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The Grass is Not Greener in the Garden State

Keara Walsh

New Jersey voters legalized adult recreational cannabis via a ballot referendum in November 2020.¹ At the beginning of 2022, the state released the first wave of cannabis retail licenses.² Of the fifty-six cannabis retailer licenses that were granted in January 2022, however, *none* were given to a black-owned businesses.³ U.S. Congressman Donald Payne (D-NJ) and the African American Chamber of Commerce of New Jersey thereafter publicly criticized the state’s lack of issuance of black-owned cannabis businesses licenses.⁴ According to Congressman Payne, “New Jersey ha[d] a chance to correct this inequality and allow people abused by the system to finally benefit from it with a fair distribution of cannabis business licenses . . . [i]nstead, we are seeing the same inequality with these licenses that we see in marijuana arrests.”⁵

New Jersey Governor Phil Murphy promised that the state’s cannabis legalization regulatory scheme would right the social justice wrongs of the past, particularly the racial disparity in arrests for cannabis-related offenses.⁶ The New Jersey Cannabis Regulatory Commission (“CRC”), the entity charged to oversee the licensing process in New Jersey, took on the duty of

¹ Suzette Parmley, *More than 170 Seek Licenses to Sell N.J. Legal Weed as Cannabis Panel Starts Taking Applications*, NJ.COM (Mar. 18, 2022), <https://www.nj.com/marijuana/2022/03/more-than-170-seek-licenses-to-sell-nj-legal-weed-as-cannabis-panel-starts-taking-applications.html>; *see also* Nina Feldman, *New Jersey Awards First Round of Recreational Marijuana Licenses for Growers*, WHYY.ORG (Mar. 24, 2022), <https://whyy.org/articles/new-jersey-awards-first-round-of-recreational-marijuana-licenses-for-growers/> (stating that Governor of New Jersey Phil Murphy signed legislation to legalize the recreational adult use of cannabis in February 2021).

² *Id.*

³ Parmley, *supra* note 1 (emphasis added).

⁴ Parmley, *supra* note 1.

⁵ Kyle Jaeger, *Congressman is “Outraged” Over Lack of Diversity in Marijuana License Approvals in New Jersey*, MARIJUANA MOMENT (Jan. 31, 2022), <https://www.marijuanamoment.net/congressman-is-outraged-over-lack-of-diversity-in-marijuana-license-approvals-in-new-jersey/>.

⁶ Parmley, *supra* note 1.

guaranteeing diversity among the new licensees.⁷ As the CRC has granted the first round of retail licenses and is in the process of review additional applications, however, it is already apparent that reform is needed to ensure equity in the New Jersey cannabis industry.

This Article explores New Jersey’s commercial cannabis adult use licensing requirements and provides reforms for New Jersey, and those states that have yet but shall legalize recreational cannabis in the future. This Article proceeds in four parts. Part I introduces the current New Jersey licensing regulations as established by the Cannabis Regulatory Commission. Part II provides an overview of other states’ recreational cannabis social equity programs and contrasts those with New Jersey’s system. Part III outlines the constitutional concerns and challenges to such social equity programs.

Part IV highlights the shortcomings of New Jersey’s licensing process and explains why it fails to provide a satisfactory social equity scheme. It also advances several recommendations aimed at improving the state’s licensing structure to adequately achieve social justice goals. These recommendations include altering the language of “diversely owned businesses” to avoid constitutional challenges to the priority given to minority applicants; establishing a certain timeframe to accept licenses in order to honor the review and approval of priority applications; and learning from the failures of the social equity grant program in California, and the plans of New York, to create an effective social equity program.

PART I: NEW JERSEY LICENSING SCHEME

In November 2020, the state legislature added to the ballot an amendment to the state constitution that legalized the recreational use of cannabis for persons age twenty-one and older,

⁷ Eric Kiefer, *NJ Denies it Hasn’t Licensed a Black Owner Since Legalizing Weed*, PATCH.COM (Feb. 7, 2022), <https://patch.com/new-jersey/westorange/no-black-owners-have-been-licensed-nj-legalized-marijuana>.

and legalized the cultivation, processing, and sale of retail cannabis.⁸ That ballot measure, which was approved by sixty-seven percent of New Jersey voters, and took effect on January 1, 2021.⁹ Following the passage of legislation that legalized and regulated recreational cannabis use and possession, the CRC was tasked with regulating the cultivation, processing, and sale of recreational cannabis.¹⁰ The CRC was initially established to oversee New Jersey’s medical-marijuana program.¹¹

The CRC issues licenses for medicinal and recreational cannabis business operations in New Jersey.¹² Each business that wishes to conduct any commercial cannabis activity requires a license, which must be active and in good standing.¹³ Commercial cannabis activities include: growing cannabis plants; storing cannabis and cannabis products; making cannabis products; transporting or delivering cannabis and cannabis products; selling cannabis and cannabis products; and testing cannabis and cannabis products.¹⁴ The CRC accepts and reviews license applications on a rolling basis, and there is currently no established limit on the number of cannabis business licenses that are available statewide.¹⁵

There are six classes of licenses for recreational use licensed businesses.¹⁶ Class 1 Cannabis Cultivator licenses authorize the growth of recreational use cannabis; Class 2 Cannabis Manufacturer licenses allow for the production of recreational use cannabis; Class 3 Cannabis

