

# **Cannabis-Related Expungement Laws**



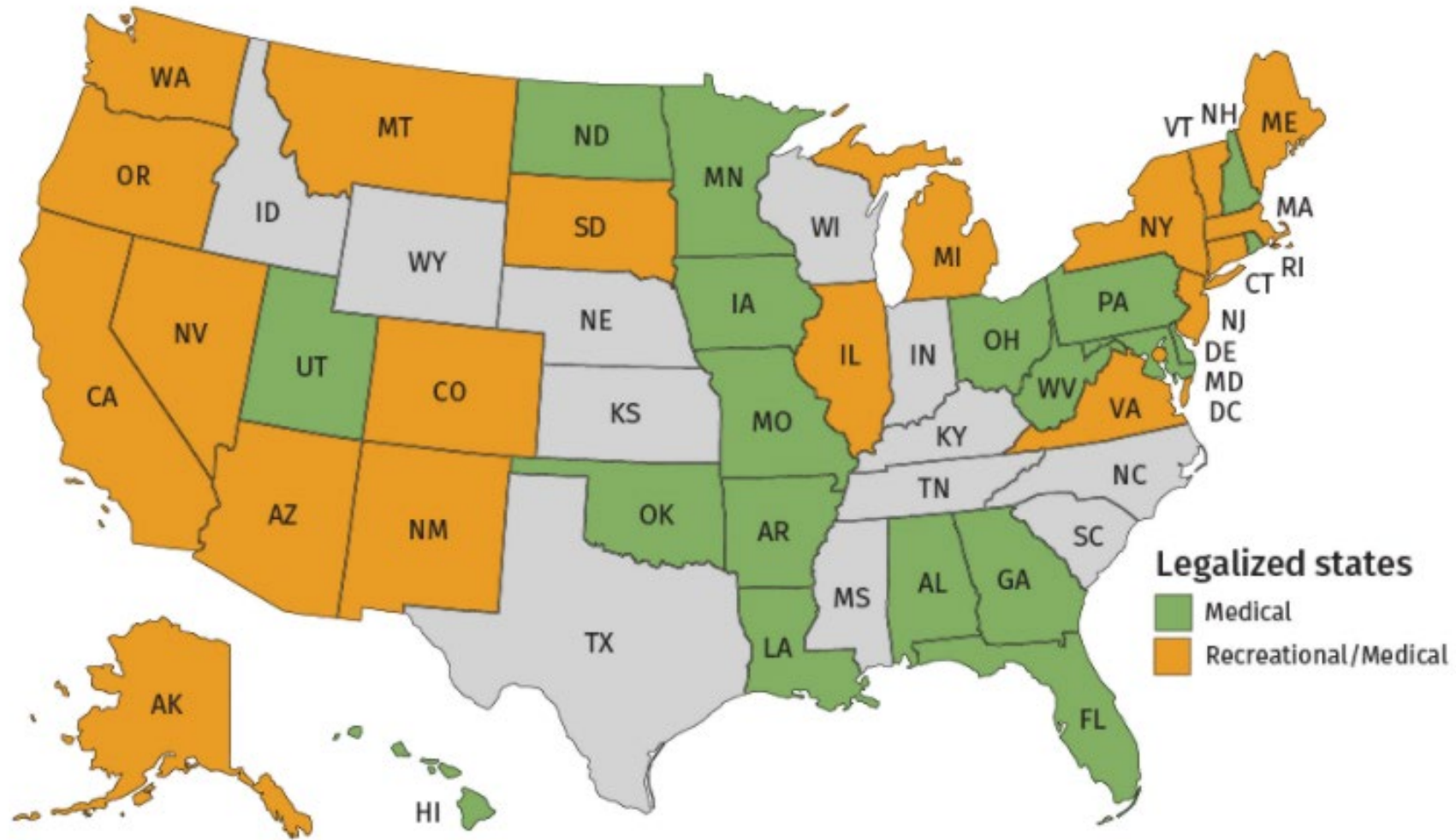
Sept. 22, 2021  
Camille K. Gourdet, JD, MA

# Presentation Overview

## **Cannabis-Related Expungement Laws**

- Continuing Expansion of State-Level Cannabis Legalization
- Persistent trend of racial inequities
- Why Cannabis-Related Expungement is Needed
- Substantive and Key Procedural Elements
- Effect of gov't initiated expungement laws

# States' Legalization of Cannabis



Note: Does not include states that have legalized only CBD-based oils.

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Source: MJBizDaily research

# A Significant Portion of Drug Arrests are Cannabis-Related

TABLE 1

## National Arrests for Marijuana and All Drugs

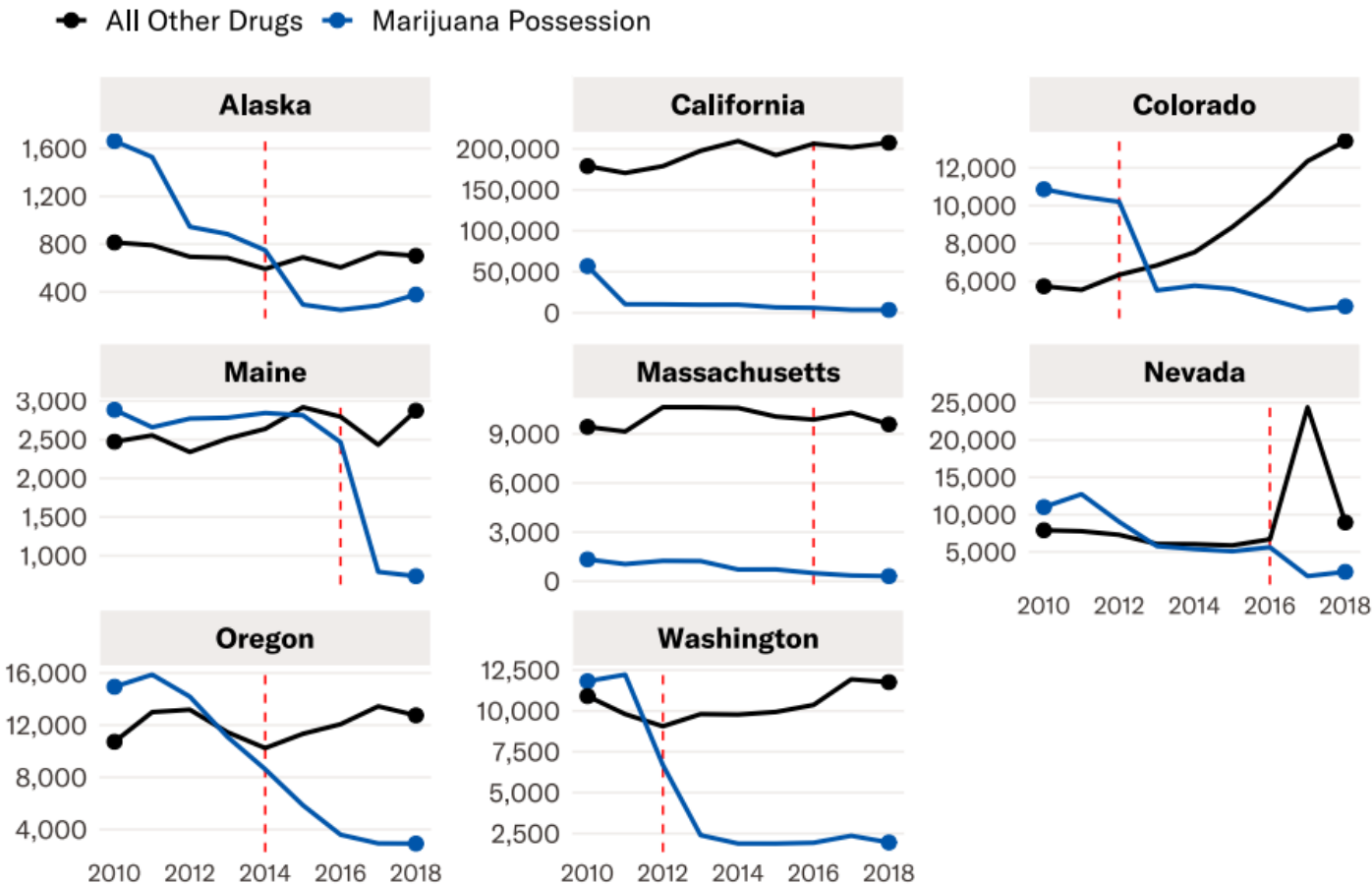
Year	Total Marijuana Arrests	All Drug Arrests	% All Drug Arrests That Were for Marijuana
2010	831,849	1,556,916	53.4%
2011	768,390	1,488,628	51.6%
2012	734,019	1,469,273	50.0%
2013	856,263	1,702,249	50.3%
2014	679,188	1,453,543	46.7%
2015	595,127	1,369,543	43.5%
2016	611,026	1,445,215	42.3%
2017	702,778	1,613,926	43.5%
2018	692,965	1,603,316	43.2%

