

University of Michigan Journal of Law Reform Caveat

Volume 55 | Issue 1

2021

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Recommended Citation

Benjamin T. Seymour, *Fair Lending for Cannabis Banking Justice*, 55 U. MICH. J. L. REFORM CAVEAT 42 (2021).

Available at: https://repository.law.umich.edu/mjlr_caveat/vol55/iss1/3

<https://doi.org/10.36646/mjlr.caveat.55.fair>

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FAIR LENDING FOR CANNABIS BANKING JUSTICE

By Benjamin T. Seymour*

I. INTRODUCTION

In the past year, New Jersey, New York, Virginia, New Mexico, and Connecticut joined the growing group of states that have legalized recreational marijuana,¹ bringing the share of the U.S. population living in such states to a staggering forty-three percent.² Unsurprisingly, the legal cannabis industry has grown accordingly, reaching \$17.5 billion in sales in 2019 with significant profits expected in these new markets.³

Despite billions in revenue, the legal cannabis industry remains overwhelmingly unbanked.⁴ Because handling the proceeds of marijuana sales constitutes money laundering under federal law,⁵ banks have refused to offer services to cannabis businesses, for fear of regulatory and criminal sanctions.⁶ Instead, the lawful cannabis industry runs almost entirely on cash.⁷ The costs of marijuana businesses'

* Yale Law School, J.D. 2021. The author would like to thank Professor Jonathan Macey for his generous support of this Comment.

1. Michael Hartman, *Cannabis Overview*, NAT'L CONF. STATE LEGISLATURES (July 4, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/ZRB3-Q256>].

2. German Lopez, *Marijuana Legalization Has Won*, VOX (June 22, 2021), <https://www.vox.com/2021/4/12/22371929/marijuana-legalization-new-mexico-virginia-new-york-biden> [<https://perma.cc/37HR-JC8N>] (“Almost half the country—about 44 percent of the population—now lives in a state where marijuana is legal to consume just for fun.”).

3. Will Yakowicz, *U.S. Cannabis Sales Hit Record \$17.5 Billion as Americans Consume More Marijuana Than Ever Before*, FORBES (Mar. 3, 2021), <https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=78c69a062bcf> [perma.cc/64E7-K3RA].

4. See, e.g., Anh Hatzopoulos, *The Cost of Cash for Unbanked Cannabis Businesses*, FORBES (July 13, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/07/13/the-cost-of-cash-for-unbanked-cannabis-businesses/> [perma.cc/MXU2-56VA].

5. *Cannabis Banking: Bridging the Gap Between State and Federal Law*, AM. BANKERS ASS'N, <https://www.aba.com/advocacy/our-issues/cannabis> [perma.cc/YSL8-9JRT] (“[T]he possession, distribution or sale of marijuana remains illegal under federal law, which means any contact with money that can be traced back to state marijuana operations could be considered money laundering and expose a bank to significant legal, operational and regulatory risk.”).

6. See Sophie Quinton, *Why Marijuana Business Still Can't Get Bank Accounts*, PEW (Mar. 22, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/22/why-marijuana-businesses-still-cant-get-bank-accounts> [perma.cc/FXX4-EXXJ].

7. See Hatzopoulos, *supra* note 4.

reliance on cash are sizable. Theft is a perennial threat, so cannabis dispensaries must invest heavily in security equipment, armed transports, and safes.⁸ For state regulators, the ubiquity of cash makes monitoring and taxing marijuana businesses acutely challenging.⁹

Academics, executive policy-makers, and legislators alike have proposed solutions to the cannabis industry's banking problem.¹⁰ With Democrats in control of Congress, marijuana banking reform finally seems feasible.¹¹ Yet, racial justice advocates have raised concerns that federal marijuana reform will fail to address the enormous costs that the War on Drugs inflicted on communities of color.¹² Allowing investors and businesses to profit off the new cannabis economy without ensuring some of that wealth goes to those most impacted by decades of disparately enforced prohibition would squander an opportunity to repair prior wrongs and salve the ills of mass incarceration.¹³

This Comment offers a fair lending solution to promote racial equity in cannabis banking reform: amend the Equal Credit Opportunity Act to ensure individuals previously arrested, charged, or convicted for selling, cultivating, or possessing marijuana will not therefore be precluded from loans to start legal cannabis businesses.¹⁴ Given disparities in the criminal enforcement of marijuana laws, this amendment would provide racial justice benefits, while also encouraging

8. See *id*; Yuki Noguchi, *Bags of Cash, Armed Guards and Wary Banks: The Edgy Life of a Cannabis Company CFO*, NPR (Apr. 10, 2019), <https://www.npr.org/2019/04/10/710076855/bags-of-cash-armed-guards-and-wary-banks-the-edgy-life-of-a-cannabis-company-cfo> [perma.cc/6E8R-HJVQ].

9. John Hudak & Aaron Klein, *Banks Don't Want to Work with Marijuana Companies. It's Time for That to Change*, BROOKINGS INSTITUTION (Mar. 28, 2019), <https://www.brookings.edu/opinions/banks-dont-want-to-work-with-marijuana-companies-its-time-for-that-to-change/> [perma.cc/WL5N-VCMS] (“[W]here cannabis businesses do not have any access to a bank . . . [it is] harder for regulators and law enforcement officials to conduct investigations and enforce the law because there is even less information available.”).

