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Bigger is Not Better: Preventing Monopolies in the National Cannabis Market



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ABOUT THE AUTHOR

Shaleen Title is an Indian-American attorney and longtime drug policy activist who currently serves as Distinguished Cannabis Policy Practitioner in Residence at the Drug Enforcement and Policy Center. She is co-founder of Parabola Center and vice-chair of the Cannabis Regulators of Color Coalition, and in 2021 was named to Boston's 40 Under 40 List. From 2017 to 2020, she served as a top cannabis regulator for the state of Massachusetts. During her time as a commissioner, she was widely recognized for her focus on racial justice and her efforts to make the cannabis industry more fair and inclusive. Before her term, she worked on multiple state marijuana legalization campaigns, and as a founding board member of the Minority Cannabis Business Association, she led the drafting of the first model bill created to give states guidance to implement a process of reinvestment and reconciliation. She is part of the Drug Policy Alliance's Federal Cannabis Regulations Working Group and serves as an advisor to Supernova Women, a nonprofit organization providing a space for women of color in cannabis, and the THC Staffing Group Mentorship Program.

Shaleen has testified in front of governmental bodies around the world about restorative justice in marijuana laws and is frequently consulted by the media on topics surrounding cannabis legalization and regulation. She holds a business degree, law degree, and graduate degree in accounting.

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EXECUTIVE SUMMARY

Cannabis is at a crossroads. With a majority of U.S. states having legalized marijuana in some form and Congress contemplating opening the doors to interstate commerce, it is a crucial and vulnerable moment for the future of these new markets. While states are making historic progress creating paths for small businesses and disenfranchised groups, larger companies are expanding, consolidating, and lobbying for licensing rules to create or maintain oligopolies.

Federal legalization will only accelerate the power grab already happening for control over the multibillion-dollar industry. Big tobacco and alcohol companies are making significant investments into cannabis, and even larger conglomerates are openly expressing their interest in the industry. Left unchecked, this scramble for market share threatens to undermine public health and safety and undo bold state-level efforts to build an equitable cannabis marketplace.

The nation's antitrust laws were created as a solution to stop the monopolistic practices of industrial titans who threatened the public good. This paper argues for applying those well developed principles to federal cannabis reform now, before it's too late. It lays out a set of policy proposals to promote the growth of a diverse and competitive market, centering consumers and public health while building on effective equity programs already at work in state markets. Here are these proposals in short form:

1. Allow people to grow a reasonable number of marijuana plants for personal use.
2. Prohibit vertical integration.
3. Do not cap the number of business licenses available in total, but limit how much of a market any one person or entity may control.
4. Create incentives for states to license small or disadvantaged businesses.
5. Enforce ownership limits and review mergers based on existing evidence of predatory and anticompetitive tactics in state marijuana markets.
6. Disqualify corporations from the cannabis industry if they have engaged in corporate crimes, defrauded the public, or caused significant public health damage.
7. Create a multi-agency task force to enforce anti-monopoly limits.
8. Authorize states to ban or delay interstate commerce in order to preserve state-level advantages to local businesses.

I. INTRODUCTION

Only a few decades ago, the Internet represented an opportunity to democratize economic opportunity, carve out an industry that rewarded innovation, and build a market with room for everyone. In the early days, with few formal barriers to entry, the market seemed truly “free” and “open.” But soon, a handful of large corporations emerged, absorbing their competitors and adopting questionable ethics and business practices. The resulting concentration of power has been problematic on multiple fronts.

The similarity to the possible paths for cannabis is striking. As with the internet, the early era of the cannabis industry showed promise that it would challenge existing norms. But the recent wave of market consolidation and high barriers to entry for smaller actors foreshadow a future national market controlled by only a handful of companies, unless lawmakers and regulators take intentional action to prevent it. Depending on the particulars of federal reforms, Congress could override—or potentially protect—individual state programs.

Unfortunately, in their current form, the major comprehensive reform bills being considered (MORE Act¹, States Reform Act², and CAO Act³) would likely eviscerate a key component of state social equity programs, trigger a race to the bottom to roll back valuable public health protections, and potentially create dangerous gaps in regulation until new federal rules are promulgated.⁴

¹ Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2021. H.R.3617 117th Congress (2021–2022). <https://www.congress.gov/bills/117th-congress/house-bill/3617/text>.

² States Reform Act. H.R. 5977 117th Congress (2021–2022). <https://www.congress.gov/bills/117th-congress/house-bill/5977/text>.

³ Senators Corey Booker, Ron Wyden, & Chuck Schumer, Cannabis Administration & Opportunity Act Discussion Draft (July 14, 2021). <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>.

