Cannabis Collaboration
Recommendations to Create an Inclusive Industry

Law Office 2

Jeremy Bardsley
Jason Blanchette
Victoria Brown
Kyleen Burke
Sarah Butson
Natasha Chabria
Jennifer Chau

Lilliana Ciresi
Sandler Ernst
Amanda Ghannam
Karina Guzman
Jacqueline Hubbard
Frank Scardino
Sarah Schulte

Northeastern School of Law
Legal Skills in Social Context
Social Justice Program
Spring 2016

In conjunction with: Northeast Cannabis Coalition & Union of Minority Neighborhoods

Fall Lawyering Fellow: Lauren Pennix
Spring Lawyering Fellow: Gabrielle Rosenblum
Research Librarian: Scott Akehurst-Moore
LSSC Professor: Gabriel Arkles
## Table of Contents

**EXECUTIVE SUMMARY**................................................................................................................. 4

**DEFINITIONS**................................................................................................................................. 8

### I. INTRODUCTION.......................................................................................................................... 9

A. The Impact of Cannabis Prohibition on the Criminal Justice System ........................................... 10
B. Colorado ........................................................................................................................................... 18
   1. Regulatory Authority .................................................................................................................... 19
   2. Licensing ..................................................................................................................................... 20
   3. Taxing ......................................................................................................................................... 22
C. Washington ..................................................................................................................................... 23
   1. Regulatory Authority .................................................................................................................... 23
   2. Licensing ..................................................................................................................................... 23
   3. Taxing ......................................................................................................................................... 25
D. Alaska ................................................................................................................................................ 26
   1. Regulatory Authority .................................................................................................................... 27
   2. Licensing ..................................................................................................................................... 27
   3. Taxing ......................................................................................................................................... 29
E. Oregon ............................................................................................................................................... 29
   1. Regulatory Authority .................................................................................................................... 30
   2. Licensing ..................................................................................................................................... 30
   3. Taxing ......................................................................................................................................... 31

### II. IMPACT OF LEGALIZATION IN OTHER STATES ................................................................. 18

A. General scheme of cannabis legalization in the United States ....................................................... 18
B. Colorado ........................................................................................................................................... 18
   1. Regulatory Authority .................................................................................................................... 19
   2. Licensing ..................................................................................................................................... 20
   3. Taxing ......................................................................................................................................... 22
C. Washington ..................................................................................................................................... 23
   1. Regulatory Authority .................................................................................................................... 23
   2. Licensing ..................................................................................................................................... 23
   3. Taxing ......................................................................................................................................... 25
D. Alaska ................................................................................................................................................ 26
   1. Regulatory Authority .................................................................................................................... 27
   2. Licensing ..................................................................................................................................... 27
   3. Taxing ......................................................................................................................................... 29
E. Oregon ............................................................................................................................................... 29
   1. Regulatory Authority .................................................................................................................... 30
   2. Licensing ..................................................................................................................................... 30
   3. Taxing ......................................................................................................................................... 31

### III. STRATEGIES FOR IMPLEMENTATION IN MASSACHUSETTS ........................................... 31

A. General Constitutional Barriers ...................................................................................................... 33
   1. Equal Protection Clause ............................................................................................................... 34
   2. Takings Clause .............................................................................................................................. 37
B. Strategy One: Appropriation of Funds for Community Benefit ...................................................... 40
   1. Specific Recommendation: Establish an Annual Grant Program ............................................. 45
   2. Specific Recommendation: Justice Reinvestment Initiative ...................................................... 57
C. Strategy Two: Engage Community Stakeholders ............................................................................. 64
   1. Specific Recommendation: Include Stakeholders on Regulatory Boards .................................... 66
D. Strategy Three: Reduce Barriers for Entry into the Cannabis Industry ......................................... 72
   1. Specific Recommendation: Support Businesspeople in Affected Communities ...................... 73
   2. Specific Recommendation: Pursue Expungement Legislation ................................................... 79
   3. Specific Recommendation: Issue Tax-Exempt Bonds .................................................................. 85
E. Strategy Four: Allocation of Cannabis Establishment Licenses ....................................................... 91
   1. Specific Recommendation: Establish Local Licensing Boards ................................................ 93
2. Specific Recommendation: Residence Requirement of License Applicants .................................................. 98
3. Specific Recommendation: Community Licensing Preferences for Cultivation and Manufacturing ................................................................................................................. 104
4. Specific Recommendation: Establish a Multiple Ownership Law ............................................................. 107

F. Strategy Five: Influence Industry Practices ............................................................................................... 110

1. Specific Recommendation: Tax deductions/incentives for business owners who hire individuals from the affected communities ................................................................................................................. 111
2. Specific Recommendation: Affirmative Action .......................................................................................... 114
3. Specific Recommendation: Providing a "Social Justice Grade" for the Cannabis Industry ............ 119

IV. CONCLUSION ........................................................................................................................................ 122

Appendix A ............................................................................................................................................... 125

Appendix B ............................................................................................................................................... 126
EXECUTIVE SUMMARY

The central goal of this report is to offer preliminary answers to a crucial and timely question: how can cannabis legalization have a positive impact on the communities that have been most severely harmed by the enforcement of cannabis prohibition? Without deliberate intervention in the establishment of the new industry, Massachusetts will likely follow the footsteps of states like Colorado, where cannabis legalization has perpetuated the racial divide and disadvantage to communities of color.1 This report is intended to support the necessary process of strategizing and advocating for a just, equitable, and inclusive cannabis industry in Massachusetts. Such an industry would offer both business opportunities and positive collateral impacts for communities that have borne the weight of cannabis prohibition. Deliberate and persistent work is required if Massachusetts hopes to escape the “cruel paradox” that has plagued cannabis legalization efforts across the country.2 As Michelle Alexander, author of The New Jim Crow: Mass Incarceration in the Age of Colorblindness, has pointed out, the United States has seen “40 years of impoverished [B]lack kids getting prison time for selling weed, and their families and futures destroyed… [n]ow, white men are planning to get rich doing precisely the same thing?”3

This report employs three broad approaches to the process of identifying recommendations for the legal cannabis industry in Massachusetts. The first approach is to study

---

3 Id.
the general regulatory scheme for legalized cannabis in the states that have passed legalization measures. The second is to examine analogous regulatory schemes, such as the alcohol industry in Massachusetts and California. The third approach is to identify relevant policy goals (e.g. encouraging diversity and inclusion) and to search for policy initiatives from a variety of analogous sources, such as mortgage lending regulations or disability services agencies. The policies are categorized into broad goals directly applicable to the cannabis industry: (1) increasing full participation in the legal industry by residents of affected communities and (2) creating a positive impact in affected communities. Each prospective policy is subjected to a study of constitutional issues that could challenge its application. This report also considers the specifications and limitations of the voter initiative that may be the vehicle for the legalization of cannabis in Massachusetts in November 2016: the Regulation and Taxation of Marijuana Act. Each recommendation this report offers includes an identification of which can be implemented under the Act and which would require amendments or new legislation.

The regulation of alcohol and legal cannabis provided a wealth of examples relevant to the goals of this report. However, there are many policies outside of regulation of legal substances that have also provided useful analogies. If Massachusetts is to become a leader in regulating cannabis for the benefit of affected communities, regulators must look to these and other examples for creative solutions. This report specifically identifies fourteen policy recommendations, including:

- Establishing an annual grant program to channel money from cannabis licensing fees and taxes into communities that have been disproportionately impacted by cannabis prohibition enforcement;
• Instituting a requirement that those seeking licenses to operate cannabis establishments in communities that have been disproportionately affected by prohibition be residents of such a community;

• Establishing a program to support ownership and leadership of the cannabis industry by businesspeople from communities that have been disproportionately impacted by cannabis prohibition.

As with any comprehensive regulatory scheme, there will be many challenges to ensuring a fair and just cannabis industry. This report anticipates several challenges to the execution of policy recommendations, including:

• Potential constitutional challenges to policy recommendations from the Equal Protection Clause and the Takings Clause of the United States Constitution;

• Obtaining and renewing funding for programs would require annual approval by the state legislature; and

• Certain recommendations would require additional legislation after the passage of the Regulation and Taxation of Marijuana Act.

This report is not the first nor last word on how cannabis legalization in Massachusetts can serve affected communities. Indeed, a comprehensive effort on the part of public officials, businesspeople, advocates, and community members is necessary to ensure that the legal cannabis industry in Massachusetts does not shut out the same people that bore the weight of the enforcement of cannabis prohibition. This effort will depend on active engagement from advocates after the Regulation and Taxation of Marijuana Act is passed. Individuals and organizations who want the cannabis industry to be inclusive and beneficial to communities of
color should actively engage with the Cannabis Control Commission (CCC). Advocates should defer to the leadership of individuals who have been personally impacted by cannabis prohibition or who represent affected communities. Public officials who are directly or indirectly involved with the regulation of the new cannabis industry should make it a priority to develop regulations that will have a meaningful and long-lasting impact in these communities. In addition, Massachusetts should monitor how the legal cannabis industry in other states has impacted communities of color and be open to learning from the successes and failures of other initiatives.

---

DEFINITIONS

When used in this report, the following words shall, unless the context indicates otherwise, have the following meanings:

Affected communities: communities that have been disproportionately impacted by cannabis prohibition⁵

Cannabis: all parts of the plant Cannabis, and the seeds, derivatives or extracts thereof. For the purpose of this report, cannabis contains two subsets, marijuana and hemp⁶

Cannabis establishment: cannabis businesses and participants, including retail marijuana stores, marijuana product manufacturers, marijuana cultivators, and marijuana testing facilities⁷

Cannabis license: A license to cultivate cannabis, for marijuana or hemp, and to sell it only to the holder of a marijuana processing license, or a hemp processing license, or at retail when designated as a farm⁸

Cultivate: to cause or permit to grow⁹

Retail cannabis license: A license to sell cannabis and cannabis products to adult consumers for consumption on the holder’s premises or off the holder’s premises, or both, as provided by the license¹⁰

---

⁶ Id. at § 2.
⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id.
I. INTRODUCTION

In November 2016, the people of Massachusetts will have the opportunity to vote on whether or not to legalize cannabis for adult use.\(^1\) Legalization will create a new era in Massachusetts' evolving history with cannabis. In 2008, the voters of Massachusetts passed a measure downgrading the possession of under an ounce of cannabis from a criminal offense to a civil penalty.\(^2\) In 2012, voters approved the distribution and consumption of cannabis for qualifying medical uses.\(^3\) This year, voters will be asked to legalize the use of cannabis for individuals over the age of twenty-one.\(^4\) If the referendum succeeds, the Regulation and Taxation of Marijuana Act will become law.\(^5\)

The legalization of cannabis would put an end to the decades-long policy of prohibition. Prohibition has cost the state hundreds of thousands of dollars annually and has resulted in the arrest and incarceration of thousands of individuals.\(^6\) This impact has been amplified in communities of color, who have consistently been overrepresented in the number of individuals


\(^{12}\) MASS. GEN. LAWS ch. 94C, § 32L (2015).

\(^{13}\) MASS. GEN. LAWS ch. 94C, App. § 1-1 (2016).


\(^{15}\) Id.

\(^{16}\) E.g., JOHN GETTMAN, MARIJUANA IN MASSACHUSETTS: ARRESTS, USAGE, AND RELATED DATA 3 (2009), http://www.drugscience.org/States/MA/MA.pdf (estimating that cannabis prohibition cost the state $230.91 million in 2006); JOHN GETTMAN, MARIJUANA IN THE STATES 2012: ANALYSIS AND DETAILED DATA ON MARIJUANA USE AND ARRESTS 37 (2012), http://norml.org/pdf_files/JBG_Marijuana_in_the_States_2012.pdf (reporting on the annual arrest numbers for marijuana in Massachusetts between 2008 (8,695 arrests) to 2012 (1,104 arrests) (2012)).
arrested and sentenced for drug crimes.\textsuperscript{17} Massachusetts has seen a dramatic increase in the racial disparity of arrests for cannabis prohibition since decriminalization and Black residents are still 3.9 times more likely than white residents to be arrested for the possession of cannabis.\textsuperscript{18}

The purpose of this report is to draw attention to the important opportunity cannabis legalization offers: the opportunity to redress the disproportionate harm prohibition has had on communities of color by establishing a cannabis industry that both includes and benefits them.

A. The Impact of Cannabis Prohibition on the Criminal Justice System

The prohibition of cannabis has had an immense impact on the criminal justice system nationally as well as in Massachusetts. The federal government estimates that there were 1,561,231 arrests for drug-related offenses in 2014. Nearly 40\% of these arrests were for the possession of cannabis.\textsuperscript{19} An additional 5\% were for the sale of cannabis.\textsuperscript{20} According to the American Civil Liberties Union (ACLU), the national arrest rate for cannabis possession has been rising in the last few decades along with a dramatic increase in drug arrests occasioned by the "War on Drugs."\textsuperscript{21} They point out that in the two decades between 1990 and 2010, the country has experienced a “53\% increase in drug arrests, a 188\% increase in the number of people arrested for marijuana offenses, and a 52\% increase in the number of people in state

\begin{thebibliography}{99}
\bibitem{Id}Id.
\bibitem{ACLU2}American Civil Liberties Union, supra note 18, at 7.
\end{thebibliography}
prisons for drug offenses…" It is important to note that federal law classifies cannabis as a Schedule I controlled substance pursuant to the Controlled Substances Act. Posession of any controlled substance is punishable by incarceration or a $1,000 minimum fine. Manufacturing or distributing cannabis is punishable by a mandatory minimum sentence of ten years.

Currently, Massachusetts law categorizes cannabis as a Class D controlled substance pursuant to the Controlled Substances Act. The penalty for possession of less than one ounce of cannabis is a $100 fine. Additionally, if minors are found in possession of less than one ounce, they are required to complete a drug awareness program and may have their fine increased to one thousand dollars if they fail to do so. Offenses involving more than one ounce of cannabis are considered criminal charges. Individuals who are convicted of the criminal charges face imprisonment for up to two years or a fine of at least $500. Those convicted may also have their driver’s license suspended immediately, without a hearing, for up to five years. Consequently, those convicted of more than one cannabis-related offense can be sentenced to imprisonment for between one and two-and-a-half years, to pay a fine of between one thousand and ten thousand dollars, or by both imprisonment and a fine. The legalization of cannabis will

---

22 Id.
23 21 U.S.C. § 812(c)(10) (2012); 21 U.S.C. § 812(b)(1) (2012) (defining schedule I controlled substances as those for which there is "a high potential for abuse... no accepted medical use... [and] a lack of accepted safety for use").
24 Id. at § 844(a) (2010).
25 Id. at § 841(a), (b)(1)(A)(vii) (2010).
27 Id. at § 32L (2015).
28 Id.
29 See id. (specifying that offenses involving less than one ounce are civil penalties).
30 See id. at § 32C(a) (2015).
31 MASS. GEN. LAWS ch. 90, § 22(f) (2015).
32 MASS. GEN. LAWS ch. 94C, § 32C(b) (2015).
largely obviate the need for these penalties, resulting in lower arrest rates and increased cost savings for the state.

Massachusetts has had mixed success with its cannabis policy in the last decade. Between 2001 and 2010, Massachusetts experienced an 86.4% decrease in the rate for cannabis possession, the most significant decrease in the nation.\(^{33}\) Cannabis-related offenses in Massachusetts dropped from 10,260 in 2008 to 2,748 in 2009, and then to 2,596 in 2012.\(^{34}\) However, while Massachusetts has seen a significant decrease in the number of individuals arrested for cannabis offenses, it has also seen a significant increase in racial disparities in enforcement.\(^{35}\)

**B. The Racially Disparate Impact of Cannabis Prohibition**

The racial disparity in the enforcement of cannabis is illuminated by the arrest rate for cannabis possession, which has consistently been higher among Black people in Massachusetts than white people.\(^{36}\) In 2001, Black men and women in Massachusetts were 2.2 times more likely to be arrested for cannabis possession than their white counterparts.\(^{37}\) By 2010, the

\(^{33}\) American Civil Liberties Union, *supra* note 18, at 129 (showing that the arrest rate for cannabis possession per 100,000 people was 134%, in 2001 and dropped to 18% in 2010).


\(^{35}\) American Civil Liberties Union, *supra* note 18, at 129 (reporting a 75.4% increase in the racial disparity in arrests for cannabis possession in Massachusetts in the decade between 2001 and 2010).

\(^{36}\) See *id.* at 52; John Gettman, *Marijuana in Massachusetts* 5 (2009), http://www.drugscience.org/States/MA/MA.pdf (reporting that in Massachusetts in 2007 white people were arrested at a rate of 121 per 100,000 while Black people were arrested over three times as often at a rate of 450 per 100,000).

\(^{37}\) American Civil Liberties Union, *supra* note 18, at 52.
disparity had grown to 3.9, increasing by 75.4%. In Barnstable County, Black residents were 11 times more likely to be arrested for cannabis possession than white residents, ranking the county fourteenth in nation for the highest racial disparity in such arrests. In Plymouth County, Black residents are 10.5 times more likely to be arrested than their white neighbors. This phenomena of racially-based enforcement of cannabis prohibition is mirrored all across the United States; for example, in 2010, a Black person was 3.73 times more likely to be arrested for cannabis possession than a white person. The Black community is ubiquitously targeted despite the fact that “rates of marijuana use and non-use between whites and Blacks are roughly equal.”

The disproportionate enforcement of cannabis prohibition has resulted in the Black community bearing an inequitable share of prohibition's collateral consequences. The financial burden of those who are arrested for cannabis possession includes legal costs, such as attorney's fees, bail, fines, and court costs. These direct financial losses are compounded by the cost of

38 Id.
39 Id. at 58.
40 Id. at 156.
41 Id. at 9.
42 See id. at 66 (reporting that in 2010, 14.0% of Black Americans and 11.6% of white Americans reported using cannabis in the last 12 months). Compare, JOHN GETTMAN, MARIJUANA IN MASSACHUSETTS 5 (2009), http://www.drugscience.org/States/MA/MA.pdf (reporting that marijuana use was about 20% more prevalent among Black people than white, but affirming that "[w]hile this is a statistically significant difference, it does not explain why arrest rates for marijuana possession for blacks are three times higher nationally than for whites"). See generally HUMAN RIGHTS WATCH, supra note 17, at 41-44 (discussing the rate of drug usage generally between whites and Blacks and concluding that the rate of "current drug users" is "roughly comparable").
43 See e.g., HUMAN RIGHTS WATCH, supra note 17, at 55-58.
missing work or losing employment because of court involvement.\textsuperscript{45} In addition, arrests for cannabis enforcement are accompanied by "emotional stress," "familial tensions," and "loss of faith in the judicial system."\textsuperscript{46} These consequences are separate from the added penalties, such as ineligibility for public housing, that may be imposed on those who are actually convicted of cannabis possession.\textsuperscript{47} The implication of the situation is clear: "[d]rug law enforcement has deepened the racial disadvantages confronted by low-income African-Americans even as it perpetuates the erroneous belief that most drug offenders are [B]lack."\textsuperscript{48} While it may be difficult to demonstrate the role of racism in the enforcement of cannabis prohibition, it is important to acknowledge it in order to redress these harms.\textsuperscript{49}

C. The Cost Savings of Cannabis Legalization

Racial disparity is not the only problem with the prohibition of cannabis in Massachusetts. It has also been an expensive endeavor for the state and its taxpayers. In the year 2000, Massachusetts is estimated to have spent $130 million prohibiting cannabis.\textsuperscript{50} Of this $130 million, about $54 million was spent on police activities and arrests; $68 million was spent on the judicial system, prosecutorial, and court costs; and $8 million was spent on state correctional institutions to house offenders.\textsuperscript{51} In the same year, Massachusetts arrested 8,975 people for

\begin{itemize}
\item \textsuperscript{45} Id. at 34.
\item \textsuperscript{46} Id. at 36-38.
\item \textsuperscript{47} 42 U.S.C. § 13661(b) (2016) (disqualifying those who use illegal drugs, including marijuana, from eligibility for public and assisted housing funded by the federal government).
\item \textsuperscript{48} HUMAN RIGHTS WATCH, supra note 17, at 55.
\item \textsuperscript{49} Cf. HUMAN RIGHTS WATCH, supra note 17, at 4.
\item \textsuperscript{51} Id.
\end{itemize}
cannabis possession and 1,365 people for cannabis sales. This averages out to $12,572 per arrest. Sale arrests presumably account for a higher proportion of cost, as a sale arrest is a more serious offense. Sale arrests often require more police investigation, are more likely to result in a complicated criminal proceeding, and are more likely to result in incarceration.

The cost of prohibition did change considerably in 2009, when the decriminalization of less than an ounce went into effect. That being so, arrests for the sale of cannabis have remained relatively steady since decriminalization. If the police, judiciary, and correctional costs remained the same in 2012 as 2000 ($12,572 per arrest), Massachusetts would still have spent $32.6 million to enforce cannabis prohibition. This is a very conservative estimate, as in 2012 there were more sales arrests (which are likely to be more expensive to process and prosecute) than there were simple possession arrests. Additionally, those 1,000 or so possession arrests are likely for amounts larger than one ounce (since arrests for possession of less than one ounce are not allowed), which is also a more serious offense than standard possession was prior to 2009.

The ACLU has also estimated the cost of cannabis prohibition and enforcement in

52 Id. at 20.
53 Id.
55 Id.
58 JEFFREY A. MIRON, supra note 50, at 20.
59 See NORML, supra note 54.
60 Id.
Massachusetts. They estimate that in 2010, the state spent between $2,973,921 and $15,681,380, arriving at a median estimate of $9,327,650. They break down the median figure into three categories of expenditures: police ($4,637,007); judicial/legal ($4,149,921); and corrections ($540,723.) These estimates show that if Massachusetts were to legalize and regulate cannabis use, the state would see millions of dollars in savings every year.

