

HEARING BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CIVIL RIGHTS AND CIVIL LIBERTIES OF THE
COMMITTEE ON OVERSIGHT AND REFORM

on

DEVELOPMENTS IN STATE CANNABIS LAWS AND BIPARTISAN
CANNABIS REFORMS AT THE FEDERAL LEVEL

**

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Delivered on

Tuesday, November 15, 2022



117th Cong., 2d. Sess.

Executive Summary

Good Morning. Chairman Raskin, Ranking Member Mace, and members of the Committee, thank you for the chance to appear before you to discuss challenges for small and minority-owned cannabis businesses, the impact of federal prohibition, and opportunities for bipartisan reform.

My name is Amber Littlejohn, Senior Policy Advisor for the Global Alliance for Cannabis Commerce (GACC). GACC is the leading cannabis trade association advocating to end federal prohibition. We seek policies that create an open and sustainable industry and true second chances for those harmed by prohibition.

I am before you today as a witness, lawyer, and testament to the transformative power of economic opportunities that can ripple for generations. In 1927, my grandfather Ben Littlejohn was born in Gaffney, South Carolina to a family of sharecroppers. In the 1970s, after a distinguished career in the U.S. Army, he had the opportunity to enter an emerging industry: personal computers. This opportunity changed the trajectory of his life and the lives of his children, grandchildren, and generations to come. Today, we again stand at the forefront of a new industry with a chance to provide intergenerational opportunities that can impact lives in Gaffney, Baltimore, Chicago, Boston, and also Birmingham.

Today, the legal cannabis industry in some form exists in forty-eight states. The medical and adult-use industries employ over 400,000 Americans and last year alone contributed \$3.7 billion dollars in state tax revenues. Cannabis is now the

sixth largest legal cash crop in the United States. Despite these significant contributions to our economy, Congress has failed to implement sensible cannabis reform.

Under the threat of criminal penalty and forfeiture, the status quo of federal prohibition continues to balkanize state marketplaces and raise insurmountable barriers to entry with devastating consequences for small and minority-owned businesses. Consequently, minority-owned cannabis businesses are in decline.

Black Americans bear the brunt of the disparate enforcement of cannabis laws.¹ They also now bear the brunt of failed state policies and the devastating impact of federal prohibition on the legal cannabis industry. Black Americans comprise just *two-percent* of owners in the legal industry,² despite representing 13.6 percent of the U.S. population³.

To promote economic opportunities and restorative justice objectives, fifteen states have implemented cannabis social equity programs. However, without addressing the barriers made insurmountable by federal prohibition, no program is

¹ AMERICAN CIVIL LIBERTIES UNION, A TALE OF TWO COUNTRIES RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 7 (2020), *available at* https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf. African Americans are 3.64 times more likely than white Americans to be arrested for marijuana possession, notwithstanding comparable usage rates. *Id.*

² JANESEA BAILEY, LEAFLY, SEEDS OF CHANGE 3 (2022), *available at* <https://www.leafly.com/news/politics/leafly-seeds-of-change-2021-report-rates-states-on-marijuana-equity>.

³ U.S. CENSUS BUREAU, QUICKFACTS (last updated July 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045221>.

sufficient to enable small businesses to compete in an industry dominated by large operators and the unlicensed market.

Ending prohibition is a critical step towards addressing the impact of failed federal drug policy. Today, less than 10% of Americans support continuing the status quo. The majority of Democratic and Republican voters favor ending federal prohibition, which requires descheduling cannabis. Rescheduling is *recriminalizing*. Descheduling is *decriminalizing*.

President Biden took a laudable step toward meaningful reform by prompting review of the status of cannabis under the Controlled Substances Act. However, it was Congress that codified prohibition and the vast machinery of anti-drug laws that sparked decades of disparate enforcement. Now, Congress has the power and obligation to comprehensively and thoughtfully correct it by focusing on sensible regulation and harm reduction.

Fortunately, Congress has substantial opportunity for bipartisan cannabis reform. The three leading comprehensive proposals—The States Reform Act (SRA), Cannabis Administration and Opportunity Act (CAO Act), and the Marijuana Opportunity, Reinvestment, and Expungement Act (MORE Act)—differ in their approach to ending prohibition, but provide a sound basis for progress. The bills reveal common bipartisan aims to:

1. Intentionally deschedule—not reschedule cannabis;
2. Provide for true second chances for those impacted by prohibition;

3. Ensure low barriers to entry and support for small and minority-owned businesses;
4. Define a role for the federal government that respects diverse state regulatory frameworks; and
5. Thoughtfully and expeditiously transition to an interstate marketplace with support and new opportunities for small and minority-owned businesses.

From these areas of agreement, Congress can move forward to end prohibition and enact sensible cannabis laws. The American cannabis industry provides too many jobs, too many economic opportunities, and supports too many social and economic initiatives for Congress to remain at impasse.

On behalf of GACC, thank you Chairman Raskin, Ranking Member Mace, and committee members for calling this hearing and exploring bipartisan opportunities for comprehensive cannabis reform. Lastly, thank you Ranking Member Mace for your courageous and thoughtful approach to minimizing undue regulatory burdens in the SRA and building this bridge for bipartisan collaboration. I look forward to the committee's questions.

The U.S. Cannabis Industry Spans Most of the Country is one of the most “prolific job creator[s] in America.”

Cannabis is growing and making significant contributions to the American economy. Forty-eight states have some form of legal cannabis under state laws.⁴ Thirty-seven states have elected to legalize and regulate cannabis for medical purposes. Twenty-one have done so for adult-use.⁵ Only two states maintain total prohibition on the use or sale of cannabis or CBD products.⁶ Cannabis legalization enjoys overwhelming bipartisan support among American voters with 91% supporting cannabis legalization in some form, with nearly 70% supporting the legalization for any use.⁷ Keeping pace with recent state cannabis legalization— 4 states legalized in 2020, 4 in 2021, and 2 in 2022⁸ – cannabis will soon be legal and regulated for medical and adult-use in a majority of American states. Already, over half of the U.S. population lives in an adult-use legal jurisdiction.

Legal cannabis is one of the most “prolific job creator[s] in America,” creating 428,000 jobs nationally, with 100,000 of those jobs created in 2021 alone.⁹ Over the

⁴ Kansas and Nebraska maintain total prohibition. Iowa has a particularly restrictive CBD-only program. See National Conference of State Legislatures, *State Cannabis Laws* (last updated Nov. 11, 2022) <https://www.ncsl.org/research/health/state-medical-marijuana-laws.asp>.

⁵ *Id.*

⁶ See *supra* note 4.

⁷ *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021); Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RESEARCH CENTER (Apr. 16, 2021).

⁸ National Conference of State Legislatures, *State Cannabis Laws* (last updated Nov. 11, 2022) <https://www.ncsl.org/research/health/state-medical-marijuana-laws.asp>.

⁹ BRUCE BARCOTT ET AL., LEAFLY, JOBS REPORT 2022 [2022 LEAFLY JOBS REPORT]; *Legal Cannabis Industry is the Most Prolific Job Creator in America - Supporting More Than 428,000 Jobs*, BUSINESSWIRE (Feb. 23, 2022), <https://www.businesswire.com/news/home/20220223005383/en/Legal-Cannabis-Industry-is-the-Most-Prolific-Job-Creator-in-America---Supporting-More-Than-428000-Jobs#:~:text=Jobs%20%7C%20Business%20Wire->

last 5 years, cannabis has grown from adding 25,000 jobs a year to the U.S. economy to over 100,000.¹⁰ By comparison, the financial sector adds 145,000 jobs per year. Cannabis jobs will continue to grow and add to the economy given the pace of legalization in U.S. states.