⁴ Bloomberg, Scott and Robert A. Mikos. “Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana.” September 27, 2021. Vanderbilt Law Research Paper No. 21-33. *Pepperdine Law Review*, Forthcoming. Available at <https://ssrn.com/abstract=3909972> or <http://dx.doi.org/10.2139/ssrn.3909972>.

Megamergers, lawsuits against regulators, predatory pricing, and political investment in excluding new entrants have always occurred at some level in the marijuana industry. But the scale at which these dynamics could unfold once cannabis is federally legal could be unprecedented. As an illustration, the tobacco company Altria, which is targeting the cannabis industry, has a market capitalization greater than the estimated market value of the entire U.S. cannabis market.⁵ Federal legalization will spur even larger companies—in beverage and food and retail sectors, where entering a federally illegal industry is an unacceptable business risk—to quickly update their analyses.

Federal legalization could also impact efforts to build a fair and equitable industry. Many state and local jurisdictions have passed laws seeking to build a social justice agenda into cannabis policy design, incorporating a reparative dimension and leveling the playing field for participation by communities most negatively impacted by the war on drugs. This has included directing significant tax revenue to communities of color harmed by the war on drugs, setting aside 50% or more of licenses and jobs for people from those communities, offering technical assistance, creating automatic expungement programs for cannabis convictions, and including other creative ways to begin to repair the harms of the drug war. The transition from individual state-level cannabis programs to a consolidated national marketplace will either respect and build on these programs or threaten their collective progress.

The goals of profit and equity are sometimes at odds, and hastily throwing the doors open to interstate cannabis commerce will advantage the wealthiest, most privileged actors. As the market grows and profits rise, corporate consolidation is up. Cannabis public relations expert Randall Huft [opined](#) in trade publication mg Magazine: “Ultimately, a company’s long-term success depends on how well it rides up the consolidation curve. ... [W]hether or not you like it, the cannabis industry will progress along the same pathway as virtually every sector that came before. A few strong companies will survive, and the rest will disappear.”⁶

This is the logic of big industry, but it does not have to be our future. John D. Rockefeller struck a similar tone when he said, “Growth of a large business is merely a survival of the fittest . . . the working out of a law of nature, and a law of God.” His oil company was ruled an illegal monopoly and dissolved in 1911. Cannabis’s transition from underground economy to regulated markets presents a unique opportunity to do things differently from the outset, and maybe even provide an example for how other industries could be better regulated.

II. DOMINATION BY BIG BUSINESS IS A THREAT TO THE INDUSTRY

Marijuana is legal for medical use in 37 states and for recreational use in 19, but the governing laws and regulations differ from state to state. With no federal regulations, there are no universal rules beyond the uncertainty that comes from mostly unenforced federal prohibition. Even the definitions of the plant itself—marijuana, cannabis, hemp—vary even after the 2018 Farm Bill helped to create a national standard for exempting low-THC cannabis from federal prohibition. For businesses, this creates a chaotic and unpredictable environment at both the state and local levels, which comes on top of the arduous task of securing capital and banking for a product still federally illegal.

The common practice of capping the total number of cannabis licenses available in a state or city tends to favor those with connections and lobbying resources. Two of the world’s largest cannabis companies by revenue, Curaleaf and Green Thumb Industries, have touted their success in such states in securities filings, with Curaleaf [noting](#) that it “maintains an operational footprint of primarily limited-license States, with natural high barriers to entry and limited market participants,”⁷ and Green Thumb Industries [describing](#) seven state-level cannabis markets in which it plans to operate as “oligopolistic.”⁸

In addition to the prevalence of license caps, other developments highlight concerns about monopolistic behavior in the cannabis industry:

- Consumers commonly complain that businesses are colluding to fix prices. At least one [lawsuit](#)⁹ has been threatened,

⁵ Altria Group’s market cap was \$90.89 billion as of January 12, 2022. The U.S. cannabis market opportunity in total is expected to grow to [\\$80 billion](#) by 2030 assuming national availability, according to Cowen analyst Vivien Azer.

(Franck, Tom. “Top Cannabis Analyst on Wall Street Raises Sales Forecast, Names Top 2019 Picks.” CNBC, January 8, 2019. <https://www.cnbc.com/2019/01/08/top-weed-analyst-on-wall-street-raises-sales-forecast-names-top-picks.html>.)

⁶ Huft, Randall. “The Cannabis Industry Is in a Consolidation Phase.” mg Magazine, June 14, 2021. <https://mgretailer.com/business/marketing-promo/the-cannabis-industry-is-in-a-consolidation-phase/>.

⁷ Roberts, Chris. “Leaked Document Shows How Legal Weed Could Go Horribly Wrong.” The Daily Beast, November 7, 2021. <https://www.thedailybeast.com/leaked-document-shows-how-legal-weed-could-go-horribly-wrong>.

