



# Oregon Cannabis Equity Act

“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked ‘insufficient funds.’ But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check- a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now.”

- I Have a Dream, Reverend Dr. Martin Luther King, Jr.



## Legislative Report

The historic criminalization of cannabis has left an indelible mark on communities of color and a legacy of disenfranchisement across the United States. With successful legalization efforts in states like Oregon, the “War on Drugs” has been transformed into a massively profitable cannabis based health and wellness industry.<sup>1</sup> However, Oregon has not reconciled that minority communities have been victim to disproportionate cannabis arrest rates for decades, in addition to other forms of public and private discrimination, that have limited economic and wealth creation opportunities. This robust historical legacy has contributed to a significant disparity in intergenerational wealth between White Americans and communities of color. This gulf and historical disenfranchisement effectively keeps communities of color out of the legalized cannabis market.

The Oregon Cannabis Act (LC 1467) will establish a holistic state-wide cannabis equity program to create a path toward building wealth in communities of color, increase market diversity in the cannabis industry, and repair past harms. The cannabis industry in the United States grew to \$10.4 billion in 2018 and employed more than 250,000 people.<sup>2</sup> In Oregon, 2019 cannabis sales reached \$725.8 million, not including medical sales.<sup>3</sup> Online cannabis guide Leafly’s fourth annual national report ranked Oregon fourth in the nation in cannabis industry jobs and the report estimated there were 18,274 jobs in the legal marijuana industry in Oregon as of January 2020.<sup>4</sup> “This staggering data underscores the need to revisit avenues for creating

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<sup>1</sup> Jasmin Mize, *Reefer Reparations*, 3 Willamette L.R. 2, 34 (2020), <https://willamette.edu/law/resources/journals/sjelj/publications/pdf/2.-mize.pdf>.

<sup>2</sup> *Id.* at 29; (citing Don Reisinger, *The Legal Marijuana Industry is Soaring—And 2019 Could Be Its Best Year Yet*, *Fortune* (Dec. 27, 2018), <https://fortune.com/2018/12/27/legal-marijuana-industry-sales/>).

<sup>3</sup> Pete Danko, *Oregon Cannabis Sales Soar in 2019, Despite Vape Crisis and Depressed Prices*, *Portland Business Journal* (Jan 3, 2020).

<https://www.bizjournals.com/portland/news/2020/01/03/oregon-cannabis-sales-soar-in-2019-despite-vape.html>

<sup>4</sup> Pete Danko, *Oregon ranks 4th in U.S. for marijuana jobs*, *Portland Business Journal* (Feb. 10, 2020), <https://www.bizjournals.com/portland/news/2020/02/10/only-three-states-have-more-marijuana-jobs-than.html>;

economic opportunities in this growing industry to those who, under current law, can no longer be said to have committed any wrong.”<sup>5</sup> This dynamic is especially notable in Oregon, as voters in 2020 voted in favor of ballot initiative 110 to decriminalize all simple drug possession.<sup>6</sup>

The Oregon Cannabis Equity Act will fortify Oregonians communities most impacted by the the War on Drugs in three ways: (1) expand current expungement statutes and fund automatic expungement programs; (2) allocate funds to community partners that support land and home ownership and income building through jobs and entrepreneurship for BIPOC communities with a priority of supporting African American, Native American, and Latina/o/x people; and (3) allocate funding to community partners that support BIPOC-owned cannabis businesses with a variety of funding options (zero-to-low interest loans, grants, equity) and technical assistance.

A Cannabis Equity Board (CEB) will be established to oversee, monitor, measure and report on cannabis equity outcomes as prescribed by legislation; specifically focused on oversight of the cannabis tax revenue allocations and equity outcomes. The CEB will own annual reporting of the Cannabis Equity Fund, as part of an all-encompassing annual Cannabis Equity report, which will include a review of cannabis equity license program qualifications to ensure participants represent communities most impacted by cannabis prohibition.

In order to effectively use the legal cannabis marketplace as a tool to lessen racial wealth disparities and increase market diversity, Oregon’s equity program must go a step further than other cannabis equity programs and use language that directly names communities most impacted by prohibition. The cannabis-equity license program, administered by the Oregon

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Bruce Barcott et al., *Cannabis Jobs Report: Legal cannabis now supports 243,700 full-time American jobs*, Leafly (Feb. 7, 2020), <https://www.leafly.com/news/industry/243700-marijuana-jobs-how-many-in-america>.

<sup>5</sup> Mize, *supra* note 1, at 29.

<sup>6</sup> Ballotpedia, *Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative* (2020), [https://ballotpedia.org/Oregon\\_Measure\\_110\\_Drug\\_Decriminalization\\_and\\_Addiction\\_Treatment\\_Initiative\\_\(2020\)#:~:text=Oregon%20Measure%20110%2C%20Drug%20Decriminalization%20and%20Addiction%20Treatment%20Initiative%20\(2020\).-From%20Ballotpedia&text=Oregon%20Measure%20110%2C%20the%20Drug.It%20was%20approved](https://ballotpedia.org/Oregon_Measure_110_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)#:~:text=Oregon%20Measure%20110%2C%20Drug%20Decriminalization%20and%20Addiction%20Treatment%20Initiative%20(2020).-From%20Ballotpedia&text=Oregon%20Measure%20110%2C%20the%20Drug.It%20was%20approved).

Liquor Control Commission (OLCC), will thus be made available to individuals convicted of a cannabis crime; and to individuals who are a member of a targeted community: African American, Latino/a/x, or Native American, or a member of a minority group not currently listed that through empirical evidence, subject to review by the CEB, can show historical community impact from cannabis prohibition commensurate to the listed impacted communities.

Qualifying equity businesses will have the benefits of gaining a provisional OLCC cannabis license without including a land use compatibility statement, fast tracked license review, lessened licensing fees, access to grants and zero-to-low interest loans, and technical assistance. These measures will directly address the capital disparities that have kept entrepreneurs of color from joining the cannabis market. The OLCC will also create an equity license variant for shared kitchen and shared processing that allows multiple licensees to share the same space and equipment.

This legislation will also allow equity businesses to be first to market in emerging aspects of the cannabis marketplace, an opportunity missed when Oregon legalized cannabis in 2014, as this legislation will create a new delivery and social consumption license that will be available exclusively to equity businesses for the first 10 years. Equity businesses will also be required to include a social equity plan within their application, to ensure that the business is furthering equitable representation of Black and Brown people throughout the industry. The OLCC will add two full time employees, funded by the Cannabis Equity Fund, to focus on supporting equity applicants and licensees through the process of licensing and ongoing support for equity licenses.

This report addresses the social and legal reasons this program should directly name African American, Latinx, and Native American communities, and those previously convicted of cannabis offenses, as the main benefactors.

## **I. Compelling Governmental Interest**

A State's interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, “identified discrimination”; second, the State must have had a “strong basis in evidence” to conclude that remedial action was necessary, before it embarks on an affirmative action program.<sup>7</sup>

### **A. Cannabis Prohibition had a Discriminatory Intent, with Repercussions Falling Disparately on African American, Latinx, and Indigenous Communities.**

#### **1. Historical and Legislative Background of Cannabis Prohibition.**

“The pharmacological use of cannabis in the United States started in the middle of the nineteenth century, however, over time, prejudices against both Black people and Mexican immigrants fused to ensure the demonization and criminalization of those who sold and used marijuana. Mexican laborers in the Southwest, already viewed as lazy, criminally minded, and of lesser intellect, became associated with marijuana smoking as an explanation for their bad attributes. The term ‘Marijuana’ came into vogue to underscore the drug's 'Mexican-ness,' further inciting anti-immigrant sentiments. Similarly, black marijuana smokers in the South, particularly the jazz musicians of New Orleans, ignited racialized fears of violent crime Marijuana was scapegoated as prompting murder, rape, and mayhem among black communities.”<sup>8</sup> Still today drug criminalization has profiled Latinos as possible traffickers due to the supply routes connecting Latin American production of illicit drugs to market in the United States.<sup>9</sup>

This misinformation, and the xenophobia and racism that went along with it, eventually found its way into Oregon newspapers and media. One such story was titled “Crazed Mexican

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<sup>7</sup> *Bush v. Vera*, 517 U.S. 952, 982 (1996).

<sup>8</sup> Mize, *supra* note 1, at 5-6.

<sup>9</sup> Steven Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. Davis L. Rev. 689, 692 (2016), <https://digitalcommons.law.seattleu.edu/faculty/778>.

Kills One and Wounds Two.”<sup>10</sup> This article alleged, “Crazed by ‘marihuana,’ the Mexican substitute for opium, Rafael Marquez late this afternoon ran amuck in Juarez, Mexico, killed one man, wounded two others seriously and then barricaded himself in an adobe house, from the shelter of which he fought a 20 minue battle with Mexican police and soldiers who literally shot him to pieces before he ceases to desist.”<sup>11</sup> Another article titled “Evil Mexican Plants that Drive You Insane” said that “The dry leaves of marijuana alone or mixed with tobacco, make the smoker wilder than a wild beast.”<sup>12</sup> The article goes on further to say “It is at this stage of the debauch that murders are committed by smokers of the marihuana weed.”<sup>13</sup> An article titled “Texas Menaced by New ‘Dope’ Weed” stated “no inconsiderable amount of the crime that is being constantly committed by mexicans of the lower class in the border region is directly traceable to the consumption of the leaves of this poisonous plant.”<sup>14</sup> These articles were published at the same time the Ku Klux Klan gained a foothold in Oregon. By 1923, the Oregon KKK claimed over 35,000 members.<sup>15</sup>

Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics, used his office to spread misinformation that associated cannabis use with violence and death.<sup>16</sup> Here are a few quotes from Anslinger: “Reefer makes darkies think they're as good as white men”; “Marihuana influences Negroes to look at white people in the eye, step on white men's shadows and look at a white woman twice”; “There are 100,000 total marijuana smokers in the US, and

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<sup>10</sup> The Oregon Journal, *Crazed Mexican Kills One and Wounds Two* (Mar. 16, 1913), <https://oregonnews.uoregon.edu/lccn/sn85042444/1913-03-16/ed-1/seq-1/#words=marihuana>.

<sup>11</sup> *Id.*

<sup>12</sup> The Oregon daily journal, *Evil Mexican Plants that Drive You Insane* (Mar. 16, 1913), <https://oregonnews.uoregon.edu/lccn/sn85042444/1913-03-16/ed-1/seq-79/#words=marihuana+Marihuana>.

<sup>13</sup> *Id.*

<sup>14</sup> Falls City news, *Texas Menaced by New “Dope” Weed* (Aug. 28, 1915), <https://oregonnews.uoregon.edu/lccn/sn96088056/1915-08-28/ed-1/seq-1/#words=marihuana>.

<sup>15</sup> Eckard Toy, *Ku Klux Klan*, *The Oregon Encyclopedia* (Sep. 19, 2019), [https://www.oregonencyclopedia.org/articles/ku\\_klux\\_klan/#.X\\_DGj2RKiLo](https://www.oregonencyclopedia.org/articles/ku_klux_klan/#.X_DGj2RKiLo)

<sup>16</sup> Mize, *supra* note 1, at 6.

most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”<sup>17</sup>

This propaganda ultimately led to passage of the Marijuana Tax Act in 1937, which effectively made marijuana a controlled substance under federal law.<sup>18</sup> Anslinger made overt appeals to racism during his testimony in support of the Marihuana Tax Act of 1937. For example, he claimed before the U.S. House Committee on Ways and Means that “[a] Negro raped a girl eight years of age. Two Negroes took a girl fourteen years of age and kept her for two days in a hut under the influence of marihuana. Upon recovery she was found to be suffering from syphilis.”<sup>19</sup>

Anslinger, as Chief of the U.S. Federal Bureau of Narcotics, created the modern war on drugs, and used his power to target prominent African Americans. One notable, and unfortunate, victim of Anslinger’s crusade against cannabis was famous jazz singer Billie Holiday.<sup>20</sup> One night after Holiday sang her protest song “Strange Fruit,” Anslinger sent her a warning that effectively told her to stop singing the song.<sup>21</sup> Billie Holiday refused. Anslinger responded by sending a government informant to gather information on Holiday so that the agency could arrest her for drug possession.<sup>22</sup> After Holiday was released from jail following a one year sentence for drug possession, Anslinger continued his war against her. Anslinger began by working to ensure

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<sup>17</sup> Michael Vitiello, *Marijuana Symposium: Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 Lewis & Clark L. Rev. 789, 799 (2019). <https://law.lclark.edu/live/files/28624-lcb233article1vitiellowebsitepdf>.

<sup>18</sup> Mize, *supra* note 1, at 6. (citing PBS FRONTLINE, *Marijuana Timeline*, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited August 16, 2019). The MTA effectively outlawed cannabis by requiring physicians and pharmacists to register and report use of the plant, as well as pay an excise tax for authorized medical and industrial uses.)

<sup>19</sup> Vitiello, *supra* note 17, at 800.

<sup>20</sup> NPR Thoughtline, *Strange Fruit* (Aug. 22, 2019, <https://www.npr.org/transcripts/752909807>).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

that night clubs would not employ Billie Holiday.<sup>23</sup> Meanwhile, Holiday was trying to get sober, which hindered Anslinger's ability to arrest her again for drug possession. Anslinger responded by sending another informant to stalk Holiday, and this agent likely planted drugs on Holiday so that she could be arrested again. This arrest was devastating for Holiday and she spent the remainder of her life battling addiction and harassment from federal agents. Even when Billie Holiday was in the hospital and critically ill, Anslinger's men went into the hospital and arrested her on her hospital bed.<sup>24</sup>

Anslinger did not target prominent White figures for their drug use as he did prominent African Americans. "At the same time that Harry Anslinger discovered that Billie Holiday had an addiction problem, he found out that Judy Garland, Dorothy from 'The Wizard Of Oz,' also had an addiction problem."<sup>25</sup> Instead of persecuting Ms. Garland, Anslinger visited her and advised her "to take slightly longer vacations."<sup>26</sup> "Years later, Harry Anslinger found out that a man he really admired, Senator Joseph McCarthy, had an addiction to opiates."<sup>27</sup> Rather than destroy his career as Anslinger did with Holiday, Anslinger "arrange[d] for a pharmacy in Washington, D.C. to discreetly give him a legal version of the drug."<sup>28</sup> Targeting African American leaders, while giving White figures a pass, further shows that Anslinger's war on drugs had a discriminatory intent.<sup>29</sup>

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<sup>23</sup> *Id.* ("At that time, to perform anywhere where alcohol was served in most cities, you needed something called a cabaret performance license, and they made sure that Billie Holiday was denied a cabaret performance license. They take away singing from Billie Holiday.").

<sup>24</sup> *Id.* ("And Harry Anslinger was very proud of what he did. He wrote after her death, for her, there would be no more good morning heartache. A member of the public wrote him a poem that he kept in a special place. It said, until the last judge proclaims that the last addict has died, then - not till then - may you be retired.").

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").



When President Nixon declared the “War on Drugs,” the antiwar movement and minority communities at the forefront of the civil rights movement were his chief political enemies.<sup>30</sup> John Ehrlichman, Nixon's aide on domestic affairs, who would eventually get convicted in the Watergate scandal, gave the following explanation to Harper’s magazine regarding the war on drugs: “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”<sup>31</sup>

“Nixon temporarily placed marijuana in Schedule One, the most restrictive category of drugs, pending review by a commission he appointed led by Republican Pennsylvania Governor Raymond Shafer. In 1972, the commission unanimously recommended decriminalizing the possession and distribution of marijuana for personal use. Nixon ignored the report and rejected its recommendations.”<sup>32</sup>

The presidency of Ronald Reagan marked the start of an unprecedented expansion of the drug war. The number of people incarcerated for nonviolent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997.<sup>33</sup> The increasingly draconian attitude toward drug

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<sup>30</sup> Mize, *supra* note 1, at 7.

<sup>31</sup> Alex Lockie, *Top Nixon adviser reveals the racist reason he started the 'war on drugs' decades ago*, Business Insider (Jul. 31, 2019), <https://www.businessinsider.com/nixon-adviser-ehrllichman-anti-left-anti-black-war-on-drugs-2019-7>.

<sup>32</sup> Drug Policy Alliance, *A Brief History of the Drug War*, [https://drugpolicy.org/issues/brief-history-drug-war?ms=5J9\\_2011Oregon110Onboard2&utm\\_campaign=fy21acquisition&cid=7011K000001S5M1QAK&spMailingID=43964982&spUserID=MTE2MTg5OTU2NTg3OQS2&spJobID=1881930836&spReportId=MTg4MTkzMDgzNgS2](https://drugpolicy.org/issues/brief-history-drug-war?ms=5J9_2011Oregon110Onboard2&utm_campaign=fy21acquisition&cid=7011K000001S5M1QAK&spMailingID=43964982&spUserID=MTE2MTg5OTU2NTg3OQS2&spJobID=1881930836&spReportId=MTg4MTkzMDgzNgS2).

<sup>33</sup> *Id.*

enforcement blocked the expansion of syringe access programs and other harm reduction policies to reduce the rapid spread of HIV/AIDS.<sup>34</sup>

“Given the racialized history of marijuana’s regulation, the War on Drugs has facilitated U.S. law enforcement’s targeting of communities of color, creating a legacy of profiling and punishment directed at African American and Latino cannabis users and sellers. This has rendered a unique portrait of the U.S. prison system, which seems to have been designed almost exclusively with the intent to cage African American and Latino drug offenders.”<sup>35</sup>

“Edward Weidenfeld, who served as general counsel to Ronald Reagan’s campaign for president, said at the time, he respected Reagan’s escalation of the drug war. However, now, Weidenfeld admits that ‘the more [I] learned about the war on drugs, the more I learned it was really a war selectively fought against minorities in th[is] country.’ Now, Weidenfeld co-owns Phyto Management, a medical cannabis cultivator in Washington, D.C. He also co-owns a large marijuana grow business in Washington state, and he uses medical marijuana to treat his Parkinson’s disease.”<sup>36</sup>

## 2. Black and Brown Communities were Disproportionately Policed and Incarcerated During the War on Drugs and Cannabis Prohibition.

Though cannabis prohibition did not use race-based language in its enforcement, the War of Drugs “was driven in large part by demonizing cannabis and punishing those who use it, and has long victimized the most vulnerable among members of our population.”<sup>37</sup> Despite the fact that Black and White Americans use cannabis at about the same rate, national data reveals that

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<sup>34</sup> *Id.*

<sup>35</sup> Mize, *supra* note 1, at 10.