Source: FBI/Uniform Crime Reporting Program Data

# Overall Cannabis-Related Arrests have been Falling in Fully Legalized States

FIGURE 7

Drug Arrests in States With Legalized Marijuana (Before 2018)



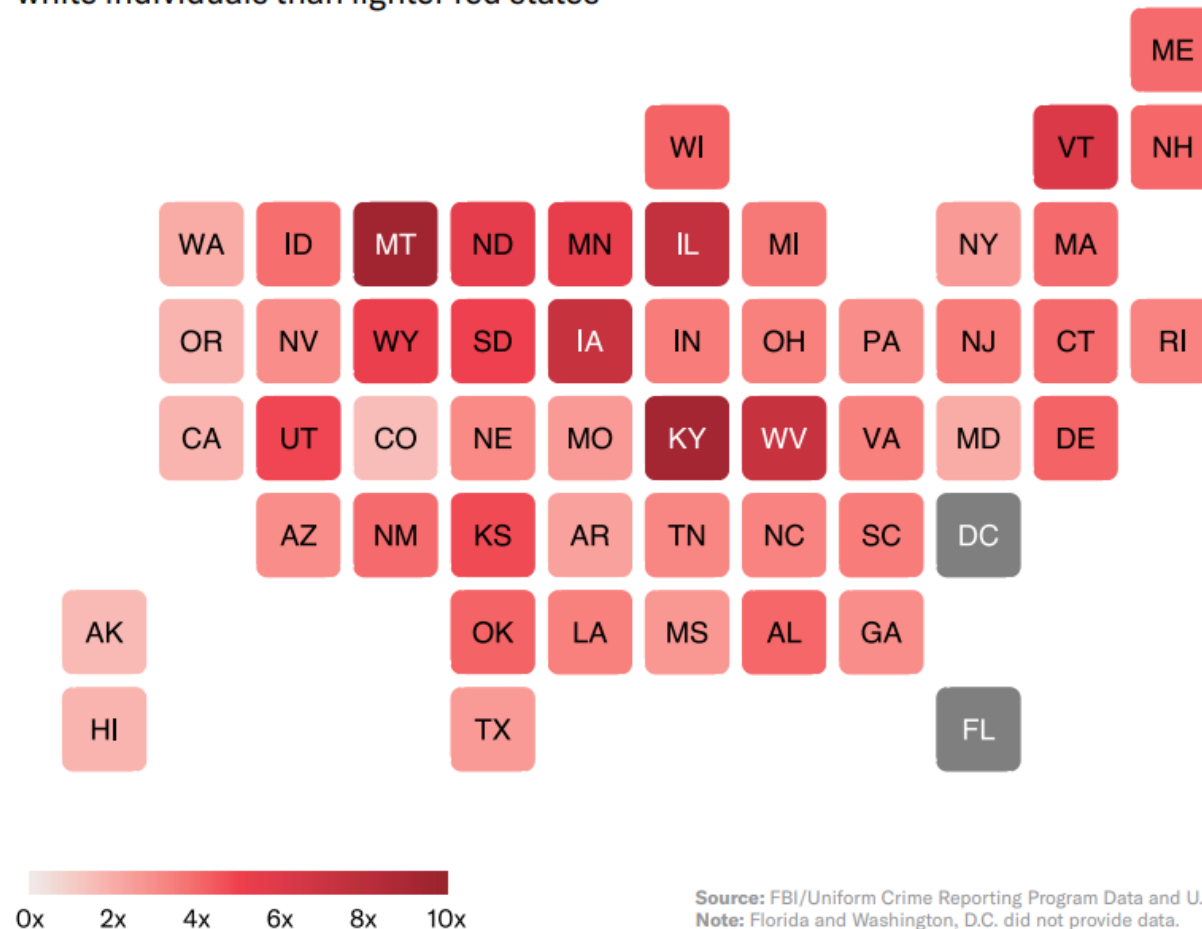
Source: FBI/Uniform Crime Reporting Program Data

# *However,* BIPOC Continue to be Disproportionately Arrested

FIGURE 11

## **Black-to-White Rate Ratios for Marijuana Possession Arrests by State (2018)**

Darker red states have higher rate ratios of arrest between Black and white individuals than lighter red states



Source: FBI/Uniform Crime Reporting Program Data and U.S. Census Data  
Note: Florida and Washington, D.C. did not provide data.

# Racial Inequities Persist in Enforcement of Cannabis Laws

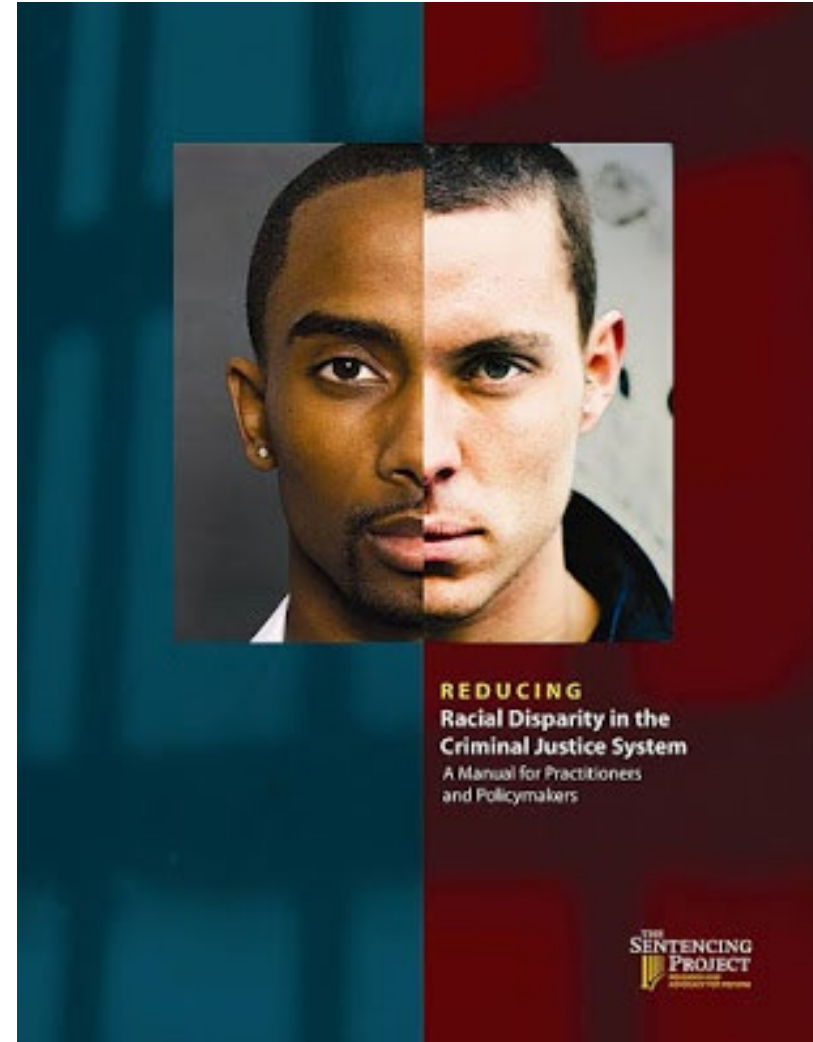
TRAINING





# Expungement

set-aside  
sealing  
annulment  
expungement  
nullification  
expunction  
vacatur