⁸ Annual Information Form, p. 23. Green Thumb Industries Inc., July 10, 2018. Available through the SEDAR filing system www.sedar.com or at: <https://www.shaleentitle.com/gti-2018-report.pdf>.

⁹ Becker, Sam. “Price Fixing and Collusion in the New Market for Legal Marijuana.” Showbiz CheatSheet, December 31, 2014. <https://www.cheatsheet.com/money-career/price-fixing-and-collusion-in-the-new-market-for-legal-marijuana.html/>.

and multiple cannabis law firms have published posts about how companies can avoid penalties for [price fixing](#)¹⁰ or [price gouging](#).¹¹

- In August 2021, a North Carolina Senate committee [approved](#) a medical marijuana bill requiring businesses selling the product to have five years of out-of-state experience, essentially disqualifying new, local entrants (the requirement was later removed).¹²
- In September 2021, a California jury [awarded](#) \$5 million in damages to a marijuana business that claimed a rival group of dispensaries teamed up to prevent it from opening.¹³

A. Threats to Equity and Diversity and to Public Health

The current marijuana market is difficult for marginalized people to access, despite many state laws explicitly intending otherwise. Today, fewer than 4% of cannabis business owners are Black, according to findings presented in the MORE Act.¹⁴ Rather than becoming easier to enter, the unique legal landscape of the cannabis industry combined with monopolistic actors is creating new, additional barriers to entry. When states pass recreational legalization laws, existing medical marijuana businesses often [lobby](#)¹⁵ or create [public relations campaigns](#)¹⁶ seeking a head start on sales, which will always disadvantage and can effectively exclude new entrants to the industry. When social equity applicants finally do enter the market, they can often be subjected to predatory [loans](#)¹⁷ and unethical [business practices](#)¹⁸ by existing companies.

Corporate consolidation can result in large companies that prove difficult to regulate effectively, and advocates of marijuana legalization have long warned of the dangers of ending prohibition without appropriate public health regulations. In the 2009 edition of “[After the War on Drugs: Blueprint for Regulation](#),” the pro-legalization drug policy think tank Transform expressed concern for any reform model that “hands control of drug markets to exploitative profiteers.” The group argued that “such an approach is, from a public health perspective at least, potentially an even worse scenario than unregulated criminal control of drug markets. Legal commercial actors—whose primary concern is profit maximization—would be free to aggressively promote consumption through marketing and advertising.”¹⁹

The case of the alcohol and tobacco industries provides a ready example of the public health risks that can result from a small number of dominant companies aggressively commercializing their products and misleading customers about health dangers. Public health concerns take a back seat when the alcohol and tobacco industries seek to maximize profits by maximizing consumption. Similar dynamics helped fuel the nation’s opioid epidemic when some pharmaceutical companies aggressively marketed certain products.

Though advocates of cannabis might be quick to stress its medicinal benefits and to suggest tobacco and alcohol are much more harmful, there still can be negative health impacts for certain populations, and effective regulation can advance both public health and consumer safety. Consolidated corporate power threatens effective regulations irrespective of the scope of risk.

There is no evidence of Big Tobacco-like fraudulent behavior in the cannabis industry so far. This reality may be the product of state-level legalization efforts which have created systems to tightly regulate and control cannabis production and sales. But federal legalization and industry concentration could undermine the state-level success, especially if a national marketplace

¹⁰ “Antitrust Risks in Marijuana Trade Associations.” Harris Bricken, May 23, 2017. <https://harrisbricken.com/cannalawblog/antitrust-risks-in-marijuana-trade-associations/>.

¹¹ Mandell, Joshua, and Evelina Gentry. “How Sellers Can Avoid Price-Gouging For ‘Essential’ Cannabis.” Law360, April 9, 2020. <https://www.law360.com/articles/1261969>.

¹² Jaeger, Kyle. “North Carolina Senators Approve Medical Marijuana Legalization Bill In Committee.” Marijuana Moment, August 24, 2021. <https://www.marijuanamoment.net/north-carolina-senators-approve-medical-marijuana-legalization-bill-in-committee/>.

¹³ Berg, Lauren. “Calif. Jury Awards \$5M In Landmark Cannabis Antitrust Case.” Law360, September 24, 2021. <https://www.law360.com/cannabis/articles/1424868/calif-jury-awards-5m-in-landmark-cannabis-antitrust-case>.

¹⁴ Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2021. <https://www.congress.gov/bills/117/congress/house-bill/3617/text>.

