

# Richmond Public Interest Law Review

---

Volume 25  
Issue 1 *General Assembly in Review 2021*

Article 8

---

3-18-2022

## First in the South: Cannabis Legalization in Virginia

JM Pedini  
*NORML*

Cassidy Crockett-Verba  
*NORML*

Follow this and additional works at: <https://scholarship.richmond.edu/pilr>



Part of the [Criminal Law Commons](#), [Legislation Commons](#), and the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

JM Pedini & Cassidy Crockett-Verba, *First in the South: Cannabis Legalization in Virginia*, 25 RICH. PUB. INT. L. REV. 143 (2022).

Available at: <https://scholarship.richmond.edu/pilr/vol25/iss1/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## FIRST IN THE SOUTH: CANNABIS LEGALIZATION IN VIRGINIA

*JM Pedini\* & Cassidy Crockett-Verba\*\**

---

\* JM Pedini is the development director of NORML. JM oversees NORML's global chapter affiliate network and ensures availability of resources and tools necessary to leverage the organization's powerful grassroots support. They also serve as the executive director of the state affiliate, Virginia NORML, where their work has directly resulted in the legalization of medical and adult-use cannabis, decriminalization of personal marijuana possession, and the establishment of the Virginia Legislative Cannabis Caucus and the Virginia Cannabis Control Authority. Appointed to the Governor's Marijuana Legalization Work Group and as co-chair of the Legal and Regulatory Subcommittee, their current focus is on the Commonwealth's continued effort to establish a fair and equitable adult-use cannabis regulatory structure that prioritizes consumer safety. Prior to drug policy reform, they enjoyed a successful entertainment and media career with The Walt Disney Company.

\*\* Cassidy Crockett-Verba (L'21) is the development associate at NORML. Cassidy manages the resources and compliance of the global chapters network. She also ensures that NORML affiliate chapters can properly engage with their supporters and are armed with the data needed to end prohibition in their states. Cassidy also acts as the legislative associate for Virginia NORML, where she works to influence cannabis policy in the Commonwealth. Cassidy graduated from the University of Richmond School of Law in 2021 and has been admitted to the Virginia State Bar. She received her bachelor's degree in history from Old Dominion University in 2017. Along with JM Pedini, Cassidy authored a paper in Richmond Law's Public Interest Law Review. She lives in Richmond, Virginia with her husband.

## ABSTRACT

*In 2021, Virginia made history when it became the first state in the South to legalize cannabis for responsible use by adults. Though legalization is now the law of the land, which today includes personal possession and cultivation, there remains much work to be done before Virginians are able to legally purchase cannabis outside of the medical program. Concerns over social equity provisions, retail sales dates, and the reenactment clauses added during the 2021 legislative session have drastically slowed the process of expanding the regulated marketplace to adult-use consumers. With many key components requiring reenactment by the 2022 General Assembly Session, the future of cannabis in the Commonwealth remains hazy and rolled up tightly in partisan politics.*

## INTRODUCTION

In 2021, Virginia became the first state in the South to legalize marijuana for adult use.<sup>1</sup> While the Commonwealth may be the first southern state to do so, it is far from the first in the nation, with nearly half of U. S. states and territories allowing for the personal possession and consumption of cannabis by adults.<sup>2</sup> This means that Virginia has a policy that will support a legally controlled market, where consumers can purchase cannabis for personal use from a safe, regulated source.<sup>3</sup> With many other state regulatory models from which to glean best practices, Virginia was well-positioned to establish policies that could begin undoing the decades of harm prohibition brought to the Commonwealth. Marijuana criminalization is rooted in racist rhetoric and continues to have a disproportionate effect on communities of color.<sup>4</sup> However, despite knowing the medical benefits, the racist history, and the relative safety of cannabis, the road to legalization in Virginia was neither easy nor straightforward and continues to be difficult to navigate.

From 2015 until 2020, medical cannabis was not technically legal, but possession, use, and even sales were permissible under an affirmative defense.<sup>5</sup> Originally, the affirmative defense was limited only to patients with intractable epilepsy, though the defense quickly expanded in 2018 to allow for any

---

<sup>1</sup> See e.g., Sarah Rankin, *Virginia Becomes First Southern State to Legalize Marijuana*, AP NEWS (Apr. 7, 2021), <https://apnews.com/article/virginia-1st-southern-state-legalize-marijuana-2346aa3ee52ce43f79b712c14346764d>.

<sup>2</sup> See Michael Hartman, *Cannabis Overview*, NCSL (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

<sup>3</sup> See *Legalization*, NORML, <https://norml.org/laws/legalization> (last visited Jan. 16, 2022).

<sup>4</sup> See generally 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/>.