In 2021, the legal cannabis industry grossed an estimated \$27 billion in sales.¹¹ Valued at \$6.2 billion in wholesale value annually, in 2021, cannabis became the fifth most valuable crop in the United States overtaking cotton, rice, and peanuts in total wholesale value.¹² It has retained top-tier status in 2022 as the sixth most valuable crop.¹³ By 2028, the cannabis market is anticipated to grow more than six times its current size of \$28 billion to \$194 billion, generating tens of billions of dollars in state tax revenue annually.¹⁴

In 2021 alone, legal cannabis sales generated for states \$3.7 billion in tax revenue¹⁵ to help fortify state budgets and fund key programs including education, youth drug prevention, public safety, mental health services, education, and job

[Legal%20Cannabis%20Industry%20is%20the%20Most%20Prolific%20Job%20Creator%20in,to%20fi ll%20the%20Rose%20Bowl.](#)

¹⁰ 2022 LEAFLY JOBS REPORT.

¹¹ M.J. Biz. Daily, *U.S. Cannabis Retail Sales Estimates 2015-2026* (last updated June 2022), available at <https://mjbizdaily.com/us-cannabis-sales-estimates/>.

¹² DAVID DOWNS ET AL., LEAFLY, CANNABIS HARVEST REPORT 2021 (Nov. 2021) [2021 CANNABIS HARVEST REPORT].

¹³ *Id.*

¹⁴ FORTUNE BUSINESS INSIGHTS, CANNABIS/MARIJUANA MARKET SIZE...AND REGIONAL FORECAST 2021-2028 (Nov. 2021), available at <https://www.fortunebusinessinsights.com/industry-reports/cannabis-marijuana-market-100219>.

¹⁵ The revenue was generated from 12 of the 18 adult use programs in operation and generating taxes. *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, MARIJUANA POLICY PROJECT (last updated March 2022), available at <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/#:~:text=As%20of%20March%202022%2C%20states,%2C%20adult%2Duse%20cannabis%20sales>

training.¹⁶ Tax revenues do not account for additional revenue from cannabis that includes application and licensing fees,¹⁷ income taxes from workers, or taxes paid to the federal government.¹⁸

¹⁶ MINORITY CANNABIS BUSINESS ASSOCIATION, MCBA NATIONAL CANNABIS EQUITY MAP, available at <https://minoritycannabis.org/equitymap/>.

¹⁷ States bring in millions to tens of millions of dollars annually off licensing and application fees. *Financial Impact of Legalizing and Regulating Cannabis for Adult Use*, MARIJUANA POLICY PROJECT (last updated 2021), available at <https://www.mpp.org/issues/legalization/financial-information-on-states-with-adult-use-legalization/>

¹⁸ *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, MARIJUANA POLICY PROJECT (last updated March 2022), available at <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/#:~:text=As%20of%20March%202022%2C%20states,%2C%20adult%2Duse%20cannabis%20sales>

Due to state and federal barriers to entry, the unlicensed market in cannabis remains larger than the legal market and proliferates despite legalization

The largest competitor to cannabis businesses of all sizes in the United States is the unlicensed market. The unlicensed market does not necessarily comply with regulatory, tax, and state balkanization rules, allowing it to effectively out-compete the legal market on price and scale. Legal businesses require a better federal and state legal environment for success in competing against and replacing unlicensed operators.

The unlicensed market is much larger than the legal market in scale and is able to successfully compete on price accordingly.¹⁹ As one commentator has put it: “California produces 13.5 million pounds of marijuana annually — but Californians only consume 2.5 million pounds of it, according to a 2017 study by the state Department of Food and Agriculture which means [unlicensed] operators are exporting more than 10 million pounds a year.” Legal cannabis itself is one of the largest cash crops in the United States. But that agricultural market of 13,000 licensed farms only covers a total of 6.2 million pounds of cannabis total.²⁰ That is roughly half the unlicensed interstate market from California alone.

¹⁹ Randal John Meyer, *Why police are raiding California pot farmers and what can be done about it*, SAN FRAN. CHRON. (Oct 9, 2021), <https://www.sfchronicle.com/opinion/openforum/article/Why-police-are-raiding-California-pot-farmers-and-16518122.php>.

²⁰ DAVID DOWNS ET AL., LEAFLY, CANNABIS HARVEST REPORT 2022 (Nov. 2022) [2022 CANNABIS HARVEST REPORT].

Accordingly, “[unlicensed] operators are gaining the upper hand on legal businesses that are struggling to play by the rules. State and local...[businesses] can’t compete on price. Legal weed is more expensive, and the [unlicensed] market offers comparable product-brand selection. Conversely, [unlicensed] operators face few penalties for avoiding taxes and selling product outside the legal marketplace. In the end, communities lose tax revenue, businesses lose customers and the environment loses responsible stewardship.”²¹

²¹ Randal John Meyer, *Why police are raiding California pot farmers and what can be done about it*, SAN FRAN. CHRON. (Oct 9, 2021), <https://www.sfchronicle.com/opinion/openforum/article/Why-police-are-raiding-California-pot-farmers-and-16518122.php>.

State cannabis policy creates present and insurmountable barriers for small and minority-owned cannabis businesses that are exacerbated by ongoing federal prohibition

From the outset, state cannabis policies create significant challenges for business owners from underserved communities. Arbitrarily limited-license markets, the lack of access to small business funding and support at market inception, and application selection processes easily gamed by the well-funded are among the state policies that render entry for small businesses near impossible. These challenges are amplified by lawsuits from unsuccessful applicants that can delay the implementation of programs designed to support small business owners, sometimes by years.²² It is crucial that future policies create an environment where small and medium sized businesses, and minority and women-owned businesses can effectively compete with both large and unlicensed operators.

Only fifteen²³ of the 37 legal cannabis states have recognized the need to include in legalization initiatives “social equity”²⁴ programs that aim to provide resources and support to enable diverse small businesses to enter and compete.²⁵ Despite good intentions and broad support, most such programs fail due to policy

²² MINORITY CANNABIS BUSINESS ASSOCIATION, MCBA NATIONAL CANNABIS EQUITY REPORT (2022) [MCBA NATIONAL REPORT] available at <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf>.

²³ There are 13 adult-use and 2 medical cannabis social equity programs. *Id.*

²⁴ GACC uses the same criteria to define these programs as the Minority Cannabis Business Association. MCBA NATIONAL REPORT, *supra*, at 2.

²⁵ Randal John Meyer, *Why police are raiding California pot farmers and what can be done about it*, SAN FRAN. CHRON. (Oct 9, 2021), <https://www.sfchronicle.com/opinion/openforum/article/Why-police-are-raiding-California-pot-farmers-and-16518122.php>.

issues that hinder opportunities for those who seek to enter the legal cannabis industry, and facilitate the growth of the unlicensed market.

