Samuel K. Giles

E-Mail: samuel.giles@colorado.edu

VIA ELECTRONIC & CERTIFIED MAIL

August 31, 2021

Senator Charles E. Schumer
322 Hart Senate Office Building
Washington, D.C. 20510

Re: Public Comment on Cannabis Administration & Opportunity Act

Dear Senators Booker, Wyden, and Schumer:

Absent explicit targeting of state designated social equity businesses; the current Cannabis Administration and Opportunity Act (CAOA) Discussion Draft perpetuates the very discriminatory policies that Congress is constitutionally bound to remedy. Specifically, the Discussion Draft states, "the devastating consequences of current discriminatory cannabis policies."[1] Yet, the Discussion Draft does not provide an adequate remedy for the targets of the War on Drugs. Many states that have initiated marijuana decriminalization designated this population as "social equity" entities.

Why would Congress voluntarily perpetuate discriminatory cannabis policies in its effort to end federal marijuana prohibition? Williams v. Pennsylvania, 579 U.S. ___ (2016) ("An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether.")

The Unconstitutionality of the CAOA as drafted

The Discussion Draft explicitly states that the so called "War on Drugs" disproportionately targets people of color. Further, the Discussion Draft acknowledges the racial disparities created by state marijuana business licensure policies.[2]

The disproportionate nature of how states issued marijuana business licenses violate the U.S. Constitution and its Bill of Rights. The Fifth Amendment prohibits the federal government from treating citizens unfairly. The Thirteenth Amendment, adopted immediately after the Civil War, prohibits slavery or, in general, treating

[1] *See* Cannabis Administration and Opportunity Act (CAOA) Discussion Draft, pg. 2
[2] CAOA Discussion Draft, pgs. 1-2

African Americans as second-class citizens, while the Fourteenth Amendment, also adopted after the Civil War, prohibits states, or their local governments, from treating people either unfairly or unequally.

Fifth Amendment Violations

The Supreme Court has held that criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems. Further, the absence of one or the other particular guarantees denies a party due process of law under the Fourteenth Amendment. In addition, the Court has held that the Due Process Clause protects against practices and policies that violate precepts of fundamental fairness, even if they do not violate specific guarantees of the Bill of Rights.

Erroneous deprivation of property

As currently written, the Discussion Draft only affords parties that have received criminal marijuana convictions an opportunity for a "sentencing review hearing."[3] This is woefully insufficient for non-violent marijuana convictions. Importantly, however, the Supreme Court has provided that, "no hearing is required if a state affords the claimant an *adequate alternative remedy*." See, e.g., *Lujan v. G & G Fire Sprinklers, Inc.*, 523 U.S. 189 (2001). Notably, the Discussion Draft does not provide for an adequate remedy.[4]

Clearly, these individuals have an obvious interest in regaining the money they paid to the state or federal government. Neither the state nor federal government can retain these funds simply because convictions were in place when the funds were taken, for once those convictions are erased, the presumption of innocence is restored. See, e.g., *Johnson v. Mississippi*, 486 U. S. 578, 585. Local, state, or federal governments may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.

The Discussion Draft creates an unacceptable risk of the erroneous deprivation of convicted parties' property. Just as restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken be the government on account of the conviction.

[3] CAOA Discussion Draft, pg. 12
[4] *See* section "Cannabis Tax Credits – the Adequate Alternative Remedy," *infra*.

Lack of post-deprivation remedy violates Due Process

In other words, these individuals must have the opportunity to recoup any fines, penalties, court costs, or restitution paid to the state because of the conviction. Thus, such lack of a post-deprivation remedy drives a massive wedge between the CAOA and the Constitution. A reasonable adequate alternative remedy is provided in section entitled in part, Cannabis Tax Credits, *infra*.

Thirteenth Amendment Violations

The Discussion Draft states, "The War on Drugs has been a war on people—particularly people of color."[5] Within this people of color population, the descendants of Africans that were imported into this county and sold as slaves make up a considerable portion of these communities that were devastated by "decades of harm."[6]

The declared unconstitutional treatment of this particular population of people demands remediation immediately. The Thirteenth Amendment not only abolished slavery under Section 1, but empowered Congress to enforce Section 1 in Section 2. In 1866, Congress enforced the abolition of slavery by passing the nation's first Civil Rights Act, prohibiting actions that it deems perpetuate *characteristics* of slavery. State actions that made African Americans second-class citizens, such as being targets of a War on Drugs, were included in the ban. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Congress deviates from its Constitutional mandate

