrested-residents>.

² Babe Howell, "Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing," *New York University Review of Law & Social Change* 33(2009). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1611269.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Bronx Defenders, "The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys, Civil Legal Services Attorneys, and Other Reentry Advocates," (April 2015).

⁸ *Ibid.*

⁹ Bronx Defenders, "The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys, Civil Legal Services Attorneys, and Other Reentry Advocates," (April 2015).

¹⁰ New York State Department of Criminal Justice Services, "eJusticeNY." Retrieved from <http://www.criminaljustice.ny.gov/ojis/ejusticeinfo.htm>

¹¹ Julie Dressner and Jesse Hicks, "How a Small-Time Marijuana Arrest Has Devastated a Great Teacher's Life," BuzzFeed News. December 8, 2013. Retrieved from https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm_term=.bnkW7qanOJ#.rcB69VoOwG

¹² Julie Dressner and Jesse Hicks, "How a Small-Time Marijuana Arrest Has Devastated a Great Teacher's Life," BuzzFeed News. December 8, 2013. Retrieved from https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm_term=.bnkW7qanOJ#.rcB69VoOwG

¹³ Justice Center, "National Inventory of the Collateral Consequences of Conviction." Retrieved from <https://niccc.csgjusticecenter.org/search/?jurisdiction=35>

¹⁴ Julie Dressner and Jesse Hicks, "How a Small-Time Marijuana Arrest Has Devastated a Great Teacher's Life," *Buzzfeed.com*. Retrieved from https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm_term=.qbEWE4QdQ#.bcrJBDPWP.

¹⁵ *Ibid.*

¹⁶ Correspondence with Legal Aid Society Parole Revocation Defense Unit (PRDU), June 2017, covering cases involving Rule 11 (Use of Marijuana) from January 1, 2017 to June 5, 2017. PRDU is the primary provider of indigent defense services for all detained accused parole violators within the NYC area and handles over 95% of all parole violations in NYC. According to DOCCS, 45% to 50% of all first-time releases onto parole were paroled to the NYC area.

¹⁷ http://gothamist.com/2017/03/03/trump_deportation_ice.php

¹⁸ <http://www.nydailynews.com/new-york/ice-court-house-arrests-immigrants-900-n-y-2017-article-1.3633463>

Memorandum

TO: Bertha Lewis

FROM: Dan Hogle

RE: Gov. Cuomo's Budget Proposal RE: Cannabis

DATE: February 5, 2019

Gov. Cuomo's History With Cannabis:

As he entered his first term in 2010, Governor Cuomo was quoted as saying, "*The dangers of medical marijuana outweigh the benefits.*" He maintained that position for years, asserting that while there were objective benefits from medical use, the potential societal harm was too great to allow even limited medical use in NYS.

It was not until 2014, that he warmed to concept of medical use. He remained firmly opposed to the regulation of adult use. Later that year, he signed an extremely limited medical program that focused the entire industry into the hands of a limited number of large corporations.

While having the most limited medical program in the United States, Governor Cuomo maintained his opposition to legalization through 2017. During which time there was progress with expanding the list of eligible conditions for the existing medical program.

In 2018 Cuomo launched a task force to investigate the potential for a legal adult use program in NYS. During the 2018 primary, Cuomo sped up the timeline for the task force and claimed to have begun crafting legislation in the months leading up to the election.

In the months after winning a third term, Cuomo announced his support for full legalization. Mid-January, he reiterated his support and claimed that he aimed to have it accomplished within the first hundred days of the year as part of the NYS budget.

Most recently, there has been some apprehension about such an ambitious timeline. However, Cuomo was quoted Friday Feb. 1st, that he thinks that they should work every day for the next 6 weeks and try to get it done.

Analysis: Like the proposals from the Senate and the Assembly, Cuomo's proposed adult use program fails to adequately address the policy objectives that have been established by "We Rise To Legalize":

- Reinvest tax revenues from the marijuana industry into the local communities that have been most disaffected by the so-called “War On Drugs”
- Expand access to medical marijuana program for communities of color
- Provide job opportunities and capital investments to M/WBE
- Create sustainable jobs with continued workforce development
- Use tax revenues to develop community-based education and abuse programs
- Expunge all non-violent marijuana convictions – and expand re-entry programs for people with marijuana-related convictions.

The governor’s proposal consolidates all control and oversight of this new multibillion dollar industry under the executive branch. This approach is problematic for many reasons. Those who have been elected by the people will not have the ability exercise the will of their constituents over this system, at any level. An added concern is that an administration that was an opponent of legalization could cripple the entire system without an opportunity for dissenting opinions to speak out.

This proposal does a lot to carve out places for the existing medical companies to operate in the recreational market at the expense of a fair and accessible program. There is not enough detail as to how the new revenue will be dispersed therefore we cannot guarantee that communities of color will get their fair share. The efforts to protect M/WBEs is insufficient as is any efforts at workforce development.

It also misses the mark in terms of criminal justice reform. It still criminalizes the non violent possession and sale of cannabis in a way that is unacceptable.

Shortcomings: Some specific examples of the shortcomings are as follows:

- **§9-12** establishes the Office of Cannabis Management within the Division of Alcohol Beverage Control. This office will be operated by an Executive Director. This position has vast controls over every aspect of the newly regulated market.

The Executive Director is given far too much power and influence over the new industry. Additionally, because this new authority is not headed by a commissioner, the state legislature has no ability to advise or to consent to the appointment.

- **§13** outlines the State Cannabis Advisory Board. The board falls under the new office established in §9-12. Their role is to advise the office on cannabis cultivation, processing, distribution, transport, testing as well as the sale of cannabis.

This board does not act as an effective check on the Executive Director, as the Executive director serves as the Chair of the Board. The vice chair, who is elected by the board can only serve in the Executive Director's absence. The Executive Director controls the number of board members, the length of their term and anything thing else. The power is far to concentrated.

- **§16** concerns the violation of cannabis laws and regulations. Early in this section it states that violations that are not outlined later in the bill can lead to imprisonment for up to one year and a fine of up to \$5,000.

We should not be imprisoning people for non-violent marijuana related offenses. The sentencing and enforcement will not be enforced uniformly. This will just continue the racially disproportionate impact.

- **§30-47** Reconstitute the NYS Medical Marijuana Program and registered organizations under the newly formed Office of Cannabis Management.

There is nothing in this proposal that increases access or affordability. It does allow for home cultivation, but that is often very arduous and costly. Sick individuals will not see this as an effective alternative.