# Expungement for Past Simple Cannabis Possession



# Expungement for Past Simple Cannabis Possession

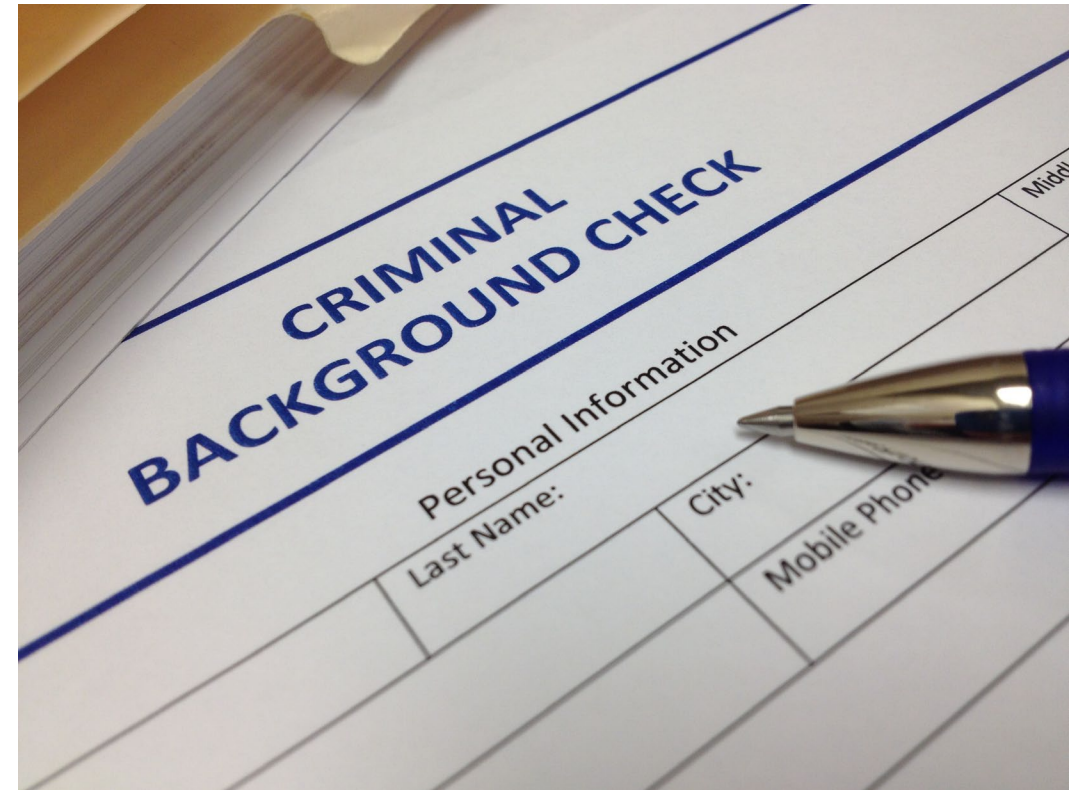
## What It Is:

“The removal of a conviction (esp. for a first offense) from a person's criminal record.”  
(Black’s Law Dictionary, 8<sup>th</sup> Ed.)

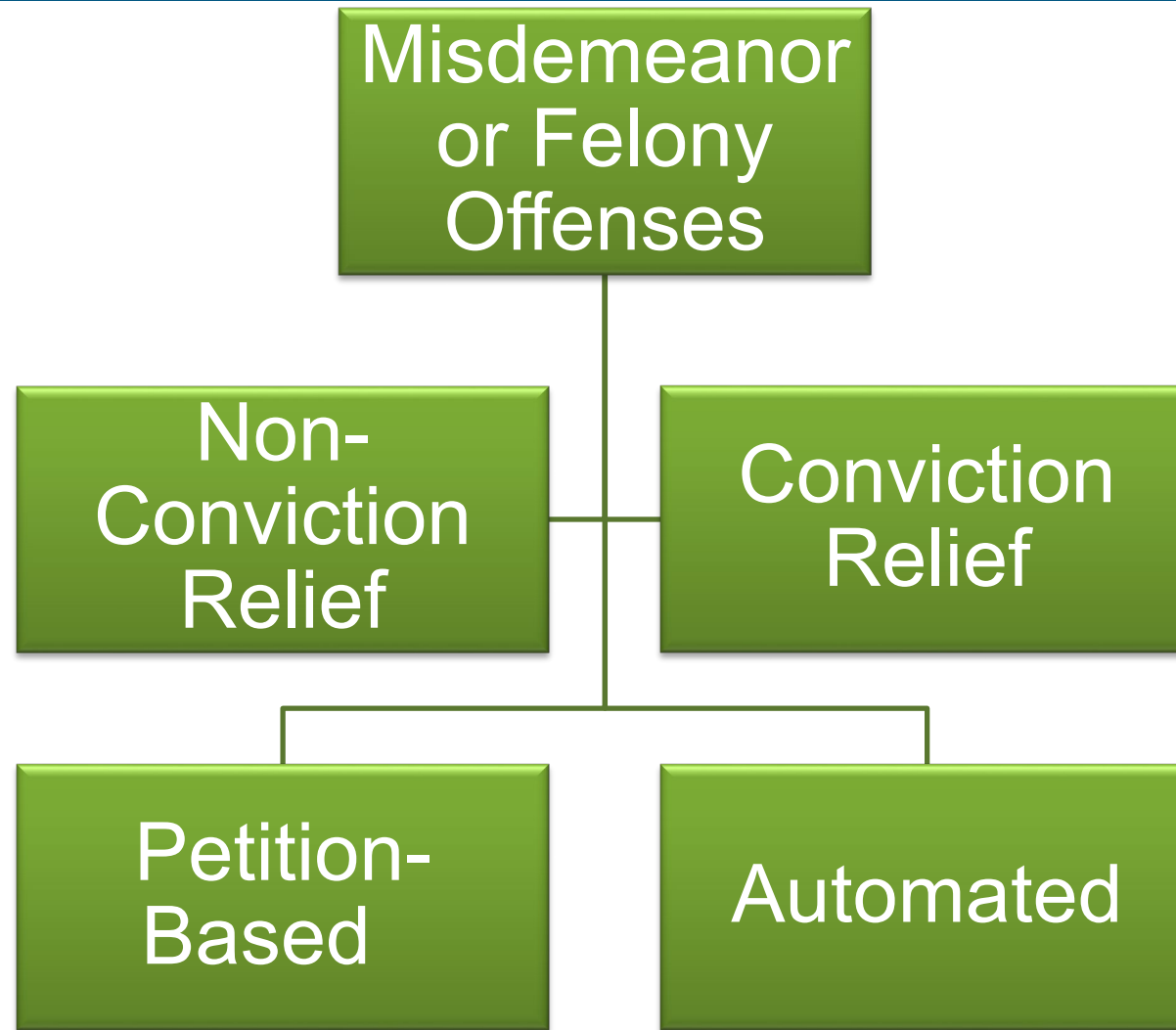
## Why It’s Needed (Collateral Consequences)