<sup>36</sup> *Id.* at 15. (citing Eleanor Clift, *How a Reagan Veteran Learned to Stop Worrying and Love the Weed Business*, Daily Beast (Apr. 20, 2018), <https://www.thedailybeast.com/how-washington-republican-edward-weidenfeld-learned-to-stop-worrying-and-love-the-weed-business>).

<sup>37</sup> *Id.* at 1.

Black Americans have been arrested for possession at more than 3.5 times the rate of Whites.<sup>38</sup> In 2017, “91% of marijuana-related arrests were for possession alone (as opposed to manufacturing or trafficking) and 47% of those [seized] were Black or Latino.”<sup>39</sup> According to the ACLU in 2013, Black Oregonians were more than twice as likely to be arrested than Whites for cannabis possession.<sup>40</sup> Breaking rates down by county, the 2013 ACLU report shows that Oregon’s more racially diverse counties had the highest cannabis arrest disparities. The disparity between the Black and White cannabis arrest rate in Multnomah county was 3.3, Washington county was 2.8, Lane county was 3.5, and Marion county was 2.8.<sup>41</sup> According to the ACLU’s report in 2018, Black people in Oregon were more than 1.8 times likely to be arrested for cannabis possession than White people.<sup>42</sup>

Statistics provided by the Oregon Criminal Justice Commission (CJC) backs the findings of the ACLU as far as over policing of cannabis related crimes against communities of color.<sup>43</sup> Despite being only around 2% of Oregon’s population, African Americans represented 10% of cannabis delivery arrests, 5% of cannabis possession arrests, and 3% of all cannabis manufacturing arrests in Oregon between 2006-2020.<sup>44</sup> This disparity persists not only in cannabis, but also in policing of all drug related crimes. African Americans represented 8% of all drug possession convictions and 9% of all delivery and manufacturing drug convictions from

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<sup>38</sup> Am. Civ. Liberties Union, *The War on Marijuana In Black And White*, 162 (Jun. 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.

<sup>39</sup> Brian Geddes, *Cannabis Social Equity Programs are Imperfect but Critically Important*, Greenwich Time (Feb. 27, 2019), <https://www.greenwichtime.com/news/article/Cannabis-Social-Equity-Programs-Are-Imperfect-but-13646592.php>.

<sup>40</sup> Am. Civ. Liberties Union, *supra* note 38, at 172 (Jun. 2013).

<sup>41</sup> *Id.*

<sup>42</sup> Am. Civ. Liberties Union, *Extreme Racial Disparities Persist in Marijuana Arrests*, (2020), [https://graphics.aclu.org/marijuana-arrest-report/OR?initms\\_aff=nat&initms\\_chan=eml&utm\\_medium=eml&initms=200422\\_420\\_messageaction-moreact\\_gradead\\_sail&utm\\_source=sail&utm\\_campaign=420&utm\\_content=200422\\_criminallaw\\_messageaction-moreact\\_gradead&ms\\_aff=nat&ms\\_chan=eml&ms=200422\\_420\\_messageaction-moreact\\_gradead\\_sail&mi\\_u=a3o4A000000Aq9OQAS&key=OR](https://graphics.aclu.org/marijuana-arrest-report/OR?initms_aff=nat&initms_chan=eml&utm_medium=eml&initms=200422_420_messageaction-moreact_gradead_sail&utm_source=sail&utm_campaign=420&utm_content=200422_criminallaw_messageaction-moreact_gradead&ms_aff=nat&ms_chan=eml&ms=200422_420_messageaction-moreact_gradead_sail&mi_u=a3o4A000000Aq9OQAS&key=OR).

<sup>43</sup> See Appendix A.

<sup>44</sup> *Id.* at 5.

1991-2006.<sup>45</sup> Latinx people in Oregon represented 14% of all drug possession convictions and 29% of all delivery and manufacturing drug convictions from 1991-2006.<sup>46</sup>

Even though Oregon has made legislative efforts to decriminalize drug possession and there has been some improvement in arrest disparities,<sup>47</sup> policing of both cannabis and non-cannabis drug laws in Oregon continues to disproportionately impact communities of color. Following passage of House Bill 2355, the Oregon CJC completed a study in 2018 to measure the impact of the legislation.<sup>48</sup> It was observed that “Blacks experienced the highest arrest rate throughout the study period as their arrest rate has consistently been nearly double that of the next closest group, Native Americans.”<sup>49</sup> Asians reported the lowest rate of any group, even lower than the rate for White Oregonians<sup>50</sup> Similar to arrests, African Americans and Native Americans in Oregon were overrepresented compared to Whites for felony possession of controlled substances convictions.<sup>51</sup> While felony drug conviction rates for White Oregonian’s dropped by 95% from 2015-2016 to 2017-2018, the conviction rate for Hispanics fell by only 75% and the conviction rate for Native Americans fell by 78%.<sup>52</sup> Between 2012 and 2016, on average, a Black person in Oregon was 2.5 times as likely to be convicted of a possession of controlled substance felony as a White person in Oregon.<sup>53</sup> Another report by the CJC was completed in 2019.<sup>54</sup> Despite a continued decline in disparity rates, minority communities

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<sup>45</sup> *Id* at 4.

<sup>46</sup> *Id*.

<sup>47</sup> See Oregon H.B. 2355 (2017); reclassified the crime of possession of a controlled substance (PCS) to a Class A misdemeanor from a Class B or C Felony, <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2355/Enrolled>.

<sup>48</sup> Michael Schmidt, *Possession of Controlled Substances Report Per House Bill 2355*, Oregon Criminal Justice Commission (CJC) (Sep. 15, 2018), <https://www.oregon.gov/cjc/CJC%20Document%20Library/PossessionofControlledSubstancesReport-9-2018.pdf>.

<sup>49</sup> *Id*. at 10.

<sup>50</sup> *Id*.

<sup>51</sup> *Id*. at 14.

<sup>52</sup> *Id*. at 11.

<sup>53</sup> *Id*. at 12.

<sup>54</sup> Michael Schmidt, *Update to Possession of Controlled Substances Report*, Oregon Criminal Justice Commission (CJC) (December 2019), <https://www.oregon.gov/cjc/CJC%20Document%20Library/2019PCSReport.pdf>.

continued to be disproportionately arrested and incarcerated for drug related crimes. Updated statistics can be found on the CJC dashboard at: [Criminal Justice Commission : Oregon Drug Trends : Statistical Analysis Center](#).

Though the most recent CJC reports found that Latinx populations were underrepresented in some drug arrest and convictions categories, this is likely due to faults in Oregon’s tracking of race when compiling these statistics. For a long time, the Oregon Law Enforcement Database Service (LEDS) didn’t track Latinx populations. Many public policy organizations also do not accurately track Latinx populations when studying disparate arrest rates.<sup>55</sup> Failing to account for Latinx individuals in White and Black estimates tends to inflate White proportions and lessen Black proportions of arrests, admissions, and prison population estimates, masking the true Black and White racial disproportionality.”<sup>56</sup> “In particular, third-party reported race variables include a higher proportion of White observations and lower proportions of Hispanic, Native American, and Asian when compared to self-reported information.”<sup>57</sup> Oregon DOC data suggests that roughly “66,000 observations in Oregon are improperly included in the White category. Further, these discrepancies in the race variable are not limited to the DOC data set but are present in all datasets that do not rely on self-reported race.”<sup>58</sup>

In response to this data shortfall, the office of Representative Akasha Lawrence Spence requested arrest data from the CJC for data using a racial correction algorithm.<sup>59</sup> This data shows

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<sup>55</sup> Human Rights Watch, *Decades of Disparity, Drug Arrests and Race in the United Nations* (Mar. 2, 2009, [https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#\\_ftn7](https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#_ftn7)). (“Hispanics/Latinos are included in the figures provided for white and black drug arrestees in this report, but their number or percentage cannot be determined”).

<sup>56</sup> Casey T. Harris, et. al., *Are Blacks and Hispanics Disproportionately Incarcerated Relative to Their Arrests? Racial and Ethnic Disproportionality Between Arrest and Incarceration* (Nov. 26, 2009), <https://link.springer.com/article/10.1007/s12552-009-9019-x>.

<sup>57</sup> Oregon Criminal Justice Commission (CJC), *Probabilistic Race Correction for Hispanics*, 1 (Sep. 2018), <https://www.oregon.gov/cjc/CJC%20Document%20Library/RaceCorrectionTechDocFinal-8-6-18.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> See Appendix B.

that African Americans in Oregon accounted for over 6% of all drug possession arrests from 2006-2019.<sup>60</sup> While the arrest rate for Latinx Oregonians for all drug activities has decreased in recent years, the Latinx populations suffered from notably high disparities in the 1990's. In 1991 Latinx Oregonians accounted for over 22% of all drug arrests, in 1993 the number increased to over 23%, and in 1996 Latinx Oregonians accounted for over 17% of all drug arrests.<sup>61</sup> What is now known regarding the collateral impact of disparate arrest rates leads to a conclusion that the repercussions of historically disparate arrest rates still impact Oregon's Latinx population.

Looking at drug related arrest and incarceration data from other states that have been able to track Latinx populations successfully, it is clear that the Latinx community has been disproportionately impacted by drug policing. In 2012, The American Journal of Public Health completed a disparate impact study by tracking approximately 170,000 drug-involved arrests in California between 1995 and 2005.<sup>62</sup> The report found a significant statistical disparity in prison dispositions between Hispanics and Whites for drug related crimes.<sup>63</sup> It was observed that prior to passage of Proposition 36 in California (which decriminalized drug possession in the state), odds of a prison sentence among Hispanics was 21% higher than among Whites.<sup>64</sup> The likelihood of diversion among Hispanics was also significantly less common than among Whites.<sup>65</sup> This discrepancy remained statistically significant even after passage of Proposition 36 in California.<sup>66</sup>

Nationwide data further reflects the racial disparity in drug policing and sentencing. About half of all federal prisoners (47.3%) are serving time for a drug offense.<sup>67</sup> For prisoners

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Nancy Nicosia PhD, et al., *Disparities in Criminal Court Referrals to Drug Treatment and Prison for Minority Men*, Am. J. of Pub. Health (Dec. 28, 2012), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2013.301222>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. Bus. & Tech. L. 235, 251 (2020),

with a drug offense as their most serious crime, 22% were White (17,300), 37% were Black (29,000), and 39% were Hispanic (31,000).<sup>68</sup> In state correctional facilities, the racial breakdown of prisoners with a drug offense as their most serious crime. is 32.4% White (61,600), 30.4% Black (57,900), and 20.3% Hispanic (38,600).<sup>69</sup> The racial breakdown of incarceration rates for drug crimes, at both the federal and state level, should raise concerns as White American make up 60.4% of the population, while Black and Latinx individuals make up only 13.4% and 18.3% of the population, respectively.<sup>70</sup> This concern should be compounded by the fact that White people in the United States use illegal drugs in the course of their lifetime at the same level or even higher than Blacks or Hispanics.<sup>71</sup>

The discrepancy in drug policing has been admitted by Oregon’s own law enforcement officers. As stated in a press release from the Oregon Association Chiefs of Police and the Oregon State Sheriffs’ Association, dated September 26, 2016: “Too often, individuals with addiction issues find their way to the doorstep of the criminal justice system when they are arrested for possession of a controlled substance. The penalty is often a felony drug conviction where the person may receive a jail sentence, are placed on probation and receive limited treatment services. Unfortunately, felony convictions in these cases also include unintended and collateral consequences including barriers to housing and employment and a disparate impact on minority communities.”<sup>72</sup>

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<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1318&context=jbtj> (citing U.S. Dep’t Of Justice, Bureau Of Justice Statistics, NCJ252156, *Prisoners In 2017*, 23 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 251-252. (citing Quick Facts Dallas City, Texas, United States Census Bureau, <https://www.census.gov/quickfacts/dallascitytexas> (last visited Feb. 1, 2020))

<sup>71</sup> *Id.* at 252.

<sup>72</sup> Schmidt, *supra* note 54, at iii; “Press Release of the Oregon Association Chiefs of Police and the Oregon State Sheriffs Association, dated September 26, 2016.”

“The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color. The wealthy can access a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model due to a number of factors, each of which contributes to the overrepresentation of such individuals in the system.”<sup>73</sup> This assertion is proven by the fact that African American adults are 5.9 times more likely to be incarcerated than Whites, and Hispanics are 3.1 times more likely.<sup>74</sup> In 2016, Black Americans comprised 27% of all individuals arrested in the United States; double their share of the total population.<sup>75</sup>

“The War on Drugs as well as policing policies including ‘Broken Windows’ and ‘Stop, Question, and Frisk’ sanction higher levels of police contact with African Americans. This includes higher levels of police contact with innocent people and higher levels of arrests for drug crimes.”<sup>76</sup> “Nationwide surveys also reveal disparities in the outcomes of police stops. Once pulled over, Black and Hispanic drivers were three times more likely as Whites to be searched (6% and 7% versus 2%) and African American drivers were twice as likely as Whites to be arrested.”<sup>77</sup> This increased level of police contact explains why over half (56%) of the 277,000 people imprisoned nationwide for a drug offense are African American or Latino.<sup>78</sup> Additionally,

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<sup>73</sup> The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, 1 (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

<sup>74</sup> *Id.* (citing U.S. Bureau of Justice Statistics, *Prisoners in 2016*, 8 tbl.6 (Jan. 2018)).

<sup>75</sup> *Id.* at 2. (citing FBI Uniform Crime Reporting Program. *Crime in the United States 2016*, [https://ucr.fbi.gov/crimein-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrested.](https://ucr.fbi.gov/crimein-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrested/))

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* at 5. (citing Langton, L. & Durose, M. (2013). *Police Behavior during Traffic and Street Stops*, 2011. U.S. Bureau of Justice Statistics; Eith, C. & Durose, M. R. (2011). *Contacts Between Police and the Public*, 2008. U.S. Bureau of Justice Statistics.)

<sup>78</sup> *Id.* at 7. (citing U.S. Bureau of Justice Statistics, *Prisoners in 2016*, (Jan. 2018)).



among youth, African Americans are 4.1 times more likely to be committed to secure placements as Whites, American Indians are 3.1 times more likely, and Hispanics are 1.5 times more likely.<sup>79</sup>

Recent data published by the Portland Police Department has shown that police in Portland, home to much of Oregon's BIPOC population, disproportionately stop African Americans. "Of the 33,035 vehicle stops Portland police made in 2019, 18% were for Black drivers and 65% were for white drivers. White people make up 75.1% of the population, while Black people make up 5.8%. The discrepancy is greater for nonmoving violation stops, a category for which the report says officers have more room for discretionary judgment. Black people accounted for 22.6% of those stops compared to 62% for white people."<sup>80</sup> Across the entire state of Oregon, African Americans account for 7% of all pedestrian stops and 5% of all traffic stops.<sup>81</sup>

Statistics regarding arrest rates for all crimes (not just drug related crimes) in Oregon shows that the State is also guilty of disparately policing minority communities. While all racial and ethnic groups in Oregon have shown a drop in the person crime arrest rate from 1986 to 2012, disparities persist. In 2012, the person crime arrest rate for African Americans was 490% higher than the statewide rate, and the rate was 4% higher for Native Americans.<sup>82</sup> For property crimes, the arrest rate was 370% higher for African Americans in 2012, and 6% higher for Native Americans.<sup>83</sup>

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<sup>79</sup> *Id.* (citing Sickmund, M., Sladky, T.J., Kang, W., and Puzanchera, C. (2017) Easy Access to the Census of Juveniles in Residential Placement. <http://www.ojdp.gov/ojstatbb/ezacjrp/>).

<sup>80</sup> Associated Press, *Black drivers stopped at a disproportionate rate in Portland*, The Register-Guardian (Nov. 27, 2020), <https://www.registerguard.com/story/news/2020/11/27/black-drivers-stopped-disproportionate-rate-portland/6443441002/>.

<sup>81</sup> Kenneth Sanchagrin, JD PhD, et al., *Statistical Transparency of Policing Report Per House Bill 2355 (2017)*, Oregon Criminal Justice Commission (CJC), 11 (Nov. 25, 2019), [https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP\\_Report\\_Final.pdf](https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP_Report_Final.pdf).

<sup>82</sup> Criminal Justice Commission (CJC), *Racial and Ethnic Impact Statement Historical Data*, 3 (2013), <https://www.oregon.gov/cjc/CJC%20Document%20Library/AdultCJSystemRacialandEthnicStatementBackground.pdf>.

<sup>83</sup> *Id.* at 4.

The racial composition of the U.S. prison population in its entirety provides another glimpse into the impact of inequitable criminal law enforcement policies.<sup>84</sup> “The Bureau of Justice Statistics (“BJS”) tracks the race of prisoners who have been sentenced to at least one year in prison; this accounts for 97% of the prison population or 1,439,808 of sentenced prisoners.”<sup>85</sup> “Of this subsection of prisoners, 30.3% are White (436,500), 33% are Black (475,900), and 23.4% are Hispanic (336,500).”<sup>86</sup> “The imprisonment rate statistics elucidate this inequity further. The imprisonment rate for Black men is 2,336 per 100,000 people, for Hispanic men it is 1,054 per 100,000, and for White men it is 397 per 100,000. In other words, Black men are imprisoned at a rate almost six times that of White men and Hispanic men are imprisoned at a rate of 2.7 times that of their White counterparts. The numbers are even worse for Black men ages 18 to 19, who are twelve times more likely to be imprisoned than their White counterparts. The numbers are even worse for black men ages 18 to 19, who are twelve times more likely to be imprisoned than their white counterparts.”<sup>87</sup>

People of color in Oregon’s prison population have been overrepresented historically and presently.<sup>88</sup> “The incarceration rate for African Americans in 2013 was 470% higher than the statewide rate; Native American/Alaska Natives were 42.5% higher than the statewide rate; and the Hispanic population incarceration rate was 9.4% higher... The prison admission rate for African Americans in 2013 was 480% higher than the statewide rate, while Native American/Alaska Natives were 30% higher than the statewide rate.”<sup>89</sup> “Since 1978, the Black incarceration rate in Oregon has increased 79%. In 2017, Black people were incarcerated at 3.9

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<sup>84</sup> Swinburne, *supra* note 67, at 251.

<sup>85</sup> *Id.* (citing U.S. Dep’t Of Justice, Bureau Of Justice Statistics, NCJ252156, *Prisoners In 2017*, 5-6 (2019)).