¹⁵ Martin, Alyson. “Virginia Lawmakers Weigh Expedited Cannabis Sales, Equity.” Cannabis Wire, November 11, 2021. <https://cannabiswire.com/2021/11/11/virginia-lawmakers-weigh-expedited-cannabis-sales-equity/>.

¹⁶ “Ready to open now?” NJ Cannabis Insider. NJ.com, October 28, 2021. <https://www.nj.com/cannabis-insider/2021/10/issue-187-ready-to-open-now.html>.

¹⁷ Bartlett, Jessica. “Predatory loans ‘will be stopped,’ marijuana regulators say.” Boston Business Journal, May 13, 2021. <https://www.bizjournals.com/boston/news/2021/05/13/ma-cannabis-commission-takes-aim-at-predatory-lend.html>.

¹⁸ Elmahrek, Adam. “L.A.’s ‘social equity’ program for cannabis licenses under scrutiny.” Los Angeles Times, June 23, 2020. <https://www.latimes.com/california/story/2020-06-23/cannabis-licenses-social-equity-4th-mvmt>.

¹⁹ Rolles, Stephen. “After the War on Drugs: Blueprint for Regulation.” Transform Drug Policy Foundation, July 1, 2009: 17. <https://transformdrugs.org/publications/after-the-war-on-drugs-blueprint-for-regulation>.

enables a growing cannabis industry to produce and market new products faster than research and regulation can adapt. As companies grow and consolidate, these corporate players eager to expand markets and reduce costs can more easily team up to lobby to resist or roll back regulations, or to challenge advertising regulations or other promotional limits. Corporate influence may overtly or covertly shape regulations, as witnessed historically with Big Tobacco (Juul, for example, recently [bought](#) an entire issue of a scholarly journal²⁰).

History also suggests larger companies will also have more resources to research and develop more profitable, more highly concentrated products. Novel and yet-to-be-developed cannabis products may be most concerning from a public health perspective. For example, cannabis could be combined with other substances to create products that are more addictive or dangerous. Big Tobacco companies have manipulated the chemical makeup of products to make them more addictive and thus more dangerous; adding ammonia to cigarettes to make nicotine hit the user's brain faster is a classic example. Even Big Tech provides a clear demonstration that concentrated corporate power can transform even the most benign products (what could be more benign than Facebook's "[like button](#)"?²¹) into something addictive and, all too often, harmful to society.

The track record of state-level reforms combined with new concerns about the future of cannabis companies has now resulted in an ironic twist in perspectives: many who previously opposed legalization, now seeing the success of state legalization efforts, are starting to warm to the notion of ending prohibition at the federal level; many small cannabis businesses and longtime reform advocates have become the loudest voices in support of going slow and exercising caution in federal reforms.

B. Open Competition ("Small" Marijuana) Is More Politically Popular than Corporate Consolidation ("Big" Marijuana)

Since the government first outlawed cannabis in the 1930s, the laws governing its use and production have been much more a product of political forces and cultural trends than research evidence or good policy. The rapidly increasing support for legalization is political in nature still; Democrats openly celebrate the "[bump](#)"²² for their party's candidates when a marijuana referendum is on the ballot. Meanwhile, former Republican officials like [John Boehner](#)²³ and [Tom Price](#)²⁴, who opposed the legalization of cannabis while in office, have had a "change of heart" and joined the industry. These decisions often have little to do with new research evidence and everything to do with new politics—and with concentrated pools of money flowing from new legal marketplaces.

Any practical effort towards sound federal marijuana policy, then, must inevitably consider both sound policy and political dynamics. On certain grounds, the two fortunately align. Policy that supports a fair market with smaller businesses in healthy competition is not just a good way to support public health and racial justice, it is also wholly in line with today's political trends. With 2021 legalization bills from both major parties, it is one of the rare political issues to enjoy broad [bipartisan](#)²⁵ support among voters.

At the same time, as lawmakers proceed, they would be wise to observe that the dislike of excessive corporate power seems to be bipartisan as well. The 2015 ballot initiative in Ohio, the only recent reform effort to be rejected by state voters by a nearly 2-1 margin, most tangibly demonstrated this point. The overall support for marijuana legalization in the state was outweighed by concerns about a reform model giving exclusive rights to grow marijuana to backers of the initiative. As press detailed, polls at the time showed strong support for ending prohibition, but there was strong "opposition to the sections of the measure that limit[ed] commercial marijuana farming to a few wealthy landowners."²⁶

With so many sectors of the American economy already dominated by large corporate actors, incorporating antitrust principles

²⁰ Dayen, David. "Senators Want Juul Punished for Buying an Academic Journal." The American Prospect, August 5, 2021. <https://prospect.org/health/senators-want-juul-punished-for-buying-an-academic-journal/>.