For clarity, the federal government sponsored the drug war's blatant departure from constitutional mandates. For nearly fifty years, the Drug Enforcement Agency (DEA) has fueled this separation, in part. It has been widely reported that over 75% of those convicted of federal drug offenses in 2019 were non-white people, many of these non-white people are African Americans. While people of all races use and sell drugs at equivalent rates, the drug war administered in part by the DEA, targets communities of color, producing profoundly unequal outcomes across racial groups.[7]

While prosecuting the drug war, the DEA also issues quasi-licenses for the very activities non-white communities are prosecuted. Specifically, the DEA's Administrator has the authority to grant a manufacturing

[5] CAOA Discussion Draft, pg. 1
[6] *Id.*
[7] "And due to racial biases in arrests and prosecutions, these individuals are disproportionately likely to be people of color." (CAOA Discussion Draft, pg. 10)

registration under 21 U.S.C. 823(a). To do so, the Administrator must determine that two conditions are satisfied: (1) The registration is consistent with the public interest (based on the enumerated factors in section 823(a)), and (2) the registration is consistent with U.S. obligations under the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407.

Strikingly, Congress failed to provide the DEA with any "social equity" styled criteria for the manufacturing registration.[8] This omission alone undermines the Thirteenth Amendment mandate. Moreover, Congress then permitted the DEA to exercise discretion on whether to eliminate an applicant because of past experience in manufacturing cannabis.[9] These two factors expressly block state designated social equity entities from DEA licensure, thus, creating a second-class citizenship scenario, in particular, for social equity entities with African American ownership.

Real Parties in Interest

The Discussion Draft seemingly attempts to bridge this Thirteenth Amendment gulf by suggesting that cannabis research funding can be steered toward Historically Black Colleges and Universities (HBCU).[10] However, well intentioned this may be, HBCU and other institutions associated with disadvantaged communities are not direct targets under the War on Drugs. Accordingly, these institutions are not the real parties in interest.

Linking research institutions to dispensaries is not novel. The Commonwealth of Pennsylvania has created a structure coupling state licensed dispensaries to colleges and universities for research purposes.[11] Congress must tie federal research appropriations to state designated social equity entities. Fortunately, many states have already identified the real parties in interest for this matter, social equity entities. Thus, research funding

---

[8] "DEA gives all applicants equal treatment regardless of the gender, race, socioeconomic status, or disabled status of the applicant. The only criteria used to evaluate the application for registration are those factors defined by Congress at 21 U.S.C. 823(a). See 21 CFR 1318.05." 85 Fed. Reg. 82,337 (Dec. 18, 2020).

[9] "Indeed, DEA registration is a fundamental component of the CSA [Controlled Substances Act], and it is wholly appropriate to consider an applicant's past noncompliance with the CSA when deciding whether to grant a registration under the Act." Controls To Enhance the Cultivation of Marihuana for Research in the United States, 85 Fed. Reg. 82,335 (Dec. 18, 2020).

[10] CAOA Discussion Draft, pg. 9

[11] *See* 28 PA. CODE Ch 1211 ("Chapter 1211 pertains to clinical registrants [dispensaries] and academic clinical research centers in this Commonwealth who wish to participate in the Medical Marijuana Program. The particular section being added allows for academic clinical research centers to enter into letters of agreement with more than one potential clinical registrant [dispensary] for the purpose of applying for approval as a clinical registrant.")

appropriated to non-social equity entities departs Congress from the constitution, while targeting federal research appropriations to social equity entities solidifies Congress' constitutional mandate.

Fourteenth Amendment Violations

In lieu of an adequate remedy commensurate with the damages the drug war caused, states began to decriminalize marijuana absent remedy. Accordingly, the licensure process adopted in many states lacked any reasonable remedy, thus produced clear racial disparities in the marijuana licensure recipient population. These gaping licensure disparities have led to rampant uncompetitive trade practices that this Discussion Draft attempts to resolve.[12]

Privileges & Immunities Clause

Until long after emancipation from slavery, most African Americans were denied access to free labor markets. This denial of access was another badge of slavery that Congress was duty bound to eliminate, not to perpetuate. Presently, vestiges of slavery persist through the War on Drugs and its vigorous marijuana prohibition enforcement that, in part, escalate mass incarceration for the drug war's intended targets.

Similar to anti-African American housing segregation, today's disparities in cannabis ownership licensure between whites and blacks is not an unintended consequence of individual choices and of otherwise well-meaning law or regulations but of unhidden public policy that is actively creating a segregated cannabis industry in decriminalized states around the country.

Cannabis is a wholly regulated market. It only exists under the tutelage of state government and federal agency. This type of cannabis licensure segregation by intentional government action is not *de facto*. Rather it is what courts call *de jure*: segregation by law and public policy. Governments have forgone their duty to uphold the Fourteenth Amendment. This negligence violates the Privileges and Immunities Clause, in particular, for African American owned social equity entities.[13]

Due Process under the Law

See Fifth Amendment Violations, *supra*.