The challenges implementing cannabis social equity programs have contributed to stark ownership statistics for minorities in cannabis. Although Black Americans have borne the brunt of cannabis enforcement,²⁶ they comprise just *two-percent* of the legal cannabis industry.²⁷ With mounting barriers to entry and competition, the number of diverse business owners in cannabis—less than one-fifth of the industry overall—is in decline.²⁸

Despite commitments to increase economic opportunities in legal cannabis for those impacted by prohibition, individuals with previous cannabis offenses are often expressly prohibited from owning or working for a cannabis business. While some states provide exceptions for individuals with qualifying nonviolent offenses, 5 of 18 adult-use and 31 of 37 medical states provide no such exemption concerning ownership.²⁹ Sixteen adult-use and 34 medical programs maintain such restrictions on employing those with previous cannabis convictions.³⁰

²⁶ACLU, *supra* note 1.

²⁷ JANELLA BAILEY, LEAFLY, SEEDS OF CHANGE 3 (2022), *available at* <https://www.leafly.com/news/politics/leafly-seeds-of-change-2021-report-rates-states-on-marijuana-equity>.

²⁸ Sophie Quinton, *Black-Owned Pot Businesses Remain Rare Despite Diversity Efforts*, PEW CHARITABLE TRUSTS (Jan. 15, 2021), *available at* <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/15/black-owned-pot-businesses-remain-rare-despite-diversity-efforts>; MJ BIZ DAILY, DIVERSITY, EQUITY, AND INCLUSION IN THE CANNABIS INDUSTRY: SPECIAL REPORT (2022), *available at* https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBiz_Diversity_Equity_Inclusion_Cannabis_Industry_Report.pdf?utm_medium=email&utm_source=&utm_campaign=MJD_202211_Diversity%2C%20Equity%2C%20Inclusion%20Report_Confirmation.

²⁹ MCBA NATIONAL REPORT, *supra*.

³⁰ *Id.*

Arbitrary limits on state licensing,³¹ issues with application selection methods,³² and questions of constitutionality have led to regular legal challenges to state level social equity programs, including Maryland, Ohio, and Illinois.³³ Most recently, New York, the next hope for economic opportunities for the individuals most impacted by cannabis prohibition, was enjoined from issuing large swaths of licenses over easily-avoidable constitutional issues.³⁴ The legal challenges block access to the market for social equity program participants leading to increased and often unsustainable costs, loss of funding opportunities, and denial of first, or even second, mover advantage. In Illinois, three years after legalization, economically and socially disadvantaged small business owners are still waiting to enter the adult-use cannabis market that in 2021 alone grossed \$1.5 billion in sales.³⁵

In Pennsylvania and New York, high costs and regulatory barriers to entry into the medical cannabis market have led to the concentration of retail market share by large companies at rates as high as 76% and 89%, respectively.³⁶ In New Jersey, early access to the adult-use market for existing medical operators have

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Varicite NY One, Inc. v. New York*, No. 1:22-cv-1013 (N.D.N.Y. Nov. 11, 2022).

³⁵ *Gov. Pritzker Announces Record-Breaking \$445 Million in FY 2022 for Total Tax Reported for Adult-Use Cannabis*, ILLINOIS.GOV (July 25, 2022), <https://www.illinois.gov/news/press-release.25213.html>.

³⁶ Rob Kuvinka, *MSOs Establishing Themselves With Strength in Legal Cannabis Markets*, NEW FRONTIER DATA (Feb. 15, 2022), available at <https://newfrontierdata.com/cannabis-insights/msos-establishing-themselves-with-strength-in-legal-cannabis-markets/>.

resulted in large operators enjoying 91% total ownership of cannabis retail businesses in the state.³⁷

Further issues with access to timely, affordable, and sufficient funding sources,³⁸ high state³⁹ and federal tax rates, and extraordinary startup, operational, and compliance costs for legal operators render competition with the unlicensed market difficult for even the best capitalized cannabis companies. The lack of meaningful opportunities for unlicensed operators to transition to the legal, regulated market adds further challenges to addressing unfair competition from unlicensed operators.

³⁷ Rob Kuvinka, *MSOs Establishing Themselves With Strength in Legal Cannabis Markets*, NEW FRONTIER DATA (Feb. 15, 2022), available at <https://newfrontierdata.com/cannabis-insights/msos-establishing-themselves-with-strength-in-legal-cannabis-markets/>.

³⁸ *Small Businesses, Big Impact: Ensuring Small and Minority-Owned Businesses Share in the Economic Recovery: Hearing before the H. Comm. on Financial Services, Subcomm. on Consumer Protection and Financial Institutions*, 117th Cong. (2022) (testimony of Amber Littlejohn, Esq., Executive Director Minority Cannabis Business Association).

³⁹ *E.g.*, GEOFF LAWRENCE, THE IMPACT OF CALIFORNIA CANNABIS TAXES ON PARTICIPATION WITHIN THE LEGAL MARKET (May 2022).

Ending Federal Prohibition Through Descheduling and Regulation is Imperative to Support American Small Business

Federal cannabis prohibition and the disparity between the federal and state cannabis law creates myriad legal and practical consequences for cannabis and ancillary cannabis businesses, employees, and aspiring cannabis entrepreneurs. The extent of these challenges undermine state criminal justice reform and economic development efforts, provide competitive advantages to the unlicensed market, and actively inhibit the viability of legal business.

The status of marijuana as a Schedule I substance under the federal Controlled Substances Act provides the legal basis for federal cannabis prohibition. Federal prohibition remains enforceable by criminal and forfeiture penalties through a vast machinery of anti-cartel laws designed to take down well-resourced, multinational cartels using a range of tools including financial services access, tax laws, and agricultural pesticide regulation. The same federal mechanisms are applied to licensed domestic businesses operating within the confines of state law, just as they would be to Pablo Escobar's taxi company.⁴⁰ These enforcement mechanisms render the height of barriers to entry and competition in the cannabis industry insurmountable for most economically and socially disadvantaged individuals.

For example:

⁴⁰ 26 U.S.C. § 280E.

(1) Federal Criminalization and Ongoing Risk of Criminal Liability. Federal cannabis arrests have declined by over 80% since 2012⁴¹ when Colorado and Washington were both the first states to legalize cannabis for adult use. However, the legal possibility of criminal enforcement creates ongoing risk of incarceration and asset forfeiture remains. Since 2013, 31,877 people have been arrested for federal cannabis offenses.⁴² Despite efforts to focus enforcement primarily on issues of public safety, the risk of criminal liability is ever present and disproportionately impacting economically and socially disadvantaged individuals and business owners.

The federal government itself has been inconsistent in guidance. In 2013, the U.S. Department of Justice issued the “Cole Memo,” enforcement guidance directing U.S. attorneys in states with state-legal cannabis programs to focus resources on criminal activity beyond activities permitted by the state through cannabis legalization.⁴³ The Cole Memo directed U.S. Attorneys to focus on issues impacting public safety, state sovereignty, and the use of public lands.⁴⁴ Remaining areas of enforcement included “preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is

⁴¹ U.S. DEP’T JUSTICE, BUREAU OF JUSTICE STATS., BULLETIN NCJ 304314, FEDERAL JUSTICE STATISTICS 2020, at 25 (May 2022), *available at* <https://bjs.ojp.gov/content/pub/pdf/fjs20.pdf>.