We should allow NYS Medicaid patients to have their Medical Marijuana covered. Additionally, the costs of the initial visit should be covered for qualifying low income patients.

- **§40** are the most troublesome provisions regarding the Medical Marijuana and the Registered Organization currently permitted to operate in the current Medical Marijuana marketplace.

This gives the Executive Director the ability to grant those existing medical licensees access to the adult use market as a cultivator, processor, distributor or

retailer. It also exempts them from some of the regulations that prevent newly licensed cultivators, processors or distributors from participating in the retail.

Additionally, it allows these well established licensed medical companies to participate in a competitive bidding process to obtain a license in an effort to fund the social equity aspects of the bill.

- **§60** describes the types of licenses the Office of Cannabis Management would be empowered to issue.

While there is a provision that outlines the ability of the new office to issue licenses of any type it deems necessary, this section is still limited.

Limiting the types of licenses will shrink the pool of individuals who can apply in the first place. Diversity with regards to the types of licenses will help to foster diverse backgrounds of licensees.

The second provision of this section states that separate licenses would be required for each facility where cultivation, processing, distribution or retail sale are all occurring.

While it is important that every aspect of the adult use program is licensed and regulated, this type of consolidation will limit the ability of new applicants to compete in the industry.

- **§63** gives the Office of Cannabis Management the authority to charge applicants for licenses a non refundable application fee or to auction licenses to bidders determined by the Office of Cannabis Management.

The fee may be based on the type, cultivation volume, and any other factor the Office of Cannabis Management deems necessary and be charged to licensees every other year. That fee is based on the amount of cannabis to be cultivated, processed, distributed or dispensed, the gross annual receipts from the previous period in addition to any other factors deemed necessary.

The auction model is yet another way to carve out spaces for existing medical companies to operate. It will make it difficult for small businesses to define their own space in the industry.

There is no discussion of a focus on M/WBEs in terms of scaling of application fees.

- **§64** outlines the selection process the Office of Cannabis Management will use when considering applicants. One of the last provisions states that the office will consider if the applicant and its managing officers are of good moral character and they do not have interests in other licensed businesses under their jurisdiction.

It is unclear what they mean by good moral character. It should be clearly defined as to avoid racially unfair enforcement of this provision. We cannot allow someone with a non violent marijuana charge in NY or another state, to be locked out of this industry.

- **§64** says the Office of Cannabis Management will give consideration to applicants that will contribute to communities and people disproportionately harmed by cannabis law enforcement.

We need to be more ambitious with how we are requiring licensees to contribute to communities disproportionately impacted by prohibition.

We need continued dedicated tax revenue to help address the needs of these communities, not charitable efforts by small businesses.

- **§66** discusses the process for license renewals. The second piece states that each applicant would need to submit documentation of the racial, ethnic and gender diversity of the employees prior to renewal. Additionally, it explains that the Office of Cannabis Management may create a social responsibility framework agreement and make adherence required to renewal.

There should be minimum standards for diversity based on the demographic information for the municipality where the applicant is based.

We need to have more affirmative language, than “may”. The office WILL create a social responsibility framework agreement and make adherence required to renewal.

- **§68** This deals with the adult use cultivator licenses and allows the licensed entity to acquire, process, cultivate and sell cannabis to a licensed processor in NYS.

A provision in this section states that someone holding a cultivator license may also apply for a processor or distributor license. This will lead to consolidation

and limit diversity in the new market.

There is no mention of ensuring a diversity of cultivator licensees. We need to ensure that communities of color are represented.

- **§69** deals with the adult use Processor Licenses which authorizes the acquisition, possession, processing and sale of cannabis to licensed retail distributors. This section goes on to state that a process licensee cannot more than three processing license.

We should limit consolidation whenever possible to allow for the most opportunities to impacted communities.

There is no mention of ensuring a diversity of Processor licensees. We need to ensure that communities of color are represented.

- **§71** refers to the adult use distributor license, which would permit the acquisition, possession, distribution from a licensed processors, micro business cultivator or registered organization to sell to licensed retail entities. It goes on to states that no person may have a direct or indirect interest in more than three retail dispensaries.

It gives yet another exemption for the existing medical companies.

- **§74** outlines the method where a licensed retail dispensary can obtain a license that permits on site consumption for customers. It states a wide variety of criteria that they base their determination on from the lease duration to the proximity to schools and houses of worship.

It does not state that consideration would be given to the needs of individuals who reside in multi unit dwellings. Many of which do not permit smoking.

A lack of public consumption spaces in an area will disproportionately impact communities of color and we should push for those needs to be articulated in the bill.

- **§84** This portion of the Governor's proposal deals with M/WBE, disadvantaged farmers and establishes an incubator program. It state that the program to provide direct support to qualifying social and equity applicants once they have

been granted licenses. The support will be in the form of counseling services, education, small business coaching and compliance assistance.

The most difficult aspect of this industry remains the financial services due to the Federal Government's scheduling of cannabis. NYS needs to take steps to provide access to revenue to qualifying candidates.

The communities impacted by prohibition will not be able to raise a lot of money on the Canadian Stock Exchange like some of the established medical companies.

There should also be requirements to participate in an apprenticeship program to aid in workforce development.

The bill does not contain any minimum level of M/WBE involvement in the cannabis industry. It talks about publishing the demographic data and actively promoting diversity but there are no hard line requirements.

- **§134** deals with penalties or violations of the new cannabis laws. Anyone who cultivates for sale, or sells cannabis, cannabis products, medical or hemp cannabis without having the appropriate license, registration or permit would be guilty of a misdemeanor and could face a \$5,000 penalty and one year in prison. For a second offense, the fine goes to \$10,000 and still face a year in prison. **Registered organizations who participate in the industry despite a revocation or suspension face the same initial fine but it does not increase per instance and they only face a sentence of 6 months.**

We see already that the rules are not written fairly. Why is an average citizen facing a longer sentence than someone at the head of one of the established medical companies, like John Boehner, who should know better and has the means to mount a more effective defense?

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§134** asserts that any person found to have made a false statement on the application to the Office of Cannabis Management can face a \$5,000 fine and up to 6 months in prison.

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§138** defines illicit cannabis as any cannabis product where taxes should have been imposed but have not been paid. Anyone involved from possession to sale or even owning a space that knowingly houses or cultivates illicit cannabis will be guilty of a misdemeanor.

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§140** outlines individuals who are forbidden to traffic in cannabis. It states that no one convicted of a felony is eligible. Again, it gives carve outs for individuals involved with registered medical providers and allows them a path to continue participating in the industry.