---

[12] CAOA Discussion Draft, pg. 27-28
[13] See *The Slaughter-House Cases*, 83 U.S. 36 (1873)

Equal Protection Clause

The costs of the War on Drugs attributable to discriminatory enforcement practices, suffered by an unknown number of people of color, are not trivial. This is not simply a result of vague and ill-defined "structural racism" but a direct consequence of federal, state, and municipal policy makers' contempt for their Fourteenth Amendment responsibilities, another expression of *de jure* segregation contrary to the constitution.

Further, purposely depressing plant touching ownership licenses for state designated social equity entities, results in these entities being priced out of mainstream cannabis markets. More importantly, these inadequate "social equity" policies are also important elements of the architecture of *de jure* cannabis segregation.

Within Colorado alone, an overwhelming majority of cannabis ownership licensure has been captured by non-social equity businesses. Thus, states have created a well-established segregated cannabis industry. These seemingly race-neutral cannabis licensure policies have disproportionately blocked social equity entities from participation in the market, reinforced drug war intentions, and made reasonable remedies for these improper policies even more difficult to actualize.

Cannabis Tax Credits – the Adequate Alternative Remedy

Since philanthropy is no substitute for a constitutionally required remedy, some states have adequately identified persons that have been negatively impacted by the "War on Drugs" as "social equity" applicants. These state qualified social equity applicants present the most logical mechanism for Congress to design an appropriate alternative remedy. Constitutional mandates can be satisfied by a Congressional Cannabis Tax Credit remedy.

Congress is under a constitutional mandate to provide remedy to those citizens that were improperly targeted under the War on Drugs. Moreover, Congress has already instituted tax credit mechanisms to address disparities stemming from other unconstitutional government policies, like housing segregation.

As Mel Martinez, former secretary of U.S. Department of Housing and Urban Development, stated:

> "The [Community Renewal] Initiative takes a revolutionary approach to creating jobs, business opportunities, and affordable housing by helping private industry flourish not through grants, but through tax relief … *Tax incentives are investments in communities that will attract private capital in a way that grants do not* and

offer businesses a more dependable way to benefit their bottom line than the old method of awarding grants." See New Market Tax Credits[14] (emphasis added.)

This sentiment is also articulated in the predecessor legislation of New Market Tax Credits (NMTC), Low Income Housing Tax Credits (LIHTC). LIHTC is widely heralded as the most successful piece of legislation in U.S. History that advanced affordable housing. Considering all of this success using tax credits as a mechanism for Congress to fulfill its constitutional duty to not perpetuate any badge of slavery, and extend the fundamental principle of fairness to all its citizens, why is the CAOA silent on this mechanism?

How would a Cannabis Tax Credit work?

Similar to both the LIHTC and NMTC, a federal agency, most likely the Alcohol and Tobacco Tax and Trade Bureau,[15] should have the authority to appropriate Cannabis Tax Credits (CTCs) to the states. The CTC would be a public/private partnership bringing together the federal government, state allocating agencies and the private sector.

State qualified social equity marijuana enterprises would receive an allocation of CTCs from the allocating agency through an application process designed by the state allocating agency to meet local economic and workforce development needs.

The cannabis tax credits are then sold to private investors to raise equity for a state qualified social equity marijuana enterprises. The investors would be part owners of these cannabis enterprises, usually as limited partners. The federal tax credit would allow private equity to be raised at lower cost, in turn permitting social equity businesses to be developed, built, and operated successfully, thus, creating a robust economic boost for underserved communities that are improper targets of the drug war. Finally, as with the LIHTC and NMTC, most administrative costs associated with a CTC would be borne by state allocating agencies, rather than the federal government.

[14] See https://archives.hud.gov/remarks/martinez/speeches/renewalconf.cfm
[15] CAOA Discussion Draft, pg. 22.

CONCLUSION

Moving forward as drafted regulates constitutional protections to mere contingencies for the targets of the War on Drugs. The "devastating consequences" of the War on Drugs are deliberate and foster *de jure* segregation. Thus, by failing to construct an adequate alternative remedy for drug war targets, Congress transfers the responsibility to enact an adequate alternative remedy from Congress to the courts. Why burden the judicial system with hundreds of billions of dollars worth of litigation when elegant legislation would suffice?

Similarly, for Congress to offer no remedy for the targets of the War on Drugs willfully perpetuates, albeit in a more refined manner, the unconstitutional policies of the past. Turning the proverbial page on this "sad chapter of American history" absent an adequate remedy just foretells of more state sponsored devastation.

Thank you in advance for your attention with this matter.

Respectfully submitted,

Samuel K. Giles
Colorado Social Equity Applicant