10. See *infra* Part II.

11. See Alayna Treene, *Advocates, Democrats Plan to Push Major Pot Reform*, AXIOS (Apr. 14, 2021), <https://www.axios.com/democrats-marijuana-national-legalization-a663e3ae-3164-4e2c-aef6-6a46699d8dcd.html> [perma.cc/35PM-GM8V].

12. See Charlotte Resing, *Marijuana Legalization Is a Racial Justice Issue*, ACLU (Apr. 20, 2019), <https://www.aclu.org/blog/criminal-law-reform/drug-law-reform/marijuana-legalization-racial-justice-issue> [perma.cc/42RD-WJWW].

13. See Ames C. Grawert, Cameron Kimble & Jackie Fielding, *Poverty and Mass Incarceration in New York: An Agenda for Change*, BRENNAN CTR. 5–6 (Feb. 23, 2021), <https://www.brennancenter.org/sites/default/files/2021-02/PovertyMassIncarcerationNY.pdf> [perma.cc/8HVF-MZB3] (“Marijuana arrests have driven up racial disparities in the criminal justice system as a whole, as historically, Black New Yorkers have disproportionately faced such charges.”).

14. See *infra* Part IV.

entrepreneurship. As a market-based social justice effort, this amendment offers a bipartisan approach to one of the most vexing and contentious issues in marijuana banking reform.

Part II of this Comment briefly surveys the federal statutes that have led to an under-banked cannabis industry and discusses the costs of cash for marijuana businesses. It then examines prior reforms proposed by academics, executive-branch officials, and legislators. Part III explores the racial equity concerns that these proposals fail to address, while Part IV offers a fair lending approach for justice in marijuana banking reform.

II. THE CURRENT STATE OF MARIJUANA BANKING

A. Money Laundering and the Costs of Cash

Federal statutes criminalizing marijuana banking have resulted in cannabis businesses relying almost exclusively on cash. The heart of this prohibitory statutory scheme is the Controlled Substances Act of 1970 (CSA).¹⁵ Under the CSA, marijuana remains a Schedule I substance,¹⁶ indicating Congress's determination that it "has a high potential for abuse" and "no currently accepted medical use in treatment in the United States."¹⁷ The CSA also authorizes civil forfeiture of "[a]ny property, real or personal within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly" from the cultivation, sale, or distribution of marijuana.¹⁸ While federal law enforcement has rarely invoked these forfeiture provisions, the CSA vests them with broad authority to seize the assets of almost any marijuana business, including bank accounts.¹⁹

Additionally, banks face significant penalties for servicing cannabis businesses under federal money laundering statutes. The Money Laundering Control Act (MLCA)²⁰ criminalizes certain transactions

15. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2018)).

16. 21 U.S.C. § 812(l)(c)(10) (2018).

17. *Id.* § 812(b)(1).

18. 18 U.S.C. § 981(a)(1)(B) (2018).

19. Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 610 (2015).

20. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18 U.S.C.).

involving the proceeds of a “specified unlawful activity.”²¹ Incorporating the CSA by reference, the MLCA treats the cultivation, sale, or distribution of marijuana as a predicate offense.²² Each transaction in the proceeds thereof is a separate offense,²³ punishable by up to \$500,000 in fines, twenty years in prison, and civil penalties.²⁴ Finally, the Bank Secrecy Act (BSA)²⁵ requires banks to report illegal and suspicious activities to the U.S. Financial Crimes Enforcement Network (FinCEN), including cash-intensive transactions.²⁶ Those who violate the BSA are subject to up to \$250,000 in fines and five years’ imprisonment.²⁷

The potentially disastrous consequences from running afoul of these federal statutes has dissuaded the vast majority of banks from offering services to cannabis businesses.²⁸ Yet, banks are not alone in their obligations under the CSA, MLCA, and BSA. Other financial service providers, such as credit card companies, face similar liability under federal law and therefore have avoided marijuana businesses.²⁹

Banks’ unwillingness to accept cannabis firms as clients has created a profound under-banking problem in the U.S. marijuana industry, which instead relies almost entirely on cash.³⁰ With billions of dollars in transactions each year, the industry’s cash dependency carries severe costs. Dispensaries’ large cash reserves make them attractive targets for robberies.³¹ To combat this risk, cannabis businesses

21. 18 U.S.C. § 1956(a)(1) (2018).

22. *Id.* § 1956(c)(7)(B)(i).

23. *See* United States v. Prescott, 42 F.3d 1165, 1166–67 (8th Cir. 1994).

24. *See* 18 U.S.C. § 1956(a)(1)–(3), (b)(1).

25. 31 U.S.C. §§ 5311–5323 (2018).

26. *See* 31 C.F.R. § 1010.311 (2020) (“Each financial institution . . . shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000, except as otherwise provided in this section.”).

27. 31 U.S.C. § 5322(a).

28. *See* Hill, *supra* note 19, at 597.

29. *See* Patrick J. Egan, Joshua Horn & Stephanie Ohnona, *Two Businessmen Convicted of Bank Fraud Conspiracy for Assisting Cannabis Company with Transactions*, FOX ROTHSCHILD (Mar. 26, 2021), <https://www.foxrothschild.com/publications/two-businessmen-convicted-of-bank-fraud-conspiracy-for-assisting-cannabis-company-with-transactions/> [<https://perma.cc/ZVL6-73K8>] (“[T]he drug remains illegal under federal law and as such banks and payment processors are prohibited from doing business with cannabis companies. For this reason, major credit card companies like MasterCard and Visa do not have merchant codes for cannabis transactions.”).