⁸ *New Jersey Public Question 1, Marijuana Legalization Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/New_Jersey_Public_Question_1,_Marijuana_Legalization_Amendment_\(2020\)](https://ballotpedia.org/New_Jersey_Public_Question_1,_Marijuana_Legalization_Amendment_(2020)) (last accessed Apr. 29, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Cannabis Reg. Comm’n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 6, 2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Wholesaler licenses permit one to store, sell, or otherwise transfer recreational use cannabis items between cannabis cultivators, wholesalers, or retailers; Class 4 Cannabis Distributor licenses allow for the transport of cannabis items in bulk between cannabis cultivators, manufactures, or retailers within the state of New Jersey; Class 5 Retailer licenses authorize the purchase of cannabis and cannabis products from licensed cultivators, manufacturers, and/or wholesalers for sale to consumers in a retail store; and Class 6 Cannabis Delivery licenses permit the transport of a consumer's purchases of recreational use cannabis and related supplies from the retailer to that consumer.¹⁷ This article will focus on Class 5 Retailer licenses.

The CRC affords certain applicants bonus points and priority review, scoring, and approval; these applications include Diversely Owned Businesses, Impact Zone Businesses, and Social Equity Businesses.¹⁸ Priority applications are meant to increase opportunities in the cannabis industry for individuals in these designated target communities, those with cannabis convictions, and minorities, women, and disabled veterans.¹⁹ The CRC reviews priority applications prior to other applications, regardless of when it receives such applications.²⁰ The CRC gives the highest priority to social equity businesses, followed by diversely owned businesses, and then impact zone businesses.²¹

The New Jersey Department of the Treasury certifies diversely owned businesses as minority-owned, women-owned, or disabled veteran-owned.²² Diversely owned businesses are defined as those that have at least fifty-one percent of the ownership interest held by persons who

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 6, 2022).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

are minorities, women, disabled veterans, or any combination thereof.²³ One or more of the minorities who own the business must also control the enterprise's management and daily business operations.²⁴ Although the CRC has not established a limit of the number of licenses that will be issued in the state, it claims to have set aside nearly one-third of all cannabis licenses for diversely-owned businesses.²⁵ Presently, the CRC intends to award fifteen percent of licenses to businesses certified as minority owned businesses, and an additional fifteen percent to women-owned or and disabled veteran-owned businesses.²⁶

Impact Zone Businesses must be located in a recognized impact zone, owned by individuals from an impact zone, or employ residents of an impact zone.²⁷ Impact zones are municipalities that meet specific criteria based on population, past criminal marijuana enterprises, law enforcement activity, rates of unemployment, and poverty.²⁸ The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act aims to assist communities that have been disproportionately affected by the War on Drugs by providing them priority consideration in the state's regulatory licensing program and a percentage of the revenue allocated from cannabis sales.²⁹ The law defines qualifying municipalities based on population; whether or not a municipality is in top forty percent of municipalities for arrests for marijuana related offenses; the crime index, which is a measure of the overall crime in a municipality; and

²³ *Id.*

²⁴ *Id.*

²⁵ Bridge West Consulting, *How to Win a Cannabis License in New Jersey as a Diversely Owned Business*, BRIDGEWESTCONSULTING.COM, <https://bridgewestconsulting.com/new-jersey-diversity-owned-business/#:~:text=At%20present%2C%2015%25%20of%20licenses,Businesses%20and%20Veteran%20Owned%20Businesses> (last accessed Apr. 29, 2022).

²⁶ *Id.*

²⁷ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 6, 2022).

²⁸ *Id.*

²⁹ *Id.*

rates of unemployment.³⁰ Of the eighty-seven municipalities that qualify as impact zones, some of New Jersey's largest cities make the list, including Newark, Jersey City, Paterson, Elizabeth, Camden, and Trenton.³¹

Social equity businesses are owned by individuals who have lived in predetermined economically disadvantaged area.³² Under New Jersey law, an enterprise can claim social equity business status if more than fifty percent of its ownership either (1) have lived in an economically disadvantaged area for five of the last ten years and have a household income eighty percent or less of the average median New Jersey household income; or (2) have been convicted of at least two disorderly persons offenses or at least one indictable offense related to cannabis.³³

N.J.S.A. 2C:35-5(b)(12) criminalized possession with intent to distribute less than one ounce of cannabis.³⁴ As a result, a New Jerseyan with that conviction will be eligible to participate in the ownership of a social equity business.³⁵ New Jersey's cannabis regulatory scheme does not require social equity applicants to detail their experience in the unregulated market, it only demands that they demonstrate how they intend to operate their cannabis retail business and comply with the relevant laws and regulations.³⁶ The CRC also looks to evidence of rehabilitation in making licensure decisions.³⁷ Factors that the CRC considers in determining whether there is clear and convincing evidence that an applicant is rehabilitated include, but are not limited to: (1) time since the offense; (2) time between offenses; (3) recommendation letters; (4) certificates of

³⁰ *Id.*

³¹ *Id.*

³² Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

achievement; (5) community service; (6) employment; (7) evidence of family support; (8) volunteer efforts; and (9) civic engagement.