<sup>5</sup> S. 1235 Gen. Assemb., Reg. Sess. (Va. 2015) (amending VA. CODE ANN. § 18.2-250.1 and adding VA. CODE ANN § 54.1-3408.3).

condition that a registered practitioner believed could be treated by medical cannabis.<sup>6</sup> The narrowly drafted laws permitted only cannabis oil products during this time.<sup>7</sup>

In 2020, the Code was amended to legalize medical cannabis products, including botanical cannabis.<sup>8</sup> Beginning in 2020, Virginia adults possessing up to one ounce of cannabis for personal use would no longer face a criminal charge.<sup>9</sup> Instead, possession would be subject to no more than a \$25 civil penalty.<sup>10</sup> Medical cannabis patients were permitted to purchase a 90-day supply of cannabis from one of the four licensed dispensaries in the Commonwealth and were not subject to the \$25 civil penalty.<sup>11</sup> Additionally, patients registered to participate in the medical cannabis program were extended limited employment protections to guard against marijuana-related termination or other adverse employment action.<sup>12</sup> However, without a medical card, there remained no opportunity for legal purchase or possession without a fine.<sup>13</sup>

As of the date of this writing, retail sales are not slated to begin in Virginia until January 1, 2024.<sup>14</sup> However, such sales may not begin without reenactment of legislation by the 2022 Virginia General Assembly.<sup>15</sup> This is one of the many provisions in the legislation subject to a reenactment clause, meaning that it will be up for both debate and vote again in the 2022 General Assembly.<sup>16</sup> The Cannabis Oversight Commission was created by study to meet between the 2021 and 2022 sessions to discuss the possibility of expediting the timeline for licensing and legal retail sales of cannabis to the public and how this could be implemented.<sup>17</sup> This initially proposed lengthy delay is one of the primary reasons that some advocates feel that the legalization measure

---

<sup>6</sup> S. 726 Gen. Assemb., Reg. Sess. (Va. 2018) (amending VA. CODE ANN. § 18.2-250.1, VA. CODE ANN. § 54.1-3408.3, and VA. CODE ANN. § 54.1-3442.7).

<sup>7</sup> S. 1557, Gen. Assemb., Reg. Sess. (Va. 2019) (amending VA. CODE ANN. § 54.1-3408.3 and VA. CODE ANN. § 54.1-3442.6).

<sup>8</sup> See VA. CODE ANN. § 18.2-250.1 (2020) *repealed* by S. 1406, 2021 Gen. Assemb., Spec. Sess. (Va. 2021).

<sup>9</sup> S. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) *repealed* by S. 1406, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

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

<sup>11</sup> VA. CODE ANN. § 54.1-3408.3 (2021); 18 VA. ADMIN. CODE § 110-60-310 (2021).

<sup>12</sup> VA. CODE ANN. § 40.1-27.4 (2021).

<sup>13</sup> S. 1235 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>14</sup> S. 1406, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>15</sup> *Id.*

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

<sup>17</sup> Joe Dashiell, *Cannabis Commission Makes Recommendations to General Assembly*, NBC 12 (Jan. 10, 2022), <https://www.nbc12.com/2022/01/11/cannabis-commission-makes-recommendations-general-assembly/>.

is insufficient.<sup>18</sup> While this legislation may not be perfect, Virginia did see a 90% decrease in marijuana arrest rates after the legislation took effect on July 1, 2021, through September 2021.<sup>19</sup>

Cannabis has been a part of Virginia history since the very beginning. It was grown by both George Washington and Thomas Jefferson in the form of industrial hemp.<sup>20</sup> Section I will address the previous landscape of marijuana laws in the Commonwealth. This will include an overview of both the medical cannabis program and decriminalization. Section II will cover the legalization legislation, including the portions that are yet to be enacted and those that must be debated and reenacted in the 2022 General Assembly. This section will also delve into the efforts by advocates as well as the many disagreements on policy decisions made in the legislation. Finally, Section III will analyze the effects of legalization in Virginia, including the large number of federal employees and arrest data.

## I. PREVIOUS LANDSCAPE

Marijuana officially became federally illegal in the United States when the Controlled Substances Act was passed in 1970.<sup>21</sup> Before that, the Marihuana Tax Act of 1937 began adding a tax on cannabis, which many doctors used at the time.<sup>22</sup> The tax made producing, selling, and prescribing cannabis prohibitively expensive.<sup>23</sup> Additionally, physicians knew “marihuana” as cannabis and did not realize that they were losing the ability to prescribe cannabis to their patients.<sup>24</sup> “Marihuana” was a term that was used to create a negative connotation with cannabis and link the substance to Mexicans, Black people, and jazz music.<sup>25</sup> Since outlawing cannabis, groups like the National Organization for the Reform of Marijuana Laws (“NORML”), Marijuana Policy

---

<sup>18</sup> See Megan Schiffres, *Did Virginia Legalize Marijuana? What Does the Bill Actually Do?*, VA. DOGWOOD (Mar 3, 2021), <https://vadogwood.com/2021/03/02/did-virginia-legalize-marijuana/> (written before the date of legalization was moved to July 1, 2021, but still discussing other issues with the bill such as corporate interests).