30. *See* Patrick A. Tighe, Note, *Underbanked: Cooperative Banking as a Potential Solution to the Marijuana-Banking Problem*, 114 MICH. L. REV. 803, 804 (2016).

31. *See, e.g.,* Tiney Ricciardi, *Denver Dispensary Burglaries Hit 3-Year High as 2019 Ended with Rash of Armed Robberies*, DENV. POST (Jan. 23, 2020, 5:55 PM), <https://www.denverpost.com/2020/01/20/denver-marijuana-burglaries-increase/> [perma.cc/MV46-Z3DS].

are forced to make inordinate investments in security equipment, from safes and cameras to armored vehicles and armed guards.³² Beyond necessitating inefficient expenditures, these robberies endanger the safety of dispensaries' workers, customers, and neighboring communities.³³ Employee theft is also a significant concern, as cash makes record-keeping and monitoring difficult.³⁴ Similarly, state regulators presiding over a cash industry are less able to supervise and tax marijuana businesses.³⁵ While these problems are most pronounced for marijuana cultivators, suppliers, and dispensaries, they are by no means limited to direct participants in the cannabis economy. Since marijuana businesses use cash to pay employees, construction contractors, utilities companies, and every other service, a wide swath of cannabis-adjacent industries have likewise become saddled with cash.³⁶

The federal ban on marijuana banking also has the perverse effect of giving unscrupulous banks and cannabis businesses a competitive advantage over their more law-abiding peers. Despite the risk of severe penalties for violating federal law, a small number of banks and credit unions have flouted the CSA, MLCA, and BSA by accepting

32. See Hatzopoulos, *supra* note 4 (“To protect against theft, as a bare minimum, cannabis retailers must purchase safes and cash-counting equipment, which are both costly. Cannabis businesses must often invest in a complex security system that includes steel doors, multiple cameras and weapon detectors.”).

33. AM. BANKERS ASS'N, *THE PUBLIC BENEFITS OF BANKING CANNABIS BUSINESSES 3* (2019), <https://www.aba.com/-/media/documents/white-paper/cannabis-white-paper.pdf> [perma.cc/C3XX-VJT6].

34. See Hatzopoulos, *supra* note 4 (“About 90% of all loss in the cannabis industry is attributed to employee theft. Handling large amounts of cash can create temptation for employees, meaning cash-run dispensaries will need to thoroughly vet their employees for integrity and trustworthiness, which can be difficult to do. The vetting comes from background checks, which, again, can be expensive and must be paired with training on how to handle and manage large amounts of cash if the vetting is successful. However, a mistake in hiring could cost the business time and money, a scenario that is, unfortunately, quite common.”).

35. See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL'Y REV. 359, 369 (2014) (“[I]t is more difficult to account for and track revenues and audit tax payments of businesses that do not use financial institutions.”); Deborah L. Dickson, Note, *Bank on Marijuana: A Legitimate Industry Warranting Banking Access*, 2 SAVANNAH L. REV. 459, 463 (2015); Tighe, *supra* note 30, at 812.

36. See Blake & Finlaw, *supra* note 35, at 370; see also Robb Mandelbaum, *Where Pot Entrepreneurs Go When the Banks Just Say No*, N.Y. TIMES MAG. (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html> [https://perma.cc/MB5P-BKMD] (illustrating the inefficiencies of dispensary payroll practices by describing how one dispensary owner “lugged a large vase full of change (the ‘genie bottle’) over to the couch, retrieved from the satchel 22 thousand-dollar bundles, plus a big stack of small-denomination bills that he’d been collecting all week” before separating employees’ salaries into separate envelopes).

cannabis businesses as clients.³⁷ To compensate for the risk of federal enforcement, these financial institutions charge hefty account and transaction fees.³⁸ Marijuana businesses have even engaged in fraud to access banking services. In a recent example, two businessmen aided the California marijuana retailer Eaze in using shell companies to misrepresent the nature of Eaze's transactions, so credit-card companies and banks would process them.³⁹ Eaze's competitors in California filed civil suits alleging unfair business practices.⁴⁰ Federal prosecutors ultimately charged the men with conspiracy to commit bank fraud; both were convicted.⁴¹ While the Eaze scandal resulted in criminal enforcement, many similar acts of bank fraud or bank acquiescence go unchallenged, such that only the least ethical financial institutions and cannabis businesses enjoy the benefits of bank services under the current federal regime.

B. Proposed Solutions

Academics and executive-branch officials alike have offered solutions to the cannabis industry's under-banking problem. But these proposals have floundered in the face of federal resistance. Recently, Congress entered the fray, with the House of Representative's passage of the SAFE Banking Act on April 19, 2021.⁴² This Section surveys each of these prior approaches in turn.

37. See Hudak & Klein, *supra* note 9 ("Only one in about 30 banks or credit unions across the United States accepts a cannabis business as a customer.").

38. See *id.*; see also Tighe, *supra* note 30, at 810 ("[T]he financial institutions that do provide services can extract high fees for accepting proceeds from marijuana-related activity and charge above-market interest rates for extending credit.").

39. Rebecca Davis O'Brien, *Men Accused of Tricking Banks into Aiding Marijuana Sales Head to Trial*, WALL ST. J. (Mar. 1 2021, 5:11 PM), <https://www.wsj.com/articles/men-accused-of-tricking-banks-into-aiding-marijuana-sales-head-to-trial-11614603992> [<https://perma.cc/FU9S-NV45>].