⁴² *Id.*

⁴³ James M. Cole, Deputy Att’y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (the “Cole Memo”); James M. Cole, Deputy Att’y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana-Related Financial Crimes (Feb. 14, 2014) (the “Cole Memo II”).

⁴⁴ Cole Memo, *supra*.

legal under state law in some form to other states; and preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity.”⁴⁵

But on January 4, 2018, the U.S. Department of Justice rescinded the Cole Memo.⁴⁶ Then-U.S. Attorney General Jeff Sessions stated upon rescinding the Memo that the Cole was “intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations.”⁴⁷ He further stated the memo was “not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.”⁴⁸

Despite decreases, the threat of criminal enforcement and asset forfeiture remains a real risk for cannabis businesses, as well as employees, investors, and ancillary service providers. The ongoing risk of federal enforcement (held back on by a funding amendment) creates scarcity of goods and services and encourages premium pricing that contribute to operational losses or margins that are razor thin at best.⁴⁹ Larger cannabis businesses are impacted but better-positioned to endure conditions that have reduced competition to a game of attrition that only the well-

⁴⁵ *Id.*

⁴⁶ Jefferson B. Sessions, III, Att’y Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018) (the “Sessions Memo”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Marijuana Laws in America: Racial Justice and the Need for Reform: Hearing before the Committee on the Judiciary Subcommittee on Subcommittee on Crime, Terrorism, and Homeland Security*, 116th Cong. 6 (2019) (statement of Randal John Meyer, Executive Director, Global Alliance for Cannabis Commerce).

funded can win. In addition to the economic implications of the risk of criminal consequences, the threat of arrest and incarceration for participation in the legal cannabis industry can discourage individuals from communities subject to disparate enforcement of cannabis laws and those with past arrests from seeking entry and employment in cannabis.

(2) Federal Tax Law. Federal tax law has a longstanding principle that illicit proceeds are still taxable income, dating back to the Al Capone income tax trial. In the 1980s, one drug dealer got creative with reporting his income and took business deductions on the assets of his taxable criminal enterprise. In response, Congress passed Internal Revenue Code Section 280E, making all traffickers of Schedule I or II substances ineligible for business deductions. While it is imperative to stop cartel traffickers from taking business deductions, the unintended consequence of using scheduling status to trigger this policy is that state-licensed businesses are ineligible for business deductions. They face an up-to-90% effective tax rate,⁵⁰ which makes competition with the unlicensed market on price difficult, if not impossible. While large operators face cartel-level tax rates and the competitive advantage of the unlicensed market, large multistate operators benefit from economies of scale of vertically integrated multistate operations with centralized control. Further, the large operators benefit from access to resources and professional services to maximize available tax structures.

⁵⁰ Terrance McCoy, *How the IRS and Congress Cripple the Marijuana Industry with an Obscure, Decades-Old Law*, WASH. POST (Nov. 5, 2014).

(3) No Access to Interstate Commerce. Because of the federal Schedule I status, cannabis products cannot cross state lines between legal U.S. jurisdictions. That is simply the criminal and commercial federal law.⁵¹ By necessity, this means each business must have its cultivation, manufacturing, retail, and distribution all set up individually in each state, presenting a substantial barrier to entry for small and medium-sized businesses and inefficiencies in the supply-chain.

Additionally, the lack of access to interstate commerce leaves legal businesses at an incredible competitive disadvantage on price and scale with unlicensed operators.⁵² “[The unlicensed] market has a competitive advantage based on outdated federal laws forcing legal operators to compete only within their own state, as opposed to [unlicensed] operators which reach the full U.S. market by ignoring federal laws.”⁵³ The federal Controlled Substances Act is a preemptive and prohibitive commercial statute based on federal interstate commerce power. It is a simple constitutional necessity that Congress, having already exercised its preemptive interstate commerce power in this area, must elect the future commercial path for interstate commerce and thoughtfully designate the implementation pathway for agencies to do so.

⁵¹ See generally, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the 1970 Controlled Substances Act Schedule I status of marijuana preempts inconsistent state medical cannabis laws under the effects doctrine, to the extent of wholly intrastate commerce and personal use).

⁵² Randal John Meyer, *Why police are raiding California pot farmers and what can be done about it*, SAN FRAN. CHRON. (Oct 9, 2021); Randal John Meyer, *Feds must join California in getting #weedwise on black market*, SAN FRAN. CHRON. (July 2, 2019).

⁵³ *Marijuana Laws in America: Racial Justice and the Need for Reform: Hearing before the Committee on the Judiciary Subcommittee on Subcommittee on Crime, Terrorism, and Homeland Security*, 116th Cong. 6 (2019) (statement of Randal John Meyer, Executive Director, Global Alliance for Cannabis Commerce).

A failure to do so would leave the cannabis industry in limbo, akin to the U.S. Food and Drug Administration (FDA) industrial hemp CBD dietary supplement rulemaking that has been ongoing for over 6 years.⁵⁴ Clear statutory deadlines, such as those in the SRA and CAO, with judicial remedies for undue administrative delay are crucial for supporting the American industry.

(4) Lack of Access to USDA Programs and Protections. Cannabis was the fifth largest U.S. cash crop in 2021 and the sixth in 2022. Yet U.S. Department of Agriculture (USDA) programs and protections remain out of reach for the cannabis industry because USDA cannot recognize a Schedule I drug as a crop because the cultivation of cannabis and cannabis germinating seeds is a federal crime.⁵⁵

The failure to recognize cannabis as a crop means federal crop insurance is unavailable for cultivators, including states with higher risks of loss. In California, wildfires have devastated legal cannabis cultivators hanging on by a thread due to high compliance costs and unfair competition from unlicensed operators.⁵⁶ About 36% of California's cannabis cultivation area is in high fire hazard zones and 24% in very high fire hazard zones.⁵⁷ Grapes had the next largest percentage of acreage in

⁵⁴ *Scientific Data and Information About Products Containing Cannabis or Cannabis-Derived Compounds; Reopening of the Comment Period*, 85 Fed. Reg. 14206, Dkt. No. FDA-2019-N-1482 (Mar. 11, 2020) (reopening the comment period on this notice to “obtain scientific data and information about the safety, manufacturing, product quality, marketing, labeling, and sale of products containing cannabis or cannabis-derived compounds.”).

⁵⁵ 21 U.S.C. Part D. *et seq.*

⁵⁶ Anna Skinner, *California Wildfires Threaten Nearly All of State's Cannabis Crops*, NEWSWEEK (Sept. 12, 2022), <https://www.newsweek.com/california-wildfires-threaten-nearly-all-states-cannabis-crops-1742111>.

⁵⁷ Pamela Kan-Rice, *Wildfire poses greater threat to cannabis than other California crops*, SCIENCE X (Sept. 9, 2022), <https://phys.org/news/2022-09-wildfire-poses-greater-threat-cannabis.html>.

high (8.8%) or very high fire hazard zones (2.9%), followed by pasture at 4.3% and 1.7%, respectively.

Federal failure to regulate cannabis as a crop has substantial implications on the ability of state and local departments of agriculture and utility and water regulators to encapsulate the actual total agricultural production and use. Moreover, the Environmental Protection Agency (EPA) and USDA cannot approve safe pesticides for use on this crop, leaving farmers without important guidance that can implicate public safety. Like industrial hemp, the agricultural production of cannabis needs federal overhaul.