It is unacceptable for a non violent felony conviction, from NY or any other state, to prevent someone from the opportunity to participate in this industry. Especially if the conviction is for behavior that is not only now lawful but is helping to balance the NYS budget. This combined with the language speaking to bureaucratic morality test is troubling.

It also states that a person who is not a U.S citizen cannot participate. We should allow a path for DACA recipients to participate. If they are able to lawfully work, no one should be denied access.

- **§141** deals with the Office of Cannabis Management ability to access criminal history information via the Division of Criminal Justice Services for all potential applicants. Applicants are also required to submit fingerprints. **Once again, we cannot allow prior non violent records to act as a barrier to the legal marketplace. This misguided approach will only solidify the illicit market. Criminal records related to non violent cannabis charges need to be expunged and we must allow a path to redemption to those caught up in the “War on Drugs”.**
- **§3382** discusses the penalties for growing cannabis by unlicensed persons. It states that no one is permitted to grow cannabis outside of those empowered by

articles three, four or five of the cannabis laws. Those knowingly growing cannabis or who allow it to grow on their land will be guilty of a class a misdemeanor.

We must allow for regular people to apply for a home cultivation license. The continued prohibition of home cultivation undercuts our attempt to bring NYS marijuana laws into the present. With penalties of up to one year in prison, the enforcement will be racially biased.

The continued illegality will encourage those engaged in illicit cultivation to create hazards to public safety and to the law enforcement officials tasked with inspected alleged home grow operations.

- **§221.20** deals with criminal possession of cannabis in the 2nd degree. Those found guilty will be charged with a class A misdemeanor as opposed to the class E felony it was prior to this proposal.

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§221.25** defines criminal possession of cannabis in the 1st degree. It reduces the penalty from a class D felony to a class E felony.

While the weight for this charge is substantial (64 oz), there should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§221.35** refers to criminal sale of cannabis in the 5th degree. This would be considered a violation and come with a penalty of \$250 people or twice the value of the sale.

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§221.40** This deals with criminal sale of cannabis in the 4th degree. In addition to \$500 fine or two times the value of the sale and/or three months imprisonment.

There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.

- **§221.45** deals with criminal sale of cannabis in the 3rd degree. This will be a misdemeanor and those guilty could face a \$1,000 penalty and up to one year in prison.
There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.
- **§221.50** outlines criminal sale of cannabis in the 2nd degree. This proposal changes this to a class E felony.
There should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.
- **§221.55** refers to criminal sale of cannabis in the 1st degree and schedules it as a class C felony.
While the weight for this charge is substantial (64 oz), there should be no criminal charges related solely to the non violent cultivation, use or distribution of cannabis. Punishments should include substantial fines and mandatory community service.
- **§490** establishes the excise tax on medical cannabis. The tax will be on the gross receipts of medical cannabis by a registered organization to certified patients or caregivers. The registered organizations pay a 7% tax.
We could reduce the financial barrier for communities to medical cannabis by allowing qualifying patients to get their medicine tax free.

Additionally, and more ambitiously, I am not clear why NYS medicaid will not cover medical cannabis but has no pause about covering dangerous opioids.
- **§493** describes the tax on non medical cannabis. There is a multi stage taxation process outlined in this provision.
 - 1) The cultivation Tax Rate is \$1/dry weight gram on flower & \$0.25 /dry weight gram of trim or leaf. This is to be paid by the cultivator at the time of sale to a licensed wholesaler.
 - a) Where the cultivator is the wholesaler, the tax will be calculated by the wholesaler and paid at the time of sale to a licensed retailer.

- b) Where the cultivator is also the retailer, the tax will be paid at the point of retail sale.
- 2) There is also a tax levied on the wholesaler when it is transferred to a retail licensee. Where the wholesaler is not also the retail licensee, the Wholesaler Tax Rate is 20% of the invoice price charged to the dispensary and will be paid at the time of sale.
- 3) Lastly, there is a tax imposed on the sale or transfer of cannabis from a wholesaler to a retail outlet at an additional 2% of the invoiced price charged by the wholesaler to a retail outlet.
 - a) Where the wholesaler is not the retail outlet, the 2% tax will be paid based on the price charged to the retail customer.
 - b) This portion of the tax is held in trust for the county in which it was paid.

This tax structure has been attempted in other states required reform later reform. The multi level approach increases administrative costs that will cannibalize the new revenue that could be used for social programs. It also creates a tremendous record keeping burden and costs. A single, cumulative tax at the point of sale would streamline the process and give NYS adult use program the best chance to succeed.

An additional tax to be retained by the local town or city could incentivize municipalities to participate in the licensing of adult use entities.

- **§58** amends the state finance law as it relates to tax revenue from medical cannabis. There will be a Medical Cannabis Trust Fund in the joint custody of the state comptroller and the commissioner of Tax & Finance and will consist of all money required to be paid by the relevant provisions of the law.
 1. 22.5% of the money will be transferred to the counties where the cannabis would be manufactured in proportion to gross sales from cannabis originating in those counties.
 2. 22.5% will go to the counties where the medical cannabis is sold in proportion to gross sales in each.
 3. 5% will be given to the Office of Alcohol and Substance Abuse Services to administer drug abuse prevention, counseling and treatment services.

4. 5% will be given to Division of Criminal Justice Services to provide grants to local police departments for personnel costs.

It is unclear where the remaining funds will be allocated.

(§59 is intentionally omitted)

Some of the tax revenue should be used to help low income medical patients with costs associated with obtaining a prescription.

Allocating some of the revenue to local municipalities in proportion with the total sales to further incentivize them to participate in the new legal market and expand the counties with medical retail locations.

- **§60** continues to amend the state finance law and creates the New York State Cannabis Revenue Fund. This will be also in the custody of the Comptroller and the Tax & Finance Commissioner.

Money can be distributed for the following purposes:

- | | |
|---|--|
| a) Administration of the cannabis program | h) Prevention |
| b) Data gathering | i) Mental health treatment |
| c) Monitoring reporting | j) Public health education & intervention |
| d) Governor's Traffic Safety Committee | k) Cannabis use & application research |
| e) Small business development loans | l) Program evaluation/improvement |
| f) Substance abuse | m) Any purpose identified by the Executive Director* |
| g) Harm reduction | |

*requires approval by the budget director

The language in the bill is far too vague as to how this money will be allocated and fails to address the needs of the communities this campaign is representing. There is no effort to address the needs of those areas disproportionately impacted with no minimum allocation requirements.