Criminal record makes it harder to:

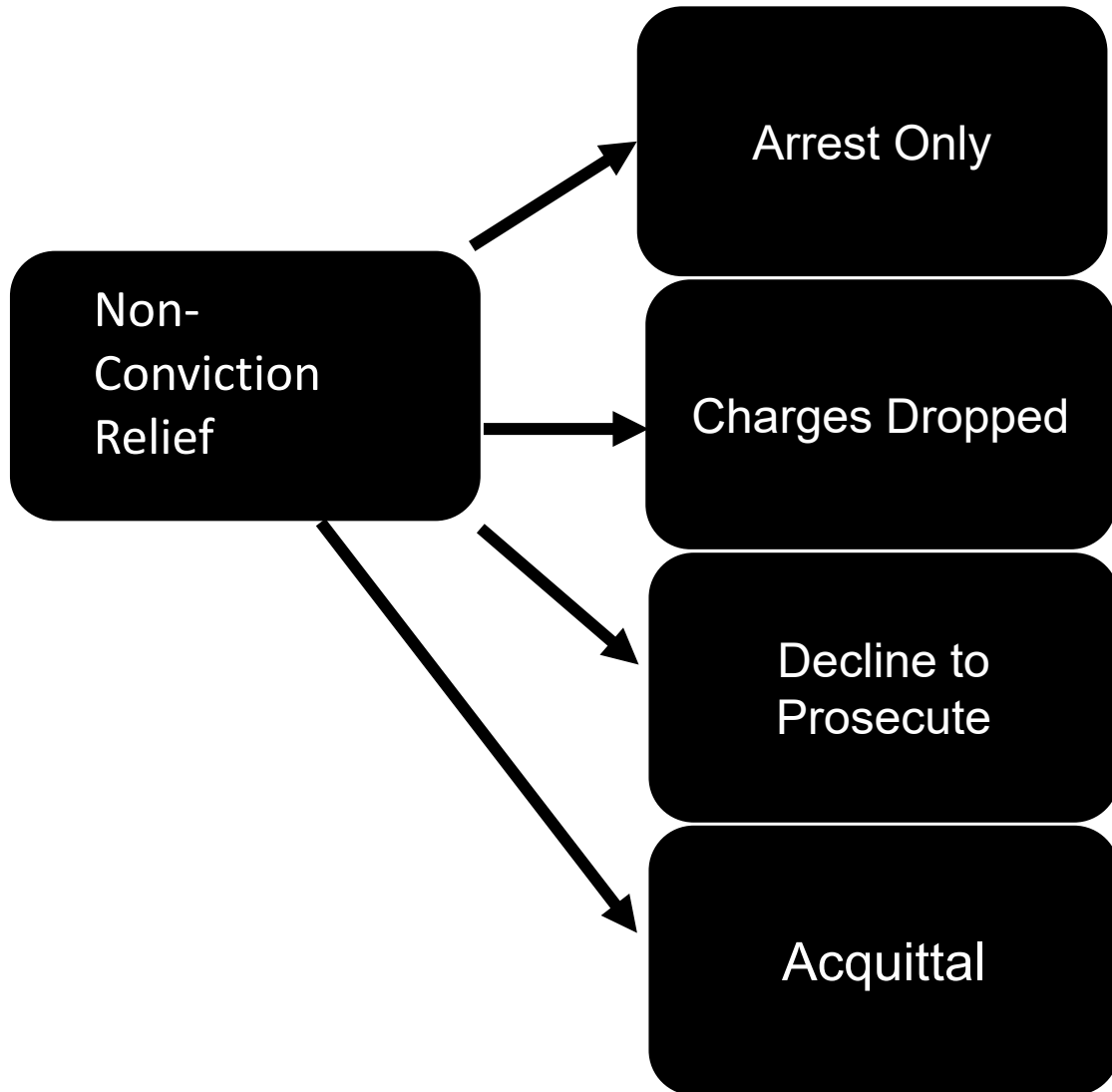
- Secure a job
- Secure or restore a professional license
- Vote (some states: temporarily or permanent ban)
- Obtain public benefits (e.g., public housing, food stamps)



# Key Substantive Elements: *Qualifying Offenses*



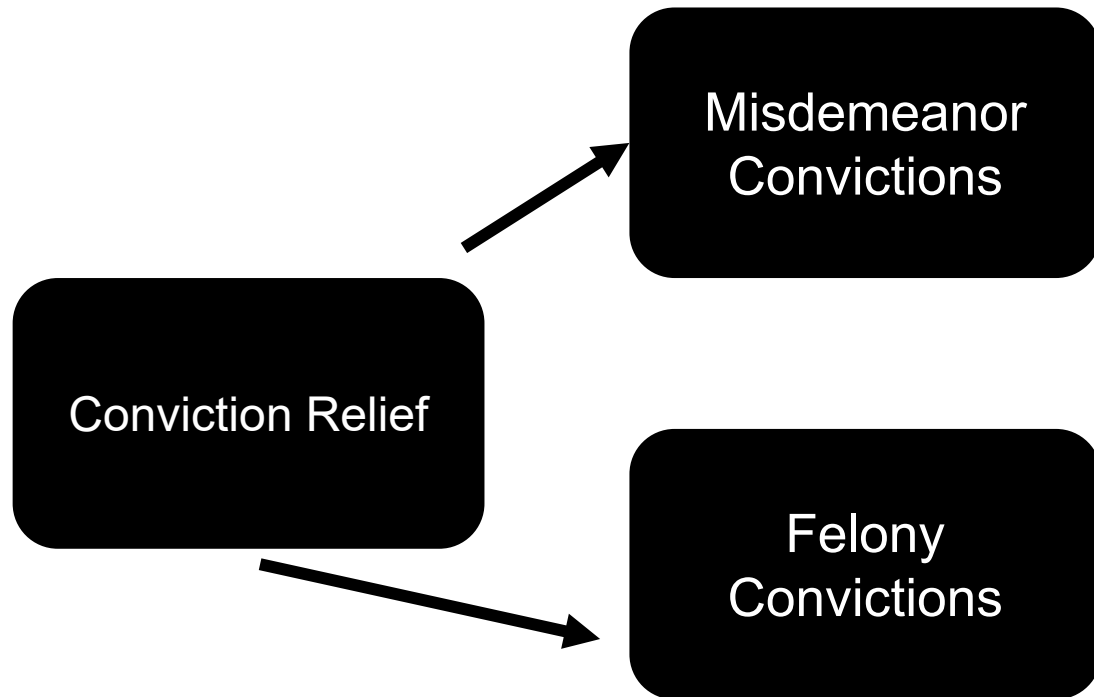
# Key Elements of Expungement: Non-Conviction Relief



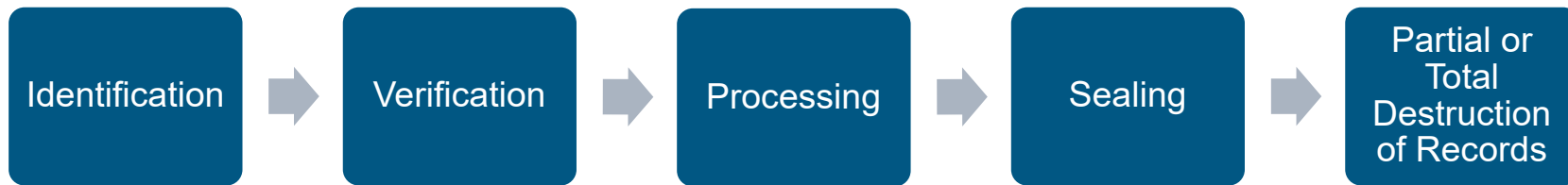
**CASE  
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# Key Elements of Expungement: Non-Conviction Relief