D. The Regulation and Taxation of Marijuana Act

Due to the negative effects of cannabis prohibition, Massachusetts hopes to legalize and regulate cannabis use through the Regulation and Taxation of Marijuana Act, a bill that will legalize cannabis use for individuals over the age of twenty-one and, hopefully, create a "regulated and taxed distribution system" for cannabis across the state. The act was drafted by the Campaign to Regulate Marijuana Like Alcohol, one of many local and state policy movements supported by the Marijuana Policy Project (MPP).

The Regulation and Taxation of Marijuana Act lays out a comprehensive system for regulating the new cannabis industry. It not only establishes a three-member regulatory agency
called the Cannabis Control Commission (CCC) to oversee the industry and promulgate regulations, but also creates a fifteen-member Marijuana Advisory Board to assist the CCC in its function.\textsuperscript{70} Under the act, all sales of cannabis products will be subject to a 3.75% excise tax in addition to the state sales tax and optional local tax.\textsuperscript{71} The CCC will collect application and license fees from all cannabis establishments including retail stores, manufacturers, cultivators, and testing facilities.\textsuperscript{72} The funds from taxes and fees will be funneled into the Marijuana Regulation Fund and is subject to annual appropriation by the state legislature.\textsuperscript{73} The Fund is designated for "implementation, administration and enforcement" of the Act and the subsequent regulatory scheme.\textsuperscript{74} The Act gives cities and towns the ability to adopt ordinances to further regulate cannabis establishments in their jurisdictions.\textsuperscript{75} If passed, the Act would take effect on December 15, 2016.\textsuperscript{76}

In the Act, there is one provision that explicitly addresses the impact that legalization may have on affected communities. It requires the CCC to promulgate:

"procedures and policies to promote and encourage full participation in the regulated marijuana industry by people from communities that have previously disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities."\textsuperscript{77}

This provision creates an affirmative duty for the CCC to target affected communities for special support and attention. It also requires the CCC to be creative in adopting regulations that

\textsuperscript{70} H.B. 3932, \S 3.
\textsuperscript{71} Id.
\textsuperscript{72} H.B. 3932, \S 4.
\textsuperscript{73} H.B. 3932, \S 5.
\textsuperscript{74} Id.
\textsuperscript{75} H.B. 3932, \S 3.
\textsuperscript{76} H.B. 3932, \S 12.
\textsuperscript{77} H.B. 3932, \S 4.
will foster participation from these communities in the new industry. Most importantly, it presents an opportunity for advocates to encourage the cannabis industry to actively right the wrongs of prohibition. Unfortunately, this provision simply establishes the imperative; it is still the responsibility of agency members, legislators, advocates, and community stakeholders to see the directive carried out.

II. IMPACT OF LEGALIZATION IN OTHER STATES

A. General scheme of cannabis legalization in the United States

In order to analyze the impact of legalization, it is important to note that at the time of this writing, four states have passed voter initiatives legalizing, regulating, and taxing the distribution and sale of cannabis for persons 21 and older. In 2012, Colorado and Washington became the first states to legalize cannabis. 78 Alaska and Oregon, in 2015 and 2016 respectively, became the other two states to legalize cannabis. 79 This section provides an overview of relevant statutes and regulations adopted in each state and serves as a foundation for strategies in Massachusetts.

B. Colorado

Colorado's cannabis scheme is more developed compared to the other states because Colorado was the first state to legalize and regulate the cannabis industry. On November 6, 2012, the citizens of Colorado approved an amendment to the state constitution to allow the retail sale

78 WASH. REV. CODE § 69.50.4013 (2015); COLO. CONST. art. XVIII, § 16.
of cannabis. The legislature named this new constitutional amendment the “Colorado Retail Marijuana Code.”

Both the Constitution and the statute granted the Colorado Department of Revenue the authority to draft regulations.

1. Regulatory Authority

The legislature granted the responsibility of adopting new regulations pertaining to retail cannabis to the Colorado Department of Revenue. In addition to this responsibility, the Department of Revenue has the power to issue licenses, renew licenses, and inspect private cannabis establishments. The Department of Revenue created the Marijuana Enforcement Division to establish the regulations set forth by both the constitution and the state statute. The Marijuana Enforcement Division has the authority to approve or deny any applications based on certain requirements such as residency and criminal history. They also have the authority to revoke licenses if, for instance, an applicant sells to minors or offers free samples.

---

80 COLO. CONST. art. XVIII, § 16; David Blake and Jack Finlaw, Marijuana Legislation in Colorado: Learned Lessons, 8 HARV. L. & POL’Y REV. 359, 359 (2014).
81 COLO. CONST. art. XVIII, § 16.
83 COLO. CONST. art. XVIII, § 16(5); COLO. REV. STAT. § 12.43.4-201 (2015).
2. Licensing

In order to run a cannabis establishment in Colorado that the Department of Revenue can regulate, the first step is to apply to the Marijuana Enforcement Division (MED). A potential applicant must be a resident of the State of Colorado for at least two years prior to applying and must be at least twenty-one years old. After these initial requirements have been met, the state of Colorado will then determine if an applicant is qualified to operate a cannabis establishment.

In comparison to other states that have legalized cannabis, Colorado is also more lenient regarding who the state will consider as a potential applicant; for example, an applicant may be able to qualify for a license even with a criminal record. This only applies, however, if, on the date of application for a license, their possession of cannabis would be legal. This statute does not permit those convicted of other federal drug crimes to hold a license unless ten years have passed since the date of the application. Those convicted of a felony in the federal system are at a severe disadvantage compared to those convicted of the same crime in the state system.

Assuming one meets this criterion related to both state and federal law, there is still no guarantee that the cannabis enforcement division will approve the license applicant, no matter how lenient.

The MED will only issue licenses to applicants who have “good moral character.” This term is defined as follows: “...[A] person of good moral character . . . [is] rehabilitated and [is]
ready to accept the responsibilities of a law-abiding and productive member of society.”\textsuperscript{97}

Additionally, the MED has defined good moral character as “having a personal history that demonstrates, honesty, fairness, and respect for the right of others and for the law.”\textsuperscript{98} Compared to the criminal history requirements, this standard appears to be quite subjective.

When considering how to determine moral character, only two precedent cases exist in Colorado.\textsuperscript{99} While neither case addresses the approval of a cannabis establishment license or a medical marijuana license, they both demonstrate how broadly the courts have varied in interpreting the "good moral character" requirement in other scenarios. In the first case, a trial court convicted the plaintiff, a licensed real estate broker, of a felony for the attempted sexual assault of a minor.\textsuperscript{100} The plaintiff did not inform the Colorado Real Estate Commission of his conviction when he renewed his license.\textsuperscript{101} When the plaintiff informed the Colorado Real Estate Commission of the felony, they revoked the plaintiff's real estate license.\textsuperscript{102} The Colorado Court of Appeals held that the Colorado Real Estate Commission must consider the factors in Colo. Rev. Stat. § 24.5-101(2) in addition to a licensee’s conviction of a felony to determine if a licensee is not of good moral character before revoking a license.\textsuperscript{103}

The following year, the Colorado Court of Appeals held that rehabilitation, after conviction of a felony, did not require the Colorado Board of Pharmacy to reinstate a license.\textsuperscript{104} This implies that good moral character is hard to prove after a serious felony has been

\begin{itemize}
\item \textsuperscript{98} Colo. Code Regs. § 212-2-103 (2015).
\item \textsuperscript{100} Colo. Real Estate Comm’n v. Bartlett, 272 P.3d 1099, 1101 (Colo. App. 2011).
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 1099, 1103.
\item \textsuperscript{104} See Colo. State Bd. of Pharm. v. Priem, 272 P.3d 1136, 1141 (Colo. App. 2012).
\end{itemize}
committed. Considering these cases, it is apparent how much discretion a licensing board can use to determine good moral character. It raises the question: to what extent will the Marijuana Enforcement Division consider prior convictions for cannabis possession as evidence of bad moral character when deciding whether to issue a license? If they do consider prior convictions, then the moral character requirement will serve as an effective barrier to the industry for people with criminal records.

The purpose of the Colorado amendment to legalize retail cannabis was to increase revenue for the benefit of the public and support "individual freedom." On the other hand, the purpose of the Massachusetts initiative is to increase public safety by removing cannabis from the black market. The difference in purpose is best reflected when one compares the licensing requirements between both states. The application fee for a license in Massachusetts will be $3,000 and the license itself will cost at least $15,000. While the Colorado statute authorizes the Colorado of Department Revenue to collect fees, the exact amount is not codified in the statute, which suggests that the fees can change.

3. Taxing

Colorado collects money from the cannabis establishments in other ways that differ from the Massachusetts proposal. For example, in Colorado, there is a 10% sales tax and a 15% excise tax on cannabis establishments. All revenue collected from cannabis sales taxes are deposited into an "old age pension fund." In regards to excise taxes on cannabis, Colorado distributes proceeds in two ways: (1) the first forty million dollars is transferred into a "public school capital

---

105 COLO. CONST. art. XVIII, § 16(1)(a).
construction assistance fund" and (2) "any amount remaining will be transferred to a public school fund," which is to be used for the maintenance of public schools.\textsuperscript{109}

\textbf{C. Washington}

In 2012, Washington legalized the sale, manufacturing, cultivation, and use of cannabis for any person twenty-one years of age or older.\textsuperscript{110}

\textbf{1. Regulatory Authority}

The cannabis industry in Washington is regulated by the state liquor and cannabis board.\textsuperscript{111} The board has the power to adopt rules and procedures for regulating the industry, including establishing licensing requirements, determining the number of retail outlets in each county, and establishing fees.\textsuperscript{112} The board consists of three members who will be appointed by the governor, with the consent of the Senate.\textsuperscript{113}

\textbf{2. Licensing}

In order to produce, process, research, or deliver cannabis, a person must obtain a license from the state liquor and cannabis board.\textsuperscript{114} The application fee for a cannabis producer, processor, and retailer license is $250, and the annual renewal or issuance fee is $1,000, which is the lowest out of the four states that have legalized cannabis.\textsuperscript{115} The board will not issue licenses to anyone under twenty-one years of age or anyone doing business as a sole proprietor who has

\textsuperscript{110} WASH. REV. CODE § 69.50.4013 (2015).
\textsuperscript{111} WASH. REV. CODE § 69.50.345 (2015).
\textsuperscript{112} WASH. REV. CODE § 69.50.345 (2015).
\textsuperscript{113} WASH. REV. CODE § 66.08.012 (2015).
\textsuperscript{114} WASH. REV. CODE § 69.50.331 (2015).
\textsuperscript{115} WASH. ADMIN. CODE §§ 314-55-075 to -079 (2015).
not resided in the state for at least six months before submitting the application.\textsuperscript{116} Furthermore, the board will not issue any licenses to an association or corporation unless it was formed in the state and its members are also qualified to obtain licenses.\textsuperscript{117} Those individuals acting as managers or agents must also meet the residency requirement.\textsuperscript{118}

As part of the cannabis license application process, the board will review the applicant’s criminal history.\textsuperscript{119} The board uses a point system to determine whether the applicant qualifies for a license.\textsuperscript{120} Typically, an applicant with more than eight points will not qualify for a license.\textsuperscript{121} For example, a felony conviction carries twelve points for a period of ten years and a misdemeanor conviction carriers four points for a period of three years.\textsuperscript{122} There is an exception to the criminal history point assignments that may encourage participation into the industry.\textsuperscript{123} If the cannabis license applicant only has two prior federal or state misdemeanor convictions for possession of only cannabis within a period of three years, the points may not count towards the point accumulation.\textsuperscript{124}

The board preferences those with prior business licenses or business in the medical marijuana industry.\textsuperscript{125} Priority for licensing—which uses a three-tier system—is awarded as follows: (1) first priority is given to applicants who apply for a retailer license prior to July 1, 2014, operated or were employed by a collective garden before 2013, maintained a state business

\textsuperscript{117} \textit{Wash. Rev. Code} § 69.50.331 (2015).
\textsuperscript{118} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Wash. Rev. Code} § 69.50.331 (2015).
license and a municipal license within the applicable jurisdiction, and have had a history of paying all taxes\(^\text{126}\); (2) second priority will be given to applicants that apply for a retailer license after July 1, 2014, but meet the other first priority requirements\(^\text{127}\); and (3) third priority will be given to all other applicants.\(^\text{128}\) The priority preferences may be a barrier for those in affected communities that do not have prior business licenses or businesses in the medical marijuana industry.

In addition to creating a preference for certain categories of license applicants, Washington limits an entity to no more than three cannabis licenses in order to reduce the possibility of a single entity controlling the market.\(^\text{129}\) This limitation may promote participation in the affected communities, because it prevents entities that receive priority preference from dominating the market.

3. Taxing

Similarly to Colorado, there is a 37% excise tax on each retail sale of cannabis products in Washington.\(^\text{130}\) The Washington state treasury created a dedicated cannabis account, and all funds received from excise taxes and cannabis-related activities, such as licensing fees and penalties, must be deposited in the account.\(^\text{131}\)

The legislature must make annual appropriations from the dedicated cannabis account.\(^\text{132}\) Annual appropriations will be made to various departments and programs, such as the

\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) Id.
Department of Social and Health Services, University of Washington Alcohol and Drug Abuse Institute, State Liquor and Cannabis Board, Department of Enterprise Services, Washington Poison Control Center, and counties, cities, and towns where licensed cannabis retailers are physically located. Pursuant to this statute, the Department of Health must have a cannabis education program that includes: “a marijuana-use public health hotline, a program for local health departments or other local community agencies for preventing use by youth . . . through media-based campaigns [and] community grant programs.” Communities that are deemed as “high-risk”—“high-risk” including factors like poor school performance, low graduation rates, gang membership, poor mental health, and youth delinquency—can apply for grants to assist in their efforts for youth prevention programs.

D. Alaska

On February 24, 2015, Alaska declared that the “use of marijuana will be legal for persons 21 years of age or older.” The cultivation, manufacturing, and sale of cannabis will also be legalized and regulated in Alaska. The first licenses for cannabis establishments will be issued in May 2016.

133 Id.
134 Id.
136 ALASKA STAT. § 17.38.010 (2015).
1. Regulatory Authority

The Marijuana Control Board has the authority to regulate the cannabis industry in Alaska. The Control Board consists of five members that are appointed by the governor and confirmed by the legislature; there must be one member currently residing in a rural area, one member from the public safety sector, one member from the public health sector, one member actively engaged in the cannabis industry, and one member from the general public or engaged in the cannabis industry. The board has the authority to establish regulations to control cultivation, manufacture, sale, license qualifications, application review, and to hear appeals from officers charged with enforcing regulations.

2. Licensing

It is important to note that no cannabis establishments in Alaska may operate without obtaining all applicable licenses from the board. Licenses are required for retailers, testing facilities, manufacturing facilities, and cultivation facilities. The Marijuana Control Board will begin accepting and processing applications for registrations after February 24, 2016. The first licenses will be issued in May 2016.

The board has established residency requirements for individuals and companies or entities applying for cannabis retail establishment licenses. In order to apply for a cannabis

139 ALASKA STAT. § 17.38.080 (2015).
140 Id.
144 ALASKA STAT. § 17.38.200 (2015).
establishment license, an individual must be a resident of the state, and if an entity or corporation is applying for a cannabis establishment license, each member of the company must be a resident of the state and qualified to conduct business in the state. License qualifications for cultivation facilities, product manufacturing facilities, and testing facilities include completing a cannabis handler permit education course, which must cover the following topics:

(1) the effects of consumption of marijuana and marijuana products; (2) how to identify a person impaired by consumption of marijuana; (3) how to determine valid identification; (4) how to intervene to prevent unlawful marijuana consumption; and (5) the penalty for an unlawful act by a licensee, an employee, or an agent of a marijuana establishment.

As part of filing a new license application for a new cannabis establishment, a person must submit their fingerprints to the Department of Public Safety for a national criminal history record check. The board will not issue a license to a person who has been found guilty of selling alcohol without a license; selling alcohol to a minor; a misdemeanor crime involving a controlled substance or violence; or who has been convicted of a Class A Misdemeanor related to selling, furnishing, or distributing cannabis within the preceding five years. This regulation may be an initial barrier for affected communities from participating in the cannabis industry, because it does not allow a person with a cannabis conviction to receive a license within five years of the conviction.

The annual licensing fee for a cannabis retailer, cultivation facility, or product manufacturing facility is $5,000; the fee for a limited cannabis cultivation facility, extract only

---

manufacturing facility, and testing facility license is $1,000; and the fee for a cannabis handler permit card is $50.\textsuperscript{151}

3. Taxing

Currently, there is a proposed amendment to the cannabis regulations to add a Marijuana Tax section.\textsuperscript{152} According to the proposed amendment, cannabis "sold or transferred from a marijuana cultivation facility shall be taxed as follows: (1) Any part of the flower and bud, including the sugar leaf, will be taxed at $50 per ounce; (2) The remainder of the plant, not included in (1) above, will be taxed at $15 per ounce."\textsuperscript{153} If this amendment is passed, it could lay the groundwork for cannabis tax revenues to be appropriated to various government programs such as those in Colorado and Washington.\textsuperscript{154}

E. Oregon

On January 1, 2016, Oregon became the most recent state to declare recreational use and possession of cannabis legal.\textsuperscript{155} The regulatory scheme is laid out by House Bill 3400 and Division 25 of the Oregon Liquor Control Commission.\textsuperscript{156} The contents of the house bill have not been codified, because the legislation is new.

\textsuperscript{151} ALASKA ADMIN. CODE tit. 3, § 306.100 (2015).
\textsuperscript{152} ALASKA ADMIN. CODE tit. 15, § 61.100 (2015).
\textsuperscript{153} Id. at 2.
1. Regulatory Authority

The state legislature authorized the Oregon Liquor Control Commission (“OLCC”) to regulate retail cannabis dispensaries and manufacture sites.\(^{157}\) The OLCC approved temporary regulations to run from January 1, 2016 to June 28, 2016 in order to begin processing applications on January 4, 2016.\(^{158}\)

2. Licensing

Like in the previous three states, one must obtain a license in order to run a cannabis establishment. First, an applicant is only required to submit a $250 dollar application fee that is nonrefundable.\(^{159}\) 230 Oregon citizens applied for retail cannabis licenses within the first three days of the initial application.\(^{160}\) The OLCC also expects it will “issue more than 850 licenses” by the year’s end.\(^{161}\) If the OLCC approves an application, the applicant must pay a license fee in an amount between $3,750.00-$4,750.00 for the most basic license.\(^{162}\)

However, the OLCC will deny an applicant who “is not of good repute and moral character.”\(^{163}\) This regulation by the OLCC is the same requirement found in the statute regarding liquor licenses.\(^{164}\) The OLCC will only approve applications from individuals who have been “resident[s] of Oregon for at least two consecutive years.”\(^{165}\) This rule will remain in

\(^{157}\) H.B. 3400, § 16.
\(^{159}\) OR. ADMIN. R. 845-025-1060(1) (2016).
\(^{160}\) H.B. 3400.
\(^{161}\) *Id.*
\(^{162}\) OR. ADMIN. R. 845-025-1060(2) (2016).
\(^{164}\) *See* OR. REV. STAT. § 471.313(4)(f) (2015).
force until January 1, 2020. It gives residents a considerable amount of time to involve themselves with the industry before out-of-state interests gain influence.

3. Taxing

All consumers will pay sales tax on retail cannabis when purchasing various cannabis retail products at an Oregon cannabis establishment. Furthermore, cannabis establishment owners will be able to deduct up to 2% of these taxes when they file with the State of Oregon.

III. STRATEGIES FOR IMPLEMENTATION IN MASSACHUSETTS

Using the information about the four states with currently legalized cannabis, this report will now detail how to implement legalized cannabis in Massachusetts while encouraging participation and positive impact in affected communities. Massachusetts will have to act strategically to create a regulatory scheme for legalized cannabis that addresses this important goal. The regulatory body overseeing the new cannabis industry must adopt strategies to develop opportunities for and channel resources into affected communities. This report assumes that the Regulation and Taxation of Marijuana Act will be the vehicle for the legalization of cannabis in Massachusetts. The act includes a key provision requiring the regulatory body, the Cannabis Control Commission (CCC), to specifically address the impact legalization will have on affected communities. As stated above, the CCC must promulgate:

Procedures and policies to promote and encourage full participation in the regulated marijuana industry by people from communities that have previously

166 Id.
167 OR. REV. STAT. ANN. ch. 669 § 1.1 (West 2015).
168 Id. at § 13.4 (West 2015).
been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities.170

The strategies below are designed to aid the Massachusetts legislature in effectuating the language of this provision so that legalization may indeed have a positive impact on communities that were disproportionately harmed by the enforcement of prohibition. This report offers five basic approaches for how the new cannabis industry may seek this goal: (1) appropriate funds to benefit affected communities; (2) engage community stakeholders; (3) reduce barriers to entry in the cannabis industry; (4) utilize the allocation of cannabis business licenses; and (5) influence industry practices. Each of these broad strategies is comprised of specific recommendations for how the CCC, together with the state legislature and local advocates, may shape the impact of the cannabis industry.

Many of the specific recommendations explained below can be implemented within the regulatory framework of the Regulation and Taxation of Marijuana Act.171 However, some policies, particularly those aimed at reshaping the licensing scheme, cannot be adopted within the Act as written. These recommendations would require follow-up legislation amending the framework of cannabis regulations. This report chose to include recommendations that can be implemented immediately after legalization and those that would require additional legislation in recognition that creating a cannabis industry that positively impacts affected communities will be an ongoing task. The state will need to employ creativity, collaboration, persistence, and commitment in order to develop an inclusive cannabis industry that works to repair the damage of prohibition.

170 Id. at § 4.
171 See Appendix B.
In addition, some of the policy recommendations in this report can only be implemented by first identifying geographical boundaries that define affected communities. For example, the policy recommendation to restrict issuance of licenses for establishments in affected communities only to residents of affected communities could not be implemented without the ability of a licensing authority to determine whether a given address falls within an affected community. Because drawing boundaries around affected communities was beyond the scope of this report, three examples of pre-established boundaries are offered here for identifying and geographically defining affected communities. First, police districts are clearly outlined geographically for some cities. Second, census tracts are clearly outlined for all cities. And third, some economically disadvantaged communities have been geographically outlined in Massachusetts through the federal government's Empowerment Zone and Enterprise Cities Demonstration Program (Empowerment Zones Program), and those designated communities could share characteristics of affected communities in ways that could make the designated empowerment zones useful for determining affected communities.