²¹ Haynes, Trevor. "Dopamine, Smartphones & You: A Battle for Your Time." Science in the News. Harvard University Graduate School of Arts and Sciences, May 1, 2018. <https://sitn.hms.harvard.edu/flash/2018/dopamine-smartphones-battle-time/>.

²² Hudak, John. "'Cannabis Coattails' and the Challenges of Polling in 2016." The Brookings Institution, October 28, 2016. <https://www.brookings.edu/blog/fixgov/2016/10/28/cannabis-coattails/>.

²³ Sewell, Dan. "Former US House Speaker to Promote Legalizing Marijuana." The Associated Press, April 11, 2018. <https://apnews.com/article/f9fcc8f2edbd4f9faee8557186461aa5>.

²⁴ Jaeger, Kyle. "Former Anti-Marijuana Congressman and Top Trump Health Official Joins Cannabis Company Board, Documents Show." Marijuana Moment, August 9, 2021. <https://www.marijuanamoment.net/former-anti-marijuana-congressman-and-top-trump-health-official-joins-cannabis-company-board-documents-show/>.

²⁵ Van Green, Ted. "Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use." Pew Research Center, April 16, 2021. <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/>.

²⁶ German Lopez, "Ohio's marijuana legalization ballot measure, explained", Nov. 3, 2015, at <https://www.vox.com/2015/8/13/9146471/ohio-marijuana-legalization-vote>.

to support small businesses may help a federal legalization bill gain broad public support. One aspect of growing public support for marijuana reform is a widespread hope that a responsible new legal industry will emerge to replace the illicit marijuana marketplace. Reform models at both the state and federal level will be especially popular if, and perhaps only when, they incorporate evidence-based provisions expressly designed to advance public aspirations for an equitable and responsible industry.

III. EXISTING FEDERAL LEGALIZATION PROPOSALS

As federal legalization approaches, policymakers and reform advocates must recognize the risks that the current federal legislative proposals may exacerbate existing challenges caused by consolidation and may undercut state programs that seek to prioritize local/small businesses or disenfranchised people.

The three current congressional proposals are not the same with respect to these concerns: the Democrat-led Cannabis Administration and Opportunity Act partially addresses monopoly concerns by prohibiting certain corporate bribery practices; the Republican-led States Reform Act exempts state-licensed cannabis operators from federal requirements and gives existing operators a distinct advantage over new entrants. All proposals, however, raise the risk of facilitating and even fostering excessive consolidation in the marijuana industry by failing to set up a regulatory structure guided by antitrust principles.

Marijuana businesses have astounding capital needs and must comply with some of the most expensive and restrictive security and inventory tracking requirements of any industry.²⁷ In addition, these businesses must navigate a layered approval process at multiple levels of government—a process complex at best, and potentially rife with bias and corruption.

Congress must decide how to navigate or alter the existing landscape. If a federal bill leaves those labyrinthine approval processes in place while at the same time removing the barriers to interstate commerce, we could be on our way to a consolidated industry that looks increasingly like other highly concentrated markets, and with many of the accompanying costs. On the other hand, opening a national market slowly and deliberately, while promoting equitable paths to starting businesses, could help counter consolidation and promote a diverse and competitive market.

If barriers to entry were low for new marijuana businesses and if licenses were issued fairly and freely at the state level, federal legalization in support of an equitable marketplace would be an easier task. But existing markets are neither open nor free, and none of the federal bills currently under consideration would get them much closer to that goal. Certainly, descheduling cannabis would improve access to banking and capital and reduce tax burdens for all cannabis companies, and *some* current federal bills contain *some* provisions to facilitate technical assistance for small businesses. But the effectiveness of such measures alone to solve existing inequities and prevent new ones is questionable. So far, we do not have evidence that similar measures have worked entirely effectively at the state level, even before many interested corporate behemoths enter the national market.²⁸ Any policy seeking to benefit small businesses and disadvantaged communities is incomplete without a set of complementary policies expressly designed to prevent corporate domination at the state and national level. Eight specific recommendations for such policies are set forth below.

IV. FEDERAL POLICY AND ENFORCEMENT RECOMMENDATIONS

1. Allow people to grow a reasonable number of marijuana plants for personal use.

Criminalizing the personal cultivation of cannabis plants and forcing consumers to buy only commercial marijuana products gives an unnecessary advantage to corporations by creating a captive market with no alternative. Allowing home cannabis cultivation, meanwhile, provides an incentive for businesses to offer products that compete with homegrown cannabis on quality, price, and—importantly for medical patients—access to a wide array of cannabis types. Many states wisely prioritize the protection of patients and consumers by allowing limited at-home cultivation and enacting robust privacy laws. Home grow laws can serve as a “check” on an anticompetitive market by providing an alternative to purchasing from corporate retailers.