<sup>86</sup> *Id.* at 250.

<sup>87</sup> *Id.* at 251.

<sup>88</sup> Criminal Justice Commission (CJC), *supra* note 81, at 5.

<sup>89</sup> *Id.*

times the rate of White people, and Native American people were incarcerated at 2.1 times the rate of White people.”<sup>90</sup>

In summary, “[A]lmost 80% of people serving time for a federal drug offense are Black or Latino. In state prisons, people of color make up 60% of those serving time for drug charges. In the federal system, the average Black defendant convicted of a drug offense will serve nearly the same amount of time as a White defendant would for a violent crime. People of color account for 70% of all defendants convicted of charges with a mandatory minimum sentence. Prosecutors are twice as likely to pursue a mandatory minimum sentence for a Black defendant than a White defendant charged with the same offense, and Black defendants are less likely to receive relief from mandatory minimums.”<sup>91</sup> Of all individuals prosecuted federally for a cannabis related crime in 2018, 72.2% were Hispanic and 12.1% were African American.<sup>92</sup> “When Black Americans represent 13.4% of the population but 37% of federal prisoners and 30.4% of state prisoners convicted of drug crimes, it is clear that the law is not being equitably enforced.”<sup>93</sup> These disparate rates of policing has led to some alleging that the, the United States is in violation of its obligations under Article 2 and Article 26 of the International Covenant on Civil and Political Rights to ensure that all its citizens—regardless of race—are treated equally under the law.<sup>94</sup>

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<sup>90</sup> Vera, *Incarceration Trends in Oregon*, 2,

<https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-oregon.pdf>.

<sup>91</sup> Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 UC Davis J. Juv. L. & Pol’y 95, 103 (2020), [http://sjlr.law.ucdavis.edu/issues/07-SJLR-Summer-2020-24-2\\_PERLMAN.pdf](http://sjlr.law.ucdavis.edu/issues/07-SJLR-Summer-2020-24-2_PERLMAN.pdf) (citing Betsy Pearl, *Ending the War on Drugs: By the Numbers*, Center For American Progress (Jun. 27, 2018), <https://www.americanprogress.org/issues/criminaljustice/reports/2018/06/27/452819/ending-war-drugs-numbers/>).

<sup>92</sup> U.S. Sentencing Commission, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics*, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/TableD\\_2.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/TableD_2.pdf).

<sup>93</sup> Swinburne, *supra* note 67, at 252.

<sup>94</sup> The Sentencing Project, *supra* 73, at 2.

## **B. Collateral Consequences of Prohibition, Coupled with Housing Discrimination, Divested Capital from African American, Latinx, and Indigenous Communities**

“A drug arrest or conviction can carry life-altering collateral consequences: parents may lose their children in court proceedings; disabled and low-income recipients of public benefits may lose health care; immigrants can face deportation; families can be evicted from public housing; and finding a job can be difficult and outright impossible in some cases.”<sup>95</sup> Due to the disparities in policing of drug policing and incarceration rates, Black and Brown communities disproportionately face these harmful repercussions. Over-incarceration and over-policing is directly responsible for wealth inequality along racial and ethnic lines.<sup>96</sup>

### 1. Collateral Consequences of Over-Policing in Black and Brown Communities.

The financial burden of those who are arrested for cannabis possession includes legal costs, such as attorney's fees, bail, fines, and court costs.<sup>97</sup> These direct financial losses are compounded by the cost of missing work or losing employment because of court involvement.<sup>98</sup> In addition, arrests for cannabis enforcement are accompanied by emotional stress, familial tensions, and loss of faith in the judicial system.<sup>99</sup> These consequences are separate from the added penalties, such as ineligibility for public housing, that may be imposed on those who are actually convicted of cannabis possession.<sup>100</sup>

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<sup>95</sup> Amer. Civ. Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (Apr. 27, 2020), <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/>.

<sup>96</sup> Mize, *supra* note 1, at 11 (citing Sasha Abramsky, *Toxic Persons*, Slate, (Oct. 8, 2010) <https://slate.com/news-and-politics/2010/10/new-research-shows-precisely-how-the-prison-to-poverty-cycle-does-its-damage.html>).

<sup>97</sup> Katherine Beckett & Steve Herbert, *The Consequences and Costs of Marijuana Prohibition*, 32 (2009), <https://faculty.washington.edu/kbeckett/The%20Consequences%20and%20Costs%20of%20Marijuana%20Prohibition.pdf>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 42 U.S.C. § 13661(b).

“For those who are formerly incarcerated, a recent analysis by the Prison Policy Initiative showed that more than 27% are unemployed, which is higher than the overall unemployment rate during the Great Depression. These results are compounded for African Americans due to existing racial discrimination present in employment practices; indeed, one study found that White job applicants with a criminal record were more likely to be called for a job interview than Black applicants without a criminal record. Contact with the criminal justice system confines one to reduced employment opportunities for generations to come, exponentially impacting one's ability to build wealth, and depriving families of breadwinners and workers.”<sup>101</sup>

This dynamic arises because, “High levels of incarceration cast a shadow of criminality over all Black men, implicating even those (in the majority) who have remained crime free.”<sup>102</sup> The implication of the situation is clear: “[d]rug law enforcement has deepened the racial disadvantages confronted by low-income African Americans even as it perpetuates the erroneous belief that most drug offenders are [B]lack.”<sup>103</sup> “The Leadership Conference on Civil Rights concluded in a study of civil rights and the criminal justice system, ‘Our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. The injustices of the criminal justice system threaten to render irrelevant fifty years of hard-fought civil rights progress.’”<sup>104</sup>

Statistics clearly support the claim that contact with the criminal justice system greatly impacts one’s financial situation. Estimates indicate formerly incarcerated people owe as much

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<sup>101</sup> Mize, *supra* note 1, at 12-13. (citing Maritza Perez, Olugbenga Ajilore, & Ee Chung, *Using Marijuana Revenue To Create Jobs*, 2 (May 20, 2019), <https://www.americanprogress.org/issues/criminaljustice/reports/2019/05/20/470031/using-marijuana-revenue-creat-e-jobs/>).

<sup>102</sup> Devah Pager, *Marked: Race, Crime, And Finding Work In An Era Of Mass Incarceration* (2007).

<sup>103</sup> Human Rights Watch, *Targeting Blacks: Drug Law Enforcement And Race In The United States*, 3 (2008), [https://www.hrw.org/sites/default/files/reports/us0508\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0508_1.pdf).

<sup>104</sup> *Id.* (citing Ronald H. Weich and Carlos T. Angulo, *Justice on Trial*, Leadership Conference on Civil Rights, 2000)

as 60% of their income to criminal debts.<sup>105</sup> “One in 87 working-aged white men is in prison or jail, compared with 1 in 36 Hispanic men and 1 in 12 African American men. More young (20 to 34-year-old) African American men without a high school diploma or GED are currently behind bars (37%) than employed (26%). Serving time reduces hourly wages for men by approximately 11%, annual employment by 9 weeks and annual earnings by 40%. By age 48, the typical former inmate will have earned \$179,000 less than if they had never been incarcerated. Incarceration depresses the total earnings of White males by 2%, of Hispanic males by 6%, and of Black males by 9%. Of the former inmates who were in the lowest fifth of the male earnings distribution in 1986, two-thirds remained on the bottom rung in 2006, twice the number of those who were not incarcerated. Only 2% of previously incarcerated men who started in the bottom fifth of the earnings distribution made it to the top fifth 20 years later, compared to 15 percent of men who started at the bottom but were never incarcerated. 54% of inmates are parents with minor children (ages 0-17), including more than 120,000 mothers and 1.1 million fathers. 2.7 million children have a parent behind bars—1 in every 28 children (3.6%) has a parent incarcerated, up from 1 in 125 just 25 years ago. Two-thirds of these children’s parents were incarcerated for non-violent offenses. One in 9 African American children (11.4%), 1 in 28 Hispanic children (3.5%) and 1 in 57 white children (1.8%) have an incarcerated parent.”<sup>106</sup>

The impact of incarceration doesn’t just impact an individual, but their children as well. “Previous research has shown that having a parent incarcerated hurts children, both educationally and financially. Children with fathers who have been incarcerated are significantly more likely than other children to be expelled or suspended from school (23% compared with 4%). Family

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<sup>105</sup> Douglas N. Evans, *The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration*, John Jay College of Criminal Justice (2014), <https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf>.

<sup>106</sup> Dr. Bruce Western & Dr. Becky Pettit, *Collateral Consequences, Incarceration’s Effect on Economic Mobility*, The PEW Charitable Trusts, 4 (2010), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf).

income averaged over the years a father is incarcerated is 22% lower than family income was the year before a father is incarcerated. Even in the year after the father is released, family income remains 15% lower than it was the year before incarceration. Both education and parental income are strong indicators of children's future economic mobility."<sup>107</sup>

“The inequitable enforcement of drug laws creates other problems for communities of color long after an individual's release from prison. One of these challenges arises from a federal law, the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (‘PRWORA’). PRWORA bans convicted drug felons from receiving Supplemental Nutrition Assistance Program (‘SNAP’) benefits. SNAP, formerly known as food stamps, is the largest nutrition program in the country and provides low-income individuals with financial assistance to pay for food. In 2019, SNAP spent over 58 billion dollars to help feed over 34 million Americans. As a result of disproportionate policing, African Americans and Hispanic Americans are more likely to be impacted by the SNAP drug felon ban. This problem is exacerbated by the fact that Black Americans and Hispanic Americans experience food insecurity, limited access to adequate food caused by a lack of money and other resources, at much higher rates than their White counterparts. Research shows that 8.1 % of White households are food insecure, compared to 21.2% of Black households and 16.2% of Hispanic households. By negatively impacting food security, the SNAP drug felon ban exposes ex-offenders to a broad spectrum of health problems, including an increased risk for hypertension, diabetes, obesity, and depression. Unfortunately, the Drug felony ban has the potential to impact the food security of the ex-offender's family as well. SNAP benefits are distributed to a household and are based on the income and number of people living in the household. When an ex-offender is subject to the ban they are excluded from the calculation of their household's benefit. For example, if the ex offender lives in a SNAP

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<sup>107</sup> *Id* at 5.

household that includes four people, that household is restricted to the benefits afforded a three person household. In this example, the family's benefits could be decreased up to \$137 per month. This challenge is exacerbated because PRWORA considers the ex-offender's income to be part of the household income despite the fact they are excluded from household count. This has the potential of raising the net-income of the household, which would reduce the value of the SNAP allotment. In conjunction these two provisions force a household to survive on less benefits. Also, research indicates that access to public assistance greatly reduces the risk of recidivism in ex-offenders. Drug offenders who are eligible for SNAP at the time of release from prison experience a 13.1% decrease in recidivism. PRWORA's drug felon ban clearly destabilizes an already vulnerable population as they attempt to reintegrate into broader society.”<sup>108</sup>

The war on drugs has had significant collateral consequences on the United State’s immigrant community. One of the collateral consequences for lawful permanent residents, most of whom are Latinx, is that controlled substance offenses (except for the very limited exception for simple possession of thirty grams of cannabis or less for one's own use) are a ground of deportability.<sup>109</sup> In 2013, simple cannabis possession was the fourth most common cause of deportation for any offense and the most common cause of deportation for drug law violations.<sup>110</sup>

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<sup>108</sup> Swinburne, *supra* note 67, at 253.

<sup>109</sup> INA § 237 (a) (2) (B) (i); 8 U.S.C. § 1227 (a) (2) (B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable”).

<sup>110</sup> Drug Policy Alliance, *The Drug War and Mass Deportation* (Feb. 2016), [https://drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet\\_The%20Drug%20War%20and%20Mass%20Deportation\\_%28Feb.%202016%29.pdf](https://drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_The%20Drug%20War%20and%20Mass%20Deportation_%28Feb.%202016%29.pdf) (citing Transactional Records Access Clearinghouse, *Secure Communities and ICE Deportation: A Failed Program?*, (Syracuse: Transactional Records Access Clearinghouse, 2014) <http://trac.syr.edu/immigration/reports/349/>).



The war on drugs has also had a major effect on education and “locked many [Black men] out of the college classroom.”<sup>111</sup> “‘Decreased college enrollment has life-long consequences,’ not only on the individual, but on society as a whole. The effects of a criminal record have a lifelong ripple effect. ‘Without a college degree, steady employment, and support services, formerly incarcerated people struggle to rebuild their life.’ Some of ‘the collateral sanctions [that] attach at arrest...include: loss of professional licenses, barriers to employment opportunities, “loss of educational aid, driver's license suspension, and bars on adoption, voting, and jury service.”’ And, when it comes to the charge, the quantity of marijuana is somewhat irrelevant because ‘those individuals convicted of low-level possession are subject to many of the same collateral sanctions as those convicted for dealing in large quantities.’ This is why ‘fifty percent of felons are rearrested [and] twenty-five percent are re-incarcerated within eight years of their initial release from prison.’ ‘Access to education could lower these high recidivism rates,’ but more importantly, the main takeaway here should be that this country needs to build equity in its citizens - each and every one of them. Losing these opportunities and other public benefits are already a present fear for people of color without the added pressure of marijuana prohibition.”<sup>112</sup>

“Unfortunately, in today's society, it is almost inherent that minorities will have a more difficult time making ends meet because their starting point is many steps behind their White counterparts. Minority communities are keeping afloat from food stamps and public housing, and ‘[the] loss of public assistance, or any sanction that interferes with the ability to work or to drive, can have a more burdensome impact on low-income and minority families.’ Every aspect of a

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<sup>111</sup> Perlman, *supra* note 92, at 107-108. (citing Tamara G. Borr, *How the War on Drugs Kept Black Men Out of College*, *The Atlantic* (May 15, 2019), <https://www.theatlantic.com/education/archive/2019/05/war-drugs-made-it-harder-black-men-attend-college/588724>)

<sup>112</sup> *Id* at 108.

family's sense of well-being is negatively affected, but ‘removing barriers to employment, housing and education is not only necessary for individuals with criminal records to get a fair shot in life, it's also critical to ensuring that a parent's criminal record does not determine their child's life chances.’”<sup>113</sup> The collateral consequences of cannabis prohibition add additional barriers for Black and Brown communities to prosper economically.<sup>114</sup>

Here are additional statistics from a survey study regarding the economic impact of contact with the criminal justice system<sup>115</sup>: The average debt incurred for court-related fines and fees alone was \$13,607, almost one year’s entire annual income for respondents who earn less than \$15,000 per year. Nearly one in five families (18%) were denied housing, or did not qualify for public housing once their formerly incarcerated family member returns. Nearly 1 in 5 families were unable to afford housing due to the loss of income resulting from their loved one's incarceration. 2 in 3 families had difficulty meeting basic needs as a result of their loved one’s conviction and incarceration. 70% of these families were caring for children under 18. The majority of formerly incarcerated individuals (67%) wanted to return to school after their release. Yet fewer than one-third (27%) were able to continue with education or training of any kind. The cost of tuition and inability to get an educational loan because of criminal conviction were among the barriers identified most often. 3 in 5 formerly incarcerated are unable to afford returning to school. 1 in 4 were denied or barred from educational loans because of their conviction. 79% of survey participants were either ineligible for or denied housing because of their own or a loved one’s conviction history. 79% of formerly incarcerated women reported

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 108-109.

<sup>115</sup> Saneta DeVuono-Powell, et al., *Who Pays? The True Cost of Incarceration on Families*, Oakland, CA: Ella Baker Center, Forward Together, Research Action Design (2015), <http://whopaysreport.org/executive-summary/pdf-executive-summary/>.

they were unable to afford housing after release. 67% of formerly incarcerated individuals associated with our survey were still unemployed or underemployed five years after their release.

## 2. Racial Segregation, Redlining, Housing & Finance Discrimination, Urban Renewal, and Gentrification.

Home ownership is one of the quickest ways for a community to build intergenerational wealth and capital. However, communities of color have largely been excluded from the benefits of homeownership, and “tend to be concentrated in areas of low opportunity.”<sup>116</sup> The benefits of homeownership have not been available to Black and Brown communities due to government discrimination and passive allowance of private discrimination through a process of redlining, residential segregation, finance discrimination, urban renewal, and gentrification.