Certain other non-cannabis criminal offenses can disqualify an applicant for priority review under N.J.S.A. 24:6-1-36B (2)(c)(iv).³⁸ The disqualification from priority review is determined on a case-by-case basis.³⁹ New Jersey law makes clear that an individual with certain convictions is presumptively disqualified from licensure eligibility, unless the CRC determines that such convictions should not disqualify the specific applicant.⁴⁰ The CRC's review centers on whether any of an applicant's previous convictions are substantially related to the qualifications, functions, or duties for license at issue.⁴¹ The CRC also considers the nature of the offense, the circumstances at the time of committing the offense, and any evidence of the applicant's rehabilitation since conviction.⁴²

The CRC began accepting applications from those interested in opening retail outlets to sell recreational cannabis on March 15, 2022.⁴³ The CRC received 236 applications for retailer licenses in just the first two days that the applications were open.⁴⁴ Once an applicant submits an application, the CRC reviews that application over a ninety day review period.⁴⁵ If an applicant is approved by the CRC for a retail license, they have a 120 day period to meet the requirements of the specific municipality where the retail business will be located.⁴⁶ Only then can the business start to create supply, hire staff, and get their business up and running.⁴⁷

³⁸ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Parmley, *supra* note 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

PART II: OTHER STATES' SOCIAL EQUITY SYSTEMS

Various states that have legalized recreational cannabis have established social equity systems into their licensing regimes.⁴⁸ The California regulatory scheme provides one such example. California voters legalized recreational cannabis by voting yes on Proposition 64 in November 2016.⁴⁹ Proposition 64 delegated to each California municipality the power to legalize or prohibit cannabis.⁵⁰ The state's established social equity scheme focuses on assisting municipalities with their respective systems through grants and assistance, rather than establishing a statewide system.⁵¹

In 2018, Governor Jerry Brown signed into law the California Cannabis Equity Act, which provides assistance to those most harmed by cannabis prohibition to enter the above-ground market as entrepreneurs or employees with high-quality, well-paying jobs.⁵² The law does not mandate that municipalities establish equity programs but, instead, ensures the distribution of millions in state funds to those cities that have instituted such programs.⁵³ In 2020, California awarded thirty million dollars to twelve municipalities to support their social equity programs.⁵⁴

Following the passage of the California Cannabis Equity Act, most California municipalities still have yet to adopt social equity programs within their cannabis regulatory schemes.⁵⁵ The ambition of the legislation has been hurdled by the limited market already

⁴⁸ Ben Sheppard, *Going for the Green: Social Equity in the Recreational Cannabis Industry*, 8 LINCOLN MEM'L U. L. REV. 280, 283 (2020).

⁴⁹ Amanda Chicago Lewis, *California Legalized Weed Five Years Ago. Why is the Illicit Still Thriving?*, THE GUARDIAN (Nov. 2, 2021), <https://www.theguardian.com/us-news/2021/nov/02/california-legal-weed-cannabis-industry-economy#:~:text=Voters%20passed%20a%20law%20in,of%20it%2C%20according%20to%20experts.>

⁵⁰ *Id.*

⁵¹ Sheppard, *supra* note 48; *see also* CAL. BUS. & PROF. § 26244 (2019).

⁵² Marisa Gerber, *California Promised 'Social Equity' after Pot Legalization. Those Hit Hardest Feel Betrayed*, L.A. TIMES (Jan. 27, 2022), [https://www.latimes.com/california/story/2022-01-27/california-pot-industry-social-equity-broken-promises.](https://www.latimes.com/california/story/2022-01-27/california-pot-industry-social-equity-broken-promises)

⁵³ *Id.*

⁵⁴ Sheppard, *supra* note 48; *see also* CAL. BUS. & PROF. § 26244 (2019).

⁵⁵ Gerber, *supra* note 52.

monopolized by big cannabis companies and saturated with illegal sales.⁵⁶ Moreover, many of the municipalities that have adopted such social equity program have not done so successfully due to a lack of funding, shifting requirements, and delays in processing applications which create additional hardships rather than removing them.⁵⁷ State data indicates that less than eight percent of all individuals granted cannabis licenses in the state are equity applicants.⁵⁸

Each California municipality has created its own unique regulations for licensing cannabis businesses and meeting social equity qualifications.⁵⁹ As of January 2022, Palm Springs and Long Beach had one equity cannabis business each; San Francisco had eighteen; Sacramento had nineteen; and Oakland had 186.⁶⁰ In Mendocino County, which has received over three million dollars in grants from the state for equity efforts, not a single applicant has ever met the equity application eligibility criteria.⁶¹ A recent report from the California Cannabis Industry Association found that social equity programs were not working as intended, and urged the California legislature to create an oversight committee that includes cannabis business owners and other community members.⁶²

New York legalized recreational cannabis in March 2021.⁶³ The state's cannabis legislation includes a robust program to reinvest millions of dollars from cannabis sales tax revenue back into minority communities that have been damaged by the war on drugs.⁶⁴ Forty percent of the tax revenue from cannabis sales is directed to minority communities, and individuals

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Gerber, *supra* note 52.

⁶² *Id.*

⁶³ Luis Ferré-Sadurní, *New York Legalizes Recreational Marijuana, Tying Move to Racial Equity*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html>.