Provisions That Should Be Included In Any Similar Legislation:

Specific examples of provisions in the Governor's budget proposal that should be included in any similar legislation are as follows:

- **§14** deals with the disposition of monies received by the new authority from the application processes, to licensing and renewal fees. In this section it talks about creating a scale for the pricing of such fees based on the size and scope of the operation.

It is important that moving forward, the costs upfront are not so high that they limit the diversity of applications.

- **§19** establishes a public health campaign demonstrating responsible adult use of cannabis in conjunction with the Department of Health, the Office of Alcohol and Substance Abuse Services and the office of mental health.

This does not address the existing needs for expanding access to treatment, but it is a good start on the education side of the We Rise Pillar. We should include a focus on the effects of underage use.

- **§60** states that the Office of Cannabis Management could not deny an applicant solely because they have a conviction for violating Article 220 or Section 221 of the penal law.

Theses areas of the penal law deal with the criminal sale of and now the unlicensed sale of cannabis. They have been heavily amended to allow for the licensed sale for adult use. However the penalties are still far too harsh and will be disproportionately applied to communities of color. It also fails to mention cannabis convictions from other states.

- **§64** outlines the selection process the Office of Cannabis Management will use when considering applicants. It states that the office will consider if the applicant has entered into a labor peace agreement with a bona-fide labor organization that is either representing the applicant's employees or actively attempting to.

1. With applicants with more than 25 employees, the office will give priority to applicants that have entered into a collective bargaining agreement with a bona-fide labor organization.

These provisions will do a lot to help address the workforce development and job opportunity pillars.

It provides common ground for the We Rise To Legalize campaign and organized labor groups.

Lastly, we should push to include consideration by the Office of Cannabis Management for those applicants or renewals that participate in apprenticeship programs and other workforce development opportunities.

*^^** Sen Diane Savino expressed concern about the legality of these requirements **^^*

- **§81** details the methods for the lawful distribution of cannabis. The system outlined is straightforward enough not to impact our principles. One provision that is a step in the right direction empowers the Executive Director to set maximum margins retail stores are permitted to mark up their inventory or risk a penalty.

This will help ensure that individuals are not priced out of responsible adult use and deter further participation in the illicit market.

- **§84** deals with minority and women owned businesses. It also deals with disadvantaged farmers and an incubator program.

It states that the Office of Cannabis Management shall implement a social and economic equity plan and actively promote racial, ethnic and gender diversity when issuing license.

They will prioritize consideration of applicants that qualify as minority and women owned businesses, or disadvantaged farmers.

Extra consideration will be given if the applicants demonstrate that the applicant is a member of a community impact by cannabis enforcement or their income is lower than 80% of the median income of the county they are in.

- **§41** details the state agencies that would be required to evaluate the effectiveness of this law. The Office of Cannabis Management, the Division of Budget, Department of Tax & Finance, Department of Health, Office of Alcohol and Substance Abuse Services, Office of Mental Health, State Police and the Division of Criminal Justice Services will issue their findings two years after the bill is enacted.

The results will be delivered to the Governor and legislative leaders and will include the progress made in achieving social justice as well as recommendations to improve the implementation.

RE: Additional Provisions That Need To Be Added To Any Similar Legislation

The following provisions were not part of Assembly Bill A03506-C but should be included in any similar legislation:

- All marijuana that is made available for purchase in New York State should be free of fertilizers, fungicides, pesticides and similar products at the time of sale.
- All marijuana that is made available for purchase in New York State should be free of bacteria, fungus, mold, and other microbial organisms at the time of sale.
- All marijuana that is made available for purchase in New York State should be labeled in terms of its potency – including, at a minimum, the content of its CBD, THC and other major cannabinoids.
- The number of licenses that are awarded for each type of license should be proportionately distributed based on the number of residents in each County.
- At least 30% of each type of license should be awarded to minority-owned businesses.
- At least 50% of each type of license should be awarded to women-owned businesses.
- Fifty percent (50%) of the taxes that are collected by New York State from marijuana sales should be distributed to a variety of programs in the communities that have been most disaffected by the prohibition against marijuana: e.g., after-school programs, job training programs, reentry programs for returning citizens, start-up funding for new businesses, etc.
- Twenty-five percent (25%) of the taxes that are collected by New York State from marijuana sales should be distributed to the County government in which the sales occurred (Note: New York City shall receive fifty percent of the taxes that are distributed to each of the following counties: Bronx, Kings, New York, Queens, and Richmond).
- It should be legal to sell marijuana to anyone who is twenty-one (21) years or older regardless of whether they reside in New York State.

- All packages of marijuana and marijuana-related products shall carry “warning labels” that are similar to those that appear on packages of cigarettes.
- All prior convictions for non-violent crimes involving the distribution, sale and/or use of marijuana shall be permanently erased from all public records.
- Anyone who is currently incarcerated in a non-federal facility in New York State for a non-violent crime involving the distribution, sale and/or use of marijuana shall be immediately released from jail or prison.
- Driver licenses that were suspended or revoked in conjunction with a non-violent marijuana-related crime shall be restored free-of-charge for an 8-year period.
- If/as necessary, New York State shall charter one or more banks to handle marijuana-related transactions within the state.
- New York State shall establish a Legal Defense Fund to provide legal representation to any individual who is accused of a non-violent marijuana-related act that is not illegal under New York State law.

MEMORANDUM

TO: Bertha Lewis

FROM: Jake O'Hara/Dan Hogle

RE: Assembly Bill A03506-C/Senate Bill S3040-C

DATE: January 29, 2019

History

Assembly Bill A03506-C is the Assembly version of Senate Bill S03040-C. Both bills were introduced on January 19, 2017 – and, since neither was passed during the 2017-2018 legislative session, they both expired as of December 31, 2018.

The Assembly version of the bill, which is an exact word-for-word version of Senate Bill S03040-C, was introduced by Assemblywoman Peoples-Stokes – and multi-sponsored by her and the following members of the Assembly: Epstein, Mosley, Seawright, Simon, Skartados, Steck, Taylor. It was also co-sponsored by the following members of the Assembly: Abinati, Bichotte, Blake, Cahill, Dinowitz, Gottfried, Hevesi, Hunter, Hyndman, Jean-Pierre, Jaffe, Jenne, Lifton, Lupardo, Niou, Pellegrino, Pichardo, Richardson, Rosenthal L, Sepulveda, Vanel, Walker, Weprin, and Wright.

The Senate version of the bill was introduced by Senator Krueger – and co-sponsored by Senators Alcantara, Bailey, Comrie, Dilan, Gianaris, Hamilton, Hoylman, Montgomery, Parker, Peralta, Rivera, Sepulveda, and Serrano.