“Residential segregation reflected the prejudice and discrimination Black people in Oregon have faced for more than a century, both by custom and by law. The Oregon Donation Land Act of 1850 promised free land to White settlers only. In 1857, by popular vote, Oregon inserted an exclusion clause in the state constitution that made it illegal for Black people to remain in the state. This clause was not removed until 1926. Oregon was one of only six states that refused to ratify the 15th Amendment to the U.S. Constitution, which gave Black people the rights of American citizenship and Black men the right to vote. The hostile racial attitude of White Oregonians manifested in Portland’s built environment through real estate practices. In 1919, the Portland Realty Board adopted a rule declaring it unethical for an agent to sell property to either Negro or Chinese people in a White neighborhood.”<sup>117</sup>

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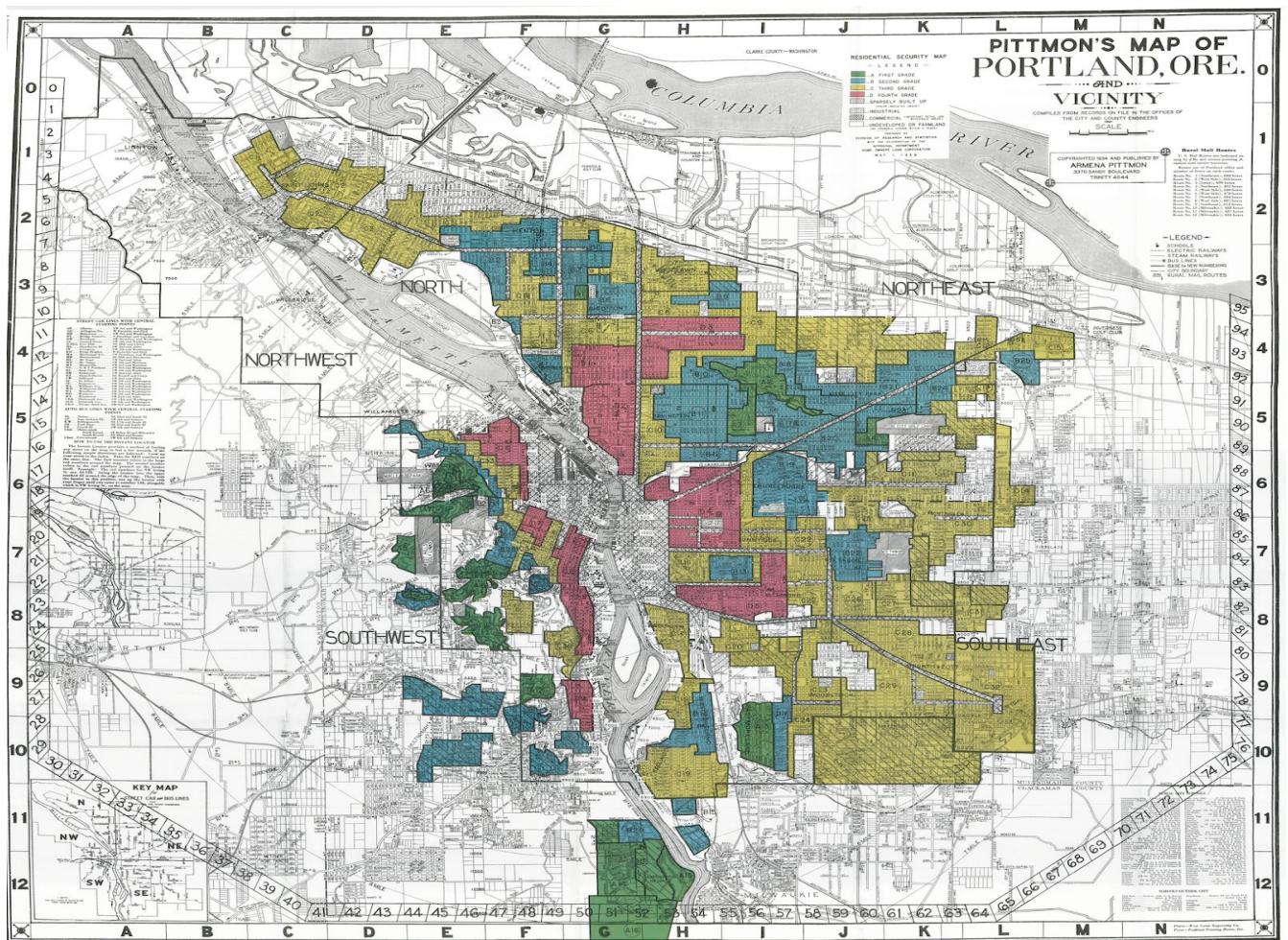
<sup>116</sup> Jenna Hughes, *Historical Context of Racist Planning, A History of How Planning Segregated Portland*, Bureau of Planning and Sustainability (BPS), 23 (Sep. 2019),

<https://www.portland.gov/sites/default/files/2019-12/portlandracistplanninghistoryreport.pdf>.

<sup>117</sup> Karen J. Gibson, *Bleeding Albina, A History of Community Disinvestment, 1940-2000*, 6,

[http://kingneighborhood.org/wp-content/uploads/2015/03/BLEEDING-ALBINA\\_-A-HISTORY-OF-COMMUNITY-DISINVESTMENT-1940%E2%80%932000.pdf](http://kingneighborhood.org/wp-content/uploads/2015/03/BLEEDING-ALBINA_-A-HISTORY-OF-COMMUNITY-DISINVESTMENT-1940%E2%80%932000.pdf).

“The federal government’s practice of redlining was used in Portland in the 1930s as a tool to reinforce racial segregation by restricting federal lending and private lending. This made it difficult or impossible for residents living in ‘redlined’ neighborhoods to receive residential and commercial loans. The Home Owners Loan Corporation (HOLC) assessed neighborhoods’ desirability by assigning colors on a map (red, yellow, blue, and green). Categorization of neighborhoods was, in part, determined by the average income, racial or ethnic makeup of the area. Redlined areas typically had concentrations of Black residents or other people of color and accounted for 12% of Portland.”<sup>118</sup>



Source: <https://dsl.richmond.edu/panorama/redlining/#loc=5/40.111/-105.952>

<sup>118</sup> Hughes, *supra* note 116, at 9.

“In 1937, an appraiser in the Lower Albina neighborhood noted, ‘This area constitutes Portland’s “Melting Pot” and is the nearest approach to a “slum district” in the city. Three-quarters of the negro population of the city reside here and in addition there are some 300 Orientals, 1000 Southern Europeans and Russians... Redlining was an important factor in preserving racial segregation, intergenerational poverty and the wealth gap between White Portlanders and most other racial groups in the city. There is evidence that it remained common for banks to practice redlining in Portland until the 1990s.’”<sup>119</sup>

“The 1957 report ‘The Negro in Portland: A Progress Report, 1945–1957’ documented what was generally understood: ‘90 percent of Realtors would not sell a home to a Negro in a White neighborhood.’”<sup>120</sup> “HAP and Portland Realtors, like their national counterparts, had two major reasons for refusing to integrate neighborhoods. First, they maintained that because ‘Negroes depress property values,’ it was unethical to sell to them in a White neighborhood; and second, if they ‘sell to Negroes in White areas, their business will be hurt.’ In addition, citizens actively sought out restrictive covenants to prevent any non-Whites from buying homes in their neighborhoods.”<sup>121</sup>

“In 1961, the League of Women Voters conducted a survey in integrated neighborhoods to evaluate the application of the Fair Housing Law. Black residents tended to be more educated than did their White neighbors. Four out of five said they had experienced housing discrimination. One Black family claimed that the inability to buy homes was compounded by employment discrimination: ‘There is a problem of fair and adequate employment . . . if there was adequate employment, a Negro could purchase the kind of house he wants.’”<sup>122</sup> This

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<sup>119</sup> *Id.*

<sup>120</sup> Gibson, *supra* note 117, at 10.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 11

dynamic is exemplified from the fact that “Portland’s waterfront remained segregated until 1964, when the Longshoremen’s and Warehousemen’s Union accepted Black workers.”<sup>123</sup>

As far as finance discrimination, a 1969 housing survey in Portland concluded that “Blacks get bad terms in purchasing. They usually buy on contract paying 10% interest. It is difficult for them to get conventional financing. Selling prices are frequently inflated to Black buyers.”<sup>124</sup> The City Club of Portland (1968) issued a report entitled “Problems of Racial Justice in Portland,” which concluded “racial residential patterns had resulted in racially isolated schools; specifically, four elementary schools were more than 90 percent Black.”<sup>125</sup> Residential segregation and housing discrimination is a national issue. Courts have found that the U.S. Department of Housing & Urban Development (HUD) knowingly supported public housing authorities that intentionally discriminated and itself engaged in discriminatory conduct. Some of these cases are as recent as the 1980’s.<sup>126</sup>

In response to the impact of residential segregation, Portland followed in the footsteps of other major American cities and undertook “urban renewal projects.” While these projects were designed to rebuild less fortunate urban communities, these programs resulted in the displacement of many of the people of color in Portland whose communities had been negatively impacted by redlining. “The federal urban renewal program and the creation of the interstate highway system cut through Portland neighborhoods designated as ‘slum and blight.’ The construction of Interstate 5, Emanuel Legacy Hospital, the Veterans Memorial Coliseum, and other developments used federal funds to pay for local projects that displaced many Black residents from North/Northeast Portland while predominantly White neighborhoods remained

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 16.

<sup>125</sup> *Id.*

<sup>126</sup> *Young v. Pierce*, 628 F. Supp. 1037 (E.D. Tex. 1985) (42 U.S.C. § 1982); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (Fifth Amendment).

preserved.”<sup>127</sup> “From 1990 to 2016, the Interstate Corridor Urban Renewal Area, which corresponds to a major portion of the Albina area that was historically home to African American homeowners, caused over 4,000 households of more than 10,000 African Americans to be displaced from the neighborhood.”<sup>128</sup>

“In places where households of color have had opportunities to own property, many have been targeted for predatory lending and are vulnerable to foreclosures. For example, Black Americans are three times more likely to be denied home loans than White Americans.”<sup>129</sup> This led to many people of color who were able to overcome redlining, urban renewal, and housing discrimination, to eventually become displaced by gentrification.

Home values tripled and sometimes quadrupled during the 1990s in gentrified neighborhoods.<sup>130</sup> The impact of this can be seen in the Portland neighborhood of Albina. “A booming economy, cheap mortgage money, bargain-basement property, and pent-up demand coincided to transform pockets of Albina in three or four years from very affordable to out of reach. At the beginning of the decade, the worry was abandonment; at the end, it was the preservation of affordable housing. By 1999, Blacks owned 36% fewer homes, while Whites had 43% more than a decade earlier. The decline was largely because Blacks sold their homes in Irvington, the most affluent neighborhood in Albina. Whites bought homes, displacing many low-income folks to relatively far-flung areas where they could afford the rent. The White home ownership rate escalated from its rock bottom of 44% to 61% in just ten years. Housing values, as a percentage of the city median, rose significantly, from 58% to 71%. This sharp rebound in

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<sup>127</sup> Hughes, *supra* note 116, at 10.

<sup>128</sup> *Id.* at 13.

<sup>129</sup> *Id.* at 23. (citing Drew Desilver and Kristen Bialik, *Blacks and Hispanics face extra challenges in getting home loans*, Pew Research Center, (Jan. 10, 2017), <https://www.pewresearch.org/fact-tank/2017/01/10/blacks-and-hispanics-face-extra-challenges-in-getting-home-loan/>).

<sup>130</sup> Gibson, *supra* note 117, at 20.

Albina property values, which corresponds with the increase in White home ownership, reveals the continuing correlation between property valuation and race.”<sup>131</sup>

“White households have experienced inequitable benefits from homeownership. White households in single-family neighborhoods have accumulated wealth through rising home values, further contributing to racial disparities in wealth. In addition, higher value mortgage interest deductions exist in these more expensive, historically exclusive areas, which results in a greater federal subsidy for those who retain wealth in their homes than those who do not.”<sup>132</sup>

If home ownership is the most common way to accumulate wealth, it is no surprise that housing discrimination had helped to perpetuate economic inequality in Portland.”<sup>133</sup> The area of Oregon where most of the State’s people of color reside. In 2011, the City of Portland, City of Gresham, and Multnomah County conducted a regional Analysis of Impediments to Fair Housing Choice (AI).<sup>134</sup> “The AI looked at fair housing complaints, demographic patterns, mortgage data, and zoning and land use policies to analyze patterns that are contributing to housing discrimination and segregation. The AI showed that low-income residents and communities of color are more concentrated in areas with reduced access to transit, schools, grocery stores, sidewalks, and other indicators of opportunity.”<sup>135</sup>

The results of this history of housing discrimination has been devastating for communities of color. According to a 2015 Portland Housing Bureau report, approximately 68.8% of Black renters and 42.9% of Black homeowners are cost burdened, meaning they spend

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<sup>131</sup> *Id.* at 21.

<sup>132</sup> Hughes, *supra* note 116, at 23.

<sup>133</sup> Gibson, *supra* note 117, at 6.

<sup>134</sup> Hughes, *supra* note 116, at 18. (citing City of Portland; City of Gresham; and Multnomah County, *Fair Housing Plan: An Analysis of Impediments to Fair Housing Choice and the Strategies to Address Them* (Portland Housing Bureau, 2011), <https://www.portlandoregon.gov/phb/article/653184>).

<sup>135</sup> *Id.*



over 30% or more of their income on rent or housing costs.<sup>136</sup> Despite being less than 10% of the county population, Black people in Multnomah County make up no less than 16.1% of the Housing and Urban Development (HUD) defined homeless population.<sup>137</sup>

Native American Oregonians have similarly struggled to find housing stability in Oregon's largest metropolitan area. "Native people count disproportionately among the urban poor."<sup>138</sup> Native Americans "experience the highest rates of homelessness, poverty and unemployment of all ethnic groups; depression, addiction and diabetes also impact the Native American community in numbers far exceeding the norm."<sup>139</sup> Native Americans "constitute 24% of all children in foster care in Multnomah County, and only 37% of our high school students living in Portland graduate on time."<sup>140</sup> Even with a large population and the strong evidence of need, "resources have not been equitably distributed to the Native American community."<sup>141</sup> There are false perceptions that Native Americans "no longer exist and chronic undercounts, inaccurate data and stereotypes about what Native Americans look like perpetuate this misconception."<sup>142</sup> It is commonly believed that Native American "education, health care, and other social support systems are fully paid for by government funding or gaming/casino revenues."<sup>143</sup> These misunderstandings lead to policies and decisions that limit Native American "access to social services and other community resources."<sup>144</sup>

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<sup>136</sup> Or. Dep't of Admin. Serv., *The Oregon Cares Fund Overview; A Fund for Black Relief and Resilience*, 9 (Jul. 14, 2020), <https://olis.oregonlegislature.gov/liz/201911/Downloads/CommitteeMeetingDocument/224705>.

<sup>137</sup> *Id.*

<sup>138</sup> *Making the Invisible Visible*, Portland's Native American Community, 3, [http://www.oneskycenter.org/wp-content/uploads/2014/03/MakingVisible\\_FINAL.pdf](http://www.oneskycenter.org/wp-content/uploads/2014/03/MakingVisible_FINAL.pdf).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

While the statewide homeownership rate for White Oregonians is 65%, the rate for communities of color is substantially less. The African American homeownership rate is only 36.5%, the rate for Native Americans is 48.4%, and the rate for the Latinx community is 45.9%.<sup>145</sup> This is consistent with nationwide trends. Between 1994 and 2017, White homeownership rates rose to 76%, while the homeownership rate increased only 49% for African Americans.<sup>146</sup> In 2016 “only 41% of Black households and 45% of Hispanic households own their homes, compared to 71% of White households.”<sup>147</sup> “Adding to this disparity, even when they own their homes, Blacks and Latinos build less wealth through homeownership than White homeowners do.”<sup>148</sup> “Moreover, because inheritance and downpayment assistance is more common in White families, African American families find themselves eight years behind White families on the path towards building home equity.”<sup>149</sup>

### 3. Other Forms of Government Discrimination Causing the Racial Wealth Gap.

Through American history, a series of policies have compounded the capital disparity between White Americans and communities of color<sup>150</sup> Some of these policies include:

- The exclusion of communities of color from immigrating and/or becoming citizens to appease both the cultural and economic concerns of White Americans. This practice, which spanned from 1790 all the way through the 1960s, intentionally impeded the

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<sup>145</sup> Appendix C.

<sup>146</sup> Dedrick Asante-Muhammed, et al., *Zero Wealth: How the Racial Wealth Divide is Hollowing Out American's Middle Class*, Prosperity Now, 8 (Sep. 2017), [https://prosperitynow.org/sites/default/files/PDFs/road\\_to\\_zero\\_wealth.pdf](https://prosperitynow.org/sites/default/files/PDFs/road_to_zero_wealth.pdf).

<sup>147</sup> Dedrick Asante-Muhammed, et. al., *The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, Prosperity Now, 7 (Aug. 2016), [https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED\\_IPS-Final-2.pdf](https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf). (citing Kasey Wiedrich, Lebaron Sims, Jr., Holden Weisman, Solana Rice and Jennifer Brooks, *The Steep Climb to Economic Opportunity*, 11-12 (Washington, DC: CFED, 2016)).

<sup>148</sup> *Id.* (citing Merrit Gillard, *Homeownership Is Still Out of Reach for Millions of Households*, 3 (Washington, DC: CFED, 2016)).

<sup>149</sup> *Id.* (citing Thomas Shapiro, Tatjana Meschede and Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, 3 (Waltham, MA: Institute on Assets and Social Policy, Brandeis University, 2013)).

<sup>150</sup> *Id.* at 16.

ability of numerous people—particularly communities of color—to access the economic asset of citizenship.<sup>151</sup>

- The exclusion of farmworkers and domestic workers—who were predominately people of color—from coverage under the Social Security Act of 1935.<sup>152</sup>
- The exclusion of a number of tip-based professions predominantly held by Black workers—such as servers, shoe shiners, domestic workers and Pullman porters—from the first minimum-wage protections enacted as part of the Fair Labor Standards Act of 1938.<sup>153</sup>
- In 1944, the G.I. Bill was enacted with the goal of helping World War II veterans adjust to civilian life by providing them with a number of benefits, such as low-cost home mortgages, low-interest business loans, tuition assistance, unemployment compensation, and support for living expenses to attend college, high school or vocational programs. By and large, the G.I. Bill is greatly credited with providing millions of largely low-income returning veterans with the opportunity to access wealth-building opportunities, which ultimately helped to create and build the American middle class that rose during the second half of the century. Unfortunately, many of the benefits distributed were intentionally withheld from service members of color by racially biased officials within the Department of Veterans Affairs who interpreted the G.I. Bill to favor White service members over those of color.<sup>154</sup>

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<sup>151</sup> *Id.* (citing Bob Annibale, Janet Murguía and Lisa Hasegawa, *Citizenship as an Asset for Economic Opportunity*, Huffington Post, (Nov. 5, 2016),

[http://www.huffingtonpost.com/bob-annibale/citizenship-as-an-asset\\_b\\_4192664.html?1383657023](http://www.huffingtonpost.com/bob-annibale/citizenship-as-an-asset_b_4192664.html?1383657023)).

<sup>152</sup> *Id.* (citing Brad Plumer, *A Second Look at Social Security's Racist Origins*, Washington Post (Jun. 3, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/03/a-second-look-at-social-securitys-racist-origins/>).

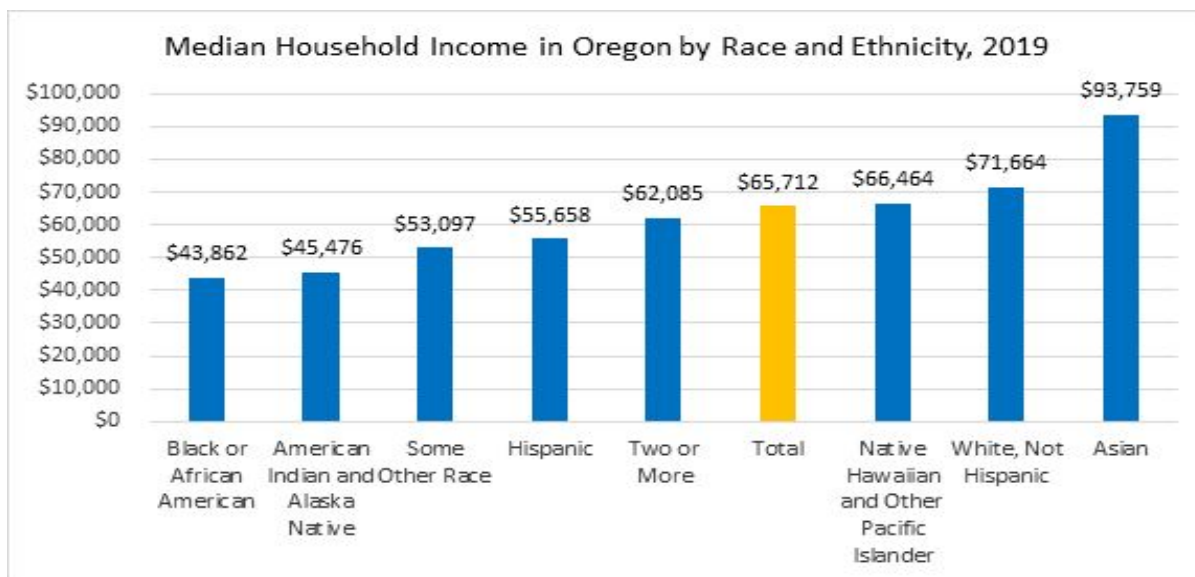
<sup>153</sup> *Id.* (citing Cora Lewis, *The Tipping Point*, BuzzFeed News (Feb. 3, 2016), <https://www.buzzfeednews.com/article/coralewis/the-tipping-point>).