40. See *Dionymed Scores Victory in Eaze Payment Processing Lawsuit*, NASDAQ (Sept. 11, 2019, 9:00 AM), <https://www.nasdaq.com/press-release/dionymed-scores-victory-in-eaze-payment-processing-lawsuit-2019-09-11> [<https://perma.cc/4CZA-ZFVC>].

41. Rebecca Davis O'Brien, *Businessmen Convicted of Duping Banks in Marijuana Sales*, WALL ST. J. (Mar. 24, 2021, 1:25 PM), <https://www.wsj.com/articles/businessmen-convicted-of-duping-banks-in-marijuana-sales-11616601574> [<https://perma.cc/294G-YSM2>].

42. See Alex Veiga, *Legalization Bids Boost Outlook for US Cannabis Industry*, ASSOCIATED PRESS (Apr. 22, 2021), <https://apnews.com/article/health-business-f8609e72180e326221abb9807d321ffc> [<https://perma.cc/39C6-M8RF>].

1. Academic Prescriptions

Legal academic commentary has produced two thoughtful solutions to the marijuana industry's lack of banking services—one emphasizing cooperative federalism⁴³ and the other looking to community banking.⁴⁴ While both are promising in theory, neither has served cannabis businesses well in practice, since both require federal assent that is infeasible in today's political environment.

In a seminal analysis of marijuana law's importance for federal-state interactions, Erwin Chemerinsky cited "the unavailability of even the most rudimentary banking services" as the most profound obstacle facing cannabis businesses.⁴⁵ To solve this problem, Chemerinsky advocated a "cooperative federalism" regime, under which Congress would amend the CSA to allow states to opt out of its marijuana prohibitions, effectively empowering states to legalize marijuana as a matter of federal law within their borders.⁴⁶ Though legally elegant, Chemerinsky's approach has proven a non-starter in Congress as many legislators, particularly Republicans, are hostile to endowing recreational marijuana with the imprimatur of federal approval.⁴⁷

Recognizing the congressional hurdle to Chemerinsky's proposal, a student note in the *Michigan Law Review* instead argued that cannabis businesses should embrace a community-banking model.⁴⁸ By forming a cannabis-only credit union, a financial institution for marijuana businesses could seek charters directly from state regulators.⁴⁹ Yet, this approach would not avoid federal scrutiny altogether, since most state-chartered credit unions must obtain deposit insurance from the National Credit Union Administration (NCUA) and are therefore subject to its supervision.⁵⁰ Moreover, to access the Federal Reserve's payment system, the cannabis credit union would need to acquire a master account at the Federal Reserve.⁵¹

43. Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 115–16 (2015).

44. Tighe, *supra* note 30, at 827 (advocating cannabis financial cooperatives and credit unions).

45. Chemerinsky et al., *supra* note 43, at 91.

46. *Id.* at 116.

47. See, e.g., Jacqueline Thomsen, *McConnell: I Won't Support Legalizing Marijuana*, HILL (May 8, 2018, 4:54 PM), <https://thehill.com/homenews/senate/386791-mcconnell-i-wont-support-legalizing-marijuana> [<https://perma.cc/KNE3-8QK9>].

48. See Tighe, *supra* note 30, at 825–26.

49. *Id.* at 827.

50. *Id.* at 828.

51. *Id.* at 829.

In practice, cannabis businesses have experimented with the strategy advocated by the note, but the results have been dire due to federal intransigence. Fourth Corner Credit Union secured a Colorado charter in 2014 to serve the state's nascent marijuana industry;⁵² however, the NCUA refused to offer Fourth Corner federal insurance and the Federal Reserve Bank of Kansas City rejected Fourth Corner's application for a master account.⁵³ Unable to function without these pillars of federal support, Fourth Corner sued the Kansas City Fed.⁵⁴ After losing in district court, Fourth Corner appealed to the Tenth Circuit, which issued a three-way split decision that allowed Fourth Corner to reapply for a master account as long as it promised not to service marijuana businesses.⁵⁵ Thus, Fourth Corner could operate only if it renounced its *raison d'être*.⁵⁶ Just like Chemerinsky's federalism approach, the community banking solution to the marijuana industry's under-banking problem faltered in the face of federal resistance.

2. Executive Policy

Attempts to ameliorate marijuana businesses' lack of banking services through unilateral executive policy-making have proven equally unsatisfactory, since the executive's inability to credibly commit to forbearance in future administrations leaves banks that avail themselves of safe harbors potentially subject to subsequent criminal prosecutions.

As states began to legalize marijuana, the Obama Administration sought to clarify the federal government's stance on these state initiatives by issuing the Cole Memorandum.⁵⁷ In the Cole Memo, the Department of Justice advised its prosecutors not to pursue CSA charges against marijuana businesses operating in compliance with state law, unless the businesses otherwise implicated certain enumerated enforcement priorities—including gang violence, interstate trafficking,

52. See Peter Conti-Brown, *The Policy Barriers to Marijuana Banking*, 6 PENN WHARTON PUB. POL'Y INITIATIVE 1, 4 (2018).

53. See *id.* at 4–5.

54. *Fourth Corner Credit Union v. Fed. Rsv. Bank of Kansas City*, 861 F.3d 1052, 1053–54 (10th Cir. 2017).