⁶⁴ *Id.*

convicted of cannabis-related offenses are entitled to have their records automatically expunged.⁶⁵ The legislation also permits individuals with past convictions and those involved in the illicit cannabis market to participate in the new legal market.⁶⁶ On January 5, 2022, New York Governor Kathy Hochul pledged two hundred million dollars to support social equity applicants in building cannabis businesses.⁶⁷ Approximately fifty million dollars of that fund will come from registered organizations licensed to operate medicinal cannabis businesses in New York, and private investors will raise the remaining 150 million dollars.⁶⁸

New York's Office of Cannabis Management was created to issue licenses for businesses to participate in the cannabis industry.⁶⁹ The Office is in the process of developing regulations that will outline the business licensure process in New York.⁷⁰ New York has undertaken a significant goal to award fifty percent of adult-use cannabis licenses to social and economic equity applicants.⁷¹ Such social and economic equity licenses will be the first licenses issued by the state.⁷² As New York drafts its cannabis licensing regulations, the state's entire focus is on the social equity licensing program.⁷³ The Executive Director of the Office of Cannabis Management expects between one and two hundred licenses to go first to individuals who were convicted of cannabis-related offenses, or those who have a parent, guardian, child, spouse, or dependent with a cannabis-related conviction.⁷⁴

⁶⁵ *Id.*

⁶⁶ Abraham Finberg, *The Great Social Experiment: Social Equity in New York*, CANNABIS INDUSTRY J. (Mar. 18, 2022), https://cannabisindustryjournal.com/feature_article/the-great-social-experiment-social-equity-in-new-york/.

⁶⁷ *Id.*

⁶⁸ *Id.*; see also Hodgson Russ LLP, *New York Gov. Pledges \$200M to Boost Social Equity Efforts as Part of Adult-Use Cannabis Legislation*, JD SUPRA (Feb. 2, 2022), <https://www.jdsupra.com/legalnews/new-york-gov-pledges-200m-to-boost-9306262>.

⁶⁹ Off. of Cannabis Management, *Licensing Overview*, NY.GOV, <https://cannabis.ny.gov/licensing> (last accessed Apr. 6, 2022).

⁷⁰ *Id.*

⁷¹ Finberg, *supra* note 66.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

New York has defined social equity applicants as (1) individuals from communities disproportionately impacted by the enforcement of cannabis prohibition; (2) minority-owned businesses; (3) women-owned businesses; (4) minority and women-owned businesses; (5) distressed farmers; and (6) service-disabled veterans.⁷⁵ New York will afford higher priority to an applicant who is a member of a community disproportionately impacted by the enforcement of cannabis prohibition; has an income lower than eight percent of the median income of the county in which the applicant resides; and was either (a) convicted of a cannabis-related offense prior to the effective date of the New York cannabis law; or (b) had a parent, guardian, child, spouse or dependent, or was a dependent of an individual who was convicted of a cannabis-related offense prior to the effective date of the New York cannabis law.⁷⁶

PART III: CONSTITUTIONAL CONCERNS

Cannabis licensure-related social equity programs face significant potential constitutional concerns due to their race-conscious remedial measures.⁷⁷ The Supreme Court of the United States has held that policies that benefit individuals on the basis of race are subjected to a two-part strict scrutiny test under the Equal Protection Clause.⁷⁸ First, a policy that benefits individuals on the basis of race must serve a compelling government interest.⁷⁹ Second, the government's method to achieve such interest must be narrowly tailored.⁸⁰ An interest is narrowly tailored when the policies that benefit individuals on the basis of race tightly fit the compelling interest, avoid unduly

⁷⁵ *Id.*

⁷⁶ N.Y. CANNABIS LAW § 87(3).

⁷⁷ Sheppard, *supra* note 48; *see also* Gerber, *supra* note 52 (“Government programs can’t consider race as an eligibility criterion under California law, so local officials crafted workarounds to determine who would qualify. The program in Los Angeles considers various factors – income, past cannabis arrests and long-term residency in an area with disproportionately high cannabis arrest rates – and has tightened the criteria through the years”).

⁷⁸ Grutter v. Bollinger, 539 U.S. 306, 323-28 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.*

burdening adversely impacted individuals, and consider race-neutral means for achieving government's interest.⁸¹

The Supreme Court held that strict scrutiny was required for federal and state-based racial classifications in *Adarand Constructors, Inc. v. Pena, Secretary of Transportation*.⁸² Petitioner in that case filed suit against federal officials claiming that a race-based presumption used in a subcontractor compensation clause violated the Equal Protection Clause.⁸³ The subcontractor compensation clause gave contractors financial incentives to hire subcontractors certified as small businesses, that were controlled by socially and economically disadvantaged individuals.⁸⁴ Petitioners submitted a low bid on the subcontract, but were not successful and lost to a certified small business.⁸⁵

The Supreme Court held that all racial classifications, imposed by federal, state, or local governmental actors, must be analyzed by a reviewing court under strict scrutiny.⁸⁶ The Court looked to the precedent set by *Richmond v. J.A. Croson, Co.*, which established three general propositions with respect to governmental racial classifications.⁸⁷ First, there is to be general skepticism around any preference based on racial or ethnic criteria; second, the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification; and third, equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.⁸⁸ These propositions lead to the Court's conclusion that any person, of whatever race, has the right to demand that any governmental actor

⁸¹ *Id.*

⁸² *Adarand Constructors, Inc. v. Pena, Sec. of Trans., et al.*, 515 U.S. 200, 207 (1995).