A. General Constitutional Barriers

The following sections propose specific policies to aid the CCC in making the cannabis industry more inclusive. In anticipation of possible constitutional challenges, this section provides a brief overview of the two relevant constitutional clauses. If the proposed policies are challenged constitutionally, it will likely be under the Equal Protection Clause and the Takings

---

172 BOSTON POLICE DEPARTMENT, Districts, Boston Police Department, bpdnews.com/districts/ (last visited Jan. 22, 2016).
Clause because the policy recommendations aim to directly benefit the communities affected by cannabis prohibition. Equal protection issues arise when certain classes of people are perceived to be given disparate treatment over others, and Takings Clause constitutional barriers come up in issues regarding governmental taking of money.  

1. Equal Protection Clause

Section 1 of the Fourteenth Amendment of the Constitution includes a provision that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.” This section, known as the Equal Protection Clause, is the basis for challenging the constitutionality of laws or policies that distinguish between groups of people. The Supreme Court of the United States uses three standards of scrutiny to analyze equal protection questions: (1) rational basis, (2) intermediate scrutiny, and (3) strict scrutiny. Rational basis is the default constitutionality test, in which the policy must be rationally related to a legitimate government interest. Rational basis is the lowest standard of review, under which a policy has a better chance of survival than under either strict or intermediate scrutiny. If a proposed policy is challenged on the grounds that it is unconstitutional, it will likely survive a rational basis review unless the court cannot find that it is rationally related to a legitimate government

---

176 U.S. CONST. amend. XIV, § 1.
177 U.S. CONST. amend. XIV, § 1.
181 Carolene, 304 U.S. 144.
Intermediate scrutiny is triggered when a policy involves a gender-based classification. In intermediate scrutiny, classifications based on gender must serve “important governmental objections and must be substantially related to achievement of those objections.” Strict scrutiny is the highest standard of review and the most difficult to survive. Strict scrutiny can be triggered in two ways: when a government policy infringes upon a fundamental right, or when government policies seem to differentiate people using “suspect classifications.” “Suspect classes” that will be reviewed under the strict scrutiny standard include race and national origin. In order to survive strict scrutiny, a policy must: (1) serve a compelling governmental interest and (2) be narrowly tailored to achieve the goal or interest and when it involves religion, (3) be the least restrictive means of achieving these policy goals. Rational basis and strict scrutiny are the two applicable standards of review for the purposes of the Regulation and Taxation of Marijuana Act.

Equal protection case law has evolved to create a framework that makes it very difficult for governmental programs that intentionally treat specific groups of people differently to be upheld as constitutional. One commonly known and continuously controversial example of this is race-based affirmative action. Opponents of programs to positively impact communities harmed by cannabis prohibition will likely argue that the programs are basically race-based

---

183 Carolene, 304 U.S. at 174.
184 Craig 429 U.S. 190.
185 Id.
188 Id.
192 Korematsu, 323 U.S. at 183.
affirmative action programs (and thus subject to strict scrutiny) if they appear to draw distinctions between groups of people based on race. The neighborhoods in Massachusetts that have been disproportionately impacted by policing are Roxbury, Dorchester, and Mattapan; these are also neighborhoods with higher African-American and Latino populations.\textsuperscript{193} Focusing on the disproportionate impact of policing on the neighborhoods, not the racial makeup, will help to avoid triggering a constitutional challenge requiring a strict scrutiny review.

However, that does not mean that programs and policies created by the Cannabis Control Commission (CCC) should disregard the legal standards required by strict scrutiny. To survive an equal protection challenge on the allegation that Massachusetts' programs and policies violate equal protection by unfairly benefiting certain groups over others, the CCC should enact policies that can measure up to the standards of review established by the Supreme Court. If the policies intentionally and directly benefit racial or ethnic minorities, they must be able to survive a strict scrutiny review.\textsuperscript{194} The CCC can use examples of programs that have been upheld as constitutional to create similar policies. General rules established by the applicable case law include criteria for remedying past discrimination and strategies for shaping policies that, while they may consider an individual’s race, may not do so in a way that disadvantages others.\textsuperscript{195} If the policies do not specifically and intentionally mention a suspect class, they will likely be upheld under a rational basis review as long as a legitimate government objective can be identified.

\textsuperscript{193} James Jennings, Measuring neighborhood distress: a tool for place-based urban revitalization strategies, COMMUNITY DEVELOPMENT, 464, 468 (Oct. 2012).
\textsuperscript{194} Adarand, 515 U.S. at 200.
2. Takings Clause

The Takings Clause is provided by the Fifth Amendment and provides the government the right to seize private property for a public benefit or use, and it requires the provision of just compensation should private property be seized.\(^{196}\) It is important to consider the Takings Clause when drafting and implementing policies for the inclusion of affected communities because the use of industry money to fund Justice Reinvestment Initiatives may qualify as a government taking.\(^{197}\) Public programs established using industry taxes may be considered a violation of the Takings Clause because money has been considered an intangible property that can be affected under the Takings Clause.\(^{198}\) The United States Constitution and the Massachusetts Constitution provide authority to the government to tax its citizens, which makes it unlikely that an industry tax will be challenged under the Takings Clause, but there is still a possibility that the use of industry taxes may trigger a Takings Clause concern.\(^{199}\) A tax is different than a governmental taking because it “is an exaction” for public use and welfare.\(^{200}\) For example, a taking is most frequently triggered when real property is seized for public use, but seizure of funds for a public

\(^{196}\) U.S. CONST. amend. V.

\(^{197}\) See Phillips v. Wash. Legal Found., 524 U.S. 156, 178-9 (1998) (holding that interested earned on account was property for the purpose of a taking violation). See, also Brown v. Legal Found. of Wash., 538 U.S. 216, 216 (2003) (holding that taking of interest from account to fund legal services for low income clients was a taking for public purposes).

\(^{198}\) See Phillips v. Wash. Legal Found., 524 U.S. 156, 178-9 (1998) (holding that interested earned on account was property for the purpose of a taking violation). See, also Brown v. Legal Found. of Wash., 538 U.S. 216, 216 (2003) (holding that taking of interest from account to fund legal services for low income clients was a taking for public purposes).

\(^{199}\) See U.S. CONST. art. I, § 8. See also MASS. CONST. art. IV, pt. II, § 1, cl. 1.

use can be considered a taking as well. This governmental taking is different from a tax because it is not included in the tax code and is done ad hoc instead of systematically.

When considering ways to establish justice reinvestment programs and policies, taxation and other fees are essential to raise capital that will help fund these initiatives. While the government has the authority to tax its citizens under both the Massachusetts and the United States Constitutions, taking private money outside of the tax scheme or property for purposes of public interest or service can trigger a Takings Clause claim. Governmental takings are exercised through the government’s eminent domain power. The United States Constitution provides the federal government this power in the Fifth Amendment. The Fifth Amendment also provides for the protection of private property by stating: “Nor shall private property be taken for public use, without just compensation.” In other words, a governmental taking of private property requires the payment of “just compensation” to the owner. Massachusetts also provides protections for its citizens and ensures that any citizen who has property seized by the government must consent to the taking. The Massachusetts Constitution provides: “...[B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public

201 See Phillips v. Washington Legal Foundation, 524 U.S. 156, 178-9 (1998) (holding that interested earned on account was property for the purpose of a taking violation). See also Brown v. Legal Foundation of Washington, 538 U.S. 216, 216 (2003) (holding that taking of interest from account to fund legal services for low income clients was a taking for public purposes).
204 See Phillips v. Wash. Legal Found., 524 U.S. 156, 178-9 (1998) (holding that interested earned on account was property for the purpose of a taking violation). See, also Brown v. Legal Found. of Wash., 538 U.S. 216, 216 (2003) (holding that taking of interest from account to fund legal services for low income clients was a taking for public purposes).
205 U.S. Const. amend. V.
206 Id.
207 Id.
uses, without his own consent, or that of the representative body of the people. These provisions protect citizens from the government and ensure that private property interests are preserved. While consent is required, Massachusetts also allows for the legislature to consent to the taking of the property should the owner not consent to the taking.

In addition to its authority to take private property power for a public use, the government can also impose regulations on the use of property that interfere with the owner’s right to fully enjoy or use the property or diminishes or completely eradicates the value of the property, which results in a regulatory taking. The common law has determined that when a regulatory taking is established, the government is required to provide just compensation to the affected property owner.

Government takings are established when: (1) the government physically occupies property unless justified by the owner’s consent to forfeit the property or eminent domain proceedings, (2) the government transfers the right to occupy the property from party to another, and (3) the government imposes a regulatory taking on the property, as previously explained.

These categories determine when government interference with property is considered a taking and when just compensation is due. Government interference, including regulatory takings and government occupation of property, is considered a compensable taking under Lingle v. Chevron, 544 U.S. 528, 538-9 (2005).

---

208 MASS. CONST. art. X, pt. I.
209 Id.
210 Id.
212 Id. at 538.
213 Id. at 536.
214 Id. at 537.
215 Id. at 537-8.
v. Chevron, and policymakers should keep this in mind when crafting policies.\textsuperscript{216} Policies that mandate or regulate what a cannabis establishment must do with its property in order to further justice reinvestment initiatives may trigger a Taking Clause complaint. If a Takings Clause complaint is filed, it will likely lead to a constitutional review of regulations that interfere with a cannabis owner's right to hold property free from government interference.\textsuperscript{217}

Concerns about governmental takings requiring just compensation might be triggered when policy makers draft justice reinvestment initiatives that involve a taking of money beyond a normal tax or the government use of privately owned property, which in this instance would be the privately owned dispensaries. A governmental taking under the Constitution can extend to intangible property, which includes money in some instances.\textsuperscript{218} Should a policymaker be interested in garnering funds for the purpose of social justice programming, the most appropriate way to do so is through establishing a fund to be generated out of the tax system, because this will avoid a taking claim.

B. Strategy One: Appropriation of Funds for Community Benefit

Securing funding through tax appropriations is one strategy that could help positively impact affected communities. Tax appropriations, by definition, are specific amounts of money authorized by state legislatures to accomplish a specific goal within a specific period of time.\textsuperscript{219}

In Massachusetts, tax appropriations are a reflection of goals the governor hopes to achieve

\textsuperscript{216} Id. at 536-8.
\textsuperscript{217} Id.
\textsuperscript{218} See Phillips v. Wash. Legal Found., 524 U.S. 156, 178-9 (1998) (holding that interested earned on account was property for the purpose of a taking violation). See also Brown v. Legal Found. of Wash., 538 U.S. 216, 216 (2003) (holding that taking of interest from account to fund legal services for low income clients was a taking for public purposes).
through state government and how those goals will be paid for.\textsuperscript{220} Tax appropriations in Massachusetts are spread across a wide array of causes, such as business development, housing and community development, education, and public safety.\textsuperscript{221} Because appropriations are so versatile in use, they are powerful tools that can also help benefit citizens and communities that are in need of governmental assistance.\textsuperscript{222} For instance, tax appropriations have been used to establish grants that assist children and families access affordable child care and early education.\textsuperscript{223} In regards to the pending legalization of cannabis in Massachusetts, tax appropriations have the potential to make an enormous impact on communities who have been disproportionately impacted through cannabis prohibition. For example, if taxes from cannabis were used to establish a grant program to help create jobs in underrepresented communities, it would serve as a poignant example of how appropriations can be used to help those in need.\textsuperscript{224}

The general mechanics of how tax appropriations function in Massachusetts are elucidated below. Further, specific programs that have been created through tax appropriations are discussed to highlight how underrepresented groups and communities have benefited from tax appropriations.

The Massachusetts constitution sets forth how appropriations from tax revenues are to be carried out within the government.\textsuperscript{225} Prior to appropriations, the governor submits a budget that contains all proposed expenditures for the fiscal year, including any revenue gained from taxes.


\textsuperscript{221} \textbf{MASS. GEN. LAWS ANN.} ch. 23, § 3 (West 2016).

\textsuperscript{222} \textbf{MASS. GEN. LAWS ANN.} ch. 58, § 25A (West 2015).

\textsuperscript{223} \textbf{MASS. BUDGET AND POLICY CENTER}, \textit{supra} note 220.


\textsuperscript{225} \textbf{MASS. CONST. art. LXIII} § 3.
Pursuant to the General Appropriations Act, all appropriations within the proposed budget must be listed with the purpose of the appropriation, any restrictive language, and the exact amount of money to be appropriated.\footnote{MASS. ANN. LAWS CH. 29, § 6 (LexisNexis 2015).} In order for appropriations to be implemented into the budget, they must be included in the “General Appropriations Bill,” which requires an annual multi-step process within the legislative and executive branch.\footnote{MASS. GEN. LAWS ANN. ch. 63, § 3 (West 2016); EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, FY2016 Budget Process and Documents (Feb. 11, 2016, 6:16 PM), http://www.mass.gov/anf/budget-taxes-and-procurement/state-budget/budget-process/fy2016-budget-process-and-documents.html.} The process begins when the governor submits the Fiscal Year Budget Recommendation to the House of Representatives.\footnote{Id.} Prior to submitting the budget recommendation, the House Ways and Means Committee (HWMC) examines the governor’s budget proposal.\footnote{Id.} Individual HWMC representatives submit budget amendments.\footnote{Id.} Joint Ways and Means Committee budget hearings are held across Massachusetts prior to the release of the House Ways and Means Budget.\footnote{Id.} The House of Representatives reviews the budget from the HWMC, amends it, and then submits it to the State Senate for review.\footnote{Id.} The Senate Ways and Means Committee (SWMC) then goes through the same process.\footnote{Id.} After the Senate approves the budget from the SWMC, the House and Senate have a Conference Committee meeting to reconcile the differences between the House and Senate budget recommendations.\footnote{Id.} The governor has ten days to review, approve, or veto the
The legislature can override the vetoes with a two-thirds vote from each branch. After approval, the budget is finalized and becomes the “General Appropriations Act” for the fiscal year.

After taxes and other revenue are collected, they are placed into the “General Fund.” Revenue within the General Fund can be categorized into two categories: on-budget and off-budget funds. On-budget funds, which hold taxes and other revenue, cover operating expenses of state government. Money from on-budget funds is appropriated as a line-item within the General Appropriations Act. An off-budget fund is a non-budgeted special revenue fund often set up as a trust fund. These trust funds are created to receive revenue from a specific source that is dedicated to a particular function. In addition to the dedicated revenue sources, some of these funds also receive transfers of revenue from the General Fund. In contrast to on-budget funds, off-budget funds do not require specific appropriation language within the annual budget.

---

239 Id.
240 Id.
241 Id. at 1, 2.
242 Id.
243 Id.
and are not typically used for governmental operating expenses. Off-budget funds are particularly useful for social welfare as it gives the government the ability to allocate money collected from taxes towards programs that benefit people in need within the state.

Taxes collected from the tobacco industry have provided several notable examples that have benefited from on-budget and off-budget funding through tax appropriations. In Massachusetts, excise taxes collected on tobacco products are placed into the General Fund and then can be appropriated accordingly for programs that need funding. One program that benefits from tobacco tax appropriations is the Commonwealth Care Trust Fund (CCTF); the CCTF finances the ConnectorCare Program which provides subsidized healthcare coverage to low-income people in Massachusetts not eligible for MassHealth. A second trust fund that benefits from tobacco excise taxes and the CCTF is the Health Safety Net Trust Fund (HSNTF). The HSNTF receives a portion of its funding from the CCTF and also from the General Fund. The purpose of the HSNTF is to reimburse hospitals and community health centers for a portion of the cost of care they provide to low-income uninsured or underinsured patients. The Health Protection Fund also receives appropriations gained from excise taxes on tobacco products. The Health Protection Fund allocates its funding to the Department of Elementary and Secondary Education, the purpose of which is to create comprehensive tobacco

244 Id. at 1, 2.
245 Id. at 3, 4.
246 MASS. ANN. LAWS ch. 64, § 7B (LexisNexis 2015).
249 MASS. BUDGET AND POLICY CENTER, supra note 247.
250 Id.
251 MASS. ANN. LAWS ch. 64, § 7 (LexisNexis 2015).
prevention programs for school health education.\textsuperscript{252} Tax appropriations from tobacco have been a powerful tool used to create social welfare programs within Massachusetts.\textsuperscript{253} The retail cannabis industry in Massachusetts may be able to create programs analogous to those that have been implemented from tax appropriations in the tobacco industry.

1. Specific Recommendation: Establish an Annual Grant Program

An example of how appropriated funds can be beneficial to the affected communities is through an annual grant program, which is a common mechanism regulatory agencies use to have a direct impact in a target community.\textsuperscript{254} They allow the government to channel funding toward an identified goal through the partnership of public or private entities. Establishing an annual grant program within the regulatory scheme of the new cannabis industry could allow the Cannabis Control Commission (CCC) to direct monies from licensing fees and excise taxes to affected communities.\textsuperscript{255} An important advantage of establishing an annual grant program is that it may be adopted within the parameters of the Regulation and Taxation of Marijuana Act.\textsuperscript{256} However, like all budget items in Massachusetts, an annual grant program would be subject to appropriation by the legislature and would therefore depend on annual approval.\textsuperscript{257}

\textsuperscript{252} \textit{Mass. Ann. Laws ch. 69, § 1} (LexisNexis 2015).
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{See Executive Office of Housing and Human Development, Grant and Funding Programs} (accessed on Mar. 2, 2016), http://www.mass.gov/hed/community/funding.
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{See Mass. Const. amend. art, 63, § 2-3.}
i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

In the context of the legalized cannabis industry, this policy would involve funds collected into the Marijuana Regulation Fund being disbursed, in the form of grants, to applying nonprofit organizations. Since the grants are funded through the Marijuana Regulation Fund, they would come entirely from licensing fees and taxes from the cannabis industry.\(^{258}\) These grants should be given by the CCC to nonprofit organizations who have shown that their programs, activities, and policies have fulfilled the mandate of chapter 94G § 4.4 by benefiting and supporting the full participation of people living in communities that have been disproportionately harmed by cannabis prohibition.

Although there are many mechanisms that can be utilized to ensure that an annual grant program is successfully implemented, this report highlights two: an application process for the appropriation of funds and a block grant structure for the distribution of funds. If funds are going to be appropriated to governments, businesses, organizations, communities, or any other entity, it is vital that those funds are utilized for a designated purpose, and that those receiving the funds are held accountable for their usage. One mechanism to ensure accountability is the institution of an application process for funds. For example, governments interested in receiving aid through the Empowerment Zones Program\(^{259}\) had to submit a rigorous application that included establishing the boundaries of their community, outlining the demographics, listing the services needed to stimulate economic growth and engage the community, and stating the amount of

\(^{258}\) H.B. 3932.
funding needed, among several other factors.\textsuperscript{260} The comprehensive application had to explain how funding would be utilized to support four overarching themes: Strategic Visions for Change, Community-Based Partnerships, Economic Opportunities, and Sustainable Community Development.\textsuperscript{261}

The application process used by those allocating funds in the cannabis industry can set forth any criteria deemed vital to meeting the goals of the industry. It can be an effective mechanism in determining the amount of funding needed in each community, gauging the resources each community needs to help its residents successfully participate in the industry, and holding people accountable for the implementation of initiatives. It should also include a means by which the entities receiving the funds report on the impact of the work that was done with that money.

Block grants are another mechanism through which an annual grant program can be structured. Specifically, block grants can be employed as a mechanism through which funding can be dispensed to designated areas, organizations, and businesses.\textsuperscript{262} Block grants are sums of money allocated for a general purpose.\textsuperscript{263} The recipients of the funds can then more specifically allocate the funds to initiatives that fit under the umbrella heading and address the unique concerns of their community members.\textsuperscript{264} For example, designated Empowerment Zones (EZs) could receive block grants under two umbrella headings: Social Service Grants and Economic

\begin{flushright}
\textsuperscript{261} Id.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\end{flushright}
Development Initiative Grants (EDIs). Social Service Grants were intended for investment in the community through training programs, skills workshops, youth programs, and business workshops, while EDIs were intended to be used with other funding for large physical development projects. Three of the accomplishments of the Massachusetts area EZs arose from the utilization of block grants: (1) training and job readiness activities for residents with CORI (Criminal Offender Record Information); (2) financial assistance to small and local businesses in the Empowerment Zone; and (3) support of neighborhood-based nonprofits.

The Empowerment Zones Program is a federally funded initiative, so it may be difficult for members of the cannabis industry to take advantage of this resource until cannabis is legalized at the federal level. However, the initiative has shown the success of utilizing block grants, so the mechanism itself may be useful as Massachusetts and other states move forward with legalization. If funds from the Marijuana Tax Fund are allocated via the block grant structure, it would allow communities to receive larger sums they could specifically distribute to the programs deemed most beneficial to their community. This mechanism would allow for regulatory oversight, but still provides the impacted communities with some level of internal autonomy to address their most pressing concerns.

**ii. What is the legal basis/justification for this strategy?**

The legal basis of this strategy was developed based on the models of California alcohol regulations, Colorado scholarship programs, and Colorado school construction taxes.