55. See *id.* at 1062, 1079 (“Fourth Corner would need to submit a new application to the Federal Reserve Bank of Kansas City. This application would consist of not only the same materials that Fourth Corner has already submitted, but also a conditional promise that Fourth Corner would service marijuana-related businesses only if doing so is legal.”).

56. Conti-Brown, *supra* note 52, at 5.

57. See Tighe, *supra* note 30, at 812.

and sales to minors.⁵⁸ FinCEN issued similar guidance in the wake of the Cole Memo, stating FinCEN would not pursue BSA charges against banks that followed a stringent set of reporting requirements when servicing marijuana businesses.⁵⁹

Very few banks began accepting clients in the cannabis industry based on FinCEN's guidance.⁶⁰ The guidance did not bind other agencies with BSA enforcement power, such that a bank naïve enough to rely on FinCEN's interpretation could find itself subject to severe penalties if the Federal Reserve or Office of the Comptroller of the Currency interpreted the law differently.⁶¹ Moreover, because the Cole Memo and FinCEN guidance were merely interpretive rules, issued without the stricture of notice-and-comment, these policy statements could be rescinded instantly, leaving banks vulnerable to prosecution.⁶² Indeed, precisely such an about-face occurred during the Trump administration, when Attorney General Jeff Sessions rescinded the Cole Memo and reinstated a strict approach to marijuana enforcement under the CSA.⁶³ While the Biden administration has signaled that it intends to pursue a somewhat more lenient approach to marijuana enforcement under the leadership of Attorney General Merrick Garland,⁶⁴ the short life of the Cole Memo vividly illustrated the inadequacy of executive solutions to the cannabis industry's under-banking problem.

58. Memorandum from James M. Cole, Deputy Att'y Gen. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/F7L6-VSM6].

59. Tighe, *supra* note 30, at 813.

60. Mandelbaum, *supra* note 36.

61. Tighe, *supra* note 30, at 814.

62. See Moises Gali-Velazquez, *Changes Needed to Protect the Banking and Financial Services Sector When Dealing with the Medical Marijuana Industry—Part III*, 133 *BANKING L.J.* 196, 202 (2016) ("The principal problem with the federal guidance is that it is not legally binding . . . Agency guidance can be changed overnight without any of the rigorous process that formal agency rulemaking would entail, thus not providing the necessary regulatory stability that banks would like to have if they decide to serve medical marijuana businesses.").

63. Memorandum from Jefferson B. Sessions, III, Att'y Gen., to All U.S. Att'ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/CB7R-2PZH] ("[P]revious nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately."); Conti-Brown, *supra* note 52, at 4.

64. See John Hudak, *Merrick Garland, Cannabis Policy, and Restorative Justice*, *BROOKINGS* (Feb. 24, 2021), <https://www.brookings.edu/blog/fixgov/2021/02/24/merrick-garland-cannabis-policy-and-restorative-justice/> [https://perma.cc/5LLD-LGVT]; cf. Glenn Thrush, *As Biden Wavers on Weed, States Speed Ahead with Marijuana Legalization*, *N.Y. TIMES* (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/new-york-virginia-weed.html> [https://perma.cc/69HF-MGZB] ("Mr. Biden, unlike most other Democratic candidates in 2020, did not support federal legalization of marijuana, but he has said he supports the efforts of individual states to take action if they see fit.").

3. Congressional Action: The SAFE Banking Act

In light of the failures of academic proposals and executive policy-making, the cannabis industry has increasingly looked to Congress to provide access to financial services. The latest manifestation of that hope is the SAFE Banking Act.⁶⁵ On April 19, 2021, the House of Representatives passed the SAFE Banking Act on a bipartisan vote of 321-101.⁶⁶ While the House approved a similar version of the bill last year, the Republican-led Senate under Majority Leader Mitch McConnell refused to consider it.⁶⁷ But with Democratic control over the Senate, the SAFE Banking Act finally seems ripe for consideration.⁶⁸

The SAFE Banking Act offers sweeping protections for firms that offer financial services or insurance to legitimate cannabis businesses. Under the bill's safe harbor, bank regulators cannot take adverse action against a bank solely for serving cannabis business clients.⁶⁹ Notably, the bill's language extends to any financial institution that "provides or has provided" such services, apparently offering retroactive relief to banks who accepted marijuana firm clients prior to the bill's adoption.⁷⁰ To ensure banks can transact in payments from the marijuana industry without fear of money laundering liability, the bill removes proceeds from cannabis-related businesses from the MLCA's ambit⁷¹ and directs FinCEN to promulgate new BSA guidance on when banks should file suspicious activity reports for cannabis industry clients.⁷² The bill likewise shields insurers of marijuana firms from federal enforcement action.⁷³ Lest these more specific provisions fail, a blanket protection exempts financial service companies, insurers, and their "officers, directors, and employees" from liability

65. SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021).

66. Jonathan Nicholson, *Cannabis-Banking Bill Approved by House; Future in Senate Uncertain*, MARKETWATCH (Apr. 19, 2021, 8:27 PM), <https://www.marketwatch.com/story/cannabis-banking-bill-approved-by-house-future-in-senate-uncertain-11618878433> [<https://perma.cc/WW9A-4HLV>].

67. See Brendan R. Chainey, Daniel S. Cohen, Daniel F. C. Crowley, Scott J. Gelbman, Barry M. Hartman & Kathleen L. Nicholas, *Cannabis Banking; The SAFE Banking Act 2.0's Status, Key Modifications, and Prospects*, NAT'L L. REV. (Apr. 2, 2021), <https://www.natlawreview.com/article/cannabis-banking-safe-banking-act-20-s-status-key-modifications-and-prospects> [<https://perma.cc/Q6RV-9TZQ>].