<sup>154</sup> *Id.* at 16-17. (citing Nick Kotz, 'When Affirmative Action Was White': *Uncivil Rights*, The New York Times (Aug. 28, 2005), <https://www.nytimes.com/2005/08/28/books/review/when-affirmative-action-was-white-uncivil-rights.html>).

4. The Resulting Wealth Gap has Decreased the Ability of BIPOC Communities to Recover from the Economic Shocks of the 2008 Recession and COVID-19.

Over-policing and housing discrimination has resulted in an extreme wealth gap between White Oregonians and communities of color. While only 13.1% of White Oregonians live in poverty, the rate of poverty for Black Oregonians is 28.7%, the rate for hispanics is 22.3%, and the rate for Native Americans is 24.4%.<sup>155</sup>

In Multnomah County, 52% of Black households experience asset poverty compared with 24% of White households, and this is further evidenced by the fact that White households in Multnomah County make on average \$67,715 per annum, more than twice the income of Black households, whose average household income is \$29,864 per annum.<sup>156</sup>



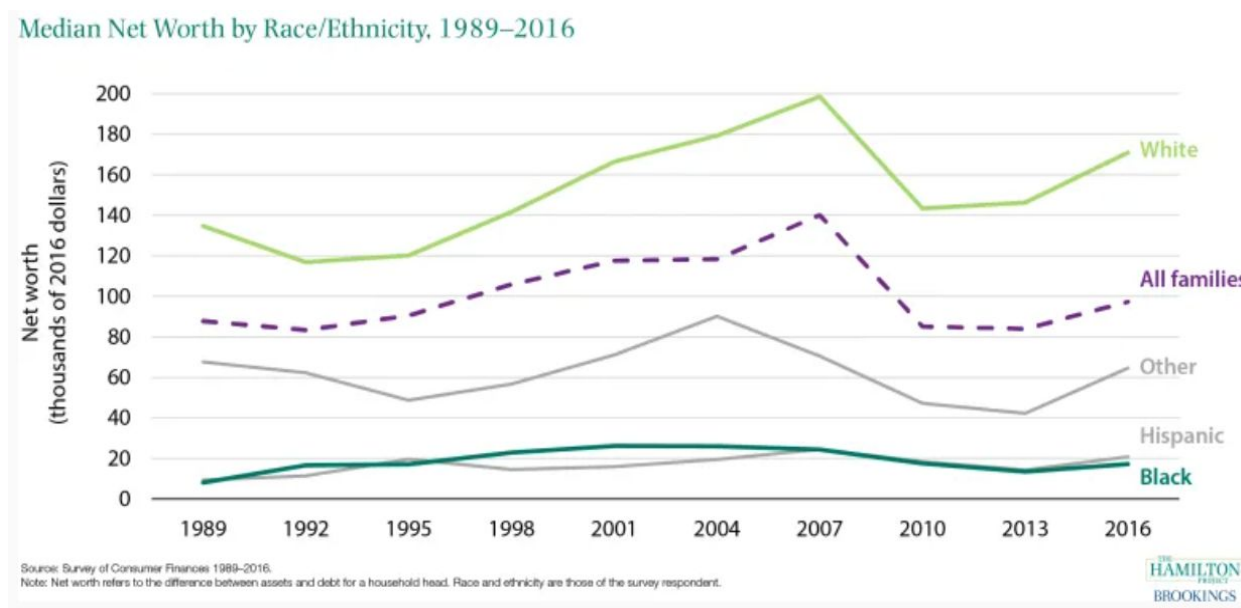
Source: 2019 American Community Survey 1-year estimates, Tables B19013, B19013B, B19013C, B19013D, B19013E, B19013F, B19013G, B19013H, and B19013I

These figures reflect a nationwide disparity. New census data shows White households with median wealth of \$171,000 compared with \$25,000 for Hispanic households and \$9,567 for

<sup>155</sup> Poverty USA, <https://www.povertyusa.org/data/2018/OR> (last visited Sep. 20, 2020).

<sup>156</sup> Or. Dep't of Admin. Serv., *supra* note 136, at 9. (citing Multnomah County, "Poverty in Multnomah County" (Dec. 3 2019)).

Black households in 2017.<sup>157</sup> That gap has only widened among people with college education: Families headed by a college-educated Black person saw their wealth decline by nearly half compared with families headed by a college-educated White person between 1989 and 2016, according to the Federal Reserve Bank of St. Louis.<sup>158</sup>



Source: <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>

Massive job loss, decreases in homeownership, asset poverty, and lack of access to capital has made the Black and brown communities less resilient to economic shocks. While the racial wealth divide Black and Latino households face today has been long in the making, the Great Recession further exacerbated the divide as Blacks and Latinos disproportionately bore the brunt of damage brought about by the bursting of the housing bubble.<sup>159</sup> During the 2008 recession, Black households lost 40% of their wealth and have not recovered in a manner

<sup>157</sup> United States Census Bureau, *2017 Data Show Homeowners Nearly 89 Times Wealthier Than Renters* (Nov. 16, 2020), [https://www.census.gov/library/stories/2020/11/gaps-in-wealth-of-americans-by-household-type-in-2017.html?utm\\_campaign=20201116msacos1ccstors&utm\\_medium=email&utm\\_source=govdelivery](https://www.census.gov/library/stories/2020/11/gaps-in-wealth-of-americans-by-household-type-in-2017.html?utm_campaign=20201116msacos1ccstors&utm_medium=email&utm_source=govdelivery).

<sup>158</sup> Federal Reserve Bank of St. Louis, *What Wealth Inequality in America Looks Like: Key Facts & Figures* (Aug. 14, 2019), <https://www.stlouisfed.org/open-vault/2019/august/wealth-inequality-in-america-facts-figures>.

<sup>159</sup> The-Ever Growing Gap, *supra* note 147, at 7.

commensurate to White households.<sup>160</sup> This is because during economic downturns, groups that have historically been excluded from labor markets tend to be the first people let go—wage and unemployment gaps continue to increase.<sup>161</sup>

A report published by the National Bureau of Economic Research found that African American businesses were hit the hardest by COVID-19.<sup>162</sup> “The number of African American business owners plummeted from 1.1 million in February 2020 to 640,000 in April, a 41% decrease. Latinx business owners also suffered major losses. The number of Latinx business owners dropped from 2.1 million to 1.4 million (32%) from February to March.”<sup>163</sup> This is likely because Black-owned businesses often have thinner financial cushions. According to Goldman Sachs, 43% of Black-owned businesses expect cash reserves to be gone by the end of this year (2020) without more stimulus from Washington.<sup>164</sup> Overall, that number is 30%.<sup>165</sup>

“Programs established to support small business were not designed with the Black community in mind. This is evident through the mechanisms and outcomes from the CARES Act Paycheck Protection Program (PPP). Nationally, 51% of Black small businesses applied for less than \$20,000 in temporary funding from the federal government, and only 1 in 10 (12%) received the assistance they requested.”<sup>166</sup> Regarding unemployment benefits, from April to June

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<sup>160</sup> Amer. Civ. Liberties Union, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, New York, NY: ACLU (Jun. 2015), [https://www.aclu.org/sites/default/files/field\\_document/discrimlend\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf).

<sup>161</sup> *Id.*

<sup>162</sup> Robert Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey*, National Bureau of Economic Research (Jun. 2020), <https://www.nber.org/papers/w27309.pdf>.

<sup>163</sup> *Id.* at 5.

<sup>164</sup> Goldman Sachs, Survey: *Disappointed and Frustrated, Small Business Owners Feel Left Behind by Congress* (Sep. 8, 2020), <https://www.goldmansachs.com/citizenship/10000-small-businesses/US/infographic-left-behind/index.html>.

<sup>165</sup> *Id.*

<sup>166</sup> Or. Dep’t of Admin. Serv., *supra* note 136, at 10.

of 2020 13% of jobless Black workers received unemployment benefits, compared with 22% for Hispanic workers and 24% for white workers.<sup>167</sup>

According to McKinsey & Company, there are two reasons that minority owned businesses have been disproportionately impacted by COVID-19: (1) they tend to face underlying issues that make it harder to run and scale successfully, and (2) they are more likely to be concentrated in the industries most immediately affected by the pandemic.<sup>168</sup>

“In an assessment of the financial health of companies, the Federal Reserve Banks reported that minority-owned small businesses were significantly more likely to show signs of limited financial health—by factors such as profitability, credit scores, and propensity to use retained earnings as a primary funding source. These companies were approximately twice as likely to be classified as ‘at risk’ or ‘distressed’ than nonminority-owned small businesses. That’s particularly concerning, since the U.S. Federal Reserve also indicates that distressed companies are three times as likely as healthy businesses to close because of a two-month revenue shock. Limited access to credit is a compounding factor that hurts the underlying health of minority-owned small businesses. Based on data from the 2018 Small Business Credit Survey, the Brookings Institution found that large banks approve around 60 percent of loans sought by white small-business owners, 50 percent of those sought by Hispanic or Latinx small-business owners, and just 29 percent of those sought by Black small-business owners. The COVID-19 crisis is likely to compound this issue: 42 percent of minority-owned small businesses

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<sup>167</sup> Ava Kofman & Hannah Fresques, *Black Workers Are More Likely to Be Unemployed but Less Likely to Get Unemployment Benefits*, ProPublica (Aug. 5, 2020), <https://www.propublica.org/article/black-workers-are-more-likely-to-be-unemployed-but-less-likely-to-get-unemployment-benefits>.

<sup>168</sup> McKinsey & Company, *COVID-19’s effect on minority-owned small businesses in the United States* (May 27, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19s-effect-on-minority-owned-small-businesses-in-the-united-states>.

responding to McKinsey’s U.S. Small Business Pulse Survey reported that obtaining credit was becoming increasingly difficult, compared with 29 percent of all respondents.”<sup>169</sup>

“The concentration of minority-owned small businesses in industries more susceptible to disruption makes a large share of them vulnerable to the pandemic. Service industries, including accommodation and food services, personal and laundry services, and retail, which have the highest share of minority-owned small businesses, could be the most highly disrupted in the near term. These services often require physical proximity to others and are less likely to be delivered remotely. And although the healthcare and social-assistance sector is less likely to see immediate net job loss and company closures, it is the industry most exposed to contracting the virus. Whether or not a small business is minority owned, 51 percent of small-business jobs performed by minorities could be vulnerable in the near term, compared with 47 percent of small-business jobs performed by White employees. Hispanic employees, for example, compose roughly 25 percent of all small-business jobs in accommodation and food services, the most immediately vulnerable sectors. Of all nursing assistants—a high-contact, essential job with elevated risks of virus contraction—33 percent are black. Both minority-owned small businesses and minority-held jobs are already being disproportionately affected by the COVID-19 crisis. While minorities composed 37 percent of the labor force in February 2020, they accounted for 58 percent of the newly unemployed on March 14, 2020. According to McKinsey’s U.S. Small Business Pulse Survey: 58 percent of minority-owned small businesses are ‘extremely’ or ‘very concerned’ about the financial viability of their business. For Native American-owned firms, the figure is 68 percent, compared with 47 percent for all U.S.-based respondents. Furthermore, minority-owned small businesses in the United States are also more likely to have conducted

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<sup>169</sup> *Id.*



layoffs or furloughs or to have shut down their business: 55 percent compared with 48 percent for all respondents.”<sup>170</sup>

“These factors impact the stability and wellbeing of the entire community, and left unchecked, will lead to more pronounced disparate outcomes for the impending decade. Immediate intervention is necessary to enable communities of color to meet basic needs and help us begin to chart a course for its collective recovery.”<sup>171</sup>

### **C. Compelling Governmental Interest in Business and Economic Diversity.**

“In construing the Equal Protection Clause, the Supreme Court has relied on a ‘mediating principle’ to give content to the otherwise ambiguous language of the clause. This mediating principle operates as a theory of constitutional review.”<sup>172</sup> “It structures the Court’s reasoning in evaluating the legitimacy of race-conscious government action (compelling interest), as well as the inquiries that determine the permissible constitutional contours of that race-conscious action (narrow tailoring). The mediating principles that have dominated equal protection analysis are the anti-subordination and anti-discrimination principles.”<sup>173</sup> However, the Supreme Court’s decisions in *Bakke*, *Grutter*, and *Fisher*, focused on the “prospective” benefit of diversity, rather than the “retrospective” focus of anti-subordination and anti-discrimination principles, and adopted what scholars have referred to as “modern diversity practice.”

“Modern diversity practice refers to the comprehensive, enterprise-wide strategic diversity initiatives that were developed in the 1990’s. Rather than a retrospective remedial focus, these diversity initiatives are driven and informed by prospective and strategic considerations

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<sup>170</sup> *Id.*

<sup>171</sup> Or. Dep’t of Admin. Serv., *supra* note 136, at 8.

<sup>172</sup> Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 Colum. J. Race & L. 75, 79 (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1926334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926334).

<sup>173</sup> *Id.*

such as improved business competence, increased operational performance, and good corporate citizenship.”<sup>174</sup>

“The ‘business case’ posits that in an increasingly diverse national and competitive global economy, businesses that fail to leverage diversity to increase competitive advantage, expand market share, and deliver culturally competent products and services will fail to thrive in the twenty-first century marketplace.”<sup>175</sup> “Against this backdrop, it becomes readily apparent that businesses seeking to capitalize on existing markets, and particularly those seeking to penetrate new markets, need to focus their attention on minority consumers.”<sup>176</sup>

“Closely related to the “business case” for diversity is the theory of ‘functional diversity.’ Under the theory of functional diversity, it is not the primary dimensions of diversity that matter most, but the secondary dimensions of diversity, i.e., socioeconomic status, geography, work style, learning style, organizational role, function, education, experience, etc. Under a functional theory, diversity enhances organizational performance by improving problem solving, decision making, and ultimately the quality of output. According to this empirical theory, the diversity of background, experience, and perspective in heterogeneous workgroups contributes to greater collaboration, thereby producing superior performance on measures of innovation and problem solving.”<sup>177</sup>

The Supreme Court in *Grutter*<sup>178</sup> clearly endorsed the “business case” and “functional diversity” interests. In *Grutter*, the United States Supreme Court endorsed Justice Powell's view in *Bakke* that student body diversity is a compelling state interest that can justify the use of race in university admissions.<sup>179</sup> The Court notes that the benefits of diversity, “are not theoretical but

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<sup>174</sup> *Id.* at 77-78.

<sup>175</sup> *Id.* at 84.

<sup>176</sup> *Id.* at 85.

<sup>177</sup> *Id.* at 86.

<sup>178</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>179</sup> *Grutter*, 539 U.S. at 326.

real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>180</sup>

Justice O'Connor built upon the precedent of *Bakke* by using with the functional theory to support the asserted interest in student body diversity.<sup>181</sup> Citing to the empirical evidence generated in the intervening years since *Bakke*, the Court noted that “diversity . . . has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.”<sup>182</sup> The Court further explained that the functional benefit obtained by student body diversity is that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”<sup>183</sup> In what is probably the Courts most clear endorsement of a modern diversity practice, the Court concluded that, “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>184</sup>

It seems like a small, logical step to apply the diversity interest in secondary education to business development programs. In making its ruling, the *Grutter* Court highlighted that “high-ranking retired officers and civilian leaders of the United States military assert that, ‘based on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.’”<sup>185</sup> “To fulfill its mission, the military ‘must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in

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<sup>180</sup> *Id.* at 323.

<sup>181</sup> Hawkins, *supra* note 172, at 105.

<sup>182</sup> *Id.* (quoting *Grutter*, 539 U.S. 306, 308 (2003)).

<sup>183</sup> *Id.* at 105-106. (quoting *Grutter*, 539 U.S. at 323)).

<sup>184</sup> *Grutter*, 539 U.S. at 332.

<sup>185</sup> *Grutter*, 539 U.S. at 331; (citing Brief for Julius W. Becton, Jr. et al. as Amici Curiae 27).

a racially diverse setting.”<sup>186</sup> From this observation the Court concluded that “it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”<sup>187</sup> It seems an equally small step to conclude that the diversity interest in market participation of Minority-owned businesses and minority employees is essential for a more diverse and powerful economy. “The evidence of the benefits obtained from effectively leveraging cross-cultural competence in the global marketplace and of the costs associated with failing to do so is mounting. Increasingly businesses are acknowledging that cross-cultural competence is an integral part of doing business in the rapidly diversifying national and increasingly complex global marketplace.”<sup>188</sup>

One industry in the United States that has adopted diversity as a compelling interest to its business model is professional sports. The National Football League’s (NFL) Rooney Rule establishes requirements to strengthen diversity by giving more opportunities for diverse candidates to be considered for head coaching and front office management positions.<sup>189</sup> Since the rule’s initial inception, the NFL has seen rules similar to the Rooney Rule adopted across business sectors and is now considered an industry best practice.<sup>190</sup>

The international community provides a comparison that advocates for the adoption of diversity as a compelling governmental interest in business development. The European Commission and the European Union Platform of Diversity Charters have created model Diversity Charters that have been adopted in over a dozen European countries.<sup>191</sup> The guide is a

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Hawkins, *supra* note 172, at 86.

<sup>189</sup> National Football League, *NFL Expands Rooney Rule Requirements to Strengthen Diversity*, 1 (Dec. 12, 2018), <https://nflcommunications.com/Documents/NFL%20Expands%20Rooney%20Rule%20Requirements%20to%20Strengthen%20Diversity%2012.12.18%20FINAL%20for%20distribution.pdf>.