---

265 Id.
266 Id.
268 Id.
The first example, California’s Alcoholic Beverage Commission, established a grant program which gives money derived entirely from licensing fees to local law enforcement to patrol areas around bars and liquor stores.\footnote{CALIFORNIA DEPARTMENT OF ALCHOHOLIC BEVERAGE CONTROL, Grant Assistance to Local Law Enforcement 1 (2015), http://www.abc.ca.gov/programs/grant.html.} This policy has been reported to improve relationships between local small businesses and police, reduce graffiti and loitering, and has resulted in fewer emergency calls to law enforcement.\footnote{Id.} It is also important to recognize that current federal banking laws make it difficult for traditional banks to accept deposits from cannabis dispensaries, so this new industry will likely struggle to enjoy the full services of banks, and may have to deal primarily in cash until the federal law changes.\footnote{Nathaniel Popper, Banking for Pot Industry Hits a Roadblock, N.Y. TIMES, July 30, 2015.} All-cash businesses present security risks (e.g. theft and burglaries) more pronounced than that of traditional businesses with access to banking services.\footnote{U.S. SMALL BUSINESS ADMINISTRATION, Accepting Cash Only (last visited Feb. 29, 2016, 7:21 PM), https://www.sba.gov/content/accepting-cash-only.} Having positive relationships between local police and local businesses may help convince potential owners to locate a dispensary in a location that is perceived to have more crime.\footnote{Center for Problem Oriented Policing, Police-Business Partnerships (last visited Mar. 1, 2016, 9:07 PM), http://www.popcenter.org/tools/partnering/4.}

The second example of the basis of this strategy is in Colorado, where strategies stemming from tax appropriations from cannabis sales have helped benefit communities and citizens within the state. More specifically, tax revenue from cannabis sales in Colorado are appropriated into one of two accounts: The Marijuana Tax Cash Fund or the Building Excellent Schools Today (BEST) program.\footnote{COLO. REV. STAT. § 39-28-501 (2015); COLO. REV. STAT. § 24-32-117 (2015); COLO. REV. STAT. § 39-28-305 (2015).} The Marijuana Tax Cash Fund is to be used for health care,
health education, substance abuse prevention, jail-based health programs, and behavioral health programs.\textsuperscript{275} Through the Marijuana Tax Cash Fund, Colorado has appropriated $2.5 million from cannabis taxes to hire healthcare professionals, and $2 million for youth and community-based programs.\textsuperscript{276}

The BEST Program, which receives 5.4\% of its funding from excise taxes on retail cannabis, consists of grants that can be awarded to Colorado public school districts, charter schools, boards of cooperative services, institute charter schools, and the Colorado School for the Deaf and Blind.\textsuperscript{277} Through the BEST program, tax revenue will be dedicated towards grant programs that can be used for new school construction and for renovations for existing public schools.\textsuperscript{278}

Through the enactment of several statutes, Colorado has taken many measures to involve the government in community outreach programs. Through the Retail Marijuana Education Program, the Colorado Department of Public Health and Environment (CDPHE) is funded to provide education, public awareness, and prevention messages for retail cannabis.\textsuperscript{279} Programs implemented through the CDPHE target the general public and specific communities as deemed necessary by the government.\textsuperscript{280} The CDPHE functions by receiving feedback from the

\begin{itemize}
  \item \textsuperscript{275} COLO. REV. STAT. § 39-28-50 (2015).
  \item \textsuperscript{276} STATUS REPORT: MARIJUANA LEGALIZATION IN COLORADO AFTER ONE YEAR OF RETAIL SALES AND TWO YEARS OF DECRIMINALIZATION, DRUG POLICY ALLIANCE 1, 2 (2015), https://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Legalization_One_Year_Status_Report.pdf.
  \item \textsuperscript{277} Building Excellent Schools Today (BEST) Fact Sheet, COLORADO DEPARTMENT OF EDUCATION DIVISION OF PUBLIC CONSTRUCTION 1 (2015), http://www.cde.state.co.us/communications/capitalconstructionfactsheet.
  \item \textsuperscript{278} Id.
  \item \textsuperscript{279} COLO. REV. STAT. §§ 25-3-1001-1007 (2015).
  \item \textsuperscript{280} Id.
\end{itemize}
Marijuana Education Oversight Committee. The Marijuana Education Oversight Committee is comprised of a diverse group of statewide stakeholders with representation from the Governor’s Office of Marijuana Coordination; the Colorado General Assembly; the Colorado Departments of Revenue (DOR), Education (CDE), Human Services (CDHS), Public Health and Environment (CDPHE) and Transportation (CDOT); the cannabis industry; medical marijuana patient advocacy groups; substance abuse prevention; higher education; health care providers; local and state prevention groups; grantees from CDHS' Tony Grampsas Youth Services (TGYS) program or the Office of Behavioral Health (OBH); and local government.

Efforts from the CDPHE have allowed for the creation of two notable public awareness and educational programs: 1) the Good to Know campaign and 2) Marihuana en Colorado: Lo Que Debes Entender Spanish-language campaign. The Good to Know Campaign, which received approximately $610,000 for the 2015-2016 fiscal year, is aimed at educating Coloradans on legal usage of cannabis, the health effects from smoking or ingesting cannabis, and compiling fact sheets and clinical prevention guidelines for healthcare providers. The Good to Know campaign strategy involved a website, 30- to 60-second television advertisements, radio advertisements, billboards, transit ads, social media promotions, and community campaign.

283 Id. at 20.
284 Id. at 19, 20.
materials. A baseline survey was conducted prior to the campaign, and follow up surveys will be made later to assess the effectiveness of the campaign and whether or not citizens’ knowledge of cannabis usage and health effects linked to cannabis usage increased.

In addition to the Good to Know campaign, the Colorado government sought to reach out to the Spanish-language speaking population comprising approximately 12% of Colorado’s population. In their baseline survey, it was concluded that the Spanish-speaking population had less knowledge of cannabis laws in comparison to English-speaking Latinos. In response to these results, the Good to Know Campaign was expanded to and modified to create a more culturally and linguistically responsive education program. The Marihuana en Colorado: Lo Que Debes Entender campaign launched on August 3, 2015. Similar to Good to Know, the campaign targeted Spanish-speaking Latinos to inform them on safe, legal, and responsible cannabis use. The campaign also sought to begin a conversation about legal cannabis among Latino/Hispanic communities noting that “an informed community is a safer community.”

CDPHE provided $175,000 in grant money to community-based organizations through a competitive Request for Applications (RFA) process. Organizations primarily serving Spanish-speaking Coloradans were eligible to apply for a grant. Grant awards averaged $25,000 per community benefitting six or seven Spanish-speaking communities within

---

285 Id. at 20.
286 Id. at 4.
287 Id. at 17.
288 Id.
289 Id. at 17, 44.
290 Id. at 18.
291 Id.
292 Id.
293 Id.
294 Id.
Colorado.\(^{295}\) Organizations who were awarded grant money from the CDPHE are to use this money to conduct outreach and educational events within their communities using the materials from the *Marihuana en Colorado: Lo Que Debes Entender* campaign.\(^{296}\) While the CDPHE currently does not have enough funding to send out a follow-up survey, the campaign will run through June 2016.\(^{297}\)

Residents in Pueblo County, Colorado, recently voted to tax local cannabis growing operations to fund scholarship programs for higher education.\(^{298}\) The scholarship, which accepts applications from high school seniors, will provide money to attend either the Colorado State University-Pueblo or Pueblo Community College.\(^{299}\) Colorado has also used money collected from retail cannabis excise taxes into a “Correctional Treatment Cash Fund.”\(^{300}\) Under this fund, a correctional treatment board is to prepare an “annual treatment funding plan that includes a fair and reasonable allocation of resources for programs throughout the state.”\(^{301}\) The judicial department shall include the annual treatment funding plan in its annual presentation to the joint budget committee.”\(^{302}\) Money from the correctional treatment cash fund is designated for the following purposes: alcohol and drug screening and testing; substance abuse education; an annual statewide conference on substance abuse treatment; treatment for substance abusers; and

\(^{295}\) Id.

\(^{296}\) Id.

\(^{297}\) Id.


\(^{299}\) Id.

\(^{300}\) COLO. REV. STAT. § 18-19-103 (2015).

\(^{301}\) Id.

\(^{302}\) Id.
administrative support costs.\textsuperscript{303} The Correctional Treatment Cash Fund seeks to target adults, juvenile offenders who are on probation, parole, work-release programs, and those who are under supervision through a diversion or treatment program.\textsuperscript{304}

Colorado's use of tax appropriations does not directly help those who have been affected by cannabis prohibition enter into the retail cannabis industry.\textsuperscript{305} However, the retail cannabis industry in Massachusetts could use Colorado's efforts—in conjunction with cannabis tax revenue—as a framework to implement similar educational programs or business education programs for those who are interested in entering into the industry.\textsuperscript{306}

\textit{iii. What, if any, are the constitutional barriers this recommendation may face?}

It is unlikely that the block grant program will be challenged under the Takings Clause because it does not propose an additional monetary charge on dispensary owners beyond the excise, sales, and use taxes established in the proposed legislation to regulate cannabis like alcohol, which are allowed under the Massachusetts tax scheme.\textsuperscript{307} The block grants discussed are federally funded and the block grants proposed are state funded. Massachusetts has not yet decided a case relating to the constitutionality of block grants, but it has decided cases that involve block grants.\textsuperscript{308} There are no apparent Takings Clause concerns for state funded block

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{303} \textit{Id.}
\item \textsuperscript{304} \textit{Id.}
\item \textsuperscript{305} \textsc{Colo. Rev. Stat.} § 39-28-501 (2015).
\item \textsuperscript{307} \textsc{Mass. Const.} art. IV, §1.
\item \textsuperscript{308} \textit{See City of Fall River v. Fall River Affordable Housing Corp.} 13 Mass. L. Rptr. 272, 272 (2001) (suit brought for breach of contract relating to the application of funds from block grant).
\end{itemize}
\end{footnotesize}
grants, and based on the rulings in *Lingle* and *Route One Liquors*, it is likely that the use of taxes will not be considered a government taking.\(^{309}\)

Furthermore, should Massachusetts choose to implement a program, like the one implemented in Colorado to benefit students from affected communities, it will likely be successful because it will be implemented through the tax scheme and not through an additional fee imposed on cannabis establishments.

The government is granted the authority to impose taxes on its citizens through the Constitution. The United States Constitution provides that: “The Congress shall have power to lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises, to pay the debts and provide for the common defense and general welfare of the United States; but all [d]uties, [i]mposts and [e]xcises shall be uniform throughout the United States…”\(^{310}\) In Massachusetts, the authority to tax is established under Pt. 2, C. 1, § 1, Art. 4, which provides the Legislative branch the power to: “impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth.\(^{311}\) In order for a tax to be considered to be reasonable or legal, it must be consented to by the people or their representatives.\(^{312}\) Additionally, *Route One Liquors, Inc. v. Secretary of Finance* determined that an excise tax on a commodity, which is a "privilege regulated by the Legislature,"\(^{313}\) Based on

---


\(^{309}\) *See City of Fall River v. Fall River Affordable Housing Corp.* 13 Mass. L. Rptr. 272, 272 (2001) (suit brought for breach of contract relating to the application of funds from block grant).


\(^{310}\) U.S. CONST. art. I, § 8, cl 1.

\(^{311}\) Id.

\(^{312}\) Id.

this ruling, cannabis will be considered a commodity, and as such, an excise tax imposed upon it will not be considered a governmental taking.\textsuperscript{314}

The Colorado scholarship program did not award money on the basis of race, but the affected communities specified contain a high concentration of minority students. This program may be challenged under the Equal Protection Clause despite the proposal to include clear language regarding a community preference instead of a race based preference. The constitutionality of race-conscious scholarship programs, unlike that of race-conscious admissions programs, has rarely been directly challenged in court. The Supreme Court has recognized that remedying past discrimination and achieving diversity in schools is a compelling interest.\textsuperscript{315} \textit{Grutter v. Bollinger} held race-conscious admissions policies to be constitutional; race-conscious scholarships are arguably another method of achieving the goal of diversity in student bodies. Such scholarship programs must, like all race-conscious programs\textsuperscript{316} a factor, but also includes holistic review of applicants and race-neutral alternatives, is constitutional.\textsuperscript{317} A school that has “convincing evidence” that discrimination has taken place in the past may take steps to remedy past discrimination without waiting for a government agency to release official findings of past discrimination.\textsuperscript{318} Schools may give financial aid to “disadvantaged” students; wealth is not a factor that triggers strict scrutiny, so socioeconomic status may be used as a factor in deciding who is eligible to receive scholarship funds.\textsuperscript{319} Race and socioeconomic status factors often overlap, but this does not nullify the constitutionality of financial aid for socioeconomically

\begin{flushleft}
\textsuperscript{314} \textit{Id.}
\textsuperscript{317} \textit{Fisher v. Univ. of Tex. at Austin}, 758 F.3d. 633 (5th Cir. Tex. 2014).
\textsuperscript{318} \textit{Wygant v. Jackson Board of Educ.}, 476 U.S. 267 (1986).
\end{flushleft}
disadvantaged students. In sum, the establishment of a scholarship, drawn from public funds through cannabis industry taxation, is likely to withstand any challenges under the Takings and Equal Protections Clauses.

2. Specific Recommendation: Justice Reinvestment Initiative

Justice Reinvestment is a strategy that was initially developed in the pursuit of criminal justice reform. Through this strategy, a state evaluates the “drivers” of its prison population, implements cost-saving policies, and reinvests funding in “high incarceration communities.” Approximately seventeen states have enacted Justice Reinvestment legislation through the direction and support of a national program funded by the federal government and headed by the Council for State Governments, Pew Charitable Trusts, and the Bureau of Justice Assistance. Extending the Justice Reinvestment strategy to the context of cannabis legalization may offer the state an opportunity to direct funds, formerly used to enforce cannabis prohibition, to reinvestments in Massachusetts communities that have seen the highest rates of arrests and

320 Id.
322 Id.
323 Id.
324 See AMERICAN CIVIL LIBERTIES UNION, ENDING MASS INCARCERATION: CHARTING A NEW JUST. REINVESTMENT 1 (2015), https://www.aclu.org/files/assets/charting_a_new_justice_reinvestment_final.pdf (adding that “around 27 states have participated in one way or another” in the national JRI program).
imprisonment for cannabis offenses. However, any attempt to separate funds from the general budget will be subject to the appropriations process.\textsuperscript{325}

\textit{i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?}

Justice Reinvestment has been developed and implemented in the context of state criminal correctional policy.\textsuperscript{326} This being so, the Justice Reinvestment model may provide useful mechanisms for adoption within the context of cannabis regulation. The basic principles undergirding the Justice Reinvestment model are that the state can avoid costs by implementing policy changes and those savings can be reinvested to further the state’s goals.\textsuperscript{327} The legalization of cannabis would be a major policy change for the state of Massachusetts. As stated earlier in this report, the state would save the millions of dollars a year that are currently spent on the enforcement of cannabis prohibition.\textsuperscript{328} In order to utilize the principles of Justice Reinvestment, the CCC should enact regulations securing the precise savings from cannabis legalization and channel those funds into the Marijuana Regulation Fund. Savings would be determined by commissioning a costs-averted report.\textsuperscript{329} From there, the funds can be reinvested directly into affected communities.

\textsuperscript{325} See MASS. CONST. art. LXIII, § 3.
\textsuperscript{328} AMERICAN CIVIL LIBERTIES UNION, supra note 18, at 132, 168-77.
\textsuperscript{329} See AMERICAN CIVIL LIBERTIES UNION, supra at 18. See also, URBAN INSTITUTE, JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT, 17 (2014).
Reinvestment could take the form of a “civic justice corps,” which is an idea recommended by Susan Tucker and Eric Cadora of the Open Society Institute in their initial articulation of the Justice Reinvestment strategy. A "civic justice corps" is a state-funded work program that would allow individuals with convictions for cannabis offenses to “join with other community residents to rehabilitate housing and schools, redesign and rebuild parks and playgrounds, and redevelop and rebuild the physical infrastructure and social fabric of their own neighborhoods.”

Cadora and Tucker also suggest using funding to establish a “locally run community loan pool to make micro-loans to create jobs or family development loans for education, debt consolidation, or home ownership and rehabilitation, transportation micro-enterprises for residents commuting outside the neighborhood, a one-stop shop for job counseling and placement services, or geographically targeted hiring incentives for employers.”

**ii. What is the legal basis/justification for this strategy?**

In order for the CCC to set aside savings for reinvestment, it would be subject to the appropriations process. As outlined above, Amendment 63 to the Massachusetts Constitution governs appropriations. The amendment sets up a system in which “all proposed expenditures” must be presented annually in a “general appropriations bill” recommended by the

---


331 *Id.*

332 *Id.*


334 See **MASS CONSTITUTION, art. LXIII, § 3.**
governor and approved by the legislature.\textsuperscript{335} A regulatory body, such as the potential CCC, may recommend uses for the saved funding, but that will need to be approved through this legislative process. This means that the continued stability of any Justice Reinvestment program implemented by the CCC would be entirely dependent on annual approval by the governor and legislature.

Justice Reinvestment has a significant and growing precedent in American government. It began as an innovation in criminal justice theory that promotes the diversion of corrections spending from large-scale incapacitation efforts to local community development initiatives.\textsuperscript{336} As stated above, Susan Tucker and Eric Cadora of the Open Society Institute are credited with the introduction the concept of Justice Reinvestment in 2003.\textsuperscript{337} Their initial articulation described a strategy that would address the national trend of mass incarceration, and its disproportionate effect on communities of color, by refocusing the goals of state corrections systems on “community level solutions to community level problems.”\textsuperscript{338} Funds would be made available by identifying “unproductive spending in corrections budgets” and subsequently adopting reform legislation.\textsuperscript{339} The idea of Justice Reinvestment has gained significant traction across the country because of its unique approach to addressing the extreme increase in the

\textsuperscript{335} Id.
\textsuperscript{338} Id. at 2; See also, AMERICAN CIVIL LIBERTIES UNION, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 5 (2015).
\textsuperscript{339} Open Society, supra note 330, at 3.
United States prison population, exorbitant state spending on corrections, and bleak recidivism rates. The Bureau of Justice Assistance (BJA) reports that, “[s]ince the 1970s, state and federal corrections populations had surged by 700%, accompanied by dramatic increases in corrections costs. From 1972 to 2011, the state prison population rose by 700%; by 2012, states were spending more than $51 billion a year on corrections.” This immense increase in scope of the United States corrections system is at the heart of the Justice Reinvestment movement.

In the last decade, the Justice Reinvestment model has received steadily increasing support in the state and federal government. In 2010, the federal government formalized its support by funding the creation of the national Justice Reinvestment Initiative (JRI). JRI supports states through the process of adopting Justice Reinvestment programs by offering grant money and technical support through their partners at the Pew Foundation and the Council for State Governments. JRI has developed a standard, seven-step model for how a state may become a JRI “site.” The steps are: (1) establish a bipartisan working-group; (2) analyze data and identify drivers; (3) develop policy options; (4) codify document changes; (5) implement policy changes; (6) reinvest savings; and (7) measure outcomes. States have identified varying “drivers” for their prison populations and have chosen a variety of specific policies in response. Specific policies states have adopted include: “eliminating mandatory minimums for repeat drug offenders”; “reducing sentences for marijuana offenses”; “expanding the use of drug

340 URBAN INSTITUTE, supra note 321, at 7-11.
341 URBAN INSTITUTE, supra note 321, at 6.
342 Id. at 5-7; See also Eric Cadora, Civics Lessons: How Certain Schemes to End Mass Incarceration Can Fail, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 277, 279-280 (2014).
343 URBAN INSTITUTE, supra note 321, at 6, 10-11.
344 Id.
345 Id. at 13-17.
346 Id.
347 Id. at 19-27.
courts”; and “expanding substance abuse, mental health, and behavioral treatment services.”\textsuperscript{348} JRI has encouraged the development and implementation of policies that have been validated by data analysis, or “evidence-based practices.”\textsuperscript{349} States calculate “savings” by identifying the “averted costs” resulting from the adoption of reform efforts.\textsuperscript{350} States may choose either to reallocate funds upfront, in anticipation of savings, or to wait until savings have been realized.\textsuperscript{351} Savings are primarily derived from “averted operating costs as a result of incarcerating a smaller prisoner population” and “averted construction costs as a result of not having to build new [correctional] facilities.”\textsuperscript{352}

JRI states have also chosen a variety of strategies for reinvesting their savings.\textsuperscript{353} Strategies include “community-based substance abuse treatment” in Louisiana; “additional probation officer positions” in North Carolina; and “mental health and drug accountability courts” in Georgia.\textsuperscript{354} The most noticeable trend in national JRI programs is that reinvestment funding is spent within the corrections system itself, instead of in the communities most impacted by mass incarceration.\textsuperscript{355} The ACLU issued a comprehensive and critical report on the national JRI charging that “JRI has abandoned reinvestment in high incarceration communities.”\textsuperscript{356} Eric Cadora has echoed this concern, adding that the JRI movement can cause “collateral consequences” in a state, including supplanting local criminal justice reform

\textsuperscript{348} \textit{Id.} at 105 and 119.  
\textsuperscript{349} \textit{Id.} at 3.  
\textsuperscript{350} \textsc{American Civil Liberties Union}, \textit{supra} note 318 at 1. \textit{See also}, \textsc{Urban Institute}, \textit{supra} note 321, at 1.  
\textsuperscript{351} \textsc{Urban Institute}, \textit{supra} note 321.  
\textsuperscript{352} \textit{Id.} at 3.  
\textsuperscript{353} \textit{Id.} at 43-47.  
\textsuperscript{354} \textit{Id.} at 46.  
\textsuperscript{355} \textsc{American Civil Liberties Union}, \textit{supra} note 318, at 1-2.  
\textsuperscript{356} \textsc{American Civil Liberties Union}, \textit{supra} note 324.
efforts. These negative consequences can only be avoided by refocusing the Justice Reinvestment movement on its initial goal “to hold state governments accountable to the places where the country's mass incarceration juggernaut had landed—namely, in impoverished communities, which were mostly, but not exclusively, [B]lack and Latino.” Advocates recommend that JRI realign itself by giving increased power and involvement to local municipalities and stakeholders who are in a better position to direct funding in ways that will cause meaningful improvements in the communities Justice Reinvestment was developed to serve.