⁸³ *Id.* at 204.

⁸⁴ *Id.* at 207.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 223.

⁸⁸ *Id.*

subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.⁸⁹

The Court has found compelling interests like diversity in education and remedying past discrimination in a particular industry.⁹⁰ In *Grutter v. Bollinger*, the Supreme Court held that the Equal Protection Clause did not prohibit the affirmative action admissions policy at the University of Michigan Law School.⁹¹ The school's admissions policy evaluated students based on numerous academic and personal factors.⁹² While the policy did not define diversity solely in terms of racial and ethnic status, and did not restrict the types of diversity contributions that were eligible for substantial weight, the admissions policy affirmed the law school's commitment to diversity with special reference to the inclusion of African American, Hispanic, and Native-American students.⁹³

The Court found that the narrowly tailored use of race in university admission decisions furthered a compelling interest, namely, to obtain the educational benefits that flow from a diverse student body.⁹⁴ The Court deferred to the law school's educational judgment that diversity was essential to its educational mission.⁹⁵ The school's good faith assertion was presumed, without a showing to the contrary, because achieving a diverse student body was part of the law school's proper institutional mission.⁹⁶ The school's admissions program was also narrowly tailored because although it was race-conscious, the program did not insulate diversity applications from competition with other applicants.⁹⁷ Rather, the school considered race or ethnicity as an

⁸⁹ *Id.* at 224.

⁹⁰ *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989).

⁹¹ *Grutter*, 539 U.S. at 343.

⁹² *Id.* at 314-15.

⁹³ *Id.* at 316.

⁹⁴ *Id.* at 328.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Grutter*, 539 U.S. at 333.

additional benefit in an applicant’s file, and was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”⁹⁸ Lastly, the school did not establish quotas for members of certain racial or ethnic groups, nor put them on separate admissions tracks.⁹⁹ The law school’s highly individualized review of each applicant’s file gave consideration to all the ways that an applicant might contribute to a diverse educational environment, without violating the Equal Protection Clause.¹⁰⁰

An Ohio court recently applied the strict scrutiny test under the Equal Protection Clause to the Ohio medicinal cannabis social equity program, which required fifteen percent of all licenses to be awarded to racial minorities.¹⁰¹ In *Pharmacann Ohio, LLC v. Williams*, the plaintiff received a medicinal cannabis license application score sufficient to qualify him for a license.¹⁰² He nonetheless was denied a license because two other applicants with lower scores were members of a disadvantaged group.¹⁰³ As a result, the plaintiff challenged that decision as an Equal Protection Clause violation under the Fourteenth Amendment.¹⁰⁴

The court examined Ohio’s medicinal cannabis racial quota under the standard of strict scrutiny.¹⁰⁵ It first considered whether the classification was a compelling government interest.¹⁰⁶ The state defendant provided evidence that the legislature sought to remedy racial disparities regarding arrest rates for cannabis offenses.¹⁰⁷ The court, however, held that the state’s evidence

⁹⁸ *Bakke*, 438 U.S. at 317.

⁹⁹ *Grutter*, 539 U.S. at 335.

¹⁰⁰ *Id.*

¹⁰¹ *Pharmacann Ohio, LLC v. Williams*, No. 17-CV-10962, 2018 WL 7500067 (Ohio Ct. Com. Pl. Nov. 15, 2018).

¹⁰² *Id.* at *2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Pharmacann*, No. 17-CV-10962, 2018 WL at *4.

¹⁰⁷ *Id.* at *10.

was not sufficient to support of finding of discrimination for minorities specifically within the new Ohio medicinal cannabis industry.¹⁰⁸ Defendant also offered evidence of discrimination in government procurement.¹⁰⁹ The court also ruled the state’s evidence regarding government procurement discrimination unpersuasive because that discrimination was not directly related to the cannabis industry.¹¹⁰ Based on these unsuccessful arguments, the court was unable to find a compelling government interest in Ohio’s medicinal cannabis racial quota. The court further noted that the legislature had failed to narrowly tailor its interest by not considering alternative race-neutral remedies, such as giving preference to companies owned by those previously convicted or arrested for cannabis offenses.¹¹¹ As a result, the court determined that the Ohio law requiring fifteen percent of medicinal cannabis licenses to go to minorities was unconstitutional under the Equal Protection Clause.¹¹²

PART IV: RECOMMENDATIONS

This paper proposes modifications to New Jersey’s flawed recreational cannabis social equity scheme informed by the successes and failures of other states. First and foremost, Governor Murphy and the CRC must address the already present shortcomings of New Jersey’s social equity program and should affirmatively reinstate the goals of the state’s cannabis industry. Second, New Jersey should alter its definition of “diversely owned businesses” to avoid constitutional challenges to its minority applicant prioritization rules and reservation of licenses for minority businesses scheme. Third, New Jersey should stop accepting licenses on a rolling basis and, instead, should establish timeframes to accept licenses in order to honor the review and approval of priority

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at *14.