²⁷ Some of these security and inventory requirements, to be fair, could be responsible for the relative public health and safety success of legalization so far. Or they could be unnecessary barriers to entry. A sensible national legalization model that prioritizes both equity and public health and safety will dedicate time and resources to study the effectiveness of such measures, and whether there are ways for smaller businesses to achieve them at a lower cost, in order to support evidence-based federal regulation.

²⁸ The lack of data on various state innovations regarding cannabis rules and regulations should not be interpreted as a signal of failure. It is simply too early to tell how effective the combination of loans and technical assistance will be at reaching social equity goals, both due to COVID-related delays in implementation and the relatively recent passage of these laws (regulators had not been appointed as of July 2021 in New York, New Jersey, and Connecticut).

Congress could eliminate federal penalties for adults who cultivate some limited number of plants on private property, for example, and gift them to others without compensation. States would be able to adopt stricter state-level penalties if they so choose, but it is critical that federal reform not preclude states from having their own desired home-grow provisions that can help contribute to a more balanced market environment for consumers and smaller businesses.

2. Prohibit vertical integration.

Prohibitions on vertical integration (controlling multiple stages of production) are common-sense, historically tested methods of avoiding anticompetitive market dominance.

The regulatory model for alcohol, which has always prohibited vertical integration, might offer a place to start, but it will not ensure a competitive marketplace on its own. One can find thousands of brands of beer to choose from, but just two massive firms, Anheuser-Busch InBev and Miller-Coors,²⁹ control over 70% of beer sales.³⁰ Still, prohibiting vertical integration might be a relatively straightforward step toward preventing a national cannabis monopoly.

Many states, including Washington, West Virginia, Maryland, Pennsylvania, Massachusetts, and Michigan have sensibly set some type of limitation on the number and type of marijuana business licenses that one entity may hold in order to promote broader access to the market.³¹ However, those boundaries may not survive federal legalization if congressional legislation imposes no such limits on the national market. Businesses restricted in one state would suddenly find themselves competing in the national market against massive businesses based in states that impose no such restrictions, which could then lead the more restrictive states to remove their own limits.

If federal legalization indeed includes a limit on vertical integration, companies that are already vertically integrated at the state level could be broken up using similar processes by which monopolies in other industries have been spun off into separate companies.

None of the federal legalization bills currently being considered explicitly prohibit vertical integration, but the CAO Act imposes prohibitions against commercial bribery and uncompetitive trade practices in the cannabis industry³². Modeled after similar rules that apply to alcohol, these policies are designed to prevent businesses from bribing or inducing other businesses into practices that would favor their products and limit competition.

3. Do not cap the number of business licenses available in total, but limit how much of a market any one person or entity may control.

A properly enforced legal limit on how much of a state and national market a single actor can control³³ is a straightforward way to help ensure that the market does not unfairly favor existing operators or allow them to dominate the market before equity programs are developed or implemented (as has been the case in multiple state markets). It is more difficult to undo monopolization of a market than to prevent it from happening in the first place.

Limiting the extent to which one business can control the market should not be confused with language that limits the *total* number of cannabis licenses, businesses, or stores in any jurisdiction. Such limits generally work to stifle a fair and open market, because they create a bidding war that often rewards larger business with more resources or experience in presenting the elements of a winning application. In contrast, limits on how many licenses/business one entity or individual can control can prevent that actor from dominating the market.

In terms of fairness, the worst possible scenario would be to enact a limit on the total number of licenses in a jurisdiction but *not* limit how much of that market one person or entity can control. For example, if a city were to allow only five marijuana cultivation centers and ten stores within its boundaries, and then license several of those permits to just one vertically integrated entity, it would become very difficult for anyone else to compete in that market. Yet many states have taken precisely that approach, usually by enacting special privileges that allow existing medical marijuana businesses to easily expand their operations into the recreational market. Unfortunately, the current federal proposals by members of Congress miss the

²⁹ Notably, Molson-Coors is a member of the "Coalition for Cannabis Policy, Education, and Regulation," a group pushing for the federal legalization of cannabis.

³⁰ Wu, Tim. *The Curse of Bigness* (2018), 117.

³¹ Swinburne and Hoke, "State Efforts to Create an Inclusive Marijuana Industry," *Journal of Business and Technology Law* (2020).

³² Cannabis Administration & Opportunity Act Discussion Draft, 29.

³³ <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>.