Additionally, the lack of access to USDA programs and infrastructure deprives small and economically and socially disadvantaged farmers of resources and assistance, including USDA guaranteed loans, access to community grants, small and microbusiness grants, and loans for improvements to land and infrastructure to ensure small and rural farmers and agricultural businesses can participate in all aspects of cannabis cultivation

(5) No Access to Federal Intellectual Property Protection. “The CSA prohibits manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana. Accordingly, the US[Patent &] T[rademark] O[ffice] will not register a trademark application for goods that are derived from marijuana because such goods are unlawful under federal law.”⁵⁸ Without

⁵⁸ Lauren Ellison Poster, *USPTO Releases Guidance on Registering a Trademark for a Cannabis-Related Good or Service*, TYDINGS LAW, <https://www.tydingslaw.com/news-insights/uspto->

intellectual property protection, businesses are unable to guard their competitive secrets or brand name from bad actors. There has been a substantial proliferation of counterfeit legal products being sold to consumers by unlicensed operators that present ongoing safety concerns regarding the identity and quality.⁵⁹

In addition to safety concerns from counterfeit products, both branded products and cannabis genetics⁶⁰ companies struggle to profit from their own intellectual property because they cannot defend it under federal law. Profit loss from counterfeits are compounded by exploitative practices where customers, partners, and investors regularly take and profit from products and genetics as if their own without compensation or recourse.⁶¹

Both branded products and genetics companies serve as strong pathways to the legal market for entrepreneurs seeking to transition from the unlicensed to legal industry. These pathways often require less startup and operational capital and present lower regulatory barriers to entry. The inability to defend their right to own and profit from their intellectual property discourages unlicensed operators from incurring the extraordinary costs of operating in the legal market. This leaves many who built the market upon which the legal cannabis industry grows without

[releases-guidance-registering-trademark-cannabis-related-good-or-service#:~:text=The%20CSA%20prohibits%20manufacturing%2C%20distributing,are%20unlawful%20under%20federal%20law.](#)

⁵⁹ Associated Press, *Knockoff pot vapes raise concerns for licensed companies*, NBC NEWS (Sept. 19, 2019), available at <https://www.nbcnews.com/health/vaping/knockoff-pot-vapes-raise-concerns-licensed-companies-n1055831>.

⁶⁰ Cannabis genetics companies breed unique seeds and strains.

⁶¹ See Zach Sokol, *Inside LA's Secret Black Market Weed Packaging Mecca*, HIGH TIMES (Nov. 12, 2022), <https://hightimes.com/cash-only/inside-las-secret-black-market-weed-packaging-mecca/>.

reasonable means to leverage their experience and cultural capital to pursue economic opportunities in the legal industry.

(6) No Access to Federal Small Business Programs. In every other sector of the American economy, small and minority-owned businesses have access to the Small Business Administration (SBA) and Minority Business Development Agency (MBDA) programs, as well as USDA programs for small and socially-disadvantaged farmers, tax incentives for small businesses, and numerous other federal programs that provide opportunity for small and minority-owned businesses and entrepreneurs to building a business, and with it generational wealth.

SBA and MBDA services play a critical role in supporting small and minority businesses. The need for technical and financial assistance is greater among individuals who lack access to seed capital, technical support, and affordable business services. Access to financial and technical support is vital for individuals participating in cannabis social equity and economic development programs.⁶² Currently, no such federal programs are available to the U.S. cannabis industry due to its controlled status.

In 2020 during the COVID-19 pandemic, despite broad recognition as “essential businesses,” legal cannabis businesses were excluded from economic recovery programs.⁶³ Under a 2018 Policy notice, the SBA held that marijuana-

⁶² MCBA NATIONAL REPORT, *supra*.

⁶³ Will Senn, *Cannabis shops are essential in a pandemic but will fail without loans or help*, SAN DIEGO UNION-TRIB. (Apr. 22, 2022), *available at*

related businesses, plant-touching and some non-plant touching businesses, are ineligible for SBA loans and services.⁶⁴ When the federal government provided relief during the COVID-19 Pandemic using SBA loan eligibility as a baseline for access to federal relief, SBA affirmed their policy maintaining that state legal cannabis businesses were ineligible for relief under the Paycheck Protection and Economic Injury Disaster Loan Programs.⁶⁵

(7) Limited Access to Financial Services. The status of cannabis as a Schedule I substance limits access to banking and financial institutions unwilling to risk prosecution for doing business with cannabis and cannabis-related businesses. Currently, only 755 of 4,236 federally insured U.S. banks and 4,903 credit unions serve the entire U.S. cannabis industry.⁶⁶ New and small entrants to the adult-use

<https://www.sandiegouniontribune.com/opinion/story/2020-04-22/cannabis-essential-dispensaries-coronavirus-pandemic-emergency-funding>.

⁶⁴ Small Bus. Admin, “Revised Guidance on Credit Elsewhere and Other Provisions in SOP 50 10 5(J).” *SBA Policy Notice: 5000-17057* (Apr. 3, 2018); see also Small Bus. Admin, “Guidance on Grantees Providing Assistance to Marijuana-Related Businesses,” *SBA Information Notice: 6000-19005*, Aug. 2, 2019; *Small Businesses, Big Impact: Ensuring Small and Minority-Owned Businesses Share in the Economic Recovery: Hearing before the H. Comm. on Financial Services, subcomm. on Consumer Protection and Financial Institutions*, 117th Cong. (2022) (testimony of Amber Littlejohn, Esq., Executive Director Minority Cannabis Business Association).

⁶⁵Letter From Senator Jacky Rosen (D-NV) to Majority Leader Mitch McConnell (R-KY) and Minority Leader Chuck Schumer (D-NY), Apr. 22, 2022 (“SBA’s current regulations exclude small businesses with “direct” or “indirect” products or services that aid the use, growth, enhancement, or other development of cannabis from SBA-backed financing, including PPP and EIDL.”), [https://www.rosen.senate.gov/wp-content/uploads/sites/default/files/2020-04/042220%20-%20Rosen-Wyden%20Letter%20on%20COVID-19%20Support%20for%20Cannabis%20Small%20Businesses%20-%20Copy 0.pdf](https://www.rosen.senate.gov/wp-content/uploads/sites/default/files/2020-04/042220%20-%20Rosen-Wyden%20Letter%20on%20COVID-19%20Support%20for%20Cannabis%20Small%20Businesses%20-%20Copy%200.pdf); Diane Novack Jones, *Cannabis Companies Reaped Millions in PPP Loans*, LAW 360 (July 7, 2022).

⁶⁶ NATIONAL CREDIT UNION ADMINISTRATION, QUARTERLY CREDIT UNION DATA UPDATE SUMMARY, 2022 (Q1), <https://www.ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q1.pdf>; FINANCIAL CRIMES ENFORCEMENT NETWORK, MARIJUANA BANKING UPDATE (Sept. 2021), available at https://www.fincen.gov/sites/default/files/shared/305326_MJ%20Banking%20Update%204th%20QTR%20FY2021_Public_Final.pdf; FEDERAL DEPOSIT INSURANCE CORP. HISTORICAL BANKING DATA (last updated 2021), [https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%](https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2)

market often find themselves unable to secure banking services, as many banks have reached the limit of their risk tolerance banking large medical companies that offer greater return on the risk.