Analysis

Both bills are lacking with respect to several of the policy objectives that have been established by We Rise To Legalize. In this regard, those policy objectives are as follows:

- Reinvest tax revenues from the marijuana industry into the local communities that have been most disaffected by the so-called “War On Drugs”;
- Expand access to the current medical marijuana program for communities of color;
- Provide job opportunities and capital investments in the marijuana industry to women-owned businesses and minority-owned businesses;
- Create sustainable jobs in the marijuana industry with continued workforce development, job training, and protections for workers;
- Use tax revenues from the marijuana industry to develop community-based education and anti-abuse programs; and
- Expunge all non-violent marijuana convictions – and expand re-entry programs for people with marijuana-related convictions.

RE: Shortcomings

Some specific examples of the shortcomings of Assembly Bill A03506-C/Senate Bill A3040-C are as follows:

- §2 deals with the Legislative findings and intent. It states that its goals are “to generate millions of dollars in new revenue, prevent access to marihuana by those under (21), reduce the illegal drug market, reduce violent crime, reduce participation of otherwise law-abiding citizens in the illicit market, end the racially disparate impact of existing marihuana laws and create new industries and increase employment”

We should add specific language to mandate directing revenue from legalization to communities affected by the drug’s prohibition, in perpetuity. (Many of the social programs for applicants/licenseses receive funding for a few years.)

- §2 prohibits the alleged use of marijuana by a parent to be the sole basis for a child abuse or neglect investigation or proceeding. It also prohibits a newborn child’s positive toxicology report for marijuana from being sufficient to support a finding of child abuse or neglect.

This bill does not take adequate steps to expunge any and all evidence of these accusations, investigations or convictions for these or any other offenses.. It is not sufficient to seal these records.

- §14 describes the revisions to the NYS penal law that replacing with “criminal” sale with “unlicensed” sale and details the relevant penalties. For example, The unlicensed sale in the 2nd degree, which involves selling to people under 21 any amount of marijuana, is labeled as a class E felony & can require up to two years of probation supervision.

There should not be any criminal charges or court mandated supervision for any small transactions involving marijuana for personal use. Fines and community service should be the method of enforcement. Anything else will lead to disproportionate enforcement targeting minority communities.

- §15 stipulates that “not more than six living plants may be planted, cultivated, harvested, dried, or processed within a single private residence or upon the grounds of that private residence, at one time”.

This language does not take into account the fact that different private residences have different numbers of people over the age of 21 living in them. In this regard, this section should be amended to specify that the limitations apply to each person over the age of 21 who resides in a given location (Note: This language needs to carefully drafted to ensure that each person only has one residence).

- §15 provides that “A town, city or village may enact and enforce reasonable regulations...” concerning the personal cultivation of marijuana.
Although the violation of such a regulation is limited to the level of an infraction – and the maximum fine allowed is \$125.00 – this language still invites local legislators to create their own rules regarding the cultivation of marijuana. This language was likely included to increase the likelihood that Upstate legislators will vote for the bill – but because it means that some residents of New York State will likely not be able to enjoy the full benefits of this legislation, it should be eliminated.
- §15.4(a)(3) refers to 16-ounces of marijuana or up to 4½-ounces of concentrated marijuana – which seems inconsistent with all the other references of “up to 2-pounds of marijuana or up to 4½-ounces of concentrated marijuana”.
There is no apparent reason for this anomaly. As a result, this section should be amended to conform with the other sections of the legislation – and should refer to “up to 2 pounds of marijuana or up to 4½-ounces of concentrated marijuana.
- §15.6 lumps together everyone who possesses more than 2-pounds of marijuana or up to 4½-ounces of concentrated marijuana.
The fact that there are no proposed gradations to these amounts makes this provision somewhat untenable. As written, this section does not distinguish between someone who is found in possession of 33-ounces of marijuana from someone who is found in possession of 33-pounds of marijuana.
- §16 provides that the unlicensed sale of more than 2-pounds of marijuana – or more than to 4½-ounces of concentrated marijuana – will be subject to the following penalties:
 - A violation punishable by a fine of not more than \$125.00 for a first offense;
 - A violation punishable by a fine of not more than \$250.00 for a first offense; and
 - A class B misdemeanor punishable for up to three (3) months in jail – and a fine of not more than \$500.00 for a third or subsequent offense.**It is unclear how this *general prohibition* of the unlicensed sale of marijuana – which does not include any language regarding the age of the buyer or the seller – will be reconciled with other sections of the proposed law that deal with (a) the sale of marijuana by someone 21 years of age or older to someone who is under the age of 21; and (b) the sale of more than 16-ounces of marijuana – or more than 16-ounces of concentrated marijuana – by anyone to someone who is under the age of 21.**

Given that this bill is supposed to create a framework for the sale of marijuana that is similar to the existing framework regarding the sale of liquor, it is understandable that 21 would be the cut-off age for someone to use marijuana. In all likelihood, however,

this will also provide an impetus to raise the age of smoking in New York State from 18 to 21 (Note: Governor Cuomo has already announced his support for such legislation).

As is also true for several other sections of the bill, this section does not specify where the proceeds from any fines will go. In this regard, the legislation should be amended to specify that all such fines are used to support community-based marijuana abuse and education programs.

Another amendment that would be helpful is to provide for community service in lieu of fines. This would help to address the disparity that is inherent in having uniform fines imposed on people with vastly different levels of assets and income.

- **§17 provides that the unlicensed sale of more than 4-ounces of marijuana – or more than to 4-ounces of concentrated marijuana – by someone 21 years of age or older to someone who is under the age of 21 will be a Class E felony: i.e., Unlicensed Sales Of Marijuana In The Second Degree (Note: In New York state, a Class E felony is punishable by up to four (4) years in prison with a minimum of one (1) year).**

It is unclear how this *specific prohibition* will be reconciled with other sections of the proposed law that generally prohibit the unlicensed sale of more than 2-pounds of marijuana – or more than to 4½-ounces of concentrated marijuana – by anyone to anyone.

- **§18 provides that the unlicensed sale of more than 16-ounces of marijuana – or more than to 16-ounces of concentrated marijuana – by anyone to someone who is under the age of 21 will be a Class E felony: i.e., Unlicensed Sales Of Marijuana In The First Degree. In New York state, a Class E felony is punishable by up to four (4) years in prison with a minimum of one (1) year.**

It is unclear how this *specific prohibition* will be reconciled with other sections of the proposed law that generally prohibit the unlicensed sale of more than 2-pounds of marijuana – or more than to 4½-ounces of concentrated marijuana – by anyone to anyone.