¹¹² *Pharmacann*, No. 17-CV-10962, 2018 WL at *20.

applications. Finally, New Jersey and other legalization states can learn from the failures of the social equity program in California as well as the implementation plans of New York’s robust system of social equity, to create their own effective social equity program.

1. Current Failings and Public Perception

As New Jersey begins to award licenses for recreational, adult-use cannabis businesses, the high hopes for social equity have already begun to falter. As critics have pointed out, the state failed to award even one of the original fifty-six licenses it granted to a diversely owned business.¹¹³ New Jersey Congressman Donald Payne and African American Chamber of Commerce of New Jersey President John Harmon, for example, both released press statements that highlighted this injustice.¹¹⁴ Governor Phil Murphy, on the other hand, reacted to that criticism by stating that the claims were inaccurate.¹¹⁵ He pointed to CRC data and stated that “applicants for medical cannabis permits are scored on the strength of their applications, including the strength of their business plans and demonstrated plans for complying with State laws and regulations.”¹¹⁶

The Governor’s statements provided little comfort and encouragement that the New Jersey social equity program is achieving the intended result to guarantee diversity within the cannabis industry. Tension between diversity candidates and the CRC already existed based upon the lack of diversity in the distribution of medicinal cannabis licenses in the state.¹¹⁷ New Jersey’s longtime

¹¹³ Kyle Jaeger, *Congressman Is “Outraged” Over Lack of Diversity in Marijuana License Approvals in New Jersey*, MARIJUANA MOMENT (Jan. 31, 2022), <https://www.marijuanamoment.net/congressman-is-outraged-over-lack-of-diversity-in-marijuana-license-approvals-in-new-jersey/>; Eric Kiefer, *NJ Denies It Hasn’t Licensed A Black Owner Since Legalizing Weed*, Patch.com (Feb. 7, 2022), <https://patch.com/new-jersey/westorange/no-black-owners-have-been-licensed-nj-legalized-marijuana>; see also John E. Harmon, *The African American Chamber of Commerce of New Jersey Advocates on Behalf of Black Entrepreneurs Excluded from NJ’s Cannabis Business*, AFR. AM. CHAMBER OF COM. OF N.J. (Jan. 27, 2022), <https://myemail.constantcontact.com/Press-Release---Black-Entrepreneurs--Excluded-from-NJ-s-Cannabis-Business.html?soid=1103630347928&aid=9UT0hQ5HRNc>.

¹¹⁴ Jaeger, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Kiefer, *supra* note 7.

racial disparity in marijuana arrests and the toll that it has taken on minority communities demands greater diversity in cannabis licensure.¹¹⁸ In 2017, New Jersey averaged ninety-five marijuana possession arrests per day, or nearly an arrest every fifteen minutes.¹¹⁹ The ACLU of New Jersey reported that Black individuals had a three-to-one higher chance of being arrested on a marijuana charge in New Jersey than white individuals in 2017, much as was the case in previous years.¹²⁰ While these statistics are not unique to New Jersey, and similar numbers have been the driving force behind cannabis social equity programs across the country, the constitutional concerns that attend to such remedial programs are significant.

The regulatory scheme in New Jersey allowed for each municipality to decide whether or not to allow or ban recreational cannabis businesses in their towns.¹²¹ Following the deadline set by the CRC in August 2021, more than seventy percent of municipalities in the state opted to ban cannabis businesses from operating in their area.¹²² However, the ban is not binding, and many municipalities have stated that they opted out of originally allowing cannabis in their towns to have the opportunity to create a road map and put in best recommendations for policies and procedures.¹²³ With over two-thirds of New Jersey voters saying yes to legalizing cannabis, the municipalities that have opted out are missing an opportunity to carry out the desire of the voters.¹²⁴

Allowing each municipality to individually decide whether or not to allow recreational cannabis businesses provides the opportunity for towns to pass off the responsibility to others.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

¹²² Kyle Jaeger, *Why Most New Jersey Municipalities are Banning Marijuana Shops Despite Overwhelming Public Support*, MARIJUANA MOMENT (Aug. 23, 2021), <https://www.marijuanamoment.net/why-most-new-jersey-municipalities-are-banning-marijuana-shops-despite-overwhelming-public-support/>.

¹²³ *Id.*

¹²⁴ *Id.*

This type of behavior has established the rhetoric that many municipalities do not want cannabis businesses ‘in their backyard,’ as there is still some negative sentiment surrounding the product.¹²⁵ With nearly 400 towns having banned all types of cannabis businesses, from cultivation to dispensaries, these towns run “a significant risk of being last to the market with an inability to meaningfully take advantage of the legal, social, and economic opportunities legal cannabis provides.”¹²⁶

Particularly for those municipalities that qualify as impact zones, banning residents from obtaining cannabis licenses cuts off a significant portion of priority review applicants. The residents of impact zones, and others that qualify for priority review, are the ones that will suffer from the ban of cannabis products for sale in their towns. The aim of the social equity programs in cannabis regulation has been to provide for those communities that have been negatively affected by the war on drugs, or otherwise qualify as an impact zone.