Massachusetts has taken the initial steps to become involved with the national JRI program. In addition, the Massachusetts legislature is currently considering the "Act to Increase Neighborhood Safety and Opportunity," also known as the “Justice Reinvestment Act.” The Justice Reinvestment Act was drafted by grassroots criminal justice reform advocates and includes specific provisions for channeling cost savings into Massachusetts

---

357 Eric Cadora, Civics Lessons: How Certain Schemes to End Mass Incarceration Can Fail, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 277, 281 (2014) (“official entry of JRI in a state can marginalize other reform advocates and even sideline other sometimes politically viable, coalition-building reform campaigns already under way. The “collateral consequences” of JRI's success--its tendency to overshadow other reform efforts that could potentially add value through additional pressure on lawmakers to make more meaningful statutory reforms--may in fact be reaching the inherently conservative limitations of state legislative bodies to pursue the more far-reaching reforms in admissions to prison and lengths of stay that are needed to reduce prison populations in a substantial way.”).

358 Id. at 280.

359 See AMERICAN CIVIL LIBERTIES UNION, supra note 324, at 19-22; Eric Cadora, supra note 357, at 281-282.


communities rather than the corrections system. If it is passed, the Justice Reinvestment Act would be an example of the type of community-centered Justice Reinvestment policy that advocates have demanded be the focus of the movement.

**iii. What, if any, are the constitutional barriers this recommendation may face?**

It is unlikely that the proposal of an annual grant program and Justice Reinvestment Initiative will be vulnerable to a Takings Clause claim. This proposal involves the use of taxpayer money for a social justice initiative, which will not trigger a taking claim under *Lingle v. Chevron*. There have been no cases decided in Massachusetts regarding the constitutionality of annual grant programs or grant programs generally. However, based on the rulings in *Lingle* and *Route One Liquors* and because the program seeks to use tax money to fund the initiative, it is unlikely that the use of the excise tax for this purpose will be challenged under the Takings Clause.

**C. Strategy Two: Engage Community Stakeholders**

Engaging community stakeholders in the process of decision-making is crucial to the success of any effort to remediate harm done to a community. “Stakeholders” are those members of the community who stand to be directly impacted by any policies that are implemented. In the present context, the stakeholders are members of affected communities. Policies intended to encourage community activism and stimulate economic growth have often faltered in their overall success due to a lack of a concentrated focus on the participation of the actual community.

---

362 The Justice Reinvestment Act contains a bundle of criminal justice reforms aimed at restoring judicial discretion in sentencing, ending collateral sanctions at the RMV for those convicted of a drug offense, and reinvesting funds into job creation programs. *Id.*


364 *Id.*
members who are impacted.\textsuperscript{365} Sustainable change cannot be achieved without the representation of key community voices.\textsuperscript{366} Thus, it is critical that any regulation of the legalized cannabis industry include a mechanism that allows residents of affected communities to directly engage with the execution of the policies.

The Massachusetts General Laws and regulatory code include many affirmations of the importance of engaging community stakeholders.\textsuperscript{367} The Cannabis Control Commission (CCC) is instructed to “meet with affected stakeholders” and to “create advisory subgroups that include affected stakeholders as necessary.”\textsuperscript{368} The regulatory body governing Massachusetts’ public schools, names “Family and Community Engagement” as one of the “professional standards for administrative leadership.”\textsuperscript{369} The regulations assert that identifying and engaging “stakeholders that support the mission of the school” are essential skills for any potential administrator in the school system.\textsuperscript{370} In addition, the regulations guiding the rehabilitation of under-performing schools include a requirement that the superintendent creates a thirteen-member advisory board of stakeholders including parents and community representatives.\textsuperscript{371}

Section 51.18 of the Massachusetts Code contains an articulation of the state’s commitment to “sustainable development principles.”\textsuperscript{372} It is an affirmation of the state’s guiding values and priorities when approaching development projects. One of the stated principles is to

\begin{flushleft}
\textsuperscript{366} \textit{Id.} at 186-187.
\textsuperscript{367} \textsc{Mass. Gen. Laws} ch. 6A, § 18M(a) (2015).
\textsuperscript{368} \textit{Id.} at § 18M(d).
\textsuperscript{369} 603 \textsc{Mass. Code Regs.} 7.10(2) (2015).
\textsuperscript{370} \textit{Id.}
\textsuperscript{371} See \textsc{Mass. Gen. Laws} ch. 69, § 1J(b) (2015).
\textsuperscript{372} 801 \textsc{Mass. Code Regs.} 51.18(2) (2015).
\end{flushleft}
“advance equity,” or to “[p]romote equitable sharing of the benefits and burdens of development” and to “[p]rovide technical and strategic support for inclusive community planning and decision making to ensure social, economic, and environmental justice.”373 This principle is applied in the “Smart Growth” Zoning program, which allows communities to receive state support for building new residential areas while “encourag[ing] community and stakeholder collaboration in development decisions.”374

1. Specific Recommendation: Include Stakeholders on Regulatory Boards

One way to engage community stakeholders that has a precedent in Massachusetts is to involve them on the regulatory board within the agency. Including members of the community among the "experts" involved in the decision-making process allows the regulations to be directly shaped by community stakeholders.375 It appears that this recommendation is unlikely to trigger any constitutional challenges under the Equal Protection Clause.

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

The Regulation and Taxation of Marijuana Act contains a provision creating a fifteen-member advisory board whose tasks include recommending guidelines, rules, and regulations.376 All of the seats on the board are appointed by the governor and are reserved for representatives of particular stakeholder groups. Seven seats on the board are designated for representatives from

373 Id. (emphasis added).
376 Id.
the cannabis establishment.\textsuperscript{377} Six seats on the board are designated for a mix of public health experts, law enforcement officials, and attorneys with relevant experience.\textsuperscript{378} The remaining two seats are reserved for “experts in social welfare or social justice.”\textsuperscript{379} These positions can and should be used to ensure the representation of affected communities. Ideally, this strategy will be a beneficial tool for affected communities to introduce specific regulations specifying that the seats for the "experts in social justice" be filled by people from affected communities.

\textit{ii. What is the legal basis/justification for this strategy?}

There are three analogous policies that utilize mechanisms to include community stakeholders that would be beneficial to analyze in this report for a better understanding of how to model the advisory boards for the legalized cannabis industry: the Citizen Advisory Board through the Department of Developmental Services, the Justice Reinvestment Act, and Empowerment Zones Programs. The first policy that includes community stakeholders on regulatory boards is the Citizen Advisory Boards (CAB) through the Department of Developmental Services (DDS).\textsuperscript{380} DDS offers programs and services to help those affected with developmental disabilities. Some of the programs include: (1) Family Support Services, (2) Autism Spectrum Services, (3) Turning 22, (4) Human Rights, (5) Provider Licensure and Certification, and (6) Contracting and Procurement.\textsuperscript{381} The goal of CAB is to involve citizens in

\begin{flushleft}
\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{379} Id.
\end{flushleft}
quality management. There are multiple ways that citizens can participate in quality management, such as participating in a survey of one person’s service; participating in the entire survey of a provider; reviewing a specific quality of life area; reviewing a specific part of the provider organization; and providing technical assistance to the team. The goal is to use the elements of CAB through DDS to enable the voices of affected individuals to be heard. By surveying the quality of the dispensaries, the affected communities would be part of deciding the level of improvement needed in dispensaries, which have the possibility of impacting their quality of life.

It would be in line with the goals of an inclusive legalized cannabis industry to implement a type of citizen’s advisory board for dispensaries. Involving members from the affected communities is an effective way to promote a better environment around the dispensaries. The goals of a citizen advisory board for dispensaries would be similar to the goals of the current citizen advisory boards through DDS. These goals include promoting volunteerism, encouraging involvement in governmental decisions, and actively listening to the concerns of the affected citizens. This area seems promising because it has been extremely beneficial to the Intellectual and Developmental Disabilities communities. This would allow members of affected communities to be included in all major decisions involving dispensaries. The benefit is that the best way to understand how the impact newly implemented programs have on affected communities is to obtain information directly from those affected communities.

Another analogous policy that involves community stakeholders is the Justice Reinvestment Act, which is a criminal justice reform bill in the current session of the

---

Massachusetts legislature. This act seeks to introduce improvements to sentencing and collateral sanctions for individuals who are convicted of crimes. It creates a board of directors tasked with advising the commissioner of a fund also created by the act. Six out of thirteen seats on the board are reserved for “individuals who are, or have been at some time, members of the target population.” This proactive engagement of the designated beneficiaries stands out as a model for all other legislation aimed at having an impact in particular community. Similarly to CAB for DDS, the Justice Reinvestment Act could promote equal opportunities for the affected communities to have their voices heard.

The final analogous policy that involves community stakeholders is the Empowerment Zones Program. In order to receive funding through the Empowerment Zones Program, communities seeking designation must submit a plan detailing the allocation of the resources. A plan for directly engaging the residents is one of the key components that must be included in any successful application. Including stakeholders on regulatory boards has been an effective method of involving community members in the decision making process.

There are currently three areas in Massachusetts designated to receive the benefits of Empowerment Zones status: Boston, Lowell, and Lawrence. Boston is designated as an Empowerment Zone (EZ), while Lawrence and Lowell are designated as Renewal Communities (RC); Boston's designation encompasses the largest geographical area of the three, and its impact

---

384 Id. at § 44(3b)
386 Id.
reaches a diverse range of demographics. As such, it was critical for the Boston EZ to establish a management mechanism that represented the varying needs of the communities it was intended to serve.

Boston Connects, Inc. (BCI) was designated to manage the Boston EZ. In an effort to engage members of both the governing political body and the stakeholders of the community, the BCI established a Boston EZ governing board. The board consists of twenty-four members, twelve of whom are appointed by the mayor and twelve of whom are elected by the residents who live in the EZ. The Board works closely with the Economic Development and Industrial Corporation (EDIC) to engage in fundraising endeavors and ensure their decisions are fiscally sound. The Board also specifically works with members of the FDIC's Office of Jobs and Community Services, who provide resources for youth and adult workforce training initiatives.

While Boston's EZ governing board model is relatively successful, it is not without flaws. Even though specific plans for community participations are a part of the application process, the actual “mandatory” language of the program is very vague. If issues arise and residents of the community are not being adequately represented, citizens cannot go to court to enforce the participatory mandates. Thus, it is critical to keep in mind that any language in the policy detailing mandatory participation of community members should be very specific. Regardless,

388 Id.
389 Jennings, supra note 267, at 26.
390 Id.
391 Id.
392 Id.
393 Id.
395 Id.
the Boston EZ's regulatory board structure can serve as a model for holistic community engagement.

In conclusion, community involvement in regulatory boards is critical to ensuring affected communities have an active voice in the governance of the cannabis industry. The three policies highlighted above serve as resources upon which regulatory boards in the context of the cannabis industry can be modeled.

iii. What, if any, are the constitutional barriers this recommendation may face?

If the stakeholders that will sit on the board are defined as members of the affected communities, it is unlikely that this recommendation will be challenged under the Equal Protection Clause. The Equal Protection Clause is the main constitutional barrier because a certain class of persons is being targeted. However, it is common practice to require community members to sit on local advisory boards.396 As discussed in further detail in the section about local licensing boards, it is beneficial to have members of the community on boards because those members know what the community needs and know how to best serve the community.397 If there is an equal protection challenge, the court will invoke the rational basis test because the policy does not specifically target a suspect class, and it is not explicitly targeting a fundamental right, which is required to trigger strict scrutiny.398 A suspect class is not being targeted because the community membership will be made of members of the affected communities. If challenged, the state would only have to show that having members of the affected communities

---

396 See Tiger, Inc. v. Hargadon, 8 Mass. L. Rep. 307 (1998). (Weymoyth Board of Selectmen’s decision to deny an alcoholic license for wine and malt was overturned. Board originally denied license application because of the number of similar facilities nearby).

397 See id.

398 See Pillai, supra note 182, at 404-405.
sitting on the advisory board is rationally related to achieve the legitimate government interests of equality and inclusion. In addition, in order to show rationality, the board can point to *Tiger Inc., v. Hargadon*, in which the court ruled that it is beneficial to have members that are familiar with the community needs in power.\(^{399}\)

**D. Strategy Three: Reduce Barriers for Entry into the Cannabis Industry**

This strategy is intended to encourage participation of businesspeople from affected communities by lowering barriers to enter the new cannabis industry. The underlying assumption of this strategy is that there are significant barriers to entering the legal cannabis industry for businesspeople in affected communities.

There are three specific recommendations with the goal of reducing barriers to entry into the cannabis industry for businesspeople from affected communities. The first is to create programs, or an office responsible for creating programs, through Cannabis Control Commission (CCC) regulations, that focus on supporting these businesspeople by providing access to training, financial assistance, and informational workshops.\(^{400}\) The second recommendation is to expunge drug-related criminal records to allow unfettered access to the cannabis industry by people from affected communities that have been convicted of drug-related crimes in the past.\(^{401}\) The third is to issue tax-exempt bonds to assist new business owners in financing operations within the cannabis industry.


1. Specific Recommendation: Support Businesspeople in Affected Communities

The CCC can create an office analogous to the Supplier Diversity Office (SDO) that would support and encourage participation of businesspeople from affected communities.\footnote{H.B. 3932, 189th Gen. Ct. Reg. Sess. (Mass. 2016); See Mass. Exec. Order No. 565 (2015), http://www.mass.gov/courts/docs/lawlib/eq500-599/eq565.pdf.} The office, under the CCC's authority, could create policies that provide businesspeople with assistance in accessing resources and information on the various policies available within the cannabis industry.\footnote{H.B. 3932; \textit{See} MASS. ANN. LAWS ch.7, § 61 (LexisNexis 2015).} Another way in which the office could support businesspeople would be by creating benchmark requirements for ownership and/or involvement in the cannabis industry by businesspeople from affected communities.\footnote{H.B. 3932; \textit{See} Supplier Diversity Program, http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/sdo/sdp/supplier-diversity-program-faqs.html (last visited Feb. 11, 2016).} The policies could face constitutional challenges, but if the programs are framed as remedial, they will likely survive a constitutional challenge.\footnote{\textit{United States v. Paradise}, 480 U.S. 149, 185 (1987).}

\textit{i. What does this recommendation look like in the context of the legalized cannabis industry in Massachusetts?}

The passage of the Regulation and Taxation of Marijuana Act would create statutes empowering the CCC with the ability to create regulations that support and encourage the full participation of businesspeople from affected communities and positively impact those communities.\footnote{H.B. 3932.} The CCC could accomplish this either by passing individual regulations for individual policies or by creating an office that would operate with the delegated authority to pursue the same goal of creating and carrying out procedures and policies that encourage
participation and positively impact affected communities. Some specific ways in which the office could provide assistance to affected businesspeople in the legal cannabis industry are: assisting with facilitating the acquisition of startup capital for new businesses by working with lending institutions, insurance companies, and private businesses; sponsoring workshops and informational conferences; and creating training programs to aid businesses in acquiring knowledge of the cannabis industry. The office could also create a certification process for businesspeople from affected communities which would allow their businesses to be officially designated as affected businesses. This certification could serve to create a benchmark for ownership or involvement requirements for businesspeople from affected communities as well as a means of expediting the process of providing assistance and information on the availability of policies and programs to eligible businesses.

ii. What is the legal basis/justification for this strategy?

The SDO is a significant starting point for examining the possibilities of supporting businesspeople from affected communities. The SDO, previously known as the State Office of Minority and Women Business Assistance, is an agency committed to promoting the development of certified minority-owned (MBE), women-owned (WBE), and minority-women-owned business enterprises and fostering diversity in state contracting within Massachusetts

---

407 See Id.
408 Id.
409 Id.
410 Id.
through the Supplier Diversity Program (SDP). The SDP is a program that operates within the SDO; it focuses on encouraging the development of MBEs and WBEs through increasing business opportunities available to them in state contracting. Governor Charlie Baker reaffirmed and expanded this goal in 2015 with Executive Order 565, which extended the promotion of equity of opportunity in state government contracting by increasing the benchmarks for state spending goals for MBEs. Each year the Operational Services Division (OSD), an oversight agency within the Executive Office of Administration and Finance, sets annual benchmark recommendations for state departments’ spending goals with MBEs and WBEs. In 2015, for example, benchmarks for spending were 6% for MBEs and 12% for WBE.

For a business enterprise to be considered an MBE or WBE under the benchmark spending goals of the SDP, it must first be certified as an eligible business under regulations set forth by Chapter 2.02 of Title 425 of the Code of Massachusetts regulations. The certification process is performed either through internal evaluation within the SDO or through certain previously-evaluated outside entities. To become a certified business enterprise, a business must be: (1) owned and controlled by the same eligible principal, (2) free of any conversion rights, (3)

---

413 Id.
416 Id.
417 425 MASS. CODE REGS. 2.02 (LexisNexis 2016).
418 Id.
independent, and (4) ongoing. Free from conversion rights means that no agreement exists in which the eligible principals of the applying business would no longer own 51% or more of the business. This certification under the SDO is a marketing tool used to enhance a business’ ability to do business in public markets, adding a competitive edge to set it apart from other contractors.

While the SDO provides assistance that specifically targets state public contracting, there are significant mechanisms that can be taken from the SDO and directly transferred to the cannabis industry to require similar assistance programs for businesspeople in affected communities. The statutes outlining the SDO’s powers and duties stipulate some specific policies that the SDO provides for MBEs and WBEs in state contracting. Through examination of the specific language in the policies created by this statute, the CCC could provide an effective means of support for businesspeople. One such policy designates that the “SDO may work with lending institutions, insurance companies, and other private businesses in the commonwealth to encourage the formation of seed money for facilitating the starting-up and expansion of minority, women and veterans businesses…” and that the “SDO may provide assistance to minority and women businesses in their efforts to obtain loan money and operating capital from private and public lenders.” This language creates a connection between the SDO

---

419 Id.
420 Id.
421 EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, supra note 415.
423 See MASS. ANN. LAWS ch.7, § 61 (LexisNexis 2016).
425 MASS. ANN. LAWS ch.7, § 61 (LexisNexis 2016).
and private entities with the goal of lowering barriers to startup capital and seed money.\textsuperscript{426} The language only states, however, that the SDO “may” work with these institutions, but does not specifically require them to do so.\textsuperscript{427} Stronger language than this would need to be used in any regulatory framework passed by the CCC if it attempts to require any subsidiary of the CCC to facilitate these kinds of meetings and negotiations; otherwise, the discretion would be left to the individual office and could result in the absence of these resources in the application of the law.\textsuperscript{428}

In addition to facilitating the acquisition of startup capital and seed funds, the “SDO may seek to increase the amount of financial assistance available to minority, women and veterans businesses from private financial institutions; and may, from time to time, sponsor conferences, workshops or other informational programs.”\textsuperscript{429} This language authorizes the office to work with financial institutions to increase the assistance available to the businesses certified under the SDP and to sponsor programs aimed at disseminating information.\textsuperscript{430} Assistance could apply to categories ranging from monetary to purely informational, but, as it is ambiguous, the office is free to act under its own discretion.\textsuperscript{431} The weak language here suggests that the office is encouraged, but not required, to do such things as were listed in the framework and that those things would not be considered mandatory.\textsuperscript{432}

A stronger framework offering business training and assistance programs is outlined in the requirement that the “SDO shall seek to encourage voluntary assistance programs by which
non-minority, non-women and non-veteran business employees are loaned to minority, women and veteran businesses or by which minority, women and veteran business persons are taken into viable business ventures to acquire training and experience in managing business affairs.”

Here, the statute is specifying a requirement, and not just an encouragement, with the goal of providing business education and training to minority businesses. The statute also stipulates that the “SDO shall seek to develop and maintain a directory of certified minority, women and veteran businesses within the commonwealth, and shall, from time to time, notify such businesses of the programs and services available to them, whether from public or private sources, or from local, state or federal agencies.” This is another instance in which the statute uses strong language to require the dissemination of information on the availability of some of the aforementioned programs. This is a significant step in ensuring that the programs are adequately used by the affected communities in which they are needed.

**iii. What, if any, are the constitutional barriers this recommendation may face?**

As of yet, the SDO established by Mass. Ann. Gen. Laws ch. 7, § 61 has not been questioned constitutionally. The statute creating the SDO states that the Supplier Diversity Program was established because the Massachusetts Commission Against Discrimination found a “history of discrimination against minorities and women in the commonwealth.” The lack of constitutional challenges may be due to the fact that “the commonwealth has a compelling

---

433 *Id.*
434 *Id.*
435 *Id.*
436 *Id.*
437 *Id.* at § 61(a)(2).
interest in promoting the use of minority owned business and women owned businesses.\textsuperscript{438}

The wording in the statute creating the SDO preempts a constitutional challenge of strict scrutiny because it addresses compelling government interests and a need for remedial action.\textsuperscript{439} If it were to be challenged, the state would have to provide proof of a compelling state interest, and the court would have to accept the state’s arguments.\textsuperscript{440} The legislature has chosen to enact the SDP and promote equality using the already available “pool of minority and women owned business.”\textsuperscript{441} If the SDP were to be challenged constitutionally, it would have several strong arguments to survive strict scrutiny. The cannabis industry is advised, when drafting legislation to create a more inclusive cannabis industry, to take the wording in Mass. Ann. Laws ch. 7c § 61(a) into consideration. In mirroring the language of the SDO, the Northeast Cannabis Coalition and Union of Minority Neighborhoods will preempt equal protection challenges and create a strong argument in the case that the court decides to use strict scrutiny as the standard of review.

2. Specific Recommendation: Pursue Expungement Legislation

Expungement removes a barrier to entry for those convicted of particular drug-related crimes interested in participating in the cannabis industry.\textsuperscript{442} Though it must be enacted through a separate statute as opposed to a regulation stemming from the CCC, expungement is a strategy worth considering towards increasing participation in the cannabis industry. Expungement legislation in Oregon, Washington, and Colorado has seen mixed results, with some bills passing

\textsuperscript{438} Id. at § 61(a)(4).
\textsuperscript{439} See id. at § 61(a)(2).
\textsuperscript{441} MASS. ANN. LAWS ch.7, § 61(a)(5).
\textsuperscript{442} Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment, 27 NIJ JOURNAL 42, 43 (2012).
into law and others stalling in committees.\textsuperscript{443} Expungement legislation is unlikely to pose any major constitutional challenges, but there may be a concern with the First Amendment as explained in the constitutional analysis.\textsuperscript{444}

\textit{i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?}

Criminal records pose arduous barriers for those who carry them through life. They can prevent those convicted of crimes from buying homes or receiving jobs for which they are otherwise qualified for.\textsuperscript{445} One way for those previously convicted of a crime to legally move past their transgressions is to have their records expunged.\textsuperscript{446} Expungement refers to the process by which all traces of a record are removed with no indication that said information has been removed.\textsuperscript{447} For the affected communities this initiative aims to help, expungement means that those previously convicted of a criminal offense would be able to enter the legal cannabis industry.