- **§20 provides that the term “smoking” does not include the use of an electronic smoking device that creates an aerosol or vapor unless local or state statutes extend prohibitions on smoking to electronic smoking devices.**

It is unclear why “vaping” marijuana is going to be treated differently than “smoking” marijuana. In this regard, this may be a first step in an attempt to have the legislature extend existing prohibitions on smoking to include electronic devices.

- **§21 deals with amending the alcoholic beverage control law. It states that it is necessary for the state to regulate and control the production, sale and consumption of**

marihuana. *“...to the extent possible, supporting economic growth, job development, and the state's alcoholic beverage production industries, MARIHUANA PRODUCTION INDUSTRIES and its tourism and recreation industry..”*

There is no mention of no minimum standards or stated carve outs for M/WBE, small businesses or historically disadvantaged communities. The phrase “to the extent possible” provides an easy out for weak implementation of the areas in the bill we support.

- **§31** creates the Bureau of Marijuana Policy – and establishes all the requirements and rules regarding the issuance of licenses for producers, processors, and retailers of marijuana and marijuana-related products. In addition, this same section also establishes policies and procedures with respect to minority-owned businesses, women-owned businesses, and incubator programs.

This section does not provide enough assurances with respect to an equitable distribution of licenses. As a result, this section should be amended to include the following provisions:

- (a) The number of licenses that are awarded for each type of license should be proportionately distributed based on the number of residents in each County;**
 - (b) At least 30% of each type of license should be awarded to minority-owned businesses; and**
 - (c) At least 50% of each type of license should be awarded to minority-owned businesses.**
- **§32** creates the New York State Marijuana Revenue Fund – and details the purposes for which those funds can be used (Note: This Fund will include all the revenues that are received by the New York State Department of Taxation & Finance with respect to the sale of marijuana in New York State plus any other funds that are appropriated by the New York State legislature for the Fund).

In order to meet the We Rise To Legalize policy objectives, this section should be amended as follows:

- (a) Fifty percent (50%) of the taxes that are collected should be distributed to the newly-established Community Grant Reinvestment Fund. Thereafter, this fund should be used to pay for a variety of programs in the communities that have been most disaffected by the prohibition against marijuana: e.g., after-school programs, job training programs, reentry programs for returning citizens, start-up funding for new businesses, etc.**
 - (b) Twenty-five percent (25%) of the taxes that are collected should be distributed to the County government in which the sales occurred (Note: New York City shall receive fifty percent of the taxes that are distributed to each of the following counties: Bronx, Kings, New York, Queens, and Richmond).**

- §32 States that the Department of Taxation & Finance can recover up to 4% of the total tax revenue received to recoup administrative costs. The Comptroller’s report estimated the tax revenue to equal 1.3 Billion while the governor’s projections are far less.
This proposes that the Department of Tax & Finance could get as much as \$52 million dollars a year to administer and collect taxes. I would like to see it compared to the allotment for alcohol.
- §33 establishes the taxing structure that will be applied to the sale of marijuana in New York State.
It is unclear whether the proposed taxing structure is proportionate to the current taxing structure for tobacco products and alcohol – and/or whether the proposed taxing structure will be competitive with that on nearby states. In this regard, a more detailed economic analysis needs to be undertaken with respect to this section.
- §34 establishes the procedure via which certain arrest records regarding certain types of marijuana-crimes can be sealed.
Sealing arrest records does not ensure that they will not resurface at some point in time. As a result, this section should be amended in order to provide for the expungement of all marijuana-related arrest records. (See Expungement Addendum)
- §35 establishes the procedure via which certain criminal records regarding certain types of marijuana-crimes can be sealed.
Sealing criminal records does not ensure that they will not resurface at some point in time. As a result, this section should be amended in order to provide for the expungement of all marijuana-related criminal records. (See Expungement Addendum)
- §36 establishes the procedure via which a court can order a pending action regarding a marijuana-related crime to be adjourned in contemplation of dismissal (ACOD) based upon a finding of exceptional circumstances. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences, including, but not limited to, those that could leave a noncitizen inadmissible or removable from the United States”.
In addition to discontinuing any such actions, this section should be amended in order to provide for the expungement of all court records concerning the action.
- §38 establishes the procedure via which certain prior convictions will not be taken into consideration.
As currently written, this section does not include convictions that were based on accusations that the defendant possessed more than twenty-five grams of marijuana.

Since “accusations” are not the same as “convictions”, this section should be amended to remove that language – and to eliminate the twenty-five grams language.

- §40 establishes the procedure via which those who have previously been convicted of marijuana-related crimes will be re-sentenced.

Rather than requiring such people to petition for a re-sentencing, this process should be automatic (Note: Anyone who is currently serving a sentence for what would no longer be a crime – or who has already served the minimum amount of time that could be imposed vis this legislation – should be immediately released from jail/prison). In addition, no supervisory period should be imposed on anyone who conviction is erased via this legislation.

- §57 establishes the Marihuana Microbusiness and Marihuana License Revolving Loan Fund.

(a) While the objectives of this section are laudable, there is, once again, no guaranteed set-asides for minority-owned businesses and women-owned businesses. As a result, this section should be amended to ensure that at least 30% of the loans are granted to minority-owned businesses – and that at least 50% of them are granted to minority-owned businesses.

(b) § 166 establishes the Marihuana Policy Bureau and outlines how the entity will be organized and how these positions will be appointed.

There should be language that prevents anyone with a financial interest in or with affiliation to any licensed entity in any state, or any current or past affiliation with law enforcement, in any state, from serving as a member of the BMP administration.

As law enforcement previous licensees cannot participate in a new licensed business based on this law, those same interests should not have undue influence over policy, implementation or enforcement.

- § 167.2 states that the Bureau shall notify the public of all licensing rules and regulations once they are determined. The bill mentions the inclusion of publicly available instructions and a series of public forums, “in all regions” of the state, determined by the Department of Economic Development.

It does not mention specific carve outs for communities impacted by prohibition. These communities should be prioritized in the Department of Economic Development’s determinations. There should be a commitment for annual events for updates and continued workforce development.

- § 167.2 (d)(2) states that the BMP has the authority to collect all fees in connection with the activities they regulate concerning the commercial marijuana trade.

They should add phrasing that prevents these fees from unfairly limiting small businesses, entrepreneurs, specifically, W/MBEs, as determined by the findings of the

annual reports various agencies are to produce as it relates to marijuana. It should force the BMP to adopt improvements annually.