The ‘marijuana localism’ that results from allowing municipalities to selectively ban cannabis sales in their town, while relying on other municipalities to provide sales to their residents, perhaps could be corrected by government incentives. If the CRC were to incentivize those municipalities, particularly those that are impact zones, to allow for cannabis dispensaries in their town, social equity goals would be more attainable in those areas. However, as evidenced by the regulatory scheme in California, state-based funding is not always successful in encouraging municipalities to adopt social equity programs.¹²⁷ Furthermore, constitutional concerns under the Equal Protection Clause would still apply to any government incentives that are implemented specifically for municipalities to allow for cannabis businesses based.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Lewis, *supra* note 49.

The original aim of the social equity provisions for recreational-use cannabis in New Jersey was to benefit those individuals and communities that were negatively affected by the war on drugs and the racial disparity in arrests for cannabis-related offenses.¹²⁸ Although the current license structure allows for individuals with a conviction of possession with intent to distribute less than one ounce of cannabis to apply for social equity licenses, the CRC provides no support or reasoning as to why that sole offense is permitted and other cannabis-related offenses need further proof of rehabilitation.¹²⁹ This arbitrary determination of who is able to apply for a license omits individuals that have been directly harmed by the very industry that the state now aspires to make millions of dollars from. New York has created a better system that also allowed for family members of those that have been negatively affected by cannabis-related offenses priority access to the market.

At present, the social equity system in New Jersey on its face states that it hopes to right the wrongs of the past and be an integral part of the regulatory system moving forward. In practice, the program already has shortcomings that are negatively affecting those individuals that the system was built to aid. By allowing impact zones, and the majority of municipalities, to opt out of cannabis licenses, and by creating arbitrary lines of which cannabis-related offenses are considered appropriate for licensure over others, New Jersey's social equity system is already failing its intended purpose. Small changes in the current CRC regulations would help to provide for the individuals that New Jersey has vowed to help with their cannabis regulatory system.

¹²⁸ Parmley, *supra* note 1.

¹²⁹ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

2. Recommendation 1: Alter “Diversely Owned Businesses” Language

While the public strongly supports social equity licensing programs, those program’s potential constitutional implications are important to scrutinize to ensure the programs are not vulnerable to challenges. As the court held in *Pharmacann*, racial quotas in such programs fail strict scrutiny unless the pertinent regulatory agency can provide specific evidence of discrimination in the state’s cannabis industry.¹³⁰ As explained above, New Jersey awards priority review and consideration to cannabis businesses that are diversely owned businesses.¹³¹ The CRC has set aside nearly one-third of all the cannabis licenses for these diversely owned businesses, with fifteen percent of licenses going exclusively to minority owned businesses.¹³² To qualify, diversely owned business must have at least fifty-one percent of the ownership interest held by person who are *minorities*, women, disabled veterans, or any combination thereof.¹³³

Given Equal Protection precedent and the fact that cannabis social equity licensing programs must avoid race-conscious measures, New Jersey should amend its definition of “diversely owned businesses” to avoid mention of racial minorities.¹³⁴ Because New Jersey gives priority to diversely owned businesses, and has carved out a certain percentage of available licenses that it hopes to dedicate to this class, a challenge similar to the plaintiff’s in *Pharmacann* maybe also be successful against New Jersey.¹³⁵ Much like Ohio, New Jersey is likely unable to provide evidence of discrimination within the recreational cannabis industry sufficient to justify its social equity “quota.” This is because the injustices tie back to racial disparity in marijuana arrests. And while the disparate impacts of cannabis prohibition were severe in New Jersey, they

¹³⁰ *Pharmacann*, No. 17-CV-10962, 2018 WL at *10.

¹³¹ Cannabis Reg. Comm’n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

¹³² Bridge West Consulting, *supra* note 25.

¹³³ *Id.* (emphasis added).

¹³⁴ See Sheppard, *supra* note 48.

¹³⁵ *Pharmacann*, No. 17-CV-10962, 2018 WL at *2.

simply cannot be tied to the modern legal cannabis industry, because the industry did not exist prior to legalization.¹³⁶

To avoid constitutional challenges, New Jersey could either alter the definition of diversely owned businesses or move forward with giving priority solely to their planned impact zone businesses and social equity businesses and eliminate diversely owned businesses altogether. In particular, giving priority to social equity businesses achieves the goal of righting the wrongs of racial disparity in cannabis-related arrests. New Jersey's definition of social equity businesses includes businesses owned by individuals who have been convicted of at least two disorderly person offenses, or at least one indictable offense related to cannabis.¹³⁷ By giving licensure priority to individuals with prior cannabis-related offenses regardless of their race or gender, New Jersey is able to guarantee social justice without opening the regulations to potential constitutional challenges. States that are hoping to create recreational cannabis license regulations in the future must be wary of including language that could be a challenge under the Equal Protection Clause. Creating a system similar to that of New Jersey, but with a focus on priority for those with previous cannabis related offenses or that reside in economically disadvantaged areas, will help states achieve their social equity goals without the risk of constitutional issues.

3. Recommendation 2: Establish a Fixed Timeframe to Accept Applications

New Jersey has not placed any limit on the number of available cannabis business licenses statewide and the CRC accepts and reviews license applications on a rolling basis.¹³⁸ The CRC has not provided details on how this model will be achieved, given the fact that diversely owned

¹³⁶ Beau Kilmer et. al, *Symposium: Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 B.U.L. REV. 1003 (2021).