Under Schedule I, the business itself, revenues from it, and its products are all considered criminal activity, proceeds, or assets.⁶⁷ This is true whether or not a business is licensed and operating lawfully within the state.⁶⁸ Federal prohibition increases the *criminal* and *enterprise* risk profile for an investment or lending because of the risk that the federal government may choose to enforce its existing prohibition. Many financial institutions will only assume the risk when the returns are high. As such, the lack of access to financial services and limited entrepreneurial capitalization disproportionately impact small businesses.⁶⁹ Several incremental measures have been offered as a first step to address some of the issues facing small and minority-owned cannabis businesses.⁷⁰ Small businesses urgently need reform. Removing cannabis from the federal schedule of controlled substances would address the core issues of risk created by ongoing prohibition.

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⁶⁷ See generally, 21 U.S.C. Part D; *id.* §§ 848, 854.

⁶⁸ See generally, *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁶⁹ Kris Krane, *Marijuana Banking Constraints Disproportionately Harm Small Businesses*, FORBES (June 13, 2018), available at <https://www.forbes.com/sites/kriskrane/2018/06/13/marijuana-banking-constraints-disproportionately-harm-small-businesses/?sh=22ffe3a754ed>.

⁷⁰ SAFE Banking Act, H.R. 1966, 117th Cong., 1st sess. (2021); CLAIM Act, H.R. 2068, 117th Cong., 1st sess. (2021).

Descheduling cannabis by removing marijuana from the schedules of Controlled Substances Act would end decades of failed drug policy and remove undue barriers to entry and competition that hinder the social and economic opportunity goals envisioned by the states in implementing legal cannabis programs. For states that have chosen to legalize cannabis, the challenges facing small and minority-owned businesses are compounded by federal prohibition. Descheduling would provide the statutory basis to correct the issues related to criminalization, financial services access, over-taxation, small and minority-owned business support, guidanceless agricultural production, and interstate commerce access. President Biden has laudably begun this review process.

There is a further need for Congress to regulate beyond simply descheduling. President Biden has not absolved Congress of its responsibility. Congress must provide a pathway for existing medical products, and—similar to alcohol—exempt adult-use cannabis from the Controlled Substances Act. By statutory and regulatory default, the FDA regulates the products market in cannabis because the Food, Drugs, and Cosmetics Act works in conjunction with the Controlled Substances Act—exercises of preemptive congressional commercial regulation that make distinct policy choices. Accordingly, the FDA regulates THC and its isomers and CBD and its isomers as approved drugs, Marinol and Epidiolex.⁷¹

⁷¹ U.S. Food & Drug Admin., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)* (last updated Jan 22, 2021) (“To date, the agency has not approved a marketing application for cannabis for the treatment of any disease or condition. FDA has, however, approved one cannabis-derived and three cannabis-related drug products. These approved products are only available with a prescription from a licensed healthcare provider.”),

Without a statutory pathway to grandfather existing state products and programs, the default would have substantial implications for the viability of existing non-drug cannabis products. Every non-drug cannabis product contains at least trace amounts of those approved drug molecules. For those same drug molecules to be used in a non-drug product, Congress must indicate so. The FDA clarified that under existing laws, cannabis products which contain THC or CBD are not approved for use as a food additive, dietary supplement, or other non-drug products, due to the drug preclusion, misbranding, and adulteration rules.⁷² Further, agency officials have testified that FDA has sufficient statutory reach to enforce those rules if it is so pleased to do so.⁷³ To avoid existential threats to state programs and products, Congress must act beyond descheduling.

An important caveat: rescheduling cannabis would not solve these issues and could exacerbate them because, simply put, descheduling is decriminalizing and rescheduling is recriminalizing.

Rescheduling cannabis by placing marijuana lower on the schedules of controlled substances would not end prohibition and its ongoing harms. It would recriminalize existing state non-drug cannabis businesses due to ongoing criminal

<https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>.

⁷² U.S. Food & Drug Admin., *FDA Regulation of Dietary Supplement & Conventional Food Products Containing Cannabis and Cannabis-Derived Compounds* (last visited Nov. 8, 2022), <https://www.fda.gov/media/131878/download>.

⁷³ *Cannabis Policies for the New Decade: Hearing before the H. Energy & Commerce Comm. Subcomm. on Health*, 117th Cong., 1 Sess. (Jan. 15, 2020) (testimony of Dr. Douglas Throckmorton, Deputy Director, FDA Center for Drug Evaluation and Research).

penalties for trafficking in or adulterating lower-scheduled drug substances.⁷⁴

Rescheduling would determine definitively that the only FDCA-lawful pathway for cannabis is as a drug through the new drug application process.

Ultimately, rescheduling would render participation in the legal cannabis industry inaccessible to all but those with pockets deep enough to enter and sustain in a framework designed for large pharmaceutical interests with billions of dollars in research and development budgets. Such barriers to entry and sustainability for small businesses are insurmountable and unduly burdensome. Even the most well-funded cannabis companies would struggle to surmount this regulatory hurdle. Furthermore, rescheduling would usurp the will of the states given FDA preemption and recent U.S. Supreme Court case law⁷⁵ on the limitless reach of federal cannabis regulation through the Controlled Substances Act.

Continued congressional inaction will break the legal cannabis industry, while such inaction represents a boon to the unlicensed market. Descheduling is critical, but a failure of Congress to also act further would also be dire. Hundreds of thousands of American jobs and billions in tax revenue is on the line. Federal refusal to end prohibition and create a non-drug product pathway outside of the schedules forgoes the opportunity to establish sensible regulations to ensure safe

⁷⁴ Rezwana Khan, *Rescheduling is Recriminalizing, Descheduling is Decriminalizing*, Cannabis Bus. Times (Nov. 10, 2022), <https://www.cannabisbusinesstimes.com/article/rezwana-khan-opinion-joe-biden-cannabis-pardons-resecheduling-desheduling/>.

⁷⁵ *Gonzales v. Raich*, 545 U.S. 1 (2005).

and reliable products.⁷⁶ Additionally, failing to provide pathways for expungement and criminal justice reform for qualifying nonviolent offenders would leave many behind and deny them the opportunity for a true second chance.

⁷⁶ Randal John Meyer, *Why police are raiding California pot farmers and what can be done about it*, SAN FRAN. CHRON. (Oct 9, 2021), <https://www.sfchronicle.com/opinion/openforum/article/Why-police-are-raiding-California-pot-farmers-and-16518122.php>.

**Recent Legislation to End Federal Cannabis Prohibition Through
Descheduling and Regulation Illustrates Substantial Bipartisan
Opportunity for Reform**

Thanks to the excellent work of Senators Schumer, Booker, and Wyden; and Representatives including Ranking Member Nancy Mace, Barbara Lee, Earl Blumeanauer, Jerrold Nadler, Brian Mast, Tom McClintcok, Peter Meijer, the late Don Young, David Joyce, opportunity exists for bipartisan cooperation on the issues most relevant to sensible and just comprehensive reform. The outpouring of support for President Biden’s recent exercise of clemency and scheduling review order was bipartisan, cross-ideological, and substantial.⁷⁷ The SRA,⁷⁸ the MORE Act,⁷⁹ and the Cannabis Administration and Opportunity Act⁸⁰ represent three approaches that take policy stances on many of the major issues of federal reform with bipartisan buy-in.