68. See *id.*

69. H.R. 1996 § 2(a).

70. *Id.* § 2(a)(1).

71. *Id.* § 3.

72. *Id.* § 6.

73. *Id.* § 4(c).

under “any Federal law or regulation” based solely on offering services to cannabis businesses.⁷⁴

The SAFE Banking Act would directly solve the cannabis industry’s under-banking problem. With broad protections for financial institutions and insurers to embrace marijuana businesses, the bill would catalyze a massive transfusion of cash into the nation’s banks, benefitting both them and the marijuana industry. Yet as the next Part explores, the bill’s fate in the Senate remains uncertain, due to the SAFE Banking Act’s lack of focus on racial justice issues and the legacy of the War on Drugs.

III. RACIAL EQUITY CONCERNS

Democratic senators have questioned the SAFE Banking Act’s fairness, as it offers comprehensive relief to banks and insurance companies while offering little to the communities most directly harmed by marijuana prohibition. These concerns are well founded, as the criminalization of marijuana was originally rooted in racist antipathy and continues to disproportionately impact communities of color. As it currently stands, the SAFE Banking Act elides these profound problems in a manner that could jeopardize its political viability.

Although broadly supportive of reforming the nation’s marijuana laws, leading Democratic Senators have sharply criticized the SAFE Banking Act’s one-track approach. The Chairman of the Senate Banking Committee, Senator Sherrod Brown, signaled that the SAFE Banking Act does too little to “ensure that the Black and brown communities, including minority-owned small businesses, most impacted by the war on drugs are able to participate in the cannabis economy and banking systems as decriminalization efforts move forward.”⁷⁵ Senator Cory Booker, a prominent criminal justice and marijuana legalization advocate, remarked: “It’s simply not enough as it stands without reinvestment in communities most hurt by the failed drug war and while people of color are left to languish in federal prisons for marijuana-related offenses. . . .The end we seek is not just legalization or access to financial institutions, it’s justice.”⁷⁶ Majority Leader Chuck

74. *Id.* § 4(a).

75. Nicholson, *supra* note 66.

76. Press Release, Sen. Cory Booker, Booker Statement on House Passage of SAFE Banking Act (Sept. 25, 2019), <https://www.booker.senate.gov/news/press/booker-statement-on-house-passage-of-safe-banking-act> [<https://perma.cc/U9KK-BZTV>].

Schumer likewise criticized the bill for benefitting wealthy financial institutions, yet offering no relief for those who bore the brunt of the failed War on Drugs.⁷⁷

These concerns are amply supported by marijuana prohibition's racist history and ongoing contribution to the mass incarceration of communities of color. Government officials and newspapers began stoking fears of marijuana consumption in the early twentieth century, by associating the substance with Mexican and African Americans.⁷⁸ Today, enforcement rates continue to reflect this dismal history, as Black Americans are "3.64 times more likely to be arrested for marijuana possession" than white Americans, despite comparable usage rates among racial groups.⁷⁹ Disproportionate arrests for marijuana charges is a significant contributor to the mass incarceration of communities of color in America,⁸⁰ inflicting generational tolls on the opportunity and wealth of entire families and neighborhoods.⁸¹ Racial justice advocates therefore contend that any cannabis reform legislation that fails to rectify these ongoing harms will widen the inequality between those privileged enough to become marijuana

77. Kyle Jaeger, *Schumer Worries Senate Marijuana Banking Vote Could Undermine Broader Legalization Push*, MARIJUANA MOMENT (Apr. 20, 2021), <https://www.marijuanamoment.net/schumer-worries-senate-marijuana-banking-vote-could-undermine-broader-legalization-push/> [https://perma.cc/GX7X-FXMY] ("We want to make sure . . . that this just doesn't let all the bankers, the big boys, in without taking into account that communities of color have paid the greatest price here and should get some recompense.").

78. See John Hudak, *Marijuana's Racist History Shows the Need for Comprehensive Drug Reform*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/23/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform/> [https://perma.cc/QGN3-GWKE] ("U.S. government officials first painted cannabis as an insidious substance flowing across the border like immigrants from Mexico. Next, the government described cannabis as a drug for the inner city and for Blacks, while also lying about it, leading to murder, rape, and insanity."); David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUND. FOR ECON. EDUC. (Apr. 11, 2017), <https://fee.org/articles/the-racist-roots-of-marijuana-prohibition/> [https://perma.cc/5CRD-XXUC].

79. EZEKIEL EDWARDS, EMILY GREYAK, BROOKE MADUBUONWU, THANIA SANCHEZ, SOPHIE BEIERS, CHARLOTTE RESING, PAIGE FERNANDEZ & SAGIV GALAI, ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 7 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [https://perma.cc/T5Z4-AGBF].

80. See Grawert et al., *supra* note 13, at 11 ("For decades, marijuana arrests have served as a common point of entry into New York's criminal justice system and served to starkly illustrate racial disparities in law enforcement.").