Currently, it is extremely difficult to get records completely expunged in Massachusetts, and frequently those who are convicted opt to seal their records instead. It is not possible to


\textsuperscript{445} Amy L. Solomon, \textit{In Search of a Job: Criminal Records as Barriers to Employment}, 27 NIJ JOURNAL 42, 43 (2012).


expunge any records that are governed by the sealing statute.\textsuperscript{448} One difference between expungement and the sealing of records is that under expungement, public records are destroyed on record it is as though the offense never occurred, but when a record is sealed, it continues to exist but become unavailable to the public.\textsuperscript{449} An offender must wait a period of five years for a misdemeanor and ten years for a felony in order to have a record sealed.\textsuperscript{450} Judges also have discretion to seal a first time drug possession charge sooner, as long as the offender does not violate any probation connected to their offence and does not reoffend.\textsuperscript{451} Massachusetts law also provides for the sealing of a record should the offense no longer be considered a crime.\textsuperscript{452} This may notably be used for cannabis offenses since possession of up to one ounce of cannabis was decriminalized in 2009.\textsuperscript{453}

\textit{ii. What is the legal basis/justification for this strategy?}

This strategy draws upon expungement models in three states that have legalized cannabis: Oregon, Washington, and Colorado.

In respect to expungement movements, Oregon is among the more progressive of those states that have legalized recreational use of cannabis. State legislators in Oregon have introduced two separate pieces of legislation that will provide relief for those who were convicted. House Bill 3372 provides for reduction of sentence for inmates convicted of crimes related to cannabis and sentenced before July 1, 2015, who "would not be culpable, or who

\textsuperscript{448} MASS. ANN. LAWS. ch. 276, § 100A (LexisNexis 2016).
\textsuperscript{449} Boe, 456 Mass. 337; MASS. GEN. LAWS ANN. ch. 276, § 100C (West 2012).
\textsuperscript{450} MASS. ANN. LAWS. ch. 276, § 100A (LexisNexis 2016).
\textsuperscript{451} MASS. ANN. LAWS. ch. 94C, § 34 (LexisNexis 2016).
\textsuperscript{452} MASS. ANN. LAWS. ch. 276, § 100A (LexisNexis 2016).
\textsuperscript{453} Id.; MASS. GEN. LAWS ch. 94C, § 32L (2008).
would be culpable of committing lesser offense, if the inmates had been sentenced on or after July 1, 2015.\textsuperscript{454} The bill also specifically lays out the outline for expungement in Section 3 by presenting amendments to the existing Or. Rev. Stat. § 137.225 to allow for expungement for cannabis offences.\textsuperscript{455} This bill allows for a retroactive approach to those affected by the regulation of cannabis. This is extremely important for a number of reasons. First, it allows those currently serving sentences to have the possibility of a reduced sentence, which hopefully allows them to re-enter society sooner and start the time period necessary to have their records sealed. Additionally, complete expungement removes a barrier for those disproportionately targeted by cannabis prohibition to enter industries barring participation by those with cannabis-related records.

Second, Senate Bill 364 requires courts to consider cannabis offenses committed before July 1, 2013, to be classified as if conduct occurred on July 1, 2013, when determining if a person is eligible for an order setting aside a conviction.\textsuperscript{456} The statute was passed into law on June 12, 2015 and introduces amendments to ORS 161.705 (classifications of felonies) to include cannabis offences into the framework of setting aside convictions.\textsuperscript{457} Overall, this bill is put into place to make cannabis crimes more likely to be set aside following a period of good behavior.

Legislators in Washington have also made several attempts to introduce expungement legislation since recreational cannabis was decriminalized in November 2012. House Bill 1041, largely identical to a bill introduced in 2013, allows for every person convicted of the

\textsuperscript{455} See OR. REV. STAT. § 4(c) (2015). See also, OR. REV. STAT. § 8(a) (2015).
\textsuperscript{457} Id.
misdemeanor "marijuana possession of 40 grams or less after their twenty-first birthday" to
apply to the sentencing court for a vacation of the applicant’s record of conviction for the
offense. Vacations of records would not be subject to the three year waiting period after
completing the terms of the sentence and disqualifications if the applicant has pending or
subsequent criminal convictions or has ever vacated another record of conviction. After an
initial January 16, 2015 public hearing in the House Committee on Public Safety, H.R. 1041 was
reintroduced three times (in April, May, and June, 2015) and has been “retained in present
status” since then. The 2015 legislative session ended without any further action. State
Representative Joe Fitzgibbons, who introduced both House Bill 1041 and its 2013 predecessor,
hopes the bill will fare better once the "dust has settled" after legislation. Prosecutors in
Washington have announced that they plan to drop all current investigations into cannabis
crimes, citing the intent of the state’s legalization act.

Finally, there is also a model of expungement in Colorado. In a 2014 case decided before
Colorado’s Court of Appeals, the court held that Colorado Constitution Article XVIII, Section
16, which decriminalized possession of one ounce or less of cannabis for personal use, applies

458 H.R. 1041, 64th Leg. (Wash. 2015).
459 Washington State Legislature, House Bill Analysis 2015,
460 Washington State Legislature, Bill Information - HB 1041,
461 Washington State Legislature, Bill Information - HB 1041,
463 Jonathan Martin, Marijuana prosecutions dropped in anticipation of legalization, THE
retroactively to defendants whose convictions under those provisions were subject to appeal or post-conviction motions on the effective date of the amendment.\textsuperscript{464} The court argued that although the general presumption is that a constitutional amendment is intended to apply only prospectively unless expressly stated otherwise, Colo. Rev. Stat. § 18-1-410(1)(f)(l) permits defendants to request post-conviction relief “if there has been a significant change in the law, applied to the applicant’s conviction or sentence, allowing in the interest of justice retroactive application of the changed legal standard.”\textsuperscript{465} Though the scope of the ruling is limited, applying only to the small amounts of cannabis made legal under Amendment 64, a potential avenue of relief exists per Colorado law which allows people to appeal their convictions at any time if they show “justifiable excuse or excusable neglect.”\textsuperscript{466} However, courts generally “set the bar extremely high for appeals filed outside the statute of limitations.”\textsuperscript{467}

Though expungement legislation has proved unsuccessful in Colorado, the state has enacted laws which give courts more power to seal records of drug convictions and eases defendants’ ability to get jobs and housing.\textsuperscript{468} As in Washington, prosecutors in Denver, Boulder, and other parts of the state decided to drop pending cannabis cases shortly after Colorado voters approved Amendment 64.\textsuperscript{469}

\textsuperscript{465} Id. at 3.
\textsuperscript{466} COLO. REV. STAT. § 16-5-402(2)(d) (2016).
iii. What, if any, are the constitutional barriers this recommendation may face?

Expungement will most likely not be challenged under the Takings Clause because it does not constitute a taking under *Lingle*.*\(^470\) Expungement will not likely face any Equal Protection challenges because it seeks to treat all affected parties (all parties convicted of a crime) equally in the eyes of the law. In order for a law to survive an Equal Protection claim, it must be rationally related to government interest unless it burdens a suspect class or a fundamental interest.*\(^471\)

While expungement is not likely to face challenges under the Equal Protection or Takings Clauses, it may receive scrutiny under the First Amendment. This report does not provide analysis of this potential challenge, but the issue has been discussed in both the Massachusetts and United States judicial systems, mostly pertaining to the right of the press to access impounded or expunged records.*\(^472\)

3. **Specific Recommendation: Issue Tax-Exempt Bonds**

This section proposes utilizing tax-exempt bonds as another mechanism to help reduce barriers to entry for new members of the cannabis industry, especially those new entrants who are members of affected communities. The purpose of issuing tax-exempt bonds is to provide a financing option to new entrants to the cannabis industry to offset the significant costs of starting a new business. While it would be ideal to encourage new entrants to apply for this financing


option through the preexisting Empowerment Zones Program, it is important to acknowledge that this may not be a realistic option until cannabis is legalized at the federal level. As an alternative, funds for the bonds can be raised through the state tax scheme and dispensed through the Marijuana Regulation Fund. While this proposal may be challenged under the Takings Clause of the United States Constitution, it is unlikely that the constitutional challenge will be successful.

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

One of the major barriers new entrants to the cannabis industry face is the sheer cost of each step of the process. The initial application for a license alone is $3,000, and licenses for specific cannabis establishments can range from $10,000 to $15,000.

One solution to reduce this barrier to entry may be the issuance of tax-exempt bonds. Tax-exempt bonds are purchased by investors (e.g. banks, private lending institutions, or individuals), who then use the purchase price to finance the loans offered. The investor is paid the amount of the bond, plus interest, upon the completion of the loan, and they may be exempt from federal and state income taxes on the interest amount. The bonds can be used to finance

\[\text{\footnotesize \cite{Id. at § 5(5)}.}\]
\[\text{\footnotesize \cite{Id.}}\]
several aspects of business operations, including construction projects and equipment expenses.\textsuperscript{477}

Under the Empowerment Zones Program, business owners in the designated areas qualify for Enterprise Zone Facility Bonds.\textsuperscript{478} Essentially, state and local governments issue tax-exempt bonds as loans to qualified businesses who needed to finance property.\textsuperscript{479} In Massachusetts, these bonds are issued through the Boston Industrial Development Financing Authority (BIDFA).\textsuperscript{480}

If members of the new cannabis industry live in one of the three designated zones in Massachusetts, and plan to establish a cannabis related business in those areas, they may be able to utilize the designation to qualify for a tax-exempt bond. However, this will largely depend on the recognition of the cannabis industry at the federal level.

Since the Empowerment Zone Program is a federal program, new entrants cannot qualify for tax-exempt bonds through this route until cannabis is legalized at the federal level. However, the Cannabis Control Commission can still coordinate with the Massachusetts state government, local governments, and BIDFA to independently issue similar tax-exempt bonds to new entrants. In this case, funds to support the bonds will likely come from the Marijuana Regulation Fund.

\textit{ii. What is the legal basis/justification for this strategy?}

Since cannabis is illegal at the federal level, banks are often reluctant to offer loans, credit card services, and checking accounts to members of the cannabis industry for fear of

\textsuperscript{478} \textit{U.S Department of Housing and Urban Development}, supra note 254.
\textsuperscript{480} \textit{Boston Redevelopment Authority}, \textit{supra} note 477.
retribution from the federal government. The Federal Deposit Insurance Corporation (FDIC) requires that banks engage in risk-based assessments when determining financing for loans; approved loans must adhere to “applicable laws and regulations.” Furthermore, the FDIC mandates that banks be aware of state and federal laws and regulations, stating that banks will be investigated for “willful acts of noncompliance.” As such, most banks do not offer traditional financing opportunities to members of the cannabis industry because they do not want to be complicit in federally illegal activities.

In addition, lenders will often refuse to provide loans to people convicted of felonies and crimes of “moral turpitude,” so it may be difficult for community members with prior criminal convictions to obtain the capital necessary to enter the cannabis industry. Until a framework of expungement is in place, new entrants with criminal histories will have to look to other solutions to secure start-up capital. Overall, until cannabis is decriminalized and legalized at the federal level, and until expungement schemes are in place, members of affected communities will have difficulties securing start-up capital and taking advantage of financing opportunities. Tax-exempt bonds may be a means by which new entrants can gain access to the legalized cannabis industry.

iii. What, if any, are the constitutional barriers this recommendation may face?

To evaluate the legal standing of providing tax exemptions, deductions, and credits for owners of cannabis establishments who hire individuals from affected communities, it is necessary to first analyze the allowances in the Massachusetts Constitution and tax code and then the Massachusetts and United States Constitutions. Chapter 58 of the Massachusetts General Laws outlines the taxation system to be employed in Massachusetts and the exemptions allowed under the system.486 In the current tax system, there is no tax exemption established for employers who hire individuals from groups who were targeted on the basis of a suspect classification, which means that additional language will need to be lobbied for in the Massachusetts legislature.487

Tax exempt bonds will likely not be challenged under the Takings Clause because they involve the use of money garnered through a tax scheme, which does not constitute a government taking under the ruling in Lingle.488 If the tax-exempt bond program is implemented in Massachusetts in partnership with BIDFA, it will have to be done through the Massachusetts tax scheme, similar to the proposed scholarship fund for affected communities. The tax-exempt bond program proposes to use money in the Marijuana Regulation Fund, which means that it will need to be lobbied for and go through the appropriations process since this specific program does not currently exist in the Massachusetts tax scheme. Should this program be established, it would use taxpayer money to fund the bonds for affected community members in order to enter the cannabis industry, which will likely not be considered a taking under Massachusetts law because this type of program is already being implemented for families to finance home ownership and

486 MASS. ANN. LAWS. ch. 58 (LexisNexis 2016).
487 Id.
Massachusetts has not yet decided a case regarding the constitutionality of government funded tax-exempt bonds; it has only decided a case on private tax-exempt bonds. Based on the rulings in *Lingle* and *Route One Liquors* and because the program seeks to use tax money to fund the initiative, it is likely that the tax exempt bonds will not pose a takings issue. Given the lack of past or current challenges to government funded tax-exempt bonds, it is unlikely that tax-exempt bonds to help affected community members enter the cannabis industry will fact constitutional challenges under the Takings Clause.

Facially, the proposal does not trigger any constitutional concerns under the Takings Clause because it does not propose to regulate or seize private property. While this strategy does not implicate the Takings Clause because it establishes a tax, it may trigger a challenge under the Equal Protections Clause. Should this strategy be followed, the drafters of the initiative to establish this in Massachusetts should avoid terms like race, minority, and other suspect classifications because this will automatically trigger a strict scrutiny review, which will make it difficult for the initiative to be successful. In order to avoid this potential challenge, drafters should use “community preference” language to be inclusive of affected communities since this is more likely to trigger a rational basis review. However, if a court should determine that the community preference language is sufficiently related to a suspect class, like race, the practice of offering preferences to minorities in hiring programs has withstood a constitutional challenge.

---

489 760 MASS. CODE REGS. 49.00 (2015).
under a strict scrutiny review. In *Brackett v. Civil Serv. Comm'n*, the Massachusetts Bay Transit Authority (MBTA) policy of employing a minority-preference hiring program withstood a constitutional challenge for violation of the Equal Protection Clause. The evidence of past discrimination for civil employees was the discriminatory hiring practices engaged in from the 1970s to the 1990s. In response, the MBTA preferentially hired women and minorities to compensate for past discrimination and passed strict scrutiny. The Court determined that remedying the past discrimination must be directed at and tailored to the agency or entity that caused the discrimination, and that discrimination in society at large will not sustain affirmative action plans for the whole of society.

The decision in *Brackett* is applicable to the proposed initiative because incentivizing dispensary owners to hire those who have been disproportionately affected by cannabis regulation is similar to enforcing a minority-preference hiring or minority favorable tax incentive program. *Brackett* determined that the government has a compelling interest to alleviate past discrimination, so implementing programs in the cannabis industry to be more inclusive of affected communities may be considered a compelling government interest in order to survive a strict scrutiny review.

**E. Strategy Four: Allocation of Cannabis Establishment Licenses**

The allocation of cannabis business licenses substantially determines distribution of

---

496 *Id.*
497 *Id.* at 546.
498 *Id.*
499 *Id.* at 554.
500 *Id.*
501 *Id.* at 545.
opportunities and privileges within a legal industry. The objective of this strategy is to establish ownership of the local industry within affected communities by residents of affected communities, which will secure leadership opportunities and keep resources flowing into affected communities via outside investors capitalizing on affected communities.

Cannabis cultivation, manufacturing, and sales will be legal only when the specific activities have been licensed by a licensing authority as is the case in other states where a legal cannabis industry has been established. A license application for a cannabis establishment must be submitted and approved in order for a cannabis establishment owner to operate and maintain a cannabis establishment. Therefore, the regulatory scheme for cannabis legalization allows for licensing to be used as a tool for shaping opportunities and privileges within a legal industry.

There are four policy recommendations related to the allocation of cannabis licenses. The first is to establish local licensing boards and to structure them in ways that empower affected communities to have a voice in who receives a license in their communities. The second is to require a license applicant to have residence in an affected community in order to obtain a license for an establishment in an affected community. The third is to give affected communities temporary exclusivity for receiving cannabis cultivator and manufacture licenses. Finally, the fourth is to set limits on the number of licensed establishments that any one person may own or operate, thereby preventing monopolies of cannabis retail shops or concentrations of power that could encroach on business territories within affected communities. All policy recommendations within this licensing section are independent. None of them are assumed to require the

503 H.B. 3932, § 5.
implementation of another recommendation within this licensing section.

1. Specific Recommendation: Establish Local Licensing Boards

Municipal legal authority over the allocation of licenses could afford local opportunities for promoting and protecting a local industry that is representative of each local community. Alcohol licensing provides an example of how local licensing could be implemented.\(^\text{504}\) The primary legal hurdle is that a new statute will be required for implementation.\(^\text{505}\) It is unlikely that a local licensing board filled with members of affected communities will be challenged constitutionally.

\textit{i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?}

Local licensing boards function by allowing local government influence over the allocation of cannabis establishment licenses.\(^\text{506}\) The goal of this policy recommendation is for local licensing to be structured in such a way that affected communities are protected from outside entrepreneurs. This way, ownership of the local industry within affected communities is allowed to be representative of those communities.

There are at least two reasons that local licensing boards are likely to be in a better position for ensuring that each local industry represents its neighborhood than are state licensing boards. First, local licensing boards are expected to have greater understanding of their local


\(^{505}\) Bloom v. City of Worcester, 363 Mass. 136, 155 (1973) (ruling that courts can infer that the Legislature intended to preempt the field when legislation on the subject is comprehensive).

characteristics than should be expected of relatively distant licensing boards. Second, local residents should have a greater ability to hold their local government accountable than the state government, because any particular neighborhood will represent a larger portion of total voters for their local government than for their state government.

There are a number of methods to increase the benefit these boards provide for affected communities. For example, local licensing boards could work in conjunction with state licensing boards, rather than in lieu of, so that there are added levels of protection. Board members could be required to take into account input from local community residents and organizations (e.g., civic associations near proposed establishments) when deciding on whether to issue a license. City council approval of board members could offer city councilors who represent affected communities some power to encourage the appointment of board members who are attentive to the interests of affected communities. In addition, licensing boards could be required to have one or more members who are residents of affected communities.

**ii. What is the legal basis/justification for this strategy?**

Alcohol licensing provides a reasonable starting point for understanding Massachusetts procedures and laws relevant to local licensing. The Massachusetts regulatory framework for alcohol includes local alcohol licensing boards with members appointed by mayors of municipalities. Alcohol license applicants who have had their license applications denied by a

---

507 *Tiger, Inc. v. Hargadon*, 8 Mass. L. Rep. 307 (1998) (holding that “Massachusetts courts have noted that local boards enjoy broad discretion because they are familiar with local conditions”).


local licensing board may bring an appeal of the decision to the state commission. Registered voters who disapprove of a local licensing board’s approval of an alcohol license application may also bring an appeal of the decision to the state commission. The state commission may remand the matter to the local licensing authority if the state commission disapproves of the denial. Although the state commission does not have authority to grant the license without the approval of the local authority, the state commission does have the authority to cancel the application if, after a hearing, the state commission determines that the circumstances warrant cancellation. If, upon appeal to courts, the decisions of licensing boards are found to be "arbitrary or capricious," the courts have authority to reverse licensing boards’ decisions.

Proponents of local licensing can consider advocating for the Cannabis Control Commission (CCC) to retain initial or final approval over all licensing of cannabis establishments, even with the addition of local licensing boards. There are at least nine states in the United States that have joint local and state licensing for alcohol businesses.

Massachusetts law would require a new statute to be implemented before local cannabis licensing boards could coexist with state licensing because the Regulation and Taxation of Marijuana Act would describe what municipalities can and cannot do and comprehensively

---

511 Id.
512 Id.
513 Id.
514 Ballarin, Inc. v. Licensing Board of Boston, 730 N.E.2d 904, 909 (Mass.App.Ct. 2000) (writing that when reviewing the action of local liquor licensing authority, courts "examining the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making); See also, Donovan v. City of Woburn, 840 N.E.2d 969 (2006); The Great Atlantic & Pacific Tea Co., Inc. v. Board of License Commissioners of Springfield, 387 Mass. 833 (1983).
addresses cannabis, and so the absence of local licensing powers within that statute would almost certainly be interpreted by courts to mean that the legislature intended to preempt local laws on this subject.\textsuperscript{516}

Massachusetts Constitution prohibits cities or towns from exercising any power inconsistent with state statutes.\textsuperscript{517} When defining “inconsistent,” the Massachusetts Supreme Judicial Court has ruled that courts can infer that the Legislature intended to preempt the field when legislation on the subject is comprehensive.\textsuperscript{518} The Court has further ruled that “[l]egislation which deals with a subject comprehensively, describing (perhaps among other things) what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject.”\textsuperscript{519} Both of these court cases would be looked to when courts decide whether localities have legal authority over the allocation of licenses.

\textit{iii. What, if any, are the constitutional barriers this recommendation may face?}

The main concern requiring specific community members to sit on local licensing boards is that it excludes other class members. If the members that will sit on the board are chosen based on their membership in affected communities, it is unlikely that the requirement of members of affected communities to serve on the local licensing board will be challenged constitutionally.