From a bipartisan and cross-ideological perspective, there is substantial agreement on ending prohibition through descheduling, providing true second chances for deserving individuals, regulating cannabis like alcohol with respect for various state frameworks, imposing competitive tax rates, providing for the expeditious and thoughtful implementation of interstate commerce rules, ensuring

⁷⁷ Statement from President Biden on Marijuana Reform, Oct. 6, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>.

⁷⁸ H.R. 5977, 117th Cong., 1st Sess. (2021).

⁷⁹ H.R. 3617, 117th Cong., 1st Sess. (2021).

⁸⁰ S.4591, 117th Cong., 2d Sess. (2022).

low barriers to entry to encourage entrepreneurship, and allowing access to traditional small business and financial support services.

(1) Descheduling, not Rescheduling. With respect to federal decriminalization, the States Reform Act, the MORE Act, and the CAO Act each propose to end federal prohibition by removing cannabis from the control schedules to federally decriminalize cannabis. The MORE Act passed the House twice on bipartisan votes. The passage of the MORE Act represents an important point of consensus between Democrats and Republicans—the federal schedules and their automatic determination of criminality for states’ legal activity no longer makes sense in the modern environment where 48 states⁸¹ provide for legal commerce in various forms of cannabis, from CBD-only to full adult use.

(2) True Second Chances. Republicans and Democrats in their respective legislative proposals agree and have worked together to ensure that deserving individuals adversely impacted by cannabis prohibition are, in fact, given a true second chance in society.

The CAO Act, and MORE Act, and the States Reform Act all take an approach, albeit different, to address this issue. The SRA takes a categorical approach, ensuring that individuals with cannabis-only offenses, expressly excluding violent, cartel, or intoxicated driving-related offenses, get a true second chance through release, resentencing, or expungement.⁸²

⁸¹ *See supra* note 4.

⁸² H.R. 5977, 117th Cong., 1st. Sess., at tit. I.

The MORE Act invests in new programs and opportunities for “qualified cannabis offenders,” as defined under the statute. The CAO Act uses elements from both categorical and qualified reentry approaches. One important point of consideration for federal lawmakers on this issue is to avoid unintentionally interfering with state programs for expungement and reentry for those deserving of second chances. Points of potential interference include disqualifying state-licensed businesses owners from federal licensure.

(3) Sensible and Responsible Federal Role. There is also substantial bipartisan consensus on the role of the federal government in thoughtfully ending prohibition across a number of policy reforms.

Low Barriers to Entry. Substantial policy agreement exists between Democrats and Republicans on ensuring that the barriers to entry for small businesses are low, albeit in different approaches. The MORE Act and the CAO Act create new programs for expungement, reentry support, community support services, business licensure, etc., and focus on leveraging federal revenue to invest in those impacted by cannabis prohibition and small and minority-owned businesses. The CAO Act includes additional provisions that provide day one support for small and minority-owned businesses and ensure legal cannabis businesses are not denied access to critical support services. The SRA approaches barriers to entry by lowering regulatory burdens and ensuring state reentry and business licensure support programs are respected in the federal scheme, while opening up traditional small business SBA services to cannabis businesses. The ideal outcome for small

businesses is a marriage of these approaches, ensuring appropriate regulatory burdens and broad economic opportunities for small businesses.

Respecting The Variety of State Frameworks. Another area of top-line bipartisan agreement is the need to respect the diverse environment of state frameworks. The SRA takes an intentional approach by (1) allowing compliant state cannabis products from licensed producers to be grandfathered into the federal scheme, ensuring any state-licensed business may obtain a federal license; and (2) protecting the rights of state to maintain additional lawful regulatory restrictions on cannabis, up to and including, prohibition. These two policy points are foundational to a thoughtful transition from prohibition.

The CAO Act also protects the right of states to maintain additional restrictions on cannabis, up to and including, prohibition. The CAO Act provides a process for entering existing products into an FDA-created cannabis products scheme. In examining an FDA-based approach to regulating existing cannabis products, careful consideration must be given to ensure incompatibility and unnecessary product schemes do not unduly burden responsible commerce.

Excise Tax. Democrats and Republicans agree that reducing the size of the unlicensed market is a central objective of cannabis tax policy. Minimizing the unlicensed market requires a tax rate that ensures legal businesses can compete with the unlicensed industry on end-price. To that end, the MORE Act contains a relatively competitive 5% excise tax rate for the first year, but grades up quickly to

8%, based on price for certain weights of flower or concentrated products. The SRA contains a competitive 3% excise tax rate for ten years based on the category of certain cannabis products and prevailing price by certain weights.

Among major proposals, the outlier is the CAO Acts' 10%, grading up to 25% over five years. Like the other measures, the CAO Act's tax provisions are based on the price for certain weights of flower or concentrated products. Competitive rates, such as those in the SRA, and stability around that competitive rate is essential to price competition with the illicit cannabis market. Additionally, the consensus on category-based taxation between these proposals provides a solid ground for bipartisan agreement on a competitive weight-category based tax.

Public & Youth Safety. Another area of vital importance and bipartisan agreement is the need to regulate cannabis to promote public safety and reduce youth access to cannabis. Over the last 50 years of prohibition, we have learned that cartels and traffickers do not care about youth use or the safety of products sold. They care about maximizing profits by selling as much product as possible to anyone who will buy it.

Conversely, the legal cannabis market has uniform laws restricting the sale of adult-use cannabis to those age 21 and above.⁸³ Consequently, the industry has

⁸³ States do allow use of medical products under 21 with a physician's recommendation.

shown 100% compliance with age gating at retail across numerous studies⁸⁴—far in excess of comparable results for tobacco or wine from non-dispensary retailers.⁸⁵

Furthermore, youth use has remained stable or decreased in states that have legalized cannabis, consistent with the overall downward trend noted in the National Institute on Drug Abuse (NIDA)’s Monitoring the Future Survey for youth use of alcohol, cannabis, and nicotine.⁸⁶

Interstate Commerce. Another critical area of bipartisan agreement expressed in the SRA and the CAO Act is the need to expeditiously and thoughtfully transition to a federal marketplace. In regulating the interstate commerce of cannabis like it does alcohol for adult-use, both the SRA and the CAO Act, albeit in very different ways, use the FDA and Tax and Trade Bureau (TTB) as the primary agencies overseeing cannabis products.

The benefits of interstate commerce to small and minority-owned cannabis businesses are numerous: access to suppliers of low-cost and higher-quality

⁸⁴ James C. Fell et al., *What is the likelihood that underage youth can obtain marijuana from licensed recreational marijuana outlets in California, a state where recreational marijuana is legal?*, 82 J. SAFETY RESEARCH 102-111 (Sept. 2022); Oregon Liquor Control Commission, *OLCC Launches Marijuana Retailer Minor Decoy Checks Bend Licensees Pass OLCC Check for Sales to Minors* (Dec. 20, 2017), https://www.oregon.gov/olcc/docs/news/news_releases/2017/nr_12_20_17_MD_Bend.pdf; David B. Buller et al., *Compliance With Personal ID Regulations by Recreational Marijuana Stores in Two U.S. States*, 80 J. STUDIES ON ALCOHOL AND DRUGS 679-686 (Dec. 2019). One study has shown only 98% compliance. Colorado Dep’t of Revenue, Marijuana Enforcement Div., *Industry-Wide Bulletin 22-04: Preventing Underage Sales* (Aug. 9, 2022).