81. See, e.g., Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* 3 (Fla. State Univ., Inst. for Just., Rsch., & Dev., Working Paper No. IJR-072016, 2016) ("[T]he costs of incarceration are also shouldered by families, children, and communities. Incarceration does not take place in a vacuum; incarcerated persons are members of families, organizations, and communities. When a person is removed from these social structures, it comes at a significant cost—not just to the person being removed but to the people and neighborhoods that are left behind.").

entrepreneurs and the communities targeted by the War on Drugs.⁸² Indeed, even in states with vibrant cannabis industries, people of color remain underrepresented in lucrative marijuana firms.⁸³

The SAFE Banking Act's failure to address racial equity issues poses a threat to its passage in the Senate.⁸⁴ While the bill would require federal banking regulators and the Government Accountability Office to conduct studies on diversity and inclusion in the cannabis industry,⁸⁵ these informational initiatives cannot remedy the underlying racial disparities that plague the United States's relationship with marijuana. The SAFE Banking Act's future viability therefore hinges on whether it can successfully integrate provisions that mitigate the injustices of the War on Drugs, particularly for communities of color. The next Part offers an amendment to the SAFE Banking Act that would do just that by reforming federal fair lending law.

IV. FAIR LENDING FOR MARIJUANA JUSTICE

This Part proposes an amendment to the SAFE Banking Act designed to address the racial equity concerns raised by leading Democratic senators:⁸⁶ extend the Equal Credit Opportunity Act (ECOA)⁸⁷—the United States' primary fair lending law—to prohibit lenders from discriminating against individuals with marijuana-related arrests, charges, or convictions, who apply for loans to fund cannabis businesses. The amendment would empower those adversely impacted by marijuana prohibitions to join the new cannabis

82. See MAKADA HENRY-NICKIE & JOHN HUDAK, BROOKINGS, *IT IS TIME FOR A CANNABIS OPPORTUNITY AGENDA*, 1-2 (2020), https://www.brookings.edu/wp-content/uploads/2020/03/Big-Ideas_HenryNickieHudak_CannabisOpportunityAgenda.pdf [perma.cc/S7NJ-78W9] (“Today, amidst a thriving state-legal cannabis industry, the same people hurt most by the drug war face the greatest barriers to participating in the emerging cannabis economy.”).

83. See Janet Burns, *Make No Mistake: Cannabis Equity Can't Wait*, FORBES (Jan. 8, 2020, 10:16 AM), <https://www.forbes.com/sites/janetwburns/2020/01/08/in-2020-cannabis-equity-cant-wait/?sh=6a0d673b1c97> [perma.cc/RYM6-4TXY]; Sophie Quinton, *Black-Owned Pot Businesses Remain Rare Despite Diversity Efforts*, PEW (Jan. 15, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/15/black-owned-pot-businesses-remain-rare-despite-diversity-efforts> [perma.cc/XAM6-GY9Z].

84. See Victor Reklaitis, *There's No 'Immediate Path Forward' in Senate for Cannabis Banking Bill, Analyst Says*, MARKETWATCH (Apr. 20, 2021, 11:37 AM), <https://www.marketwatch.com/story/theres-no-immediate-path-forward-in-senate-for-cannabis-banking-bill-analyst-says-11618933075> [https://perma.cc/Y2XJ-EUAH] (noting Senate Democrats' focus on the “damage done to minority families from the war on drugs”).

85. H.R. Res. 1996, 117th Cong. §§ 8-9 (2021).

86. See *supra* notes 75-77 and accompanying text.

87. 15 U.S.C. § 1691.

economy as entrepreneurs. Given the well-documented racial disparities in marijuana enforcement, this fair lending reform would promote racial equity in a manner likely to garner bipartisan support in the Senate.

The ECOA forbids creditors from discriminating against any applicant “on the basis of race, color, religion, national origin, sex or marital status, or age.”⁸⁸ Like under other antidiscrimination statutes, ECOA plaintiffs may be able to allege that a facially neutral criterion is nevertheless discriminatory because of its disparate impact on individuals with a protected characteristic.⁸⁹ Lenders, however, can then justify their practices by offering a legitimate business rationale for the neutral criterion.⁹⁰ In practice, disparate impact ECOA claims are extraordinary difficult to prove, such that borrowers often lack an effective remedy unless a lender overtly discriminates.⁹¹

Litigants’ efforts to extend the ECOA’s fair lending protections to those with criminal records based on disparate enforcement against communities of color have failed. In *A.B. & S. Auto Service v. South Shore Bank of Chicago*,⁹² a Black small-business owner brought an ECOA suit, claiming defendant’s denial of his loan applications based on his prior criminal arrests and charges—including for possession of a controlled substance—constituted discrimination, due to that policy’s disparate impact on African Americans.⁹³ The district court rejected the lawsuit, holding that because plaintiff’s prior criminal charges “reflected negatively on his judgment and character,” the bank had a legitimate business purpose in denying his small business loan on those grounds.⁹⁴

Academic commentators have noted that this limit on the ECOA has contributed to a vicious cycle in communities of color adversely impacted by mass incarceration.⁹⁵ For many previously incarcerated

88. *Id.* § 1691(a)(1).

89. See Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J.L. & POL’Y 575, 577 (2018).

90. See *id.* at 578.

91. See Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. BANKING & FIN. L. 199, 206 (2012).

92. 962 F. Supp. 1056 (N.D. Ill. 1997).

93. *Id.* at 1057–59.

94. *Id.* at 1064.