³³ Sample language, as adopted from Massachusetts regulations, might read: "No person, corporation, association, or other entity shall, at any one time, own, be a majority shareholder of, or otherwise have direct or indirect control or management of more than a total of five cannabis enterprise licenses or 100,000 square feet of canopy cultivation issued by the [regulating agency]."

opportunity to correct these dynamics and instead could cement past results.

Different types of rules attempting to prevent market domination have been passed in several states, including Massachusetts, Pennsylvania, and Illinois, which limit the number of one type of license an entity may hold to three, five, and ten respectively.³⁴ To balance state interests in autonomy with goals for a fair and equitable national cannabis marketplace, a sensible congressional bill would automatically grant a federal registration to anyone with a state license, provided that doing so would not violate the federal government's own limits on overall ownership and control.

4. Create incentives for states to license small or disadvantaged businesses.

The first marijuana social equity programs in the country were enacted in the mid-2010's, and subsequent programs have built upon them. It is too early to draw final conclusions as to their benefits, but years of innovation and continuous adjustments based on public feedback have created a wealth of information and progress.³⁵

Oakland, California, the first jurisdiction to pass equity-related legislation for cannabis, has developed a comprehensive program for eligible applicants, providing them with access to grants and property loans, among other support services. The city has also set aside 50% of dispensary licenses for equity licensees. Massachusetts, the first state to pass cannabis equity legislation at the state level, reserved all of its cannabis delivery licenses for equity program participants for a period of at least three years, allowing the new businesses to bypass brick-and-mortar stores and deliver cannabis products directly to consumers. Illinois was the first state to create a fund to provide capital to social equity businesses, and Colorado recently revamped its entire legal marijuana program with a new focus on social equity. Washington finally passed an equity licensing measure last year. New York and New Jersey have drawn from these experiences, and some observers expect them to implement the most equitable marijuana programs yet.

To know whether state equity programs are successful, federal legislation must provide a mechanism to assess the effectiveness of different state innovations and encourage those that work best. One such mechanism, focused on the historic inequities of marijuana prohibition's enforcement, was part of the Marijuana Justice Act of 2019; a provision in that bill reduced federal funds for the construction or staffing of prisons and jails to those states that arrest or incarcerate people for marijuana offenses disproportionately by race.³⁶ A similar model could be used to tie federal funds to benchmarks related to state support and advancement of small and disadvantaged businesses in the marijuana industry.

5. Enforce ownership limits and review mergers based on evidence of predatory and anticompetitive tactics in state marijuana markets.

States with ownership limits have developed antitrust enforcement mechanisms. In the past few years, multiple high-profile (and potentially anticompetitive) marijuana company mergers were announced only to be canceled after failing to receive state regulators' approval. Since marijuana laws typically allow regulators broad access to documents and contracts, investigators can examine the contracts to find violations of ownership and control rules, such as unlawful management agreements that give control and revenues to one party while a different party is listed on paperwork. Investigators could also look at supply or purchase agreements to find exclusive contracts that could impede new competitors from entering the market. Such investigative authority could exist at both state and federal levels.

As with regulatory rulemaking and licensing, the merger review process should be transparent and inclusive. Agencies should welcome input from industry and other members of the public as part of their review. Whenever possible, proposed remedies and agreements should be subject to public comment before they become final. Penalties at both the state and federal level should be sufficient to disincentivize violations. In Massachusetts and California, for example, a marijuana business license essentially becomes void if the business changes who controls the business without regulatory approval.³⁷

6. Disqualify corporations from the cannabis industry if they have engaged in corporate crimes, defrauded the public, or caused significant public health damage.

Proposed federal marijuana legalization bills as well as virtually every state cannabis legalization law exclude people from entering the marijuana industry based on past individual conduct or criminal records. Some of these exclusions should be

³⁴ Swinburne, Matthew, and Kathleen Hoke. "State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs." *Journal of Business and Technology Law*, 3, 15, no. 2 (2020). <https://digitalcommons.law.umaryland.edu/jbtl/vol15/iss2/3/>.

³⁵ Title, Shaleen. Fair and Square: How to Effectively Incorporate Social Equity Into Cannabis Laws and Regulations (December 6, 2021). Ohio State Legal Studies Research Paper No. 672, Drug Enforcement and Policy Center, 2021, Available at SSRN: <https://ssrn.com/abstract=3978766> or <http://dx.doi.org/10.2139/ssrn.3978766>

³⁶ "Marijuana Justice Act of 2019." S.597, 116th Congress (2019–2020). <https://www.congress.gov/bills/116/congress/senate/bills/597>.