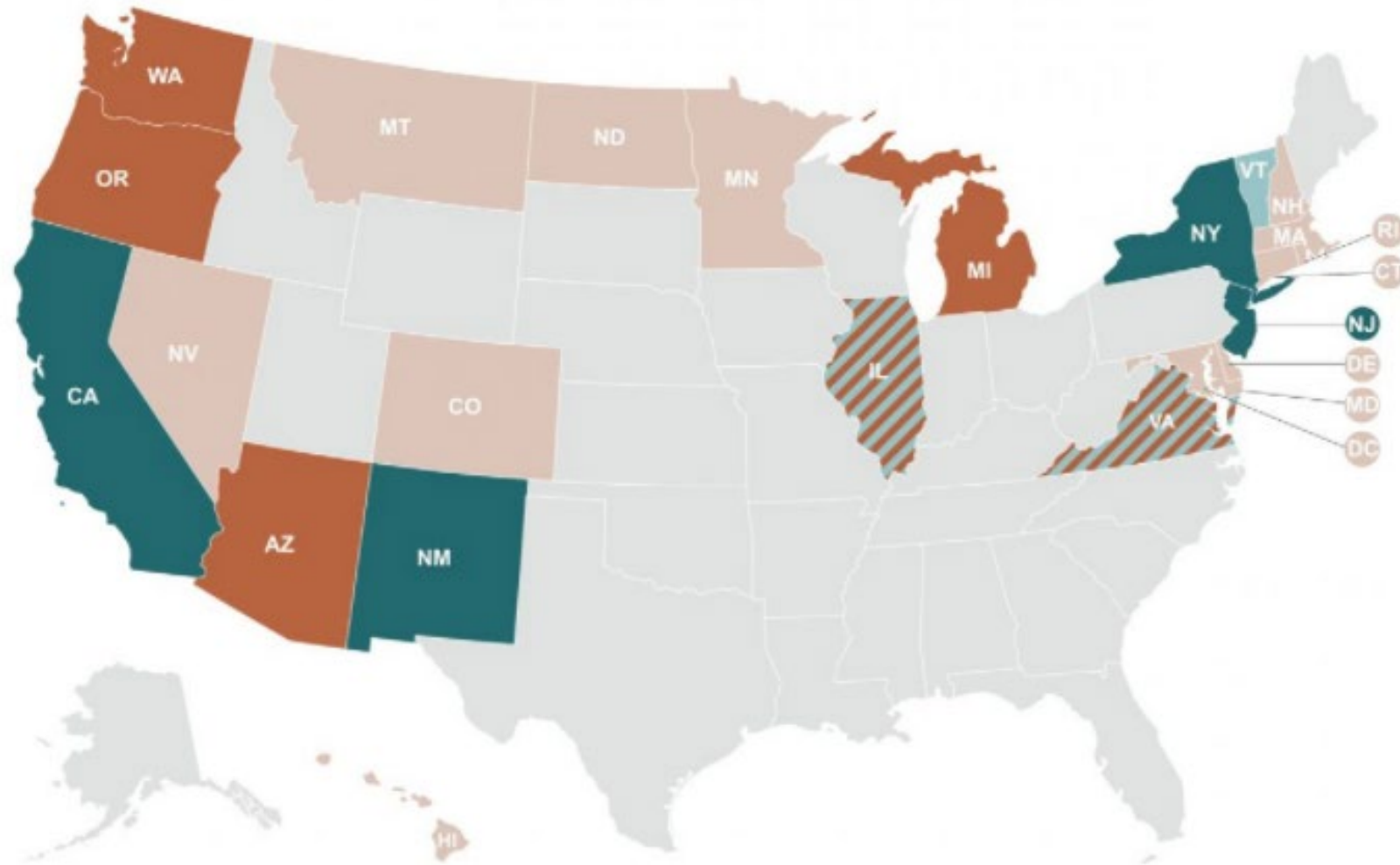
# Key Procedural Elements



# Marijuana Record Relief Laws

State laws specifically authorizing expungement or sealing of marijuana convictions

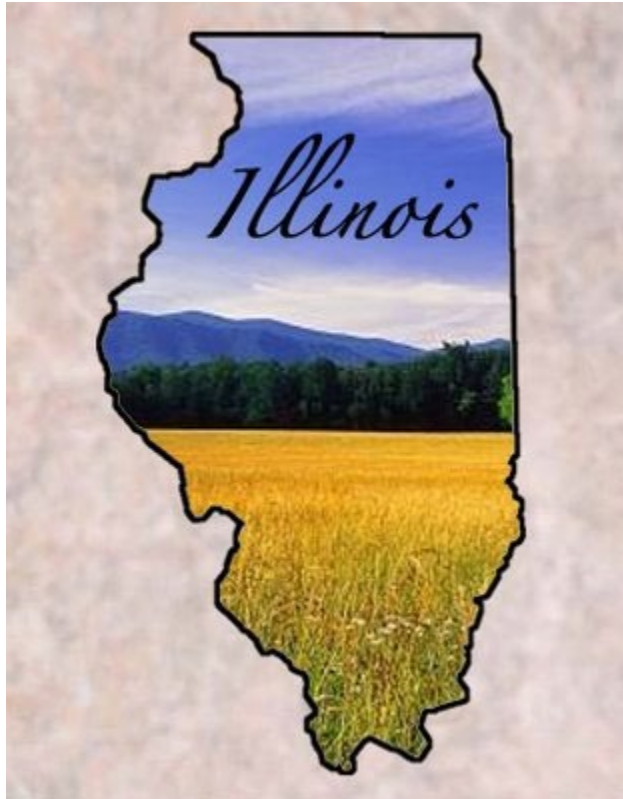
■ Broader Automatic Relief   ■ Limited Automatic Relief   ■ Broader Relief By Petition   ■ Limited Relief by Petition



*Note: Categories assigned do not consider general record relief that may cover marijuana convictions*



# State Examples: Gov't Initiated Record Clearing



# Effect of Expungement Laws: CA

## Proposition 64 Data Summary Report

### Total Reported Petitions, by Reporting Period

Reporting Period	Counties reporting	Resentencing petitions	Redesignation Applications	Juvenile Petitions for Relief	Total
Nov-Dec 2016	49	831	299	81	1,211
Jan-Mar 2017	40	1,230	566	116	1,912
Apr-Jun 2017	35	432	521	30	983
Jul-Sep 2017	37	535	741	147	1,423
Oct 2017-Mar 2018	34	451	1,310	65	1,826
Apr-Sep 2018	35	1,694	737	7	2,438
Oct-Dec 2018	29	148	209	4	361
Jan-Mar 2019	22	18	108	9	135
Apr-Jun 2019	51	2,070	3,713	15	5,798
Jul-Sep 2019	52	284	316	1	601
Oct-Dec 2019	51	247	1,009	4	1,260
Jan-Mar 2020	52	127	415	1	543
Apr-Jun 2020	50	3,300	3,004	19	6,323
Jul-Sep 2020	51	90	96	11	197
Oct-Dec 2020	51	398	864	2	1,264
<b>Total</b>		<b>11,855</b>	<b>13,908</b>	<b>512</b>	<b>26,275</b>

# Effect of Expungement Laws: NJ

## **NOTICE TO THE BAR**

### **AUTOMATED PROCESSES FOR CERTAIN MARIJUANA AND HASHISH CASES IN ACCORDANCE WITH THE MARIJUANA DECRIMINALIZATION LAW**

The Supreme Court by the attached order dated July 1, 2021 provides for the dismissal, vacating, and expungement of certain marijuana and hashish cases involving offenses enumerated in the Marijuana Decriminalization Law, L. 2021, c. 19 (codified in relevant part at N.J.S.A. 2C:35-23.1 and N.J.S.A. 2C:52-6.1). Approximately 360,000 cases in the Superior Court (Criminal and Family) and in the Municipal Courts potentially fall within this statutory direction.