<sup>190</sup> *Id.*

<sup>191</sup> European Commission, *Practical Guide to Launch and Implement a Diversity Charter* (2015), <https://op.europa.eu/en/publication-detail/-/publication/d757b218-6302-4ff6-a11a-f24133b3305b>.

clear adoption of the business case for diversity and advocates that increased business diversity optimizes human resource management and economic performance.<sup>192</sup> Citing studies that have found diversity promotes constructive exchanges, reciprocal dynamism, and emulating effects; the guide argues that differences are stimulating and therefore increase the overall economic performance of an organization.<sup>193</sup> Public funding has been made available for programs that follow the guide through the European Social Fund (ESP), which funds 50% to 85% of the total cost of projects.<sup>194</sup>

The benefits of business diversity have been absent in the United States economy, due to disparities in capital and the absence of direct funding to these communities. “If the number of people-of-color firms were proportional to their distribution in the labor force, people of color would own 1.1 million more businesses with employees. These firms would add about 9 million jobs and about \$300 billion in workers’ income to the U.S. economy.”<sup>195</sup> From 2007 to 2021, African American men were the only group to have a decline (2.3 percent) in the number of their businesses.<sup>196</sup>

“A majority of business owners rely on their own wealth or on the wealth of their family and friends to start and run a business. There are large differences in wealth by race. At the median, Asian Americans have about 80 percent of the wealth that Whites have. Hispanics and African Americans have less than 10 percent. This means that, on average, these differences are

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<sup>192</sup> *Id.* at 8.

<sup>193</sup> *Id.*; see also Goodwill Management and IMS-Entreprendre pour la Cite, *Diversité du capital humain et performance économique* (2011). [https://www.ouvertures.net/wp-content/uploads/DP\\_IMS\\_Performance\\_Diversite.pdf](https://www.ouvertures.net/wp-content/uploads/DP_IMS_Performance_Diversite.pdf)

<sup>194</sup> European Commission, *supra* note 191, at 14.

<sup>195</sup> Algeron Austin, *The Color of Entrepreneurship, Why the Racial Gap among Firms Costs the U.S. Billions*, Center for Global Policy Solutions, 4 (Apr. 2016), <http://globalpolicysolutions.org/wp-content/uploads/2016/04/Color-of-Entrepreneurship-report-final.pdf>.

<sup>196</sup> *Id.* at 6.

reflected in the capital available by race and Hispanic ethnicity for starting and running a business.”<sup>197</sup>

“If it takes wealth or access to capital to be a successful entrepreneur, then America’s past and present policies that suppress wealth-building in communities of color are also suppressing American entrepreneurship,”<sup>198</sup> and thereby depriving the entire state economy and cannabis industry of the benefits that flow from increased diversity.

**D. Lack of Capital in Black and Brown Communities, and Absence of State Effort to Increase Business Diversity, has Denied Equitable Access to the Cannabis Marketplace.**

Lack of access to capital is one of the biggest factors contributing to the racial disparities in entrepreneurial success.<sup>199</sup> This is especially true in the developing cannabis marketplace, where due to prohibition, standard banks fear lending money for cannabis endeavors because such loans are not backed by FDIC insurance.<sup>200</sup> A cannabis equity survey conducted in Seattle found that 60% of respondents attributed access to capital as the biggest hurdle to entering the cannabis market, and 24% of respondents attributed racism and gentrification as their greatest hurdle.<sup>201</sup>

“The reality of the current cannabis industry is that many lack access to the capital or investment necessary for the licensing and regulatory fees required to legally cultivate or distribute cannabis and cannabis-derivative products.”<sup>202</sup> “This in turn discourages diversity

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<sup>197</sup> *Id.* at 18.

<sup>198</sup> *Id.* at 19.

<sup>199</sup> *Id.* at 18.

<sup>200</sup> Mize, *supra* note 1, at 15. (citing Andre F. Bourque, *After the Smoke Clears*, *Ebony Magazine* (Spring 2019), <https://www.magzter.com/articles/13294/347233/5cdab7bc37360>).

<sup>201</sup> Seattle, *Cannabis Equity in Our Community - A Racial Equity Toolkit Project*, 3 (2020),

<https://www.seattle.gov/Documents/Departments/FAS/RegulatoryServices/cannabis-equity-survey.pdf>.

<sup>202</sup> Mize, *supra* note 1, at 15-16. (citing Office Of Cannabis, Human Rights Comm’n & Controller’s Office, *City & County Of San Francisco Cannabis Equity Report*, 38-41 (Nov. 1, 2017),

<https://mass-cannabis-control.com/wpcontent/uploads/2017/12/CNBADMPC11-21-2017-San-Francisco-Equityreport.pdf>).

within the industry, as very few minority-owned businesses can afford the average start-up costs for a dispensary, which range from \$250,000 to \$750,000, or more.”<sup>203</sup> The continued prohibition of cannabis adds additional costs due to attorney’s fees, camera feeds necessary to comply with Oregon administrative requirements, and security costs.

“These high buy-in costs form a barrier to minority participation in the marijuana industry because of the contours of poverty in the United States. The median income for a White household was \$70,642 in 2018; by comparison, Black households averaged \$41,361 and Hispanic households \$51,450. To reiterate this disparity, 9% of White Americans live below the federal poverty line compared to 22% of Black Americans and 19% of Hispanic Americans. This economic disparity is magnified in the legal cannabis industry. Since marijuana remains illegal under federal law, the vast majority of banks and credits unions will not provide services to cannabis businesses. As a result, the vast majority of marijuana businesses are self-funded with 84% of businesses utilizing the founder's savings to launch the business, while only 1% of businesses were able to secure a bank or state agency loan.”<sup>204</sup>

“The lack of minority-owned cannabis businesses has the potential to stifle minority employment opportunities throughout the industry. Research indicates a strong racial bias exists in hiring practices. One study revealed that on average, White applicants received 36% more callbacks than equally qualified African American applicants and 24% more than equally qualified Latino applicants.”<sup>205</sup> “Another study revealed that resumes with ‘white sounding

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<sup>203</sup> *Id.* at 16.

<sup>204</sup> Swinburne, *supra* note 67, at 256.

<sup>205</sup> *Id.* (citing Lincoln Quillian Et Al., *Meta-Analysis Of Field Experiments Shows No Change In Racial Discrimination In Hiring Over Time*, Proc. Of The Nat’l Acad. Of Sci. 10871 (Douglas S. Massey ed., 2017), <https://www.pnas.org/content/early/2017/09/11/1706255114>).

names’ received callbacks at a 50% higher rate than resumes with ‘African American sounding names.’”<sup>206</sup>

“The racial biases of ownership and management contribute to the disparate employment opportunities available to minorities. Research has repeatedly shown that White employers are more likely to hire White employees and minority employers are more likely to hire minority employees. One study of small businesses revealed that 57.8% of White owned firms employed no minority employees, while 93.5% of Black firms had a workforce that was made up of at least 50% minority employees. Another report indicated that 76% of all employees in Black-owned firms were Black, 16% were White. In contrast, this report found that the workforces at White-owned firms were only 29% Black. The reality of these hiring practices emphasizes the importance of minority ownership and management within the cannabis industry. Without minority representation at the highest level, minorities will have limited access to job opportunities throughout the entire industry.”<sup>207</sup>

The legal cannabis industry was valued at \$10.4 billion dollars in 2018 and is expected to grow to \$30 billion by 2025.<sup>208</sup> However, “state-level regulations have yet to construct workable pathways for industry revenue to be diverted towards educational and financial resources for those who might otherwise enter the market but are barred from doing so due to lack of capital.”<sup>209</sup>

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<sup>206</sup> *Id.* (citing Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003) <https://www.nber.org/papers/w9873>).

<sup>207</sup> *Id.* at 257.

<sup>208</sup> *Id.* (citing Gillian Flaccus, *Legal Marijuana Industry Toasts Banner Year*, Associated Press (Dec. 27, 2018), <https://apnews.com/0bd3cdbae26c4f99be359d6fe32f0d49> (indicating that the legal cannabis industry was valued at \$10.4 billion in 2018); see also Iris Dorbian, *New Cannabis Report Predicts Legal Sales to Reach Nearly \$30 Billion by 2025*, Forbes (Sept. 24, 2019), <https://www.forbes.com/sites/irisdorbien/2019/09/24/new-cannabis-report-predicts-legal-sales-to-reach-nearly-30-billion-by-2025/?sh=ee2c7c11211c> (reporting projections for legal cannabis sales for 2025)).

<sup>209</sup> Mize, *supra* note 1, at 16.



Racial disparities in cannabis industry participation are reflective of a larger issue regarding minority participation in the agriculture industry. In December 2020, The National Young Farmers Coalition issued a report titled “Land Policy: Towards a More Equitable Farming Future.” The report found that in the United States , “White individuals account for 95 percent of all farmers, own 98 percent of farmland, and receive the vast majority of agriculture-related financial assistance.”<sup>210</sup>

Government assisted financing, even if it was available to cannabis businesses, would likely not help the situation. “In Oregon, the number of Small Business Administration (SBA) loans to African American-owned businesses is down 94 % since 2007. Last year, the SBA backed just four loans to Black-owned businesses in our state.”<sup>211</sup> “Without direct debt-free cash investments in Black-owned businesses the very inequities the state and federal government have allowed to flourish will further deepen.”<sup>212</sup> The state of Oregon has taken some steps to assist minority owned businesses during the COVID-19 crisis. The Oregon CARES Fund for Black Relief and Resilience allocated \$62 million in Coronavirus Relief Funding to Black-owned businesses.<sup>213</sup> Despite this, Black and brown entrepreneurs in Oregon are still struggling disproportionately due to the economic fallout from COVID 19.

This has led to non-profit organizations stepping in to offer capital sources to entrepreneurs of color interested in joining the cannabis industry.<sup>214</sup> While these organizations

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<sup>210</sup> Patrick Williams, *A Look at BIPOC’s Ability to Access Capital and Income Through Cannabis in 2020*, Cannabis Dispensary (Dec. 21, 2020), <https://www.cannabisdispensarymag.com/article/black-indigenous-people-of-color-bipoc-access-capital-income-cannabis-2020/>.

<sup>211</sup> Or. Dep’t of Admin. Serv., supra note 136, at 10. (citing Malia Spencer, *Coalition warns business relief measures leave out people of color*, Portland Business Journal (Apr. 21, 2020) <https://www.bizjournals.com/portland/news/2020/04/21/coalition-warns-business-relief-measures-leave-out.html>).

<sup>212</sup> *Id.*

<sup>213</sup> Or. Dep’t of Admin. Serv., *Oregon Cares Fund for Black Relief and Resilience* (Apr. 2020), <https://olis.leg.state.or.us/liz/201911/Downloads/CommitteeMeetingDocument/224678>.

<sup>214</sup> <http://www.nuleafproject.org/>

have done great work, studies show that non-profit organizations are traditionally underfunded when led by people of color. Among organizations focused on improving the outcomes of young Black men, for example, groups with Black leaders had 45 % less revenue, and unrestricted assets that were 91% lower, than their counterparts with White leaders.<sup>215</sup>

Reparations are needed for communities of color to recover from cannabis prohibition. “A properly formulated theory of reparations enforces the commitment a state has toward victim groups and ‘looks to the needs of the bottom,’ acknowledging not only the racial injustice a specific victim group has suffered, but also the economic injustice that many victim groups continue to face.”<sup>216</sup> “In this way reparations can open up a dialogue among oppressed groups that ‘internalizes new norms and moves us closer to the end of all forms of victimization.’”<sup>217</sup>

Guidance in formulating such reparations can be found in international law. U.N. General Assembly resolution 60/147 provides that compensation should be provided for any economically accessible damage, including: physical or mental harm; lost opportunities, including employment, education, and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>218</sup>

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<sup>215</sup> Cheryl Dorsey, et al., *Overcoming the Racial Bias in Philanthropic Funding*, Stanford Social Innovation Review (May 24, 2020), [https://ssir.org/articles/entry/overcoming\\_the\\_racial\\_bias\\_in\\_philanthropic\\_funding](https://ssir.org/articles/entry/overcoming_the_racial_bias_in_philanthropic_funding).

<sup>216</sup> Mari Matsude, *Looking Beyond the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 394-397 (1987).

<sup>217</sup> *Id.*

<sup>218</sup> G.A. Res. 60/147, (IX) 20, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec 16, 2005), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

## **II. Narrowly Tailored**

In assessing whether a race conscious remedial action is narrowly tailored, the Court looks at several factors, including: the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; and the impact of the relief on the rights of third parties.<sup>219</sup> Many of these factors are also present in race conscious programs that have a prospective goal in increasing diversity.<sup>220</sup>

### **A. Use of Race Neutral Language Would Render an Equity Program Ineffective.**

“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives.”<sup>221</sup> Other cannabis equity programs have used race neutral criteria. These criteria factors include “Prior Cannabis Conviction,” “Low Income” or “Median income”, “Area of Disproportionate Impact”, and “Member of Impacted Family.” As will be discussed, several of these qualifying factors do not accurately reflect the groups most disproportionately impacted by cannabis prohibition. The use of these factors in other equity programs has, unfortunately, led to issues of both overinclusiveness and underinclusiveness.

#### **1. Prior Cannabis Conviction Qualification.**

This proposed equity program allows individuals with a cannabis conviction to qualify for equity licenses, as long as the individual's income does not exceed the maximum income requirement (average-area median area income). While this factor does track individuals who were impacted disproportionately by cannabis prohibition, it does not, standing alone, paint the full picture of how the war on drugs disproportionately impacted certain communities.

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<sup>219</sup> *United States v. Paradise*, 480 U.S. 149, 171-172 (1987).

<sup>220</sup> *See Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

<sup>221</sup> *Grutter*, 539 U.S. at 339.

This qualification, however, will likely be too lenient without an income ceiling. Plenty of wealthy and White Oregonians have been arrested for cannabis, but have not suffered the same direct and collateral consequences of that arrest. These individuals are also more likely to have capital sources within their family. By not having an income ceiling on the prior conviction qualification, it could lead to a situation where many affluent people, who are not members of impacted communities, become overly represented in social equity licenses. Including an income ceiling in the proposed qualification for prior cannabis conviction ensures that only individuals who have suffered the most severe economic impacts of that conviction are qualifying for the cannabis equity program.

## 2. Resident of a Disproportionately Impacted Area.

“Resident of a disproportionately impacted” area is a common qualifying factor in cannabis equity programs. An area of disproportionate impact is often defined as “geographical areas that, due to statute, policy, or other law, has been adversely affected more than others within the same municipality or state.”<sup>222</sup>

This factor will not provide an accurate reflection of communities historically impacted by cannabis prohibition, as a lack of real estate capital has made communities of color more susceptible to disruption and displacement. Gentrification, especially in Portland where much of Oregon’s minority population resides, has displaced residents from areas that experienced disparate arrest rates in the past. Many areas that would qualify as “areas of disproportionate impact” are now inhabited by residents who did not bear the brunt of prohibition.

COVID-19 has only exacerbated housing instability for communities of color. Because of the pandemic 34.8% of all tenants in Oregon now owe back rent, and of that total, 56% are

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<sup>222</sup> Rhode Island, H 5795 (2019), <http://webserver.rilin.state.ri.us/BillText19/HouseText19/H5795.pdf>.

Black, Indigenous, and People of Color (BIPOC) tenants.<sup>223</sup> The result is that tenants who are Black, Indigenous, and People of Color “are more likely to be cost burdened and struggle with housing insecurity, and are over-represented among the houseless population in Oregon.”<sup>224</sup>

The cannabis equity program in Oakland, California, is one program that serves as an example of “resident of a disproportionately impacted area” being an overly-inclusive metric. In Oakland, 86% of the equity applicants qualify for the equity program based on residency in census tracts impacted by the War on Drugs, while only 14% qualify based on a previous cannabis-related conviction.<sup>225</sup> This suggests that race neutral language using “disproportionately impacted area” fails to capture the intended recipients, as the metric would allow too many non-minority owned businesses to get funds through the equity program.

The city of Los Angeles has a cannabis equity program that has also been noted for having problems stemming from the use of employing geographic metrics to give license preference. Activists in Los Angeles have said that not employing race specific qualification, and instead using geographic markers, made qualification for equity licenses too broad and allowed “a wide range of applicants who were not directly affected by marijuana arrests.”<sup>226</sup> This helps to explain why it is estimated only 18 of the 100 people who were originally eligible for equity licenses in Los Angeles were African American.<sup>227</sup>

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<sup>223</sup> Lisa K. Bates, Ph.D., *Stability, Equity, and Dignity: Reporting and Reflecting on Oregon Tenant Experiences*, A Research Justice Collaboration: Community Alliance of Tenants & Portland State University, 2 (Sep. 2020), <https://www.pdx.edu/homelessness/sites/g/files/znlchr1791/files/2020-09/Renters%20in%20Covid-Oregon%20summer%202020.pdf>.

<sup>224</sup> *Id.* at 1.

<sup>225</sup> Aly Bonde, *Engineering Equity in Oakland's Cannabis Market*, Berkeley Public Policy Journal (Apr. 18, 2020), <https://bppj.berkeley.edu/2020/04/08/spring-2020-journal-engineering-equity-in-oaklands-cannabis-market/>.

<sup>226</sup> Sam Levin, *'This was supposed to be reparations': Why is LA's cannabis industry devastating black entrepreneurs?*, The Guardian (Feb 3, 2020), <https://www.theguardian.com/us-news/2020/feb/03/this-was-supposed-to-be-reparations-why-is-las-cannabis-industry-devastating-black-entrepreneurs>

<sup>227</sup> *Id.*

According to Professor Carl Abbott, “Portland’s very success in attracting well educated residents to older neighborhoods has increased the pace of ‘gentrification,’ meaning the displacement of lower-income residents by people who can pay more for the same property.”<sup>228</sup> This observation, combined with the added stress of COVID-19 on renters and low income homeowners, leads to a conclusion that use of “area of disproportionate impact” would not effectively benefit individuals who were overly policed when cannabis was illegal in Oregon.

### 3. Low or Average Median Income.

Low or average median income is another qualifying factor that many cannabis equity programs have used. This factor has been used as people of low income were disproportionately arrested for cannabis related crimes. People of color are also more likely to qualify as being low income. However, low income standing alone does not accurately reflect the economic impact of generational government discrimination, as this discrimination is better reflected in disparities in community wealth rather than income.