- § 174 deals with the provisions governing BMP's initial rulemaking. It states that within 240 days of the effective date of the legislation, the BMP will make provisions, rules and regulations necessary to carry out the legislation.
There should be commitments to consider limitations of small businesses, lower income applicants and W/MBEs when prescribing these rules. With special attention to those governing the micro business loan fund, W/MBE categorizations, community grant fund, and other allocations of new revenue. Also it should require that the rules be updated annually to address any unforeseen regulatory issues or limitations based on the annual reports and agency recommendations.
- § 174.4 states that the rules and regulations the BMP develop do not prohibit operation of marijuana establishments expressly or through regulations.
There should be language that mentions providing assistance to W/MBE and communities disproportionately affected by marijuana prohibition with regards to navigating burdensome regulations.
- § 183 focuses on renewals of licenses and permits issued but the BMP. It mentions that a licensee or permit holder that wishes to seek a renewal, must supply documentation relating to the racial, ethnic and gender diversity of the employees and the ownership.
There are no stated minimum levels of effort, compliance, nor any benchmarks, incentives or penalties. There should be hard lined standards to develop workforces in communities historically affected by the prohibition and unjust enforcement.
- § 184 states that applicants must submit a plan to ensure gender, racial and ethnic diversity that reflects the demographics of town or city.
The effectiveness of the plan's implementation should impact the likelihood of future renewals. If they need to submit a plan, and the year employment breakdowns, there should be a stated incentive for achieving diversity standards.
- § 190 deals with the establishment of fees for license applications. It states that these fees shall not exceed the administrative costs of implementation.
These fees may become a barrier for low income applicants. The bill should include language that states that these fees are to be scaled down with regards to applicants income or W/MBE status, just as they are to be scaled up for larger operations.

- § 190 also has a line that talks about certain individuals being barred from receiving a license. It mentions that persons who are not US citizens or lawfully admitted alien for permanent residence in the United States.

We should give specific consideration to DACA recipients and those with work visas.

- § 191 states that reasonable costs incurred by the BMP for administering section 190 of the Alcoholic Beverage Control Law are to only be covered by the revenue from the fund until 2023-2024. Those sections are the ones that deal with M/WBE Incubator Program and Social Equity Programs.

Dedicated funding for Dept. of Tax & Finance, SUNY and Dept of Criminal Justice Services all remain in effect each year. These allocations for micro business loans and Social Equity Applicants should remain annually as well.

- § 448 deals with a mandate that marijuana retailer applicants are required to submit a Surety Bond with the NYS Department of Tax & Finance equal to two months of the cultivation facilities anticipated retail marijuana excise tax.

This will limit access to minority, women, low income applicants based on how Surety Bonds are calculated.

RE: Provisions That Should Be Included In Any Similar Legislation

Some specific examples of provisions in f Assembly Bill A03506-C/Senate Bill A3040-C that should be included in any similar legislation are as follows:

- §2 prohibits the alleged use of marijuana by a parent to be the sole basis for a child abuse or neglect investigation or proceeding.

This is an important provision that will protect the rights of parents – and that will prevent the unnecessary disruption of families. As such, this provision should be included in any version of this legislation.

- §2 prohibits a newborn child's positive toxicology report for marijuana from being sufficient to support a finding of child abuse or neglect.

This is an important provision that will protect the rights of parents – and that will prevent the unnecessary disruption of families. As such, this provision should be included in any version of this legislation.

- §2 would require the State to close any open investigations of child abuse or neglect that are based solely on the accused's use of marijuana – and to seal the records regarding those investigations.

This is an important provision that will protect the rights of parents – and that will prevent the unnecessary disruption of families. As such, this provision should be included in any version of this legislation.

- §6 eliminates marijuana as a basis for any type of asset forfeiture action.
This is an important provision that will protect the rights of anyone whose assets might be seized in conjunction with any type of marijuana-related investigation. As such, this provision should be included in any version of this legislation.
- §15 allows individuals over the age of 21 to possess, use, be under the influence of, display, purchase, obtain or transport up to 2-pounds of marijuana or up to 4½-ounces of concentrated marijuana.
These proposed limitations are substantially higher than what other states have imposed with respect to marijuana and concentrated marijuana. As such, this provision should be included in any version of this legislation.
- §15 allows individuals over the age of 21 to transfer, without remuneration, up to 2-pounds of marijuana or up to 4½-ounces of concentrated marijuana to another individual over the age of 21.
These proposed limitations are substantially higher than what other states have imposed with respect to marijuana and concentrated marijuana. As such, this provision should be included in any version of this legislation.
- §15 allows individuals over the age of 21 to possess, plant, cultivate, harvest, dry and process up to six (6) living marijuana plants – and the marijuana and concentrated marijuana produced by those plants.
These proposed limitations are substantially higher than what other states have imposed with respect to marijuana and concentrated marijuana. As such, this provision should be included in any version of this legislation.
- §15 provides that no conduct that is permitted via this legislation can constitute the basis for approach, search, seizure, arrest and/or detention.
This is an important provision that will protect citizens from being approached by law enforcement officers – and from being searched, arrested or detained and/or having any of their assets seized – as a result of any lawful activity that involves marijuana. As such, this provision should be included in any version of this legislation.
- §15 provides that possession of more than 2-pounds of marijuana or up to 4½-ounces of concentrated marijuana will be a violation punishable by a fine of not more than \$125.00.

These proposed limitations are substantially higher than what other states have imposed with respect to marijuana and concentrated marijuana – and the penalty for violating them is only a violation. As such, this provision should be included in any version of this legislation.

Notwithstanding the above, the fact that there are no proposed gradations to these violations makes this provision somewhat untenable. In this regard, why would someone who is found to have with 33-ounces of marijuana be given the same penalty as someone who is found to have with 33-pounds of marijuana?

- **§ 23** amends Section 65-b of the alcoholic beverage control law. 7(a) provides an affirmative defense for persons found to have sold Marijuana to a person under the age of 21 if the purchaser presented an approved ID, the agent for the licensee performed due diligence up to and including a barcode scan.

I would allow for an affirmative defense for record keeping violations by allowing licensees accused to submit proof of prior compliance with regulations. A history of compliance should be taken into consideration considering the regulatory burden on small businesses.

- **§25** extends the existing prohibitions regarding the personal consumption of alcohol to the personal consumption of marijuana. As a result, no one will be allowed to:
 - smoke marihuana in public;
 - smoke marihuana products in a location where smoking tobacco is prohibited pursuant to section thirteen hundred ninety-nine-o of the public health law;
 - possess, smoke or ingest marihuana products in or upon the grounds of any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board while children are present; or
 - smoke or ingest marihuana products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.