\textsuperscript{516} \textit{Bloom v. City of Worcester}, 363 Mass. 136, 155 (1973) (ruling that courts can infer that the Legislature intended to preempt the field when legislation on the subject is comprehensive); H.B. 3932, § 5 189th Gen. Ct. Reg. Sess. (Mass. 2016).
\textsuperscript{517} \textit{Mass. Const.} art. 2, § 6 (West 2015).
under the Equal Protection Clause. Although the requirement of having certain members on the board may be questioned on the grounds that it excludes other members, it is common for local licensing boards to have community members as members of local licensing boards. If the local licensing boards are questioned constitutionally, the court will more likely than not invoke the rational basis test rather than strict scrutiny because a suspect class is not directly involved and a fundamental right is not being questioned. If the local licensing boards are questioned they can point to the principle that community members know the community the best. The boards may point to *Tiger, Inc., v. Hargadon*, where the court ruled that “[i]n the context of various licensing schemes, the Massachusetts courts have noted that local boards enjoy board discretion because they are familiar with local conditions.” The requirement of including affected community members on licensing boards may be analogous to the case of *Marchesi v. Selectmen of Winchester* where the board denied a bowling alley license because it would disturb the neighboring property owners. The court in *Marchesi* ruled “the selectmen, who may be assumed to be familiar with local conditions and with what will best serve the public interest of their communities, are granted broad discretionary powers.” As the court deferred to a local board in the bowling alley decision in *Marchesi*, courts may understand that cannabis licensing boards with community members on the board will know how to best serve the affected communities.

---


521 *Id.*

522 See Pillai, *supra* note 182, at 404-05.


524 *Id.*


526 *Id.* (quoting *Marchesi v. Selectmen of Winchester*, 42 N.E.2d. 817 (1942)).
2. Specific Recommendation: Residence Requirement of License Applicants

A residence requirement would require a cannabis license applicant to have residence in an affected community in order to obtain a license for an establishment in an affected community. There may not be any similar examples of this recommendation, but there are various types of residence restrictions such as a City of Boston requirement for employees to have resident status in Boston in order to be employed by the city. A new statute would be required for implementation of the policy proposal in this section because the CCC proposed in the Regulation and Taxation of Marijuana Act would not have authority to restrict allocation of licenses to people of particular communities. A residence requirement may be challenged under the Equal Protection Clause.

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

This policy requires that applications for establishments in affected communities be granted only to residents within affected communities. The intent is to shape the local industry within each affected community to be representative of affected communities, and to keep resources flowing into, not out of, affected communities. Listing a qualifying address on a license application should not be enough to qualify for an establishment within an affected community, but rather applicants should be required to list the address they claim to be their primary residence. Applicants need not live in the affected community for which they propose an

527 See generally BOS. MASS. CODE § 5-5.3 (2015).
529 See generally BOS. MASS. CODE § 5-5.3 (2015).
establishment, but a primary residence within an affected community anywhere could be enough to meet the qualifications of this policy proposal.

ii. What is the legal basis/justification for this strategy?

A new statute will be required before a residence requirement can be implemented so that it can work in conjunction with, or at least not be inconsistent with, the Regulation and Taxation of Marijuana Act which details requirements of the CCC for approving of licensing. Currently, when a license applicant meets a number of criteria, the Regulation and Taxation of Marijuana Act requires the CCC to issue the license to the applicant within 90 days after the CCC receives the application. None of the criteria outlined in the Regulation and Taxation of Marijuana Act allows for residence requirements.

Community residence requirements for licensing are not currently being implemented in Massachusetts regarding licensing of any type or in other states regarding licensing of cannabis. There are, however, some analogous laws. Some municipalities have city ordinances with residential requirements for municipal employees, such as the City of Boston. In addition, there are programs that provide particular groups of people with preferential treatment for licensing, such as was established by the Veterans’ Access, Livelihood, Opportunity and Resources Act (VALOR Act).

---

531 Id.
533 2012 Mass. Acts ch. 108 (providing licensing benefits for military veterans and spouses of veterans, implemented through The Division of Professional Licensure of the Office of Consumer Affairs & Business Regulation); Office of Consumer Affairs and Business Regulations, Licensing Benefit for Active Duty Military, Relocated Military Spouses, and
iii. What, if any, are the constitutional barriers this recommendation may face?

One potential constitutional issue regarding residential preferences for restricting licenses to residents of affected communities is what is referred to as the Dormant Commerce Clause.\textsuperscript{534} The Commerce Clause of the United States Constitution authorizes Congress to regulate commerce among the states.\textsuperscript{535} The Commerce Clause has been recognized to include what has been termed as the Dormant Commerce Clause, which prohibits states from employing laws that discriminate against interstate commerce. The United States Supreme Court has ruled that a statute facially discriminates against interstate commerce if it overtly prevents foreign enterprises from competing in local markets.\textsuperscript{536} One federal case relating to the Dormant Commerce Clause is particularly on point and involves a former Massachusetts statute requiring in-state residency for holders of alcohol licenses.\textsuperscript{537} The Federal District Court of Massachusetts held that the in-state residence requirement effectively prohibited the out-of-state resident from holding an in-state license and therefore violated the Dormant Commerce Clause.\textsuperscript{538}

Proponents of a residency requirement should be cautious to avoid implementing a law that would effectively prohibit out-of-state residents from holding in-state licenses, because doing so would violate the Dormant Commerce Clause.\textsuperscript{539} However, a policy requiring that any licensee within an affected community have residency status within that particular community or a different affected community within Massachusetts would still allow out-of-state residents to

\textsuperscript{535} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{536} Lewis, 447 U.S. 27.
\textsuperscript{538} Id.
\textsuperscript{539} See id.
hold licenses in non-affected communities and therefore could survive a constitutional challenge. Furthermore, a residence requirement could be further strengthened against constitutional challenges by allowing out-of-state residents to obtain licenses in affected communities within Massachusetts when those applicants have a primary residence within an affected community out-of-state.

If a residence requirement triggers a constitutional challenge under the Equal Protection Clause it will be analyzed using the rational basis test. The policy poses a two tier constitutional problem: restricting a class of residents within the state and restricting a class of residents out-of-state. The more difficult constitutional problem will arise under restricting the right to travel and the Equal Protection Clause because rights of a class of residents would be infringed without due process. In addition, the residency requirement for those not residing in affected communities out-of-state on its face seems to be creating a penalty from obtaining a business in state because in order to open a dispensary a person’s primary residency must be in an affected community. In Saenz v. Roe (where the state of California provided long term residents with a higher level of benefits than new residents), the court ruled that “the right to travel embraces the citizen’s right to be treated equally in [the] new state of residence, the discriminatory classification is itself a penalty.” Citizens must be treated equally regardless of where in the Union they migrate to or reside because the states make up one union, which allows migration between the states without discrimination. In the case of Saenz, the Supreme Court of the United States ruled that it was unconstitutional to provide disproportionate benefits

Id. at 504.
Id. at 500 (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).
to residents that recently moved.\textsuperscript{545} In \textit{Attorney Gen. of New York v. Soto-Lopez}, veterans were deprived of certain benefits because of their resident status when they joined the military not their current residential status. The court, in \textit{Attorney Gen of New York}, ruled that the state could not deprive the military veterans of certain benefits due to residence.\textsuperscript{546} The residential requirement being proposed for the cannabis industry can be distinguished from the previous cases because the cannabis residency requirement would be based on current status in affected communities and not previous statuses.\textsuperscript{547} The court, in \textit{Attorney Gen. of New York}, ruled that there can be no discrimination based “solely on the basis of [the date of] their arrival in the state.”\textsuperscript{548} The residence requirement is not based on the date of arrival but the current status of the business or individual as a resident in an affected community.

In \textit{Attorney Gen. of New York}, the court deemed the equal protection problem to be analyzed under the rational basis test rather than strict scrutiny because it dealt with different classes of citizens but not with a suspect class.\textsuperscript{549} Those looking for a residence requirement can cite to \textit{Attorney Gen. of New York} to call for a rational basis test, but the state must defend its residency requirement to show that the residency requirement is rationally related to some government interest because “[d]iscrimination against nonresidents is allowed here when: (1) there is a substantial reason for the differential treatment, and, (2) the discrimination bears a substantial relationship to the state’s objective.”\textsuperscript{550} A rational basis test is also appropriate

\textsuperscript{545} \textit{Id.} at 498.
\textsuperscript{547} \textit{Id.}
\textsuperscript{548} \textit{Id.}
\textsuperscript{549} \textit{Id.}
because the present residency requirement does not infringe upon a fundamental right, only the right to open up a dispensary in an affected communities.\textsuperscript{551}

The case of \textit{McCarthy v. Philadelphia Civil Service Comm’n} is helpful to cite when arguing residency requirements for business.\textsuperscript{552} In \textit{McCarthy}, appellant was terminated from the Philadelphia Fire Department because his permanent residence changed from Philadelphia to New Jersey. The court, in \textit{McCarthy}, ruled that it was not irrational for the fire department to require its employees to live in the state of Philadelphia, and that a residency requirement did not violate the right of interstate travel.\textsuperscript{553} States are able to impose a residency requirement on municipalities such as the City of Boston, and may require its workers to live within the City of Boston.\textsuperscript{554}

The present initiative must distinguish itself from the case of \textit{Supreme Court of New Hampshire v. Piper}, in which the issue at hand is whether a residency requirement to be admitted to the New Hampshire bar violates the Privileges and Immunities Clause of the United States Constitution in the case that the residency requirement is challenged under the Privileges and Immunities Clause.\textsuperscript{555} The court in New Hampshire ruled that the residency requirement did interfere with the Privileges and Immunities Clause of the Constitution of the United States.\textsuperscript{556} The Privileges and Immunities Clause of the United States Constitution prevents Congress from interfering with the privileges of citizens, such as practicing law.\textsuperscript{557} The Regulation and Taxation of Marijuana Act can distinguish itself from \textit{Supreme Court of New Hampshire}, by arguing some

\textsuperscript{553} \textit{Id}.
\textsuperscript{554} \textit{Bos. Mass. Code} § 5-5.3 (2015).
\textsuperscript{556} \textit{Id}.
\textsuperscript{557} \textit{Id}.
 at 276 (quoting \textit{Baldwin v. Montana Fish & Game Comm’n}, 436 U.S. 371 (1978)).
legitimate rational reason for the residency requirement. The rational reason must be one that does not interfere with economic prosperity.\textsuperscript{558}

3. Specific Recommendation: Community Licensing Preferences for Cultivation and Manufacturing

A community preference would prohibit, for a brief period of time immediately post-legalization, the licensing authority from granting cannabis cultivator and manufacturing licenses for establishments residing outside of affected communities. An example of preferential treatment for cannabis licensing can be drawn from Massachusetts, and other states, where the proposed law in Massachusetts and laws enacted in other states establish that members within the medical marijuana industry are given a time period immediately post-legalization when they have priority or exclusive opportunities for licensing.\textsuperscript{559} A new statute would be required for implementation of this policy to provide affected communities with exclusive opportunities.\textsuperscript{560} If the proposed legislation does not directly implicate racial or ethnic groups, it is much less likely to trigger strict scrutiny and much more likely to trigger a rational basis review should it be challenged on equal protection grounds.

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

A community preference would allow affected communities to have temporary exclusive opportunities for receiving cannabis cultivator or manufacturing license, essentially prohibiting, for a brief period of time immediately post-legalization, the licensing authority from granting

\textsuperscript{558} Id. at 286. \\
\textsuperscript{560} Id.
such licenses for establishments residing in non-affected communities. Such an initial priority for affected communities to receive licenses at the production-level could assist in revenue flowing into, not out of, affected communities. Furthermore, the initial opportunity could provide a fair opportunity for affected communities to establish leadership within the legal industry and for their businesses to establish a loyal consumer base.

**ii. What is the legal basis/justification for this strategy?**

Providing affected communities with early opportunities in the cannabis business is analogous to laws establishing other business opportunities for disadvantaged communities, such as the Empowerment Zone and Enterprise Cities Demonstration Program.  

An example of preferential treatment for cannabis licensing can be drawn from Massachusetts and other states, where the proposed law in Massachusetts and laws enacted in other states establish that members within the medical marijuana industry are given a time period immediately post-legalization when they have priority or exclusive opportunities for licensing.  

Such preferential treatment for the medical industry is a barrier to the proposed policy of providing affected communities with early opportunities since it essentially temporarily shuts out potential new business opportunities for affected communities. Colorado and Washington created barriers to entry similar to the proposals of Massachusetts by requiring a period of time

---

562 H.B. 3932, § 5.
that licenses are exclusive to pre-existing medical marijuana firms.\textsuperscript{563}

Because of the mandatory preferential treatment for licensing post-legalization given to the medical industry, a new statute would be required before a preferential treatment granted to affected communities could be implemented to work in conjunction with, or at least not be inconsistent with, the Regulation and Taxation of Marijuana Act which details requirements of the Cannabis Control Commission (CCC) for approving of licensing.\textsuperscript{564}

\textit{iii. What, if any, are the constitutional barriers this recommendation may face?}

Based on how the Supreme Court has applied different standards of review for equal protection claims, if a community preference licensing program that defines members of the community by their residence is challenged on equal protection grounds, the rational basis test will be used; residence is not a suspect or quasi-suspect classification requiring a higher level of scrutiny.\textsuperscript{565} As discussed earlier, rational basis just means that there must be a legitimate government objective that is rationally related to the policy. Remediying past discrimination, reducing unemployment in these communities, and ensuring diversity in the industry are all potential goals of such a policy that would likely survive a rational basis review. If the law mentions a suspect classification, such as race, it could trigger an equal protection claim requiring a strict scrutiny review, but it is important that for strict scrutiny the law must show intent to discriminate against a suspect class, as opposed to merely having the effect of unequal


\textsuperscript{565} 

treatment of a suspect class. Because the cannabis industry is so new, and there is no legal precedent, it may be difficult for a policy that does explicitly mention a suspect class, such as race, to survive the rigorous standards required by strict scrutiny. If the proposed legislation does not directly implicate racial or ethnic minorities, then it is much less likely to trigger strict scrutiny, and much more likely to survive a rational basis review should it be challenged on equal protection grounds.

4. Specific Recommendation: Establish a Multiple Ownership Law

The multiple ownership law is a limit on the number of cannabis licenses that one person may own individually or jointly, which is intended to prevent monopolies and limit the concentration of power within the industry that could otherwise be leveraged to work against business interests of affected communities. An example can be drawn from alcohol licensing in Massachusetts where licensees are limited in the number of licenses they are allowed to own or control. A new statute would be required for implementation of this policy in the context of cannabis licensing in order for it to work in conjunction with the Regulation and Taxation of Marijuana Act. A multiple ownership policy is not likely to raise any equal protection challenges.

567 See Johnson v. Martignetti, 375 N.E.2d 290, 297 (1978) (ruling that legislative aims at controlling the tendency toward concentration of power in the liquor industry and preventing monopolies are rationally related to legitimate state concerns); See generally MASS. GEN. LAWS ANN. ch. 138, § 15 (West 2015).
i. *What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?*

This policy option would set limits on the number of licensed establishments that any one person may own or operate, individually or jointly, within the state, thereby preventing monopolies of cannabis retail shops or concentrations of power that could be leveraged to encroach on business territories within affected communities. Even though there always remains a possibility that this proposed law could have the unintended consequence of prohibiting residents within affected communities from monopolizing throughout the state, the reality that there are often limited resources within affected communities suggest the far more likely outcome that the law would, or could at least have some potential to, protect against powerful interests outside the communities encroaching into affected communities.

ii. *What is the legal basis/justification for this strategy?*

The legality and implementation of this policy in Massachusetts can be drawn from experiences in alcohol licensing. At the end of alcohol prohibition and the very beginning of alcohol regulation in 1933, Massachusetts limited the number of licenses that could be granted to any “person, firm, corporation, association, or other combination of persons” to three alcohol

---

570 *See Johnson v. Martignetti*, 375 N.E.2d 290, 297 (1978) (ruling that legislative aims at controlling the tendency toward concentration of power in the liquor industry and preventing monopolies are rationally related to legitimate state concerns).


retail licenses. That limit remained until a 2011 Act amended Mass. Gen. Laws Ann. ch. 138, § 15 to increase the limit from three to five effective January 01, 2012, from five to seven effective January 01, 2016, and from seven to nine effective January 01, 2020. The state of Washington has employed this policy in regard to cannabis licensing, limiting the number of licenses an entity may have to three.

Implementation of such a law in the context of Massachusetts cannabis licensing would require a new statute to be passed. Currently, when a license applicant meets a number of criteria, the Regulation and Taxation of Marijuana Act would require the CCC to issue the license to the applicant within 90 days after the CCC receives the application; none of the criteria outlined in the Act would allow for limiting the number of licenses a person may own.

iii. What, if any, are the constitutional barriers this recommendation may face?

A multiple ownership policy is not likely to raise any equal protection challenges. It does not involve a state action that distinguishes between people based on suspect classifications such as race, ethnicity, or national origin, and it does not involve a governmental infringement on a fundamental right, so if it were challenged on equal protection grounds, it would not trigger strict or intermediate scrutiny. Rather, only a rational basis review would be required, so this policy would pass constitutional muster as far as equal protection is concerned as long as a legitimate government interest can be identified as the goal of the policy. Preventing monopolies and guaranteeing fair competition in the cannabis industry could be potential government interests.

that would likely suffice. The analogous laws in Massachusetts' alcohol industry, which have
never been challenged on equal protection grounds, suggest that a multiple ownership law would
pass constitutional muster; additionally, the state of Washington has successfully implemented a
multiple ownership law in its cannabis industry that has never been challenged as a violation of
equal protection.

F. Strategy Five: Influence Industry Practices

The general intent and hope of this project is to identify ways the new cannabis industry
in Massachusetts can positively impact affected communities. A key way to make this happen is
to encourage, incentivize, and require participants in the new industry to take action.
Recommended actions include hiring people from affected communities, providing funding to
nonprofits and other groups whose goal it is to help people in affected communities, and provide
benefits, both tangible and intangible, for these communities.

This report proposes the following measures to meet this goal: (1) offer tax incentives
and credits to encourage owners of cannabis establishments to hire individuals from affected
communities and/or to open businesses in these communities; (2) institute affirmative action
requirements for business owners within the cannabis industry; and (3) create a public record of
each dispensary’s efforts and successes in benefiting affected communities.

Many of these proposals are intended to be implemented as regulations by the Cannabis
Control Commission (CCC) immediately after the initiative becomes law. This report considers
the following suggested regulations to be within the scope of the authority granted by the Act to
Regulate and Tax Marijuana and able to withstand judicial review under a lawsuit pursuant to
Massachusetts General Law Ch 30A § 14.7. However, some of the proposed changes require
measures outside of the statutory authority given in the Act, and will thus require a new statute to be enacted by the legislature in order to take effect. The proposals are labeled accordingly below.

1. Specific Recommendation: Tax deductions/incentives for business owners who hire individuals from the affected communities

This specific recommendation proposes providing tax deduction provisions for cannabis establishment operators who hire members of affected communities. It will allow new entrants to gain experience in the initial stages of the development of the new adult cannabis industry. Implementation of a tax incentive program may trigger a constitutional challenge on equal protection grounds. As a result, it is critical that any statute or regulation elucidating this policy is framed using the language of "community preference."

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

Only “experienced marijuana establishment operators” can apply for licenses to operate a cannabis establishment until 2018. This means that new entrants to the cannabis industry cannot apply for licenses immediately after legalization. However, this section proposes a mechanism through which potential new entrants can gain experience in the industry during the next two years: tax deductions and incentives. Tax deductions and employment credits can be used to incentivize current cannabis establishment operators to set up their operations in affected communities and hire, teach, and train residents of affected communities.

ii. What is the legal basis/justification for this strategy?

This mechanism was implemented with relative success in the three Massachusetts
Empowerment Zones; employment of residents of the designated area increased by approximately 60%, and a flood of new businesses established their operations within the designated areas.\textsuperscript{579}

While tax incentives are a useful tool to consider, it is important to recognize that they may not be immediately beneficial to new entrants in 2018. Smaller businesses have a harder time claiming certain tax benefits since often they do not generate enough profit for the benefits to have a significant impact.\textsuperscript{580} This may not be an issue for experienced operators who can operate larger cannabis establishments, and new entrants may be able to take advantage of tax incentives as their own establishments produce more revenue.

Implementation of this mechanism would require coordination with the state and local governments. If it is successful, this mechanism could provide potential new entrants and community members with an opportunity to immediately participate in the industry while bringing economically stimulating industry to their neighborhoods.

iii. What, if any, are the constitutional barriers this recommendation may face?

To evaluate the legal standing of providing tax exemptions or incentives for owners of cannabis establishments who hire individuals from affected communities, it is necessary to first analyze the allowances and then the potential constitutional challenges. Chapter 58 of the Massachusetts General Laws outlines the taxation system to be employed in Massachusetts and the exemptions allowed under the system.\textsuperscript{581} In the current tax system, there is no tax exemption established for employers who hire individuals from groups who were targeted on the basis of a

\textsuperscript{579} \textit{Id}.
\textsuperscript{580} \textit{Id}.
\textsuperscript{581} \textsc{Mass. Gen. Laws} ch. 58 §§ 1-51 (2016).
suspect classification. In order to execute this initiative, additional regulatory and statutory language will need to be lobbied for and added to the Massachusetts tax scheme. Facialy, the proposal does not trigger any constitutional concerns under the Takings Clause because it does not propose to regulate or seize private property. Based on the rulings in *Lingle* and *Route One Liquors*, this strategy will likely not be considered a government taking.

While this initiative does not implicate the Takings Clause because it establishes a tax, it may trigger an Equal Protections claim. In order for this initiative to avoid a strict scrutiny challenge, it should be written to avoid language regarding race or other protected classes. If the language of the initiative is written using the language of "community preference" it will likely only be challenged under the rational basis test, which will be easier to survive than strict scrutiny. However, even if the community preference is considered to be race driven, Massachusetts, in the past, has upheld a race preference under a strict scrutiny review. The Massachusetts judicial system has not yet decided a case regarding tax exemptions based on the hiring of a specific group of people. While utilizing tax incentives in hiring practices has not yet been determined in Massachusetts, the practice of offering preferences to minorities in hiring programs has withstood a constitutional challenge under a strict scrutiny review. In *Brackett v. Civil Serv. Comm'n*, the Massachusetts Bay Transit Authority (MBTA) policy of employing a minority-preference hiring program withstood a constitutional challenge for violation of the Equal Protection Clause. The evidence of past discrimination for civil employees was found in discriminatory hiring practices from the 1970s to the 1990s. In response, the MBTA hired

---

582 Id.
585 Id.
women or minorities to compensate for past discrimination and passed strict scrutiny. The Court determined that remedying the past discrimination must be directed at, and tailored to, the agency or entity that caused the discrimination, and that discrimination in society at large will not sustain affirmative action plans for the whole of society.