“Earning a middle-class income does not guarantee middle-class economic security. White households in the middle-income quintile (those earning \$37,201-\$61,328 annually) own nearly eight times as much wealth (\$86,100) as middle-income Black earners (\$11,000) and ten times as much wealth as middle-income Latino earners (\$8,600). This disconnect in income earned and wealth owned is visible across the entire income spectrum between these groups.”<sup>229</sup>

People who are of low income, but not from one of the disproportionately impacted communities, did not experience the same community wealth impact from prohibition and are

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<sup>228</sup> Hughes, *supra* note 116, at 20. (citing Carl Abbott, *Planning a Sustainable Portland: A Digital Library for Local, Regional, and State Planning and Policy Documents*, (Urban Studies and Planning Faculty Publications and Presentations, 2005), [https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1105&context=usp\\_fac](https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1105&context=usp_fac)).

<sup>229</sup> Dedrick Asante-Muhammed, et. al., *The Road to Zero Wealth*, Prosperity Now, 5 (Sep. 2017), [https://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth\\_FINAL.pdf](https://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf).

more likely to have access to traditional or familial funding sources. Those who were directly affected by a cannabis arrest can still qualify for the program via the cannabis conviction criteria.

Since cannabis is illegal at the federal level, banks are often extremely reluctant to offer loans, credit card services, and checking accounts to members of the cannabis industry for fear of retribution from the federal government.<sup>230</sup> In the absence of reserved community wealth, people of color who are of low income will not have the capital needed to enter the marketplace at an equitable rate. While potential applicants who are not part of an impacted community, but qualify as low income, are more likely to have investment opportunities given their familial access to capital and their community's traditional access to capital.

States have a compelling interest “in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination [in industry].”<sup>231</sup> Use of a low income factor will likely benefit individuals who are not from communities of color who experienced the worst aspects of prohibition, thereby perpetuating public and private discrimination through disparate representation in the cannabis market.

#### 4. Member of an Impacted Family.

Member of an impacted family usually means an individual whom had a parent, legal guardian, child, spouse, or dependent, or was a dependent of an individual who, prior to cannabis legalization, was arrested for, convicted of, or adjudged to be a ward of the juvenile court for any non-violent crime under the law of the State or any other jurisdiction relating to the sale, possession, use, cultivation, manufacture, or transport of cannabis.<sup>232</sup>

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<sup>230</sup> Jeffrey Stinson, *States Find you Can't Take Legal Marijuana Money to the Bank*, Stateline (Jan. 5, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/5/states-find-you-cant-take-legal-marijuana-money-to-the-bank>.

<sup>231</sup> *Western States Paving Co. v. Wash. State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

<sup>232</sup> Minority Cannabis Business Association, *MCBA's Ten Model Municipal Social Equity Ordinances*, 7 (Jul. 1, 2019), <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/07/MCBAs-Ten-Model-Municipal-Social-Equity-Ordinances.pdf>.

Use of this criteria would almost certainly make the program overinclusive. The current proposed program already gives eligibility for people who were convicted for a cannabis offense, subject to an income limitation. If everyone of these people with a prior cannabis offense have two legal parents and just one sibling, the program will be open to four times as many people. This would dilute the percentage of individuals who suffered the most direct impact of prohibition and community divestment.

5. Conclusion of the Maryland Medical Cannabis Commission Regarding us of Race-Specific Qualification in Cannabis Licensing.

The State of Maryland looked to use race-based preferences when it began to establish regulations for its medical cannabis program. However, “Maryland’s licensing board abandoned that state’s preferences in 2015 after a Deputy State Attorney General wrote a brief letter suggesting the preferences would likely violate the Equal Protection Clause of the Fourteenth Amendment.”<sup>233</sup> In response, the Maryland Governor commissioned a study in 2018 to determine the efficacy of race-based preferences for Maryland’s cannabis market. The findings were based partially from a 2017 disparity study,<sup>234</sup> with the 2018 study using those findings to compare significant racial disparities in related industries.<sup>235</sup>

The report concluded that, “the 2017 Disparity Study provides a strong basis in evidence, consisting of both quantitative and qualitative findings, that supports the use of race- and gender-based measures to remediate discrimination affecting minority- and women-owned businesses in the types of industries relevant to the medical cannabis business.”<sup>236</sup> Moreover, the 2017 Disparity Study details a range of race- and gender-neutral activities that the State has

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<sup>233</sup> Robert Mikos, *New Study Defends Constitutionality of Racial / Gender Preferences in the Award of State Marijuana Licenses* (Jan. 18, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/01/323/>.

<sup>234</sup> NERA Economic Consulting, *Business Disparities in the Maryland Market Area*, 322 (Feb. 8, 2017).

<sup>235</sup> Jon Wainwright, *Letter to Maryland Department of Transportation*, NERA Economic Consulting (Jan. 17, 2018), <https://cdn.vanderbilt.edu/vu-my/wp-content/uploads/sites/2523/2018/01/14143015/MD-consultants-report-on-diversity.pdf>.

<sup>236</sup> *Id* at 13.



already undertaken to address existing disparities.<sup>237</sup> The 2017 Disparity Study found that, notwithstanding these race- and gender-neutral activities, many of which have been in place for a number of years, “disparities continue to exist in both public and private contracting in the same geographic and industry markets in which medical cannabis licensees and independent testing laboratories are likely to operate”.

Based upon these findings, it was recommended to the State that use of race-based preferences was essential to create a more inclusive industry. The study concluded that “Absent such affirmative remedial efforts by the State, I would expect to see evidence in the relevant markets in which the medical cannabis licensees will operate that is consistent with the continued presence of business discrimination.”<sup>238</sup>

#### 6. Documented Discrimination within Oregon’s Economy and Industry.

State and local governments in Oregon have conducted disparate impact studies similar to those conducted in Maryland. In 2019, the Oregon Department of Transportation completed a disparity study regarding “Disadvantaged Business Enterprises (DBE).”<sup>239</sup> The study concluded that discrimination on the basis of race, ethnicity, and gender affects minority- and women-owned firms in the Oregon transportation contracting industry.<sup>240</sup> The study also noted quantitative evidence of disparities in outcomes for minority- and women-owned firms regarding entry and advancement, business ownership, access to capital, bonding, and insurance.<sup>241</sup> The 2019 study conducted on behalf of the Oregon Department of Transportation also considered what percentage of DBE contracts were awarded in a race-neutral manner. In 2017, for all

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Keen Independent Research LLC, *Oregon Department Of Transportation 2019 DBE Disparity Study Update*, Prepared for Oregon Department of Transportation (Apr. 2019), [https://lcaonline.files.wordpress.com/2019/06/odot\\_2019\\_dbe\\_disparity\\_study\\_final\\_report.pdf](https://lcaonline.files.wordpress.com/2019/06/odot_2019_dbe_disparity_study_final_report.pdf)

<sup>240</sup> *Id.* Chapter 4, Page 8.

<sup>241</sup> *Id.* at Chapter 4, Page 11.

ODOT contracts administered through the Federal Highway Administration (FHWA) program, 12.32% were awarded to DBE companies; with 4.73% awarded through race-neutral manners, and 7.59% awarded through race-conscious manners.<sup>242</sup> In 2018, 8.94% of contracts were awarded to DBE companies; with 2.86% awarded through race-neutral manners, and 6.08% were awarded through race-conscious manners.<sup>243</sup>

The Portland Development Commission (PDC) completed its own study to determine whether its efforts to increase participation of minority-and-women owned businesses (MBE/WEBs) in Portland and PDC contracting were effective and whether other programs are needed.<sup>244</sup> The report concluded that PDC's race conscious programs had decreased disparities; however, there was "evidence of disparities in the utilization of MBEs and WBEs on City and PDC contracts *when City and PDC programs did not apply*."<sup>245</sup> The report also concluded that despite the City's race conscious programs, disparities persist. "For example, WBEs received about 5 percent of construction-related professional services prime contract dollars, which is lower than what those firms might be expected to receive based on availability."<sup>246</sup> The report found that there was also evidence of disparities within the Portland marketplace regarding:

- Annual revenue of certain MBE groups and WBEs is lower than other firms in the Portland area construction and construction-related professional services industries.
- There is evidence that minorities and women face greater disadvantages than other firm owners when seeking capital, bonding and insurance.
- There is also quantitative and qualitative evidence that MBE/WBEs face barriers to working as prime contractors and as subcontractors on local public sector contracts.

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<sup>242</sup> *Id.* at Chapter 4 Page 14.

<sup>243</sup> *Id.*

<sup>244</sup> BBC Research & Consulting, *CHAPTER ES. Executive Summary*, <https://www.portlandoregon.gov/bfrs/article/344656>

<sup>245</sup> *Id.* at 1.

<sup>246</sup> *Id.*

- There is evidence that the current availability of MBEs and WBEs to perform City construction and construction-related professional services contracts is less than what might be expected if minorities and women had the same opportunities as nonminorities and men to enter and advance within these industries, and form and grow their businesses.<sup>247</sup>

These disparity studies show that Oregon’s government contracting and industry still discriminates against businesses owned by the groups listed for qualification for cannabis equity business licenses: African American, Latinx, and Native American individuals. It is also important to note here that the Portland cannabis equity program, which employed race-neutral factors, has suffered from programing shortfalls. Despite promises to reinvest city tax funds into the equity program and reinvestment into impacted communities, 79% of the tax revenue went to law enforcement.<sup>248</sup> Only 10% of the funding went to small business programs that assist minority owned cannabis businesses.<sup>249</sup> While a state-funded disparity study similar to the one in Maryland could not be commissioned before the Cannabis Equity Act was drafted, the findings of other ordinances<sup>250</sup> leads to a conclusion that this step would prove what activists already know: the cannabis industry has almost entirely shut out minority owned businesses.

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<sup>247</sup> *Id.*

<sup>248</sup> Portland City Auditor, *Recreational Cannabis Tax: Greater Transparency and accountability need*, 5 (May 2019), <https://www.portlandoregon.gov/auditservices/article/730292>

<sup>249</sup> *Id.*

<sup>250</sup> Darlene Flynn, *Equity Analysis and Proposed Medical Cannabis Ordinance Amendments*, City of Oakland, Director, Dept. of Race & Equity (Feb 23, 2017), <http://www2.oaklandnet.com/oakcal/groups/cityadministrator/documents/report/oak063627.pdf> (“This analysis identifies disparities within the cannabis industry as well as revisions to the City’s medical cannabis ordinances, including a phased permitting process that prioritizes equity applicants and encourages equity incubators, to address the root causes of these disparities”).

7. Legislative History Demonstrating Good Faith Consideration of Race-Neutral Alternatives.

Oregon House Bill 4088, introduced to the legislature in 2020, was the first attempt at creating a state-level cannabis equity program in Oregon.<sup>251</sup> This bill was introduced without the use of race-based qualifiers.<sup>252</sup> During the summer of 2020, the Oregon People of Color (POC) Caucus created a work-group to expand House Bill 4088 and other efforts that attempted to create cannabis equity in Oregon. It was only after a good faith consideration of race-neutral factors that it became apparent that the only way for cannabis equity to succeed in Oregon is through the use of bill language that specifically names and benefits those groups most impacted by the war on drugs. That is, individuals who have a prior cannabis conviction, and those from specific minority groups who were disproportionately policed and suffered the personal, fiscal, and social consequences of the war on drugs and mass incarceration.

**B. The Duration of the Program is Limited, and the Program is Flexible Through the Inclusion of a Waiver-Like Provision.**

The scope of this program is limited due to the open nature of the Oregon cannabis market. Besides the cannabis grow industry that has been put on a moratorium<sup>253</sup>, all other aspects of the currently existing industry are open and licenses are unlimited. This equity program does not use a percentage set aside or quota. Instead, the program simply offers financial and technical assistance to enter a market where licenses are not capped.

The use of the race-based qualifier, as it is currently written, is limited in duration. The newly created Cannabis Equity Board (CED), as part of an all-encompassing annual Cannabis Equity report, will review cannabis equity license program qualifications to ensure participants

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<sup>251</sup> Oregon H.B. 4088 (2020), <https://olis.oregonlegislature.gov/liz/2020R1/Downloads/MeasureDocument/HB4088/Introduced>.

<sup>252</sup> *Id.*

<sup>253</sup> Oregon S.B. 218 (2019), <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB218/Enrolled>.

represent communities most impacted by cannabis prohibition and to ensure that the Oregon cannabis market is becoming more racially inclusive. This review is very analogous to the type of review articulated by the Supreme Court in *Fisher v. University of Texas at Austin*.<sup>254</sup> The CEB will have at its disposal valuable data about the manner in which different approaches to program qualifications may foster diversity.<sup>255</sup> The CEB will continue to use the data it receives to scrutinize the fairness of the current program qualifier; assess whether changing demographics have undermined the need for a race-conscious policy, and identify the effects of the affirmative-action measures it deems necessary.<sup>256</sup> It will be the obligation of the CEB to engage in constant deliberation and continued reflection regarding basis for program qualification.

To ensure that the program is as inclusive as possible, the race-based qualifier contains a waiver-like provision. If someone comes from a minority group that is not currently included as a benefitting minority group, but can show that their community has been disproportionately impacted due to cannabis prohibition, that applicant can enter the program through a “waiver-like” provision that would allow their minority group to qualify for the equity designation. This is essential to the program as significant variation in the quality of reporting across years, agencies, and places, leaves some gaps in the data that make it difficult to quantify racial disparities at the local level regarding cannabis policing.<sup>257</sup> “Further, limitations in FBI data make it difficult to examine these disparities, particularly in regards to Latinx and multiracial people. The FBI does not count Latinx as a racial category and instead puts Latinx individuals in other racial categories — for example, Black or White.”<sup>258</sup>

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<sup>254</sup> *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

<sup>255</sup> *Compare Id.* at 2214.

<sup>256</sup> *Id.* at 2214-2215.

<sup>257</sup> Amer. Civ. Liberties Union, *supra* Note 95.

<sup>258</sup> *Id.*

Unlike the Ohio medical cannabis equity program that was struck down on equal protection grounds that used a general MBE qualification, this proposed equity program specifically lists the communities most impacted by prohibition.<sup>259</sup> The specific focus of this bill is on African American, Latinx, and Native-American communities; in addition to groups who may later be admitted under the waiver provision, ensuring that this program is benefitting the groups disproportionately targeted by the war on drugs.

The most pertinent durational aspect of this policy is the ten year social equity license designation for a social consumption license and a new delivery license. Such a time duration is not the first of its kind, as the Massachusetts equity program has similar provisions.<sup>260</sup> “The Massachusetts Cannabis Control Commission (‘MCCC’) recently created two special licensing opportunities for social equity applicants. The first special license is the new Delivery-only License which allows a business to deliver marijuana and marijuana products directly to consumers from a marijuana retailer or a medical marijuana treatment center. This new license opportunity is offered exclusively to Economic Empowerment Priority Applicants and Social Equity Program Participants for the first 24 months. The MCCC may extend this exclusivity period if the objective of increasing representation in the regulated marijuana industry by ‘people from communities that have previously been disproportionately harmed by Marijuana prohibition and enforcement of the law has not been met.’ Similarly, the Social Consumption Establishment Pilot Program creates a special license that allows a business to sell marijuana and marijuana products for onsite consumption. This new license is offered exclusively to a select group of applicants, which includes Economic Empowerment Priority Applicants and Social Equity Program Participants, for the first 24 months. Again, the MCCC may extend this exclusivity

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<sup>259</sup> *Pharmacann Ohio, LLC v. Williams*, No. 17CV10962, at 9 (Ohio Com. PI 2018).

<sup>260</sup> Swinburne, *supra* note 67, at 269.

period if the objective of increasing representation in the regulated marijuana industry by ‘people from communities that have previously been disproportionately harmed by Marijuana prohibition and enforcement of the law has not been met.’ In addition to providing the benefit of an exclusivity period for these new marijuana business licenses, the Commonwealth has also tried to address the potential financial barriers created by the application and annual license fees. Both the Delivery-only and the Social Consumption Establishment license are subject to a \$1,500 application fee and a \$10,000 annual license fee. This is the same fee structure imposed on marijuana retail establishments, marijuana product manufacturers, and outdoor marijuana cultivators with between 30,001 and 40,000 square feet of marijuana canopy. However, the Commonwealth has waived the application fee and cut the annual license fee in half for Social Equity Program Participants and Economic Empowerment Priority Applicants.”<sup>261</sup>

A similar time period is needed for these emerging licenses to ensure that these newly created areas of the cannabis marketplace are available to communities of color in Oregon. As already stated, entrepreneurs of color are grossly underrepresented in the cannabis marketplace. This is largely because of a lack of access to capital. Under 18 U.S.C. §1956, banks that engage in financial transactions involving the proceeds of an unlawful activity, e.g. the proceeds of marijuana sales, can face fines up to \$500,000 or twice the value of the transaction, whichever is greater, and/or imprisonment up to twenty years.<sup>262</sup> In addition, banks that work with marijuana businesses run the risk of losing their deposit insurance coverage.<sup>263</sup>

Another new license type that will be available exclusively to equity license holders is a “shared kitchen” license that allows multiple licensees to share the same space and equipment. Such a license is not unprecedented, as the cannabis equity program in Long Beach, California,

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<sup>261</sup> *Id.* at 269-270.

<sup>262</sup> 18 U.S.C. § 1956(a)(1) (2016).

<sup>263</sup> 12 U.S.C § 1818 (2011).

created such a license, as well as a specialty delivery license.<sup>264</sup> The Long Beach city council approved these two new license types due to the shortfalls of their program, as only one equity license has been issued despite there being 79 qualified applicants.<sup>265</sup> The Long Beach City Council attributed the failure of equitable market participation to a lack of access to capital.<sup>266</sup> The City Council believed that allowing equity businesses to pool their resources through a shared space will help to resolve shortfalls in capital and make it easier for equity license holders to open businesses.<sup>267</sup>

The necessity of self-financing has led the cannabis marketplace to quickly become consolidated by the independently wealthy. Making the market inaccessible to small businesses. In 2019, a cannabis firm in Portland was purchased by a Massachusetts company for nearly \$1 billion.<sup>268</sup> The possibility of federal legislation in the near future has led private cannabis company stocks to skyrocket.<sup>269</sup> From this background, it is clear that if minority-owned businesses are to benefit from emerging cannabis markets in Oregon, social equity businesses in Oregon must be afforded an opportunity to be first to market.