³⁷ Massachusetts 935 CMR 500.415. <https://www.mass.gov/doc/935-cmr-500-adult-use-of-marijuana/download>. California 4 CA CCR §15023, 4 CA CCR §15023. <https://govt.westlaw.com/calregs/Document/IB1FBEE8DA137468E8E50E98E617C61D8>.

eliminated (for instance exclusions based on convictions for cannabis possession and small-scale distribution), in part because these exclusions disproportionately disadvantage certain groups and in part because there is no evidence that excluded populations pose any kind of special risk if involved in the new marijuana industry. There is, however, good reason to adopt exclusions for corporations or other business entities that have been bad actors relevant to securing operating licenses or running a marijuana business. Under the CAO Act, States Reform Act, or any other federal bill that includes federal permitting, a mandatory disqualification should be added for actual malfeasance in corporate practices.³⁸ Under such a rule, any corporation that has been found to engage in corporate crimes or fraud, or to have produced products that have caused substantial harm to public health (such as Big Tobacco companies), should not be permitted to enter the marijuana industry, nor should any corporation owned or controlled by that entity.

7. Create a multi-agency task force to enforce anti-monopoly limits.

An anti-monopoly task force made up of state, federal, and local officials who share information would help to prevent unlawful corporate conduct that undermines equitable cannabis laws. At the state level, companies that receive social equity benefits, for example, already report attempted predatory contracts and practices by other businesses to regulators who can then investigate them, address them with new rules, and even share the information with regulators in other states. Reviews of material collected for banking compliance could potentially also be helpful to regulators in detecting transactions related to unlawful or hidden control of a company. Federal legalization should complement and expand this process, especially because a federal watchdog can better identify business with a problematic track record in multiple jurisdictions.

Appropriate enforcement should include a way for members of the public to share information about potential violations with the multi-agency task force. For example, whistleblowers who are witness to or even invited to participate in anticompetitive conduct should be incentivized to provide tips to the task force or other regulators.

8. Authorize states to continue to ban or delay interstate commerce to preserve state-level advantages to local businesses.

Vanderbilt Law School Professor Rob Mikos wrote earlier this year that “if we want to limit industry consolidation or boost minority participation in the cannabis market or shape the cannabis market in other ways, it will likely take congressional legislation to get the job done. ... As it stands, however, Congress does not appear to recognize the impending rise of interstate commerce in cannabis and the challenges it will pose to state regulators.”³⁹

Legalizing marijuana at the federal level is not enough to solve current problems of inequitable access to the market, and it may in fact result in a dramatic consolidation of the industry. The most sensible way to proceed with federal legislation would be for Congress to explicitly authorize states to delay or ban interstate commerce initially, as part of a larger plan for racial and social justice, and then take the necessary time to gather data and information to proactively regulate the industry before states are required to allow interstate commerce. This would also allow state and local social equity programs to continue.

If the MORE Act, States Reform Act, or CAO Act passed as written, consolidation is highly likely, fueled by economies of scale and regional advantages such as favorable growing climates and industry-friendly state and local politicians. This result is especially likely during the formative period after marijuana is descheduled but before federal regulations are promulgated. One way to ensure smaller businesses get off the ground is to specifically allow individual states to determine when to join the national marketplace.

By explicitly authorizing states to continue their current programs, we can slow down consolidation and states can continue to experiment, especially with programs that favor local businesses. We are, after all, still learning the ins and outs of how best to regulate marijuana. With more time to study state markets, federal agencies can develop the core competency to properly regulate the industry to promote competition and innovation.

V. CONCLUSION

Cannabis legalization provides a rare opportunity to nurture a more equitable industry nationally and a more accountable corporate culture. Lawmakers are effectively starting from scratch, legalizing a multibillion-dollar industry almost overnight around a plant that has been illegal for generations. Decisions made today will have lasting impacts on the future of the market,

³⁸ For sample legislative language creating this disqualification, see Parabola Center’s model language, Approach #1, pages 8–9. <https://www.parabolacenter.com/MORE%20Act%20Rewrite%20by%20Parabola%20Center.pdf>.

³⁹ Mikos, Robert A. “Interstate Commerce in Cannabis.” March 2, 2021. *Boston University Law Review*, No. 857 (2021), Vanderbilt Law Research Paper No. 21-09. <https://ssrn.com/abstract=3796262>.

determining whether the cannabis market is dominated by a few powerful companies or open to all types of entrepreneurs.

The biggest lesson from Big Tobacco and Big Tech is that free and open competition is not an issue we can safely figure out after the fact. The legalization movement has broad public support and has its origins in grassroots advocacy. Public policy around it should rightly serve the public. Sensible regulation to prevent excessive corporate power, protect public health, and serve the public good must not become a sidenote.

It is up to us to build a fair market where everyone has an opportunity to compete and thrive. Let's reap the benefits of competition and enjoy an innovative market that respects workers, consumers, and the cannabis plant itself for generations to come.