The decision in Brackett is applicable to the proposed initiative because incentivizing dispensary owners to hire those who have been disproportionately affected by cannabis regulation is similar to enforcing a minority-preference hiring program. While the cannabis industry does not have a history of discrimination because it’s a new industry, the regulation of cannabis was discriminatory in its intent and practice; this initiative, as well as the MBTA hiring program, sought to remedy past wrongs committed against a specific group of people. Both are narrowly tailored by being specifically tied to a certain group of people to serve a compelling interest (correcting discrimination). Should the tax exemption be challenged on the grounds of equal protection, it will likely survive a strict scrutiny review given the decision in Brackett, which is still good law in Massachusetts.

2. Specific Recommendation: Affirmative Action

Utilizing affirmative action in the context of the new cannabis industry would require owners of cannabis establishments to give hiring preferences to people of particular demographics, such as racial minorities or people with residences in affected communities, as a condition for receiving or renewing cannabis establishment licenses. Government mandated affirmative action has been upheld for private actors as a condition for receiving government

---

586 Id.
587 Id. at 554.
588 Id.
approval of government funded projects. \(^{589}\) Whether the CCC will have the authority to implement hiring requirements based on demographics of employees will depend largely on interpretation of text, as discussed below, within the Regulation and Taxation of Marijuana Act. \(^{590}\)

\(i.\) What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

Government imposed affirmative action would require that licensees of cannabis establishments give hiring preferences to racial minorities, or to people with residence in affected communities, in order to receive or renew cannabis business licenses. Receipt and renewal of a government-issued license to operate a cannabis establishment would depend on the licensee developing and complying with their own affirmative action business plan.

\(ii.\) What is the legal basis/justification for this strategy?

There are analogous programs to draw from to design a policy that would encourage licensees to hire people from affected communities. The programs most analogous to government mandated affirmative action requirements of cannabis licensees, are affirmative action requirements of government funded projects completed by private contractors. \(^{591}\) As one example, the Boston Residents Jobs Policy, requires that when the city pays private contractors for construction projects the work must include performance with at least 50% of its worker-


hours to come from Boston residents, 25% from minorities, and 10% from women. The city attempts to enforce the policy by withholding payments to contractors who do not make a “best faith effort” to comply. The policy began as an executive order by Mayor Kevin White in 1979. It was defended against constitutional challenges with the Mayor’s counsel arguing in court that the order is to ensure adequate representation of city residents in construction union jobs and a lessening of racial tensions. It was later adopted as a city ordinance. However, government contracts with private actors are not perfectly analogous to government issued licenses to private actors.

When the CCC establishes regulations for licensed cannabis establishments, proposed Chapter 94G § 4(a)(3) would require the CCC to include minimum standards for employment that are directly and demonstrably related to the operation of a cannabis establishment and similar to qualifications for licensure and employment standards in connection with alcoholic beverages. It is plausible that the CCC has the authority to implement hiring requirements based on demographics of employees, but the authority will depend on whether affirmative action can be interpreted to be within the meaning of "directly and demonstrably related to the operation of a marijuana establishment and similar to qualifications for licensure and employments standards in connection with alcoholic beverages." As such, although there are

592 Id.
596 CITY OF BOSTON, supra note 591.
598 Id.
no affirmative action policies directly analogous to the model proposed in this report, this proposal may be a feasible mechanism through which to positively impact affected communities.

**iii. What, if any, are the constitutional barriers this recommendation may face?**

Although there is no legal precedent judging the constitutionality of programs that intend to specifically and positively impact affected communities, affirmative action case law provides a lens through which the structure of these programs can be adequately established to ensure they succeed on any equal protection challenges. In anticipation of such challenges, if the policies specify that racial or ethnic minorities will be impacted,\(^{599}\) they must be narrowly tailored\(^{600}\) to achieve a compelling government interest,\(^{601}\) and must be the least restrictive means of achieving that interest.\(^{602}\) Remedying past discrimination is one example of a compelling interest, but there are specific criteria a program must fulfill in order to do so in a constitutional way: the discrimination must be specific and identified, and there must be strong evidence that remedial action is necessary.\(^{603}\)

While not exactly analogous, affirmative action programs in university admissions can also provide guidance. Schools have a compelling interest in securing diverse student bodies, and affirmative action admissions programs that do so are constitutional if race is a "plus factor" and there is still "individualized consideration of each and every applicant."\(^{604}\) Race-based affirmative action programs are vulnerable to equal protection challenges and strict scrutiny

\(^{599}\) See *Korematsu v. United States*, 323 U.S. 214 (1944).
review because race is a suspect class. Under *Bush v. Vera*, 517 US 952 (1996), an affirmative action program that claims to fulfill the compelling state interest of remedying past discrimination must show that the discrimination is specific and identified, and that there is strong evidence that remedial action is necessary prior to the establishment of an affirmative action program. The evidence does not have to be conclusive, but there must be specific statistical findings showing the necessity of state action to remedy past discrimination. There could also be other state interests at stake, such as securing diversity in economic industries. Affirmative action programs can consider race as a "plus factor" as long as there is still "individualized consideration of each and every applicant." The proposed affirmative action program for the cannabis industry should fit these guidelines, or risk being deemed unconstitutional. The presence of other affirmative action programs in Massachusetts, none of which have yet been challenged on any alleged violation of equal protection, suggests that a similar program in the cannabis industry would not be likely to raise any serious constitutional concerns, as long as the policy follows the established patterns and criteria for legal affirmative action.

Additionally, a 2011 Executive Order by then-governor Deval Patrick provides that "non-discrimination, diversity, and equal opportunity shall be the policy of the Executive Branch of the Commonwealth of Massachusetts in all aspects of state employment, programs, services, activities, and decisions," and that "[a]ll state agencies shall develop and implement affirmative action and diversity plans to identify and eliminate discriminatory barriers in the workplace;"
remedy the effects of past discriminatory practices; [and] identify, recruit, hire, develop, promote, and retain employees who are members of under-represented groups.”

Although this does not guarantee that an affirmative action policy will not be challenged on constitutional grounds, it suggests that Massachusetts will likely be receptive to the idea of affirmative action in the fledgling cannabis industry.

3. Specific Recommendation: Providing a “Social Justice Grade" for the Cannabis Industry

This policy would entrust the CCC with providing all businesses in the cannabis industry with a “social justice grade.” This grade will be determined by the business’ adherence to a set of criteria that fulfill the commission’s mission to positively impact and promote full participation of affected communities. A similar policy has been started in Massachusetts in regards to a regulatory body giving grades to banks. This policy will likely survive any constitutional challenge.

i. What does this strategy look like in the context of the legalized cannabis industry in Massachusetts?

The CCC would review the performance of the cannabis industry businesses in how the businesses have adhered to the ballot initiative’s mandate to “promote and encourage full participation … by people from communities that have been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities.” Metrics to be used for this review could be: the amount of people from affected communities hired for

---

work, money donated to nonprofits working with and led by these communities, working with contractors designated by the Supplier Diversity Office (SDO), reinvesting in these communities if the business is located in one, and hiring people from affected communities who have unexpunged records. The review board would then assign a letter grade (A – F) corresponding with the performance of each business. This information would be publicly accessible through a website.

**ii. What is the legal basis/justification for this strategy?**

An analogous program has been in place in Massachusetts since 2010 through the Community Reinvestment Act.\(^{611}\) This act was drafted into law in response to the financial crisis and the especially deleterious effect the crisis had on low and middle income borrowers.\(^ {612}\) The statute is significant as it recognizes that a past wrong has been committed, and strives for remedial action by supervising “bank[s] in satisfying their continuing and affirmative obligation to help meet the credit needs of the communities in which offices and branches are maintained, including areas contiguous thereto and low and moderate income neighborhoods.”\(^ {613}\) The government does not exert operational control over the banks, but rather assigns banks a letter grade (available to the public) relating to their performance in fair lending practices to low and middle income people.\(^ {614}\) We can draw an analogous link to cannabis regulation by having the CCC recognize that there was a wrong to affected communities due to disproportionate policing and strict cannabis prohibition. Although it is not the fault of the cannabis industry for this wrong, unlike how some say the banks were at fault for the financial crisis, it could be argued

\(^{612}\) *Id.*
\(^{613}\) *Id.*
\(^{614}\) *Id.*
that such regulation would be used to create some transparency in a controversial industry and will uphold the mandates in the Regulation and Taxation of Marijuana Act. Additionally, this policy will likely be considered a regulation because it does not create any new tax or obligation for cannabis businesses. The businesses are not forced to do anything; rather, their performance is graded and released to the public by the CCC. Also, outside of the direct regulation, it would be recommended that interested non-profit groups and individuals would spread these grades via social media and other formats to encourage followers and peers to patronize businesses that scored high, while staying away from those that did not.

**iii. What, if any, are the constitutional barriers this recommendation may face?**

Because the concept of a social justice grade system is relatively new, there is no directly analogous legal precedent. However, the social justice grade system is not likely to raise any serious challenges on equal protection grounds. Since the social justice grade program does not involve a suspect class, it would not trigger strict or intermediate scrutiny upon an equal protection review. Instead, if this policy is challenged as a violation of the Equal Protection Clause, it will likely require only rational basis review. As long as there is a legitimate government interest that the policy aims at achieving, rational basis requirements are satisfied. The relevant government interests include remedying past discrimination and securing a diverse industry. The analogous Community Reinvestment Act has never been challenged as a violation of constitutional rights, and there is no past or currently pending federal or Massachusetts litigation to suggest that this recommendation will pose a challenge on equal protection grounds.

---

615 H.B. 3932.
IV. CONCLUSION

In conclusion, cannabis legalization can and should be implemented using a comprehensive regulatory scheme assuring that people from affected communities are able to positively participate in and benefit from the legal cannabis industry. In particular, this report recommends a number of possible policies that could be of use to the legalized cannabis industry. These include funding opportunities, licensing requirements, expungement, among others, to be used to redress the prior harms of prohibition. In order to effectively benefit the people who will ultimately implement the recommendations mentioned, the constitutional barriers, if any, have been included in this report. It is the goal of this report to provide the most informative and promising recommendations to ensure the inclusion of people in those affected communities.

This report hopes to help aid in protecting residents of affected communities from being shut out of ownership and leadership in the legal industry, and to create pathways to ownership, leadership, and employment in the industry for residents of affected communities. This report is designed to be a tool for advocates to identify policy options, but is not the first nor last word on how cannabis legalization in Massachusetts can best serve affected communities. It is imperative that public officials, business people, advocates, and community members alike make a conjoined effort to create a legal industry that best serves the affected communities.

In addition to the policies recommended, Massachusetts should monitor how the legal industry has impacted affected communities in other states and remain open to learning from the successes and failures of other initiatives. As shown through the other states analysis, the other states that have legalized cannabis have not focused on the detrimental impacts on specific affected communities. Upon legalization in Massachusetts, public officials should monitor the
industry's inclusivity of residents in affected communities and work quickly to correct failures in the regulatory structure. Through the aforementioned recommendations, Massachusetts and other states may begin to create a new path of inclusivity in the legalized cannabis industry.
Appendix

Cannabis Collaboration
Recommendations to Create an Inclusive Industry

Law Office 2

Jeremy Bardsley
Jason Blanchette
Victoria Brown
Kyleen Burke
Sarah Butson
Natasha Chabria
Jennifer Chau

Lilliana Ciresi
Sandler Ernst
Amanda Ghannam
Karina Guzman
Jacqueline Hubbard
Frank Scardino
Sarah Schulte

Northeastern School of Law
Legal Skills in Social Context
Social Justice Program
Spring 2016

In conjunction with: Northeast Cannabis Coalition & Union of Minority Neighborhoods

Fall Lawyering Fellow: Lauren Pennix
Spring Lawyering Fellow: Gabrielle Rosenblum
Research Librarian: Scott Akehurst-Moore
LSSC Professor: Gabriel Arkles
## Appendix A

Table 1. General Scheme of Cannabis Legalization in Other States.

<table>
<thead>
<tr>
<th>Categories</th>
<th>Alaska</th>
<th>Washington</th>
<th>Colorado</th>
<th>Oregon</th>
</tr>
</thead>
</table>
Appendix B

The Regulation and Taxation of Marijuana Act

(Drafted by: “Campaign to Regulate Marijuana Like Alcohol”)

The following is an overview of the relevant portions of the Regulation and Taxation of Marijuana Act. Direct quotations from the Act are included wherever possible. The full text of the Act is available at, https://malegislature.gov/Bills/189/House/H3932.

Goals:

- Legalize cannabis for adults over the age of 21
- To create “a system that licenses regulates and taxes…similar to alcohol.”

Cannabis Control Commission

- The Cannabis Control Commission (CCC) is the regulatory body created by the Act to oversee the new legal cannabis industry. The CCC is granted “general supervision and sole regulatory authority over the conduct of the business of marijuana establishments.”
- CCC consists of a commissioner and two associate commissioners. These officials are appointed by treasurer, “based on experience or expertise in public health, law enforcement, social justice, the regulation and business of consumer commodities and the production and distribution of marijuana and marijuana products . . . .” See Figure 1.
- “Not more than two commissioners shall be of the same political party.”
- The CCC may hire staff (investigators, assistants, etc…) as are “necessary for the performance of its duties” and to ensure enforcement of marijuana laws.
- The CCC must, “adopt regulations consistent with [the Act] for the administration, clarification and enforcement of laws regulating and licensing marijuana establishments.”
- The required regulations include:
  - "procedures for the issuance and renewal of licenses to operate marijuana establishments . . . ."

---

619 Utilizing the social justice requirement may be a way to ensure that the CCC is representative of and accountable to communities that have been disproportionately affected by the enforcement of cannabis prohibition.
“a schedule of application, license and renewal fees in an amount necessary to pay for all regulation and enforcement costs of the commission…”

“qualifications for licensure and minimum standards for employment that are directly and demonstrably related to the operation of a marijuana establishment…”

“Procedures and policies to encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities.”

- Initial regulations must be distributed by a deadline of September 15, 2017.
- All records from Commission meetings will be made available to the public.

Figure 1. Structure of the Cannabis Control Commission.

Cannabis Advisory Board

- The Cannabis Advisory Board is a 15-member body appointed by the governor “to study and make recommendations on the regulation of marijuana and marijuana products.”
- Members are to serve two-year terms with no compensation (except for expenses).
- The Board is to convene at the discretion of the Cannabis Control Commission.
- All records from Board meetings will be made available to the public.
- The 15 seats on the Board are explained in Table 2.
- Duties of the Cannabis Advisory Board include:

---

o To “advise the commission on marijuana cultivation, processing, manufacture, transport, distribution, testing and sale.”

o To, “on its own initiative, recommend to the commission guidelines, rules and regulations and any changes to guidelines, rules and regulations that the board considers important or necessary.”

Table 2. Composition of the 15-Member Cannabis Advisory Board.

<table>
<thead>
<tr>
<th>Qualification Needed for a Seat on the Cannabis Advisory Board</th>
<th>Number of Seats Allotted for Position on the Cannabis Advisory Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert in marijuana cultivation</td>
<td>1</td>
</tr>
<tr>
<td>Expert in marijuana retailing</td>
<td>1</td>
</tr>
<tr>
<td>Expert in marijuana product manufacturing</td>
<td>1</td>
</tr>
<tr>
<td>Expert in marijuana testing</td>
<td>1</td>
</tr>
<tr>
<td>Board member or officer of a medical marijuana treatment center</td>
<td>1</td>
</tr>
<tr>
<td>Registered medical marijuana patient</td>
<td>1</td>
</tr>
<tr>
<td>Individual who represents marijuana retail consumers</td>
<td>1</td>
</tr>
<tr>
<td>Expert in public health</td>
<td>2</td>
</tr>
<tr>
<td>Expert in law enforcement</td>
<td>2</td>
</tr>
<tr>
<td>Expert in social welfare or social justice</td>
<td>2</td>
</tr>
<tr>
<td>Attorneys with experience providing legal services to marijuana businesses, marijuana consumers or medical marijuana patients in the commonwealth.</td>
<td>2</td>
</tr>
</tbody>
</table>

Marijuana Tax

- Excise Tax
  o The Act institutes an excise tax “imposed on the sale of marijuana or marijuana products by a marijuana retailer to anyone other than a marijuana establishment at a rate of 3.75 per cent of the total sales price”. Paid to Commissioner of Revenue.

---

637 Two seats on the Cannabis Advisory Board are reserved for experts in “social welfare or social justice.” This may provide an opportunity to specifically seek representation from communities that have been disproportionately harmed by the enforcement of cannabis prohibition.
Marijuana excise tax is levied in addition to the 6.25% sales tax paid by retailers on gross sales/services (in accordance with Mass. Gen. Laws ch 64 § 2).

**Local Tax Option**
- Cities or towns can impose an additional sales tax at a “rate not greater than 2 per cent”. Tax is collected by the commissioner and distributed to the cities/towns. 639

**Marijuana Regulation Fund** 640

- The Marijuana Regulation Fund is a depository for all monies from:
  - license applications,
  - civil penalties for violations,
  - state excise tax revenue, and
  - interest on balance in fund.
- The Fund is to be expended for the “implementation, administration and enforcement” of the Act. 641
- “Unexpended balanced my be re-deposited in the General Fund…” 642
- All funds are “subject to appropriation.” 643

**Local Control** 644

- The Regulation and Taxation of Marijuana Act provides measures for local control, specifying that:
  - “A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with [the rest of the act]” 645
- Local control measures under the Act may:
  - “Govern the time, place and manner of marijuana establishment operations and of any business dealing in marijuana accessories,” (“except that zoning ordinances or by-laws shall not prohibit placing a marijuana establishment which cultivates, manufactures or sells marijuana or marijuana products in any area in which a medical marijuana treatment center is registered to engage in the same type of activity”). 646
  - “Limit the number of marijuana establishments in the city or town” 647
  - “Restrict the licensed cultivation, processing and manufacturing of marijuana that is a public nuisance” 648

---

643 Funds that are “subject to appropriation” are incorporated into the General Appropriations Bill and must be approved annually. Mass. Const. art. XLIII § 3.
“Establish reasonable restrictions on public signs related to marijuana establishments”

“Establish a civil penalty for violation of [this controls], similar to the penalty imposed for the violation of an ordinance or by-law relating to alcoholic beverages.”

- Cities and town may call a referendum to decide whether marijuana establishments will be allowed to facilitate on-premises consumption of marijuana at their locations.
- Local governments may not “prohibit the transportation of marijuana or marijuana products or adopt an ordinance or by-law that makes the transportation of marijuana or marijuana products unreasonably impracticable.”

**Licensing of Marijuana Establishments**

- The Cannabis Control Commission is required to forward a copy of every completed application for a marijuana establishment it receives to the city or town the establishment would be located in.
- The Commission is to give notice of acceptance or rejection within 90 days.
- Marijuana establishments cannot be within 500 ft. of a pre-existing school.
- The “controlling person” of a marijuana establishment cannot have been convicted of a felony, unless solely for marijuana-related offense (except selling to a minor).
- The commission will approve all applications that comply with state and local guidelines, as long as there are licenses available.
- If a city or town has limited the number of marijuana establishments, the commission will give priority to medical marijuana facilities (before Jan 1, 2018).
- Licenses are granted for a term of one year.
- Renewal requires an additional application and fee (unspecified). See Table 3 for a breakdown of the fees specified within the Act.
- **Non-exclusion of applicants with a marijuana-related conviction:**
  - “…a prior conviction solely for a marijuana related offense or for a violation of section 34 of chapter 94C of the General Laws (unlawful possession of marijuana) shall not disqualify an individual or otherwise affect eligibility for employment or licensure in connection with marijuana establishment, unless the offense involved [selling to a minor].”
- **Priority access to medical marijuana licenses:**
  - “Experienced marijuana establishment operators” (defined to mean current medical marijuana businesses) are allowed to apply for marijuana retailer licenses and marijuana

654 While this provision does not expunge the records of those convicted of cannabis-related offenses, it is an important measure to ensure that the new legal cannabis industry may include those individuals.
product manufacturer licenses one year before the general public and for marijuana cultivator licenses two years before the general public.

- See Table 4 for an overview of the preliminary application timeline.

Table 3. Overview of application and license fees for retail marijuana establishments.

<table>
<thead>
<tr>
<th>Fees(^{659})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial application</td>
</tr>
<tr>
<td>License for retail marijuana store</td>
</tr>
<tr>
<td>License for marijuana product manufacturer</td>
</tr>
<tr>
<td>License for a marijuana cultivator</td>
</tr>
<tr>
<td>License for marijuana testing facility</td>
</tr>
</tbody>
</table>

Table 4. Preliminary application timeline for marijuana retail and manufacturing licenses.

<table>
<thead>
<tr>
<th>Preliminary Application Timeline(^{660})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
</tr>
<tr>
<td>10/1/2017</td>
</tr>
<tr>
<td>10/1/2017</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>10/1/2018</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>10/1/2019</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

If fewer than 75 medical marijuana treatment centers are “provisionally registered” by 10/1/2017, then all applicants may submit applications earlier.\(^{661}\)

<table>
<thead>
<tr>
<th>Date</th>
<th>License</th>
<th>Who can apply</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/1/2018</td>
<td>Retailer</td>
<td>All applicants</td>
</tr>
<tr>
<td></td>
<td>Product manufacturer</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Cultivator</td>
<td></td>
</tr>
</tbody>
</table>