These are reasonable prohibitions – and are consistent with the prohibitions that already exist with respect to alcohol. As such, this provision should be included in any version of this legislation.

- **§ 184(E)** states that for renewal applicants with more than 25 employees, the applicant needs to supply evidence that they have entered into or in the process of negotiating a labor agreement.

They should also be required to engage in an apprenticeship programs, prioritizing communities disproportionately affected by prohibition.

- **§ 190** deals with minority and woman owned businesses, the incubator program and the Social Equity Plan. BMP will implement a social equity plan and actively promote

racial, ethnic and gender diversity with qualifying M/WBE being prioritized for applications. Social Equity Plan shall consider additional criteria in licensing determinations with extra weight given to applications that include:

- Member of a community impacted by the enforcement of marijuana prohibition
 - Income lower than 80% of the median income where business is located
 - Convicted of a marijuana related offense prior to the effective date
- § 190 also states the BMP shall create an incubator program to provide direct support to Social Equality applicants. Provide direct support, counseling, education, small business coaching and compliance.

There should also be financial literacy training and help with financing etc, available to qualifying social equity applicants.

RE: Additional Provisions That Need To Be Added To Any Similar Legislation

The following provisions were not part of Assembly Bill A03506-C but should be included in any similar legislation:

- All marijuana that is made available for purchase in New York State should be free of fertilizers, fungicides, pesticides and similar products at the time of sale.
- All marijuana that is made available for purchase in New York State should be free of bacteria, fungus, mold, and other microbial organisms at the time of sale.
- All marijuana that is made available for purchase in New York State should be labeled in terms of its potency – including, at a minimum, the content of its CBD, THC and other major cannabinoids.
- The number of licenses that are awarded for each type of license should be proportionately distributed based on the number of residents in each County.
- At least 30% of each type of license should be awarded to minority-owned businesses.
- At least 50% of each type of license should be awarded to women-owned businesses.
- Fifty percent (50%) of the taxes that are collected by New York State from marijuana sales should be distributed to the newly-established Community Grant Reinvestment Fund. In this regard, this fund will be used to pay for a variety of programs in the communities that have been most disaffected by the prohibition against marijuana: e.g., after-school programs, job training programs, reentry programs for returning citizens, start-up funding for new businesses, etc.

- Twenty-five percent (25%) of the taxes that are collected by New York State from marijuana sales should be distributed to the County government in which the sales occurred (Note: New York City shall receive fifty percent of the taxes that are distributed to each of the following counties: Bronx, Kings, New York, Queens, and Richmond).
- It should be legal to sell marijuana to anyone who is twenty-one (21) years or older regardless of whether they reside in New York State.
- All packages of marijuana and marijuana-related products shall carry “warning labels” that are similar to those that appear on packages of cigarettes.
- All prior convictions for non-violent crimes involving the distribution, sale and/or use of marijuana shall be permanently erased from all public records.
- Anyone who is currently incarcerated in a non-federal facility in New York State for a non-violent crime involving the distribution, sale and/or use of marijuana shall be immediately released from jail or prison.
- Driver licenses that were suspended or revoked in conjunction with a non-violent marijuana-related crime shall be restored free-of-charge for an 8-year period.
- If/as necessary, New York State shall charter one or more banks to handle marijuana-related transactions within the state.
- New York State shall establish a Legal Defense Fund to provide legal representation to any individual who is accused of a non-violent marijuana-related act that is not illegal under New York State law.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: NOAH POTTEL, ESQ.

Address: 750 THIRD AVENUE

I represent: SELF

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: REGINA SMITH

Address: APT 275 LENOX AVE.

I represent: HARLEM BUSINESS ALLIANCE

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 2/27/19.

(PLEASE PRINT)

Name: Arthur Kwada

Address: 199 W 62 ST.

I represent: THE URBAN AID SOCIETY

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 5.30904A.3500C & S.3693 Res. No. _____

in favor in opposition

Date: 2/27/19

(PLEASE PRINT)

Name: Emily Marie Ramos

Address: 434 E 105th St., Apt. 2C, New York NY 10029

I represent: High Mi Madre! Coop, Green Workers Coop, East Harlem

Address: 1231 Lafayette Ave, 2nd floor, BX, NY 10474 Preservation

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 1426 Res. No. 470

in favor in opposition

Date: 2/27/19

(PLEASE PRINT)

Name: FRED NEUSTADT

Address: 1640 122nd Avenue #2D N.Y.C.

I represent: 4 FREEDOM MARIJUANA STUDY

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 1445 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Donald KANSHPE

Address: 1325 Ave of the Americas

I represent: BTEA

Address: _____

Admin

THE COUNCIL THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Dana Sussman (CCHR)

Address: _____

I represent: _____

Address: _____

Admin

THE COUNCIL THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Ray Cameron (Probation)

Address: _____

I represent: _____

Address: Dana Suss

Admin
(lead
testimony
Admin)

THE COUNCIL THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Admin Jorge (George Camacho) max

Address: _____

I represent: Ray Cameron (Probation)

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. all Res. No. _____

in favor in opposition

Date: 2/27/19

(PLEASE PRINT)

Name: Melissa Moore

Address: 330 7th Ave

I represent: Drug Policy Alliance

Address: same

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 744

in favor in opposition

Date: 2/27

(PLEASE PRINT)

Name: JULIAN MCKINLEY

Address: 133 BEDFORD AVE. ROCKAWAY, NY

I represent: DEMOCRACY IT WORK INSTITUTE

Address: 115 5th Ave, NY, NY

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 2/27/19

(PLEASE PRINT)

Name: Eli Northrup

Address: _____

I represent: The Bronx Defenders

Address: 360 E 161st St. Bronx, NY

Please complete this card and return to the Sergeant-at-Arms

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 738

in favor in opposition

Date: 2/27/19

(PLEASE PRINT)

Name: Kenny Mark

Address: Fort Greene, Brooklyn

I represent: Organic Relief Solutions

Address: Fort Greene, Brooklyn

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 1415 Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Brian Cunningham

Address: 451 Park Ave / 50

I represent: Building Contractors Assoc

Address: 451 Park Ave 50 NY NY 10016

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Jackie Carmana

Address: _____

I represent: Brooklyn Defender Services

Address: 177 Livingston, Brooklyn

Please complete this card and return to the Sergeant-at-Arms