¹³⁷ Cannabis Reg. Comm'n, *Recreational Cannabis Businesses*, NJ.GOV, <https://www.nj.gov/cannabis/businesses/> (last accessed Apr. 29, 2022).

¹³⁸ *Id.*

businesses, impact zone businesses, and social equity businesses are to receive bonus points and have priority review, scoring, and approval over other applications.¹³⁹

Within the first two days that the CRC permitted Class 5 Retailer licensing applications to be submitted, the Commission received over two hundred applications.¹⁴⁰ There is no public data regarding the number of those applications that involved social justice applicants. In addition, it is unclear how the CRC can ensure that diversely owned businesses, impact zone businesses, and social equity businesses receive priority over other applications that are submitted first in a system that permits rolling applications. Does the CRC start review of non-social justice applications as they roll in but then halt those reviews upon receipt of a priority application? Are priority applications really only afforded bonus points, and no other form of priority in approval over other applications? It is all a mystery.

New Jersey and other legalization states would benefit from the implementation of a fixed timeframe to accept applications. The development of separate, predetermined submission windows would help the CRC review licenses as a larger group. It also would allow the CRC to determine which licenses receive priority review and approval, and then set them aside from other applications. In this connection, New Jersey can learn from the proposed New York regulations, which require the state to issue all of its initial licenses to social and economic equity applicants.¹⁴¹ Furthermore, setting a timeframe for the acceptance of applications will enhance transparency and public trust by providing applicants a better idea of when the CRC will accept or deny applications.

As things currently stand, the CRC has ninety days to review an application and then an applicant has 120 days to meet their municipality's unique requirements.¹⁴² These long delays

¹³⁹ *Id.*

¹⁴⁰ Parmley, *supra* note 1.

¹⁴¹ Finberg, *supra* note 66.

¹⁴² Parmley, *supra* note 1.

create significant problems for applicants. This is because the CRC requires that applicants maintain site control while their applications are pending. As a result, applicants must have legal access to and control over the real estate at which their businesses will operate.¹⁴³ This requires many applicants to pay mounting monthly lease payments, which cannot be deducted as business expenses because of federal cannabis prohibition.¹⁴⁴ Given the financial burden of maintaining commercial real estate while applications are pending, and the particularly difficulty that this presents for priority applicants, it is critical that New Jersey develop a more defined timeline to review and approve license applications.

4. *Recommendation 3: Lessons from California and New York*

New Jersey and other states can learn from the regulations set forth in California, and currently proposed in New York and make adjustments to their programs to maximize social equity. As already explained, California law does not require municipalities to establish equity programs. Instead, the state distributes funds to cities that have implemented such programs.¹⁴⁵ The failure of many California municipalities to adopt social equity programs demonstrates that grant money alone is not an effective incentive or foundation for social equity programs. Furthermore, the California Cannabis Industry Association has called for the California legislature to create an oversight committee that includes cannabis business owners and other community members.¹⁴⁶ If California creates such a committee, its findings will be crucial to other states' regulatory systems. Establishing an inclusive committee to review the regulations and provide the unique perspective of cannabis business owners will provide other states with critical knowledge of what is and is not working in this context.

¹⁴³ Kiefer, *supra* note 7.

¹⁴⁴ Kiefer, *supra* note 7.

¹⁴⁵ Gerber, *supra* note 52.

¹⁴⁶ *Id.*

New York created a robust program to reinvest millions of dollars of cannabis tax revenues in minority communities and Governor Hochul has already committed two hundred million dollars to support social equity cannabis business applicants.¹⁴⁷ New York also intends to award their first set of licenses to social and economic equity applicants as well as to award fifty percent of their licenses to such applicants.¹⁴⁸ Similar to the regulation framework as set forth in New Jersey, however, New York may need to alter its language that defines social equity applicants as minority-owned businesses to avoid possible constitutional challenges. New York should instead give preferential review to individuals from communities that have been disproportionately impacted by the enforcement of cannabis prohibition, as outlined in their definition of social equity applicants.¹⁴⁹

New Jersey and other states should mimic New York's proactive approach of issuing the first licenses to social equity program applicants. This approach makes social equity a serious component of the state's cannabis industry and ensures diversity in the state's cannabis industry. While all states may not have the ability to commit the immense amount of money that New York has pledged to social equity applicants, they certainly can reinvest tax revenue from the sale of cannabis back into those minority communities that were most affected by the injustices of the war on drugs. Using cannabis-generated tax revenue in this way is another avenue for states to achieve social equity outside of their licensing schemes.

CONCLUSION

The legalization of adult-use, recreational cannabis in New Jersey, as in many other states across the country, came with the promise of righting the social justice wrongs of the past created

¹⁴⁷ Finberg, *supra* note 66.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

by decades of racially disparate arrests for cannabis-related offenses. As New Jersey issues the state's first retail licenses and begins to process myriad additional applications, it is apparent that reform is needed to ensure equity in the cannabis industry in New Jersey. There are obvious shortcomings in the New Jersey commercial cannabis licensure scheme that can be remedied now. In so doing, it is key to be attentive to the lessons learned from other states. Altering regulation language to avoid constitutional challenges to the minority applicant priority provisions; establishing definitive timeframes to accept licenses in order to honor the review and approval of priority applications; and learning from the success and failures of the social equity programs in other states will help New Jersey create a cannabis industry that is just for all.