# Thank You!



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**September 21-23**



# Marijuana Regulation and Social Equity

# Panelists

## ❑ Camille Gourdet, JD

- Research Public Health Analyst
- RTI International

## ❑ William Tilburg, JD

- Executive Director
- Maryland Medical Cannabis Commission

## ❑ Mathew Swinburne, JD

- Associate Director
- Network for Public Health Law-Eastern Region





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# **Legal Policies Focused on Diversity, Equity, and Inclusion in the Cannabis Industry**

*Mathew Swinburne, J.D.*

*Associate Director*

*The Network for Public Health Law-Eastern Region*

*9/22/2021*

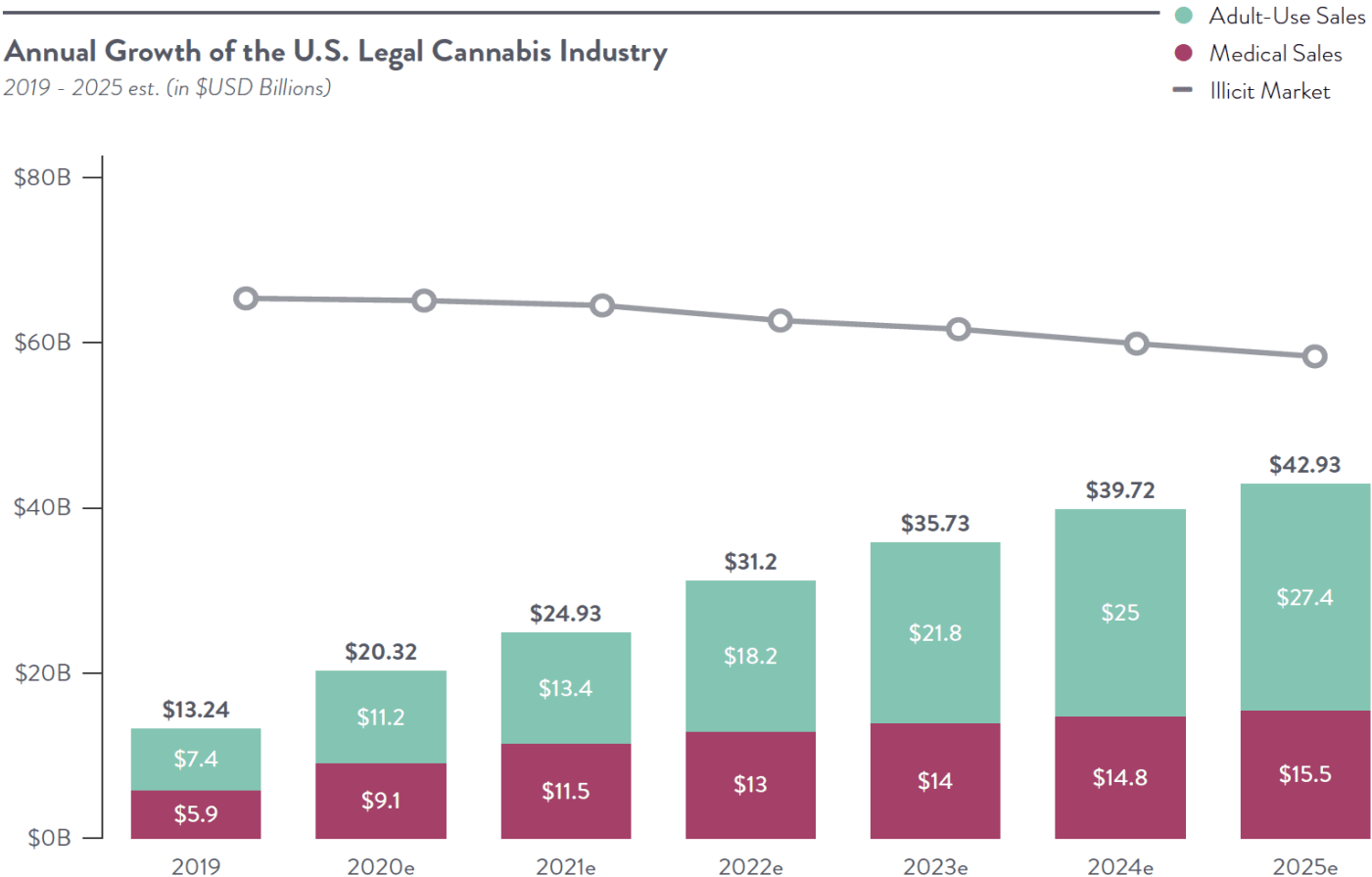
# Presentation Agenda

1. Economic Opportunities and Diversity in the Cannabis Industry
2. Policies Focused on DEI
  - ☐ Licensing
  - ☐ Business Support
  - ☐ Reinvestment

# Size of the Cannabis Industry

## Annual Growth of the U.S. Legal Cannabis Industry

2019 - 2025 est. (in \$USD Billions)



Source: New Frontier Data

# Communities of Color are Missing Out on the Cannabis Boom

- ❑ Nationally, 81% of marijuana business owners are white (2017 Study)
- ❑ Only 4.3% of owners identify as African Americans.
- ❑ 12.8% of U.S. Population is African American
- ❑ Ownership does not necessarily denote a controlling interest
- ❑ Disparities are magnified when juxtaposed to the damage done to communities of color as part of America's War on Drugs
- ❑ Lines up with national problem—18.3% of all businesses are minority owned.



# Why is Minority Ownership Important?

- ❑ Legal Cannabis industry supported 321,000 jobs in 2020 (32% increase)
- ❑ Lack of minority-owned cannabis businesses has the potential to stifle minority employment opportunities throughout the industry.
- ❑ Studies show **strong racial bias exists in hiring practices**
- ❑ White applicants received 36% more callbacks than equally qualified African American applicants and 24% more than equally qualified Latino applicants.
- ❑ Resumes with “white sounding names” received callbacks at a 50% higher rate than resumes with “African American sounding names.”
- ❑ 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.



# Barriers to Minority Participation

## Racial Contours of Poverty

- ❑ Poverty Rates 2020: White 8.2%, Hispanic 17.0%, and Black 19.5%

## High Startup Costs

- ❑ Adult-Use retail location: \$312,000
- ❑ Cannabis processing business: \$500,000

## Capital Requirements

- ❑ Show that applicant is financially viable
- ❑ PA: grower processor must have 2 million in capital, \$500,000 needs to be in financial institution.

## Marijuana remains illegal under federal law

- ❑ Vast majority of banks will not provide services
- ❑ 84% of businesses use the founder's savings to launch the business.