95. See Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237, 1239 (2005); Kelly Elizabeth Orians, “I’ll Say I’m Home, I Won’t Say I’m Free”: Persistent Barriers to Housing, Employment, and Financial Security for Formerly Incarcerated People in Low-Income Communities of Color, 25 NAT’L BLACK L.J. 23, 47 (2016).

individuals, their criminal records pose an insuperable barrier to the credit they require to reenter society and achieve financial stability.⁹⁶ Thus, racial justice advocates have argued that extending fair lending protections to individuals with criminal records would foster racial equity and begin to repair the enduring harms of the War on Drugs.⁹⁷

Drawing on this fair lending literature, the Senate should amend the SAFE Banking Act to ensure that those who bore the greatest costs from marijuana prohibition—disproportionately people of color—enjoy the benefits of cannabis banking. The amendment would modify the ECOA, as codified at 28 U.S.C. § 1691, to expressly prohibit creditors from discriminating against an applicant for loans for a legitimate marijuana-related business on the basis of prior arrests, charges, or convictions for marijuana possession, cultivation, or distribution. Furthermore, to promote clear enforcement, the amended SAFE Banking Act should instruct the Consumer Financial Protection Bureau to revise its fair lending regulation, Regulation B,⁹⁸ and enforce the new ECOA provisions accordingly. Finally, private plaintiffs like the loan applicant in *A.B. & S. Auto Service* could also enforce this provision of the SAFE Banking Act.

A fair lending amendment to the SAFE Banking Act would likely promote bipartisan support of the bill. In addition to addressing racial equity concerns among leading Senate Democrats,⁹⁹ this revision would promote several values of central importance to Senate Republicans. Empowering individuals with marijuana-related criminal records to enter the cannabis industry is a pro-market strategy for alleviating recidivism that emphasizes entrepreneurship, financial independence, and small-business ownership.¹⁰⁰ Moreover, the remainder of the SAFE Banking Act already enjoys support among a sizable portion of congressional Republicans, as evident by the bill's

96. See Henderson, *supra* note 95, at 1246; see also ASPEN INST., PRISON TO PROPRIETOR: ENTREPRENEURSHIP AS A RE-ENTRY STRATEGY 13 (2016), <https://www.aspeninstitute.org/wp-content/uploads/2016/09/AFN-PrisonToProprietor.pdf> [<https://perma.cc/2V42-7GVR>] (“Most formerly-incarcerated individuals who pursue business development will face particular challenges in accessing credit.”).

97. See, e.g., Henderson, *supra* note 95, at 1237–38 n.2, 1265 (“Criminal exposure is a particularly problematic proxy for ability and willingness to repay loans given the impact of overt and unconscious racism in the disproportionate policing and prosecution of African-Americans and Latinos, and therefore should not be used as such.”); Orians, *supra* note 95, at 47.

98. See 12 C.F.R. § 1002.4 (2021).

99. See *supra* Part II.

100. Cf. ASPEN INST., *supra* note 96, at 17 (“Entrepreneurship and self-employment can play a crucial role in supporting formerly-incarcerated individuals, particularly people and communities of color who are disproportionately affected by incarceration. Business ownership can provide the means for these individuals to build self-confidence, connect with the labor market, and achieve self-sufficiency as they reintegrate into communities.”).

bipartisan support in the House of Representatives¹⁰¹ and the comments of certain pro-business Senators.¹⁰² Thus, this Comment's proposed amendment is not merely normatively desirable, but also politically prudent.

V. CONCLUSION

America's burgeoning legal cannabis industry remains severely under-banked, forcing marijuana businesses to overinvest in security measures and rendering even ordinary processes, like payroll, expensive and time consuming.¹⁰³ Prior attempts to offer financial services to cannabis businesses despite statutory prohibitions in the CSA, MLCA, and BSA have failed, spurring Congress to enter the fray.¹⁰⁴ With the House of Representatives' recent passage of the SAFE Banking Act, cannabis banking reform is closer to a reality today than ever before. But lingering concerns among Senate Democrats about the bill's lack of racial justice provisions remain a significant hurdle to the SAFE Banking Act's enactment.¹⁰⁵ To allay these concerns, this Comment proposes extending the ECOA's fair lending protections to those with marijuana-related criminal records. This amendment to the SAFE Banking Act would promote racial justice and combat the ongoing harms of the War on Drugs, while fostering entrepreneurship and economic independence in marginalized communities. With the benefit of this fair lending solution, the SAFE Banking Act would be far more likely to pass the Senate with bipartisan support.¹⁰⁶

Of course, the tailored expansion of the ECOA suggested by this Comment is far from a panacea. The disastrous consequences of the War on Drugs and mass incarceration are both pervasive and persistent, especially for America's communities of color. Broader initiatives are necessary to remedy the generational costs of these failed policies since equity and economic vitality will require opportunities outside the new cannabis industry as well as within it. Nevertheless,

101. See *supra* note 66 and accompanying text.

102. See, e.g., Neil Haggerty, *Pot Banking Could Get New Life on Toomey-Led Senate Panel*, AM. BANKER (Nov. 17, 2020, 12:54 PM), <https://www.americanbanker.com/news/pot-banking-could-get-new-life-on-toomey-led-senate-panel> [<https://perma.cc/AJR4-3JA5>] (“[Senator] Toomey signaled support for a marijuana banking bill, a key priority for the financial services industry. . .”).

103. See *supra* Section II.A.

104. See *supra* Section II.B.

105. See *supra* Part III.

106. See *supra* Part IV.

Congress should seize the chance it currently has to incrementally address the dire challenges facing the United States, if only as a first step on the winding path towards justice.