Pending federal legalization compounds the need for minority representation in the Oregon cannabis industry. Oregon passed legislation in 2019 that allows the governor to enter into interstate trade compacts, once certain conditions are met.<sup>270</sup> While interstate cannabis trade

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<sup>264</sup> Hayley Munguia, *Long Beach moves ahead with changes to Cannabis Social Equity Program*, Press-Telegram (Jan 5, 2021), <https://www.presstelegram.com/2021/01/05/long-beach-moves-ahead-with-changes-to-cannabis-social-equity-program/>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Mike Rogoway, *Portland marijuana company Cura Cannabis sells for \$1 billion*, The Oregonian (May 2, 2019), <https://www.oregonlive.com/business/2019/05/portland-marijuana-company-cura-cannabis-sells-for-nearly-1-billion.html>.

<sup>269</sup> Shariq Khan, *Weed stocks surge as Kamala Harris vows to decriminalize pot in debate*, Reuters (Oct. 8, 2020), <https://www.reuters.com/article/us-cannabis-stocks/weed-stocks-surge-as-kamala-harris-vows-to-decriminalize-pot-in-debate-idUSKBN26T3IH?s=04&fbclid=IwAR2Y2Bd-39EyqxGiemHQjTJ1UBir5vXVWPI0Nuh6nj7oZkqSGgN10cfQjE>.

<sup>270</sup> Or. S.B. 582 <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SB582>.



has not yet been realized, the potential market growth is substantial. Oregon will become a national leader in the cannabis trade once interstate trade is a reality. This presents a once in a lifetime opportunity to use a developing market to reinvest in communities most in need of financial support. For minority owned businesses in Oregon to become major players at the federal level, legislation at the state level is necessary to ensure market participation pre-federal legalization.

**C. The Cannabis Equity Act will not Improperly Disadvantage Other Groups, and Increased Diversity will Benefit the Cannabis Market as a Whole.**

To be narrowly tailored, a race-conscious policy must not unduly burden individuals who are not members of the favored racial and ethnic groups.<sup>271</sup> It is important to note that members of the non-favored racial groups can still gain admission to the program via the prior cannabis conviction qualification. Additionally, an applicant who cannot join the equity program is in no way denied access to markets that are currently established. The benefits that equity applicants receive are more ancillary than any sort of quota system, and directly address the barriers which have kept businesses owned by individuals from targeted communities from entering the legal cannabis market.

One failure of other equity programs has been the long wait periods that applicants must endure in order to receive their license or open their business.<sup>272</sup> The Oregon Cannabis Equity Act will resolve this issue by assigning the OLCC to immediately process equity licenses with no more than a thirty day wait from application submission to application processing start; not subjecting equity licenses to the sixty day rule that nulls their application if they are not ready to be licensed at sixty days from the start of the application processing; and allowing equity

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<sup>271</sup> *Grutter*, 539 U.S. at 340.

<sup>272</sup> Levin, *supra* note 226, (“On a recent afternoon, the couple showed the Guardian around the still vacant store they had rent to house their dispensary. They pointed to empty glass shelves and the display counters that would feature their products. They estimate they have lost more than \$200,000 on the endeavor.”).

applicants who meet all other license qualifications to receive a provisional OLCC cannabis license without including a Land Use Compatibility Statement.

Most importantly, non-minority entrepreneurs in the cannabis industry who won't qualify for the program will still benefit from the program as increased diversity in the cannabis industry will make the cannabis market, and the Oregon economy in general, more profitable. This idea of success through diversity was adopted by the Supreme Court in *Bollinger* where the court accepted the concept of "critical mass."<sup>273</sup> The University of Michigan Law School sought, through the school's official admissions policy, to attain the purported educational benefits of having a diverse student body by enrolling a "critical mass" of students who were members of underrepresented minority groups such as African Americans, Hispanics, and Native Americans.<sup>274</sup> The Court ruled that the goal of attaining a "critical mass" of underrepresented minority students did not transform the program into a quota.<sup>275</sup>

Critical mass has clear application in business diversity. "Companies in the top-quartile for ethnic/cultural diversity on their executive teams were 33% more likely to have above-average profitability than companies in the fourth quartile. Companies with the most ethnically/ culturally diverse boards worldwide are 43% more likely to experience higher profits."<sup>276</sup> Recently published studies have shown the economic loss attributed to the racial wealth gap and lack of representation in business. A 2019 report by McKinsey & Company estimated that the effect of the racial wealth gap "will cost the US economy between \$1 trillion

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<sup>273</sup> *Id.* at 307.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 313.

<sup>276</sup> McKinsey & Company, *Delivering Through Diversity*, 8, 13 (Jan. 2018), [https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity\\_full-report.ashx](https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx).

and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.”<sup>277</sup> A 2020 study completed by Citi found that if the racial wealth gap were closed 20 years ago, \$16 trillion could have been added to the U.S. economy; and if the gap were closed today, \$5 trillion can be added over just the next half decade.<sup>278</sup> In response to these findings, Citi created a \$1 billion initiative to close the racial wealth gap, with a focus on building wealth through housing and entrepreneurship.<sup>279</sup>

Jurisdictions that have not employed equity programs have failed to incorporate minority owned businesses into their legal marketplace, and are thus leaving money on the table. Prior to establishing a cannabis equity program, none of the thirty dispensary licenses in Sacramento, California, were minority owned.<sup>280</sup> While at the same time, it was estimated that 50% of the approximately 100 illegal delivery services in Sacramento were minority owned.<sup>281</sup> Employing race based qualification for equity licenses will most effectively enable businesses owned by those most impacted by the War on Drugs to enter Oregon’s legal cannabis market, and help to create a critical mass of minority owned businesses in the marketplace.

If it takes wealth or access to capital to be a successful entrepreneur, then America’s past and present policies that suppress wealth-building in communities of color are also suppressing

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<sup>277</sup> McKinsey & Company, *The Economic Impact of Closing the Racial Wealth Gap*, (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>.

<sup>278</sup> Citi GPS: Global Perspectives & Solutions, *Closing The Racial Inequality Gaps The Economic Cost of Black Inequality in the U.S.*, (Sep, 2020), <https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D>

<sup>279</sup> Reshma Kapadia, *Fixing the Racial Wealth Gap Could Add \$5 Trillion to the Economy. Here’s Where to Start*, MarketWatch (Sep. 27, 2020), [https://www.marketwatch.com/articles/fixing-the-racial-wealth-gap-could-add-5-trillion-to-the-economy-heres-where-to-start-51601234449?mod=article\\_inline](https://www.marketwatch.com/articles/fixing-the-racial-wealth-gap-could-add-5-trillion-to-the-economy-heres-where-to-start-51601234449?mod=article_inline)

<sup>280</sup> Nick Thomas, *Which California city might show the way forward for cannabis social equity in the state?*, Marijuana Business Daily (Feb. 4, 2020), <https://mjbizdaily.com/which-california-city-might-show-the-way-forward-for-cannabis-social-equity-in-the-state/>

<sup>281</sup> *Id.*

American entrepreneurship.<sup>282</sup> To get an idea of the potential importance of access to financial capital in contributing to racial disparities in business ownership and outcomes, one only has to look at the alarming levels of wealth inequality that exist in the United States.<sup>283</sup> Half of all Black households have less than \$6,200 in wealth.<sup>284</sup> Wealth levels among White and Asian households are 11 times higher.<sup>285</sup> Low levels of wealth among disadvantaged minorities are likely to translate into less successful businesses because the owner's wealth can be invested directly in the business or used as collateral to obtain business loans.<sup>286</sup> Lending discrimination can exacerbate this problem by further restricting access to capital.<sup>287</sup>

The Black/White disparity in startup capital is the largest single factor contributing to racial disparities in closure rates, profits, employment, and sales.<sup>288</sup> Firms with higher levels of startup capital are less likely to close and are more likely to have higher profits and sales and to hire employees. The estimated positive relationship is consistent with the inability of some entrepreneurs to obtain the optimal level of startup capital because of liquidity constraints.

The racial gap in education is also significant in this discussion, as it contributes to the disparities in market participation and minority business ownership throughout the economy. “A 2019 state audit of Portland Public Schools found a 53 percentage point achievement gap, for example, between the district's white and Black students in language arts.”<sup>289</sup> The 2019 “report

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<sup>282</sup> Robert W. Fairlie and Alicia M. Robb, *Race and Entrepreneurial Success: Black-, Asian-, and White-owned businesses in the United States*, The MIT Press (2008).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> Latisha Jensen, *A 2019 Audit Found Deep Racial Disparities in Student Achievement in Portland Public Schools*, Willamette Week (Oct. 13, 2020), <https://www.wweek.com/news/schools/2020/07/29/a-2019-audit-found-deep-racial-disparities-in-student-achievement-in-portland-public-schools/#:~:text=of%20Willamette%20Week,-A%202019%20Audit%20Found%20Deep%20Racial%20Disparities,Achievement%20in%20Portland%20Public%20Schools&text=The%20biggest%20gap%20is%20between,Black%20students%20in%20language%20arts>. See also Dennis Richardson, *DOE Education Portland Public Schools Must Do More to Monitor Spending and Address Systemic Obstacles to Student Performance*,

shows only 21% of Black students met or exceeded grade-level standards on the 2017-18 English Language Arts achievement test compared to 74% of white students. The achievement level differences for math are even steeper. Only 11% of Black students met the standards for math compared to 60% of white students.”<sup>290</sup> A 2015 study completed by Portland State University found that across Oregon, outcomes of students of color were worse than the outcome for White students, and that the disparity was persistent across all income demographics.<sup>291</sup> The Oregon Cannabis Equity Act will ameliorate this disparity by providing additional funding to the Student Success Funds for African American, Indigenous, and Latinx students.

“To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required ‘critical mass’ of target group participation in the work force, it is essential to combat the effects of apst systemic discrimination.”<sup>292</sup> By providing financial and technical assistance to qualifying businesses, Oregon’s cannabis market will become accessible to businesses owned by individuals from targeted communities. Thus allowing the entire marketplace to benefit from increased productivity, and allow the state to benefit from increased tax revenue that will result from a more efficient market. The CEB will also be charged with reviewing the use of race-based language to determine if it is still necessary and to what degree the legal cannabis market in Oregon is becoming more inclusive. This demonstrates that equity licenses are not going to be issued to the detriment of non-BIPOC businesses, but rather, will be administered to ensure only equitable market participation by communities most impacted by prohibition and cannabis criminalization.

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*Particularly at Struggling Schools*, Secretary of State Oregon Audits Division (Jan. 2019), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/6687804#>.

<sup>290</sup> *Id.*

<sup>291</sup> Anne Sinkey & Ann Curry-Stevens, *Disaggregating Student Outcomes by Race and Income: Educational Equity in Oregon*, Portland State University (2015), [https://pdxscholar.library.pdx.edu/care\\_pubs/2/](https://pdxscholar.library.pdx.edu/care_pubs/2/)

<sup>292</sup> *CN v. Canada (Canadian Human Rights Commission)*, 1 S.C.R. 1114 Date: 1987-06-25 (1987).

## Conclusion

For genuine social reconciliation to occur, America must engage in a process of acknowledging its past and repairing the enduring injustices it has created at home.<sup>293</sup> The Oregon cannabis industry provides a once in a generation opportunity to ensure that economic growth benefits communities most in need of capital. Oregon was at the forefront of ending cannabis prohibition, and has been noted as the only state among the early crusaders of legalization to exhibit a substantive desire to use legalization as a tool to advance racial justice.<sup>294</sup> The campaign to legalize cannabis in Oregon highlighted, “People of color are disproportionately more likely to be arrested for and incarcerated longer for marijuana possession than white people, also making this measure a step toward reducing unjust impacts of the prison system on people of color. . . . Even though both groups use marijuana at the same rate, Black Oregonians are twice as likely to be arrested for marijuana possession as Whites.”<sup>295</sup>

The Oregon Cannabis Equity will accomplish the goal of advancing racial justice by reducing barriers to market entry that have kept BIPOC communities from the marketplace. This will be accomplished by allowing qualified equity businesses to: receive a provisional OLCC cannabis license without including a Land Use Compatibility Statement; assigning equity license applicants immediately to begin processing by the OLCC with no more than a thirty day wait from application submission to application processing start; and, not subjecting equity license applicants to the sixty day rule that nills their application if they are not ready to be licensed at fifty days from start of application processing.

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<sup>293</sup> Charles J. Ogletree, Jr., *Repairing the past: new efforts in the reparations debate in America*, 38:2 Harv. C.R.-C.L. L. Rev. 279 (2003).

<sup>294</sup> David Schlusel, *The Mellow Pot-Smoker: White Individualism in Marijuana Legalization Campaigns*, 105 CAL. L. REV. 885, 914 (2017), <http://www.californialawreview.org/wp-content/uploads/2017/07/6Schlusel-35.pdf>.

<sup>295</sup> *Id.*

Ohio's short lived experience using race-specific language proved that such language is effective as 16% of the state's medical licenses were minority owned.<sup>296</sup> On the other hand, use of race-neutral factors have been found to be ineffective. In Massachusetts, only 1.2% of cannabis businesses are minority owned, and only 10 applications were received for the 123 social equity licenses that we set aside by the state.<sup>297</sup>

“The American Bar Association (ABA) has identified more than 40,000 state and federal regulations that impose collateral consequences on criminal convictions.”<sup>298</sup> “One analysis of the ABA data found that at least 84 percent of collateral consequences were related to employment, and 82 percent did not have an end date.”<sup>299</sup> Providing automatic expungement of cannabis offenses will clear thousands of records and brighten the future for thousands of Oregonians.

The scope of this program is narrowly tailored to further the State's compelling interest to remedy past discrimination, and increase diversity, because: (1) after a good faith consideration of race-neutral qualifying factors, absence of a race based qualifier will not allow the program to benefit communities most impacted by the war on drugs; (2) the scope and duration of the program is limited; (3) the program is flexible and targets the specific minority group suffering disparities arising from discrimination, which has been perpetuated through programs intended to be race-neutral; and (4) the program will not improperly disadvantage other groups as a more diversified marketplace will benefit the entire industry and economy.

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<sup>296</sup> Ben Sheppard, *Going For The Green: Social Equity In The Recreational Cannabis Industry*, 8 *Lincoln Mem. L. Rev.* 1, 308-309 (Winter 2020),

<https://digitalcommons.lmunet.edu/cgi/viewcontent.cgi?article=1128&context=lmulrev>

<sup>297</sup> *Id.*

<sup>298</sup> Maritza Perez et. al., *Using Marijuana Revenue to Create Jobs*, Center for American Progress (May 20, 2019), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/05/20/470031/using-marijuana-revenue-creat-e-jobs/> (citing National Institute of Justice, *National Inventory of the Collateral Consequences of Conviction* (May 2019), <https://www.nij.gov/topics/courts/pages/collateral-consequences-inventory.aspx>).

<sup>299</sup> *Id.* (citing Stephen Saltzburg, *Testimony Before the Equal Employment Opportunity Commission to Examine Arrest and Conviction Records as a Hiring Barrier* (Jul. 26, 2011) <https://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm#fn9>).

The Supreme Court has used the Equal Protection Clause for the purpose of protecting subordinated groups from governmental acts that contribute to their subordination.<sup>300</sup> African Americans were the intended primary beneficiaries of the Equal Protection Clause and should be designated as a specially disadvantaged group.<sup>301</sup> African American and other social groups who are in a position of perpetual subordination should be viewed as having certain protections guaranteed under the Equal Protection Clause.<sup>302</sup> In the context of police discrimination and lack of intergenerational wealth, it is clear that in addition to the African American community, Latinx and Native American communities are also especially disadvantaged groups. “The continuing disadvantaged condition of communities of color creates a necessity that race-conscious actions be created to bring members of traditionally excluded groups into the economic mainstream.”<sup>303</sup>

Following demonstrations in the summer of 1967, President Lyndon B. Johnson created the Kerner commission to study three things: “What happened?, Why did it happen?, and What can be done to prevent it from happening again?”<sup>304</sup> The basic conclusion of the study was this: “Our nation is moving toward two societies, one black, one white--separate and unequal. Reaction to last summer's disorders has quickened the movement and deepened the division. Discrimination and segregation have long permeated much of American life; they now threaten the future of every American.”<sup>305</sup>

It is self-evident that the events during the summer of 2020 were not much different from the summer of 1967. However, as stated by the Kerner Commission: “This deepening racial division is not inevitable. The movement apart can be reversed. Choice is still possible. Our

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<sup>300</sup> See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>301</sup> Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

<sup>302</sup> *Id.*

<sup>303</sup> Samuel Issacharoff & Pamela S. Karlan, *Groups, politics, and the Equal Protection Clause*, 58:35 *Univ. of Miami L. Rev.*, 36 (2003), <https://core.ac.uk/download/pdf/194852813.pdf>.

<sup>304</sup> *Report of the National Advisory Commission of Civil Disorders* (1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

<sup>305</sup> *Id.* at 1.



principal task is to define that choice and to press for a national resolution. To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values. The alternative is not blind repression or capitulation to lawlessness. It is the realization of common opportunities for all within a single society. This alternative will require a commitment to national action--compassionate, massive and sustained, backed by the resources of the most powerful and the richest nation on this earth. From every American it will require new attitudes, new understanding, and, above all, new will. ”<sup>306</sup>

“It is time now to turn with all the purpose at our command to the major unfinished business of this nation. It is time to adopt strategies for action that will produce quick and visible progress. It is time to make good the promises of American democracy to all citizens--urban and rural, [W]hite and [B]lack, Spanish-surname, American Indian, and every minority group. Our recommendations embrace three basic principles:

- To mount programs on a scale equal to the dimension of the problems;
- To aim these programs for high impact in the immediate future in order to close the gap between promise and performance;
- To undertake new initiatives and experiments that can change the system of failure and frustration that now dominates... and weakens our society.”<sup>307</sup>

“These programs will require unprecedented levels of funding and performance, but they neither probe deeper nor demand more than the problems which called them forth. There can be no higher priority for national action and no higher claim on the nation's conscience.”<sup>308</sup>

“Claims that law must be ‘color-blind; or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality... [We cannot] let

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 2.

<sup>308</sup> *Id.* at 2.

color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens... In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat people equally, we must treat them differently. We cannot- we dare not let- the Equal Protection Clause perpetuate racial supremacy.”<sup>309</sup>

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<sup>309</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327, 407 (1978); Justice Brennan, concurring in part and dissenting in part.