# Populations Targeted by DEI Policies?

## Variables States Consider

- ☐ Race, Gender, and/or Veteran status of Applicant/Business Owners
- ☐ Race, Gender, and/or Veteran status of Employees
- ☐ Income of the Applicant/Business Owners
- ☐ Prior Cannabis Offenses of Applicants
- ☐ Business is owned by a person from, located in, or employ individuals from a community disproportionately impacted by the war on drugs
  - High marijuana arrest rates
  - Poverty rates
  - Uninsured rates
  - Government benefit rates





# Example of DEI Policy Focus: NJ

- Social Equity Business: owned by people who have lived in economically disadvantaged areas or have prior cannabis offenses. (80% of median income and 150% of uninsured rate)
- Diversity Owned Businesses: Minority, woman or disabled veteran owned and certified as such by the NJ Dept. of Treasury.
- Impact Zone Businesses: Located in an Impact Zone, owned by people from impact zone, or employs people from impact zone.
  - high unemployment, crime, and marijuana arrests



# Licensing-Priority Application Review

- ☐ DEI Applications are reviewed first.
- ☐ Regardless of when submitted they go to the front of the line.
- ☐ May increase likelihood of receiving a license in a capped system.
- ☐ Gets earlier access to the market in an uncapped system.
- ☐ Examples: Policy adopted by MA and NJ.



# License-Scoring Preference

- ❑ In a capped system, applications for a cannabis license are scored on a series of factors and highest scores awarded the limited licenses.
- ❑ Example: Illinois
  - All applications are scored on a 250-point scale and applicants that qualify as a social equity applicant are awarded 50 points.
- ❑ Social Equity Applicant-IL
  - 51% ownership interest from individuals who have lived in a disproportionately impacted area or
  - Have been arrested or convicted of certain cannabis crimes or are a member of an impacted family
  - Employee at least 10 people from a disproportionately impacted area or who have a qualifying cannabis crime.

# Licensing-Racial Quotas

- ❑ Ohio passed legislation that required that at least 15% of the cultivator, processor, and testing laboratory licenses be awarded to minority owned businesses.
- ❑ Challenged in court- *Pharmacann Ohio, LLC v. Williams*.
  - Argued that it denied white applicants equal protection under the law.
- ❑ Court reviewed the racial quota under strict scrutiny and struck it down for failing to be narrowly tailored to the government interest in remedying racial discrimination.



# Licensing-Special Categories

## Colorado-Accelerator License

- ☐ Allows the licensee to work out of an established marijuana cultivator or manufacture's premises.

## New Jersey-Micro Business Licenses

- ☐ Limited number of employees (10), smaller facility (2500 sq. ft.), and limited cannabis sales (1000 plants or 1000 lbs/month)
- ☐ Reduced application and licensing fees.

## Massachusetts-Marijuana Courier License

- ☐ Allows delivery of cannabis products from retailer/dispensary directly to customer.
- ☐ Exclusive available to "Certified Economic Empowerment Priority Applicants" and "Social Equity Program Participants" for 36 months.



# Business Support

## Financial Support

- ☐ To address lack of banking services.
- ☐ Low-interest rate loans and grants to assist applicants gain entry to, and successfully operate in the cannabis marketplace.
  - Example: Illinois' Cannabis Development Fund
- ☐ Waiver of application fees and reduction in licensing fees.



## Education/Training Services

- ☐ Management, recruitment, and employee trainings;
- ☐ Accounting and sales forecasting;
- ☐ Legal compliance;
- ☐ Marijuana industry best practices; and
- ☐ Assistance with identifying or raising funds or capita.



# Community Reinvestment

## New Jersey: Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization (CREAMM) Fund.

### 1.) 7% retail transfer tax

- ☐ At least 70% of these funds need to be invested in municipalities defined as **impact zones** and direct financial aid to persons residing in these areas
  - Top 40 percent of municipalities in the State for marijuana related arrests, top 15 % for unemployment, and other crime metrics.

### 2.) Social Equity Excise Fee- placed on cultivators and varies depending on the average selling price of cannabis in the state.

- ☐ Invest in for-profit, non-profit, public entities, and municipality programs that focus on (1) education, (2) economic opportunities, (4) health, (5) well-being of communities, and (6) financial support



*Thank you for your time.*

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# Outro Slide

Please remember to fill out the conference survey located in the description of this session

# Legal and Practical Challenges to State Social Equity Efforts

**September 22, 2021**

**Will Tilburg, J.D. M.P.H.**

**Executive Director, Maryland Medical Cannabis  
Commission**



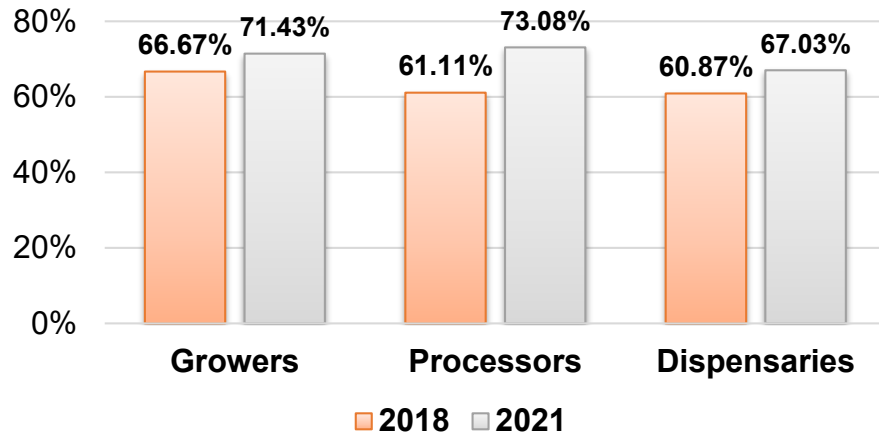
# MMCC Background

- **Independent commission within the Maryland Department of Health**
- **Mission:** Provide a safe, effective, and consumer-friendly medical cannabis program for qualifying patients (Health-General Article §13-3302)
- **13 volunteer commission members who serve 4-year terms**
  - 9 appointed by Governor with advice and consent of the Senate
  - 3 selected from list provided by Senate President/Speaker of the House
  - 1 Secretary of Health or designee
  - ***Current Commission Makeup:*** 10 out of 13 are minorities and/or women
- **Commission members supported by 50+ full-time staff**
  - 39 out of 53; 7 out of 9 senior managers are minorities and/or women
- **100% specially funded (license fees); FY 2021 budget: \$10.9 million**
- **Major program functions:**
  - Licensing and regulation of medical cannabis businesses
  - Registration and regulation of patients, caregivers, and certifying providers
  - Enforcement of authorizing statutes and regulations to ensure product and patient safety and licensee compliance
  - Public education on the medical cannabis program and its laws and regulations

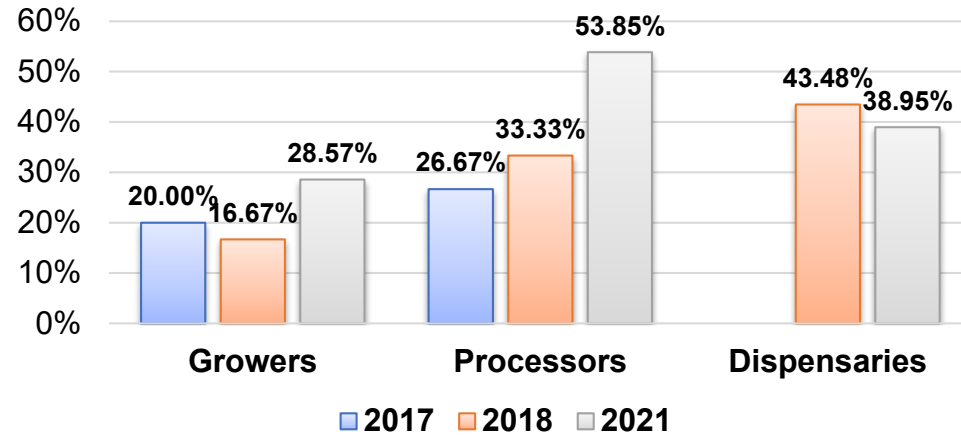


# Diversity Among Maryland License Holders

## Any Minority/Women Owners



## > 50% Minority/Women Owned



- MMCC awarded 3 grower and 8 processor licenses in October 2020;
- All 11 licenses were awarded to disadvantaged minority- and women-owned businesses