⁸⁵ Mary Hrywna et al., *Retailer Compliance With Tobacco 21 in New Jersey, 2019-2020*, JAMA (Oct. 5, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2797038>.

⁸⁶ Nat’l Inst. on Drug Abuse, *Percentage of adolescents reporting drug use decreased significantly in 2021 as the COVID-19 pandemic endured* (Dec. 15, 2021), <https://nida.nih.gov/news-events/news-releases/2021/12/percentage-of-adolescents-reporting-drug-use-decreased-significantly-in-2021-as-the-covid-19-pandemic-endured>; Nat’l Inst. on Drug Abuse, *Monitoring the Future Survey (2021)*, available at <https://monitoringthefuture.org/data/21data.htm>.

cannabis medicine and products, access to established brands and genetics, and greater access to a diverse supply chain.⁸⁷ Additionally, interstate commerce could provide new opportunities for small businesses, including brands and genetics companies, to enter state markets currently captured by a handful of large cannabis firms.

It is crucial to thoughtfully legislate and provide clear agency guidance for the transition to interstate commerce to ensure that small and minority-owned businesses have a meaningful opportunity to prepare for and participate in interstate cannabis commerce. To this end, the implementation of interstate trade must follow an efficient but thorough process that recognizes (1) the need for clear guidance and timely implementation, and (2) the vast disparity between large operators and small and minority-owned cannabis businesses in access to capital and resources to scale and compete.

The arbitrary or indefinite suspension of interstate trade would be a major disservice to consumers and small businesses alike. Indefinitely or arbitrarily delaying interstate commerce would simply provide more time for large operators to enjoy limited markets and secure additional state market shares, while small operators struggle with exorbitant tax rates and the lack of access to capital due to federal prohibition. Small cannabis businesses, like small craft brewers, increase

⁸⁷ MINORITY CANNABIS BUSINESS ASSOCIATION, COMMENTS OF BEHALF OF THE MINORITY CANNABIS BUSINESS ASSOCIATION REGARDING THE CANNABIS ADMINISTRATION OPPORTUNITY ACT DISCUSSION DRAFT (Sept. 1, 2021).

product diversity and contribute to a robust business environment where businesses can innovate to meet ranging consumer preferences.

Wisely, both, the CAO Act and the SRA trigger necessary major rulemaking and promulgation deadlines over a 1-2 year period after enactment subject to the Administrative Procedure Act.⁸⁸ This allows the federal government to set and enforce reasonable timelines for the promulgation of regulations and to implement small business support programs to allow for a timely and expeditious transition to interstate commerce.

Both bills take pains to avoid the interstate commerce issues associated with industrial hemp and its derivative products. Six years after the passage of the Farm Bill legalizing hemp, FDA has yet to engage in rulemaking to regulate hemp products, denying consumers greater access to safe and regulated hemp products, and causing devastating impacts on all but the largest and best-capitalized businesses.

Support for Small and Minority-Owned Businesses. The need to support access to economic opportunities for small and minority-owned cannabis businesses is yet another opportunity for bipartisan agreement. Approaches range from the SRA lowering undue regulatory burdens, ensuring access to SBA loans and services, and grandfathering existing small businesses, to the CAO Act addressing the issue from multiple angles including the timely funding of small business programs and

⁸⁸ 5 U.S.C. ch. 5, subch. I § 500 *et seq.*

broad activation of federal programs for small and economically and socially disadvantaged businesses. The MORE Act provides general funding to SBA and creates a justice fund that would support state social equity programs, *inter alia*.

Despite state programs designed to encourage diverse and small business participation in the legal cannabis industry, extraordinary regulatory burdens, extraordinary upfront capital requirements, and the lack of funding sources available to small cannabis businesses threaten the ability for many small and minority-owned cannabis businesses to survive to see the end of federal prohibition, let alone compete in a post-prohibition market.

The CAO Act includes a broad and thoughtful approach to funding and support for small and minority-owned cannabis businesses. The bill provides timely funding to provide financial and practical support for small businesses in transition to the post-prohibition market through funding for the Cannabis Restorative Opportunity⁸⁹ and Equitable Licensing Grant⁹⁰ Programs. The lack of the timely funding activation for state social equity and economic development programs has limited the ability of diverse entrepreneurs to enter the market due to the extraordinary costs and fees associated with obtaining a license and adapting to evolving regulatory and market conditions.

There is also bipartisan agreement on the need for access to existing federal small business development programs. The SRA, MORE Act, and CAO Act all

⁸⁹ S. 4591, 117th Cong., 2d Sess., at tit. III, subtit. A.

⁹⁰ *Id.*

ensure access to SBA services for cannabis businesses. In addition to ensuring programmatic access, the SRA provides for access to existing SBA funds.⁹¹ The MORE Act also provides SBA funding for loans to *all* economically and socially disadvantaged businesses. However, the Opportunity Trust Fund is funded through federal tax revenues. As such, the funds will not be made immediately available for the transition to a post-prohibition market.

The CAO Act also provides improved access to additional federal programs designed to support small and diverse businesses including MBDA and USDA. Federal funding and technical assistance programs are vital for small and minority-owned cannabis businesses to navigate and succeed in the post-prohibition business environment by helping small businesses address traditional barriers to business formation and scaling.

The areas of bipartisan agreement on support for small and minority-owned cannabis businesses provides a foundation for growth and further consensus. For example, only the SRA recognizes the USDA as the primary agency with jurisdiction, from seed to harvest, which is important for creating opportunity and certainty for socially-disadvantaged and small farmers. The CAO Act employs a necessarily broad range of business and financing solutions. The SRA's thoughtful approach to regulation would help ensure reduced regulatory burdens and lower barriers to entry for small businesses. The final contours of the roles of TTB and

⁹¹ H.R. 5977, 117th Cong., 2d Sess., at tit. IV.

FDA remain up in the air, but there is a bipartisan basis on the points from which to proceed to maximize economic opportunities for small and minority-owned businesses.

Conclusion

The United States can either perpetuate the harms of cannabis prohibition, or it can end the failed policies and associated consequences of their enforcement. To do so requires descheduling, not rescheduling cannabis, and reaching out across areas of bipartisan policy reform to promote sensible policies. Fortunately, the work has begun and the political will exists to do more.

About the Global Alliance for Cannabis Commerce

GACC is the leading U.S. cannabis industry trade organization dedicated to ending cannabis prohibition. We support policies that create a vibrant, open, and dynamic industry for cannabis businesses, ensuring criminal justice reform, and addressing the harms of cannabis prohibition.

GACC advocates in front of government, policymakers, and legislators to support legalizing and regulating the cultivation, manufacture, distribution, and use of medical and adult-use cannabis products globally. GACC further works to ensure that medical and adult users of cannabis are not improperly stigmatized for their ordinary needs and activities.

GACC members believe that it is impossible to talk about the inevitable end of federal cannabis prohibition without discussing a way to rectify the issues that cannabis prohibition has caused in American society. Indeed, it is our organization's Corporate Social Responsibility position that "it is the specific responsibility of the cannabis industry to support legislation and other measures to mitigate and compensate those most harmed by" cannabis prohibition.