## >50% Minority-owned

- Growers: 5/21 (24%)
- Processors: 10/26 (38%)



# Ownership Diversity in Other States

State	Minority Ownership %
Colorado	11.8% (all license categories)
Massachusetts	<ul style="list-style-type: none"> <li>• Cultivators (166 total) 8% minority owned</li> <li>• Manufacturers (132 total) 7% minority owned</li> <li>• Retailers (221 total) 9% minority owned</li> </ul>
Michigan	10% (all license categories)
Nevada	<ul style="list-style-type: none"> <li>• 24.4% (Owners/Managers)</li> <li>• 18.5% (Board of Directors)</li> <li>• 15.9% (Executive Board Member)</li> </ul>
Washington	<ul style="list-style-type: none"> <li>• 18% of all licensees</li> <li>• 12% of producers/processors</li> </ul>

U.S. Census Bureau Ownership Data (January 2021)	Percentage of all businesses
Minority	18.3% of total employer firms; 6.7% of all firms are minority-owned with > 4 employees
Women	19.9% of total employer firms; 7.3% of all firms are women-owned with > 4 employees



# The Maryland Experience

# House Bill 2 (2018)

Emergency legislation adopted by the Maryland General Assembly (requires 3/5<sup>th</sup> majority) to “address the needs of minority and women applicants and minority and women-owned businesses seeking to participate in the medical cannabis industry.”

## How?

- Evaluate a disparity study ordered by the Governor to determine whether there is a compelling interest to implement remedial measures (e.g., race-conscious)...to assist minorities and women in the medical cannabis industry.”
- Conduct ongoing outreach to encourage small-, minority- and women-owned businesses to apply
- Award grants to business/educational organizations to train and assist small-, minority- and women-owned businesses on the medical cannabis industry and how to apply
- Adopt emergency regulations to implement remedial measures in the application process
- Collect/monitor data on race, gender and ethnicity of medical cannabis owners and employees, and percentage of ownership.



# Implementation

- Adopted emergency regulations allocating 15 out of 100 points on the application to diversity-related provisions
- Awarded \$225,000 in grant funding to train small, minority and women business owners. These trainings attracted more than **700 attendees**.
- Co-hosted 12 free workshops to educate small, minority, and women business owners and entrepreneurs on the medical cannabis industry in Maryland. The trainings were attended by more than **400 potential applicants**.
- Co-hosted 4 free workshops to discuss the new medical cannabis grower and processor license applications, including how to apply, explanations of the questions, and the laws and regulations in Maryland. The trainings were attended by more than **500 potential applicants**.
- Accepted public comment and questions on the new grower and processor applications. The Commission received more than **300 questions** and posted responses to each question on our website.

## Result:

- 3 out of 3 grower licenses awarded to minority-owned firms
- 8 out of 8 processor licenses awarded to minority-owned firms

# So why is Maryland identified as a cautionary tale for social equity?



## Potential Reasons

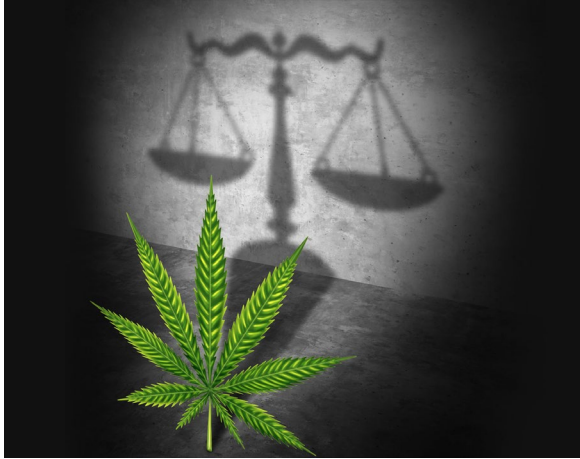
- **Length of time** – 28 months between legislation taking effect and award of license preapprovals
- **Use of race- and gender-conscious provisions** – more susceptible to litigation; harder to defend (e.g., Ohio)
  - 9 lawsuits filed challenging application process; 2 still active
- Allegations of bias in application review process
- Limited number of license awards
- With limited number of licenses, financing remains a significant barrier to entry
- **Cost** – Development, evaluation, and investigation costs exceeded \$1.2 million

# Experiences in Other States (so far)



- Legal delays are (seemingly) inevitable.
- High capital costs continue to be a significant barrier to entry across jurisdictions.
- In “uncapped” jurisdictions, multi-state operators (MSOs) hold a majority of market share. Social equity applicants – as more recent awardees – face additional hurdles in finding locations that comply with local zoning requirements, securing financing, and maintaining a physical location prior to final licensing.
- In “capped” jurisdictions, MSOs were awarded (or later purchased) most medical cannabis licenses. By way of holding a medical cannabis license these operators were also able to access the adult-use market earlier than social equity applicants and build brand recognition and market share.

# Experiences in Other States (so far)



**Early Adopters** (CO, OR, WA, NV, AK) – Legalization driven by ballot initiatives; program implementation predated focus on social equity.

**The Next Wave** (IL, CA, MA) – Social equity provisions included in legislation/regulations; social equity measures faced significant legal challenges and delays.

**Social Equity 2.0** (CT, NJ, NY, VA) – Legislation seeks to learn from challenges of previous states; focus on microbusinesses, small business loans/grants, community reinvestment, and new license categories; programs largely not yet implemented.



# Questions State Policymakers Must Consider in Developing Social Equity Programs

1. How do you gauge success? (e.g., license ownership, leadership, and/or employment)?
  - Is a program successful if socially and economically disadvantaged owners are awarded licenses and these owners turn around in 1, 2, or 5 years and sell their license to an MSO or other non-disadvantaged business? If not, how can you legally seek to address?
2. Capped versus uncapped? (Really state versus local control)
3. Is an uncapped market where any individual or business can operate, but large corporations' control most of the market share equitable?
4. How should social equity grant or low-interest loan programs be funded? (Fees on existing operators is the most common approach)
5. How should cannabis industry revenues be allocated?
6. Which state or which industry should serve as a model?



# Potential Public Health Concerns



- States are increasingly viewing an uncapped market as a way to establish a more equitable cannabis industry. However, states with an uncapped market do not have a larger percentage of socially and economically disadvantaged businesses.
- Also, an uncapped market may present additional public health concerns, including:
  - Excess cultivation/production, which can lead to **product diversion**
  - Increased difficulty in enforcing **sanitation, product quality and other health and safety requirements**
  - Increased **retail density**, particularly in urban and low-income communities
  - Greater burden on county/municipal governments to address any impacts of legalization

# What is the Path Forward?

- Prioritize decriminalization, automatic expungement and other criminal justice measures that can be implemented without delay and will have immediate impact
- Evaluate how projected tax revenues can be targeted to have the greatest impact in your state/locality; engage communities on distribution of funds
- Robust health and safety data collection pre-implementation
- Kitchen sink approach to expanding opportunities in the legalized market
  - Provide a wide-range of ownership opportunities – new license categories, including those tailored to small businesses, and more licenses
  - Business and cannabis industry training opportunities for all levels
  - Reduce financial barriers to market entry
    - Reduce or waive application and licensing fees
    - Offer grants or business loans to small, minority and women businesses
  - Reduce complexity of application and licensing process
  - Public outreach and education on licensing and training opportunities
- Leverage existing state infrastructure for business development/training, loans/grants, and other aspects of social equity program. Let cannabis regulators regulate.

**Thank you.**

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Commission**

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