<sup>19</sup> See Lindsey Kennett, *Marijuana-Related Possession Arrests Drop 90% Across Virginia*, NBC 10 (Sept. 15, 2021), <https://www.wsls.com/news/local/2021/09/14/marijuana-related-possession-arrests-drop-90-across-virginia>.

<sup>20</sup> Max Juhasz, *The Founding Fathers & Hemp*, PLAIN JANE, <https://blog.plainjane.com/the-founding-fathers-and-hemp>, (last visited Jan. 12, 2022).

<sup>21</sup> Controlled Substances Act of 1970, 21 U.S.C. § 812(a)(10) (2018).

<sup>22</sup> Adam Drury, *The Marihuana Tax Act of 1937*, HIGH TIMES, <https://hightimes.com/culture/the-marihuana-tax-act-of-1937>, (last visited Jan 12, 2022).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

Project, and others have worked to repeal these unjust laws.<sup>26</sup> Over the years, a patchwork of laws regulating the sale of medical and adult-use (also colloquially known as recreational-use) cannabis has emerged in response to public outcry over prohibition.<sup>27</sup> In Virginia, the landscape has been shifting over the last half-decade to benefit residents of the Commonwealth who are seeking to benefit from safe, legal access to cannabis.

#### A. Medical Cannabis

Beginning in 2015, a new landscape for cannabis in the Commonwealth emerged with the passage of limited medical-use laws.<sup>28</sup> Virginia did not immediately legalize or allow production of medical cannabis for patients. An affirmative defense for the use and possession of tetrahydrocannabinolic acid (“THC-A”) and cannabidiol (“CBD”), two cannabinoids found in cannabis, was provided for patients with intractable epilepsy only.<sup>29</sup> This affirmative defense did not legalize medical cannabis and did not allow for the purchase of medical cannabis in Virginia. In 2017, Governor Ralph Northam approved legislation allowing dispensaries (known as “pharmaceutical processors”) to produce THC-A and CBD oils for the first time, subject to regulations set forth by the Board of Pharmacy.<sup>30</sup> The oils would be available for purchase by patients pursuant to a recommendation from a physician.<sup>31</sup> Legislation in the 2020 General Assembly legalized possession of medical cannabis pursuant to a recommendation from a registered practitioner and removed the affirmative defense.<sup>32</sup> The first medical cannabis dispensary opened on October 17, 2020, marking the first time registered patients could legally purchase medical cannabis.<sup>33</sup> Between 2015 and 2020, there was no legal way to

---

<sup>26</sup> *About NORML*, NORML, <https://norml.org/about-norml> (last visited Jan. 5, 2022); *Mission and Values*, MARIJUANA POL’Y PROJECT <https://www.mpp.org/about/mission-and-values/> (last visited Jan. 5, 2022).

<sup>27</sup> *State Medical Cannabis Laws*, NCSL, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated Jan. 4, 2022); Jeremiah Wilhelm, *Understanding Medical vs. Adult-Use Cannabis Dispensaries*, LEAFLY (Jan. 30, 2017), <https://www.leafly.com/news/cannabis-101/what-is-a-marijuana-dispensary> (noting that the term “recreational-use” has fallen out of favor, especially with activists, as many patrons do not do consume solely for recreational purposes and cannabis has many uses that fall outside of the “recreational/medical binary”).

<sup>28</sup> S. 1235 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>29</sup> See Bailey Rahn, *The Complete Guide to CBD (Cannabidiol)*, LEAFLY (Nov. 25, 2019), <https://www.leafly.com/news/cannabis-101/what-is-cbd>; Bailey Rahn, *What is THCA and What are the Benefits of This Cannabinoid?*, LEAFLY (Mar. 17, 2015), <https://www.leafly.com/news/cannabis-101/what-is-thca-and-what-are-the-benefits-of-this-cannabinoid>; Laura Vozzella, *Va. House Allows Marijuana Oils for Epilepsy*, WASH. POST. (Feb. 10, 2015), [https://www.washingtonpost.com/local/virginia-politics/va-house-allows-marijuana-oils-for-epilepsy/2015/02/10/008a395c-b071-11e4-886b-c22184f27c35\\_story.html](https://www.washingtonpost.com/local/virginia-politics/va-house-allows-marijuana-oils-for-epilepsy/2015/02/10/008a395c-b071-11e4-886b-c22184f27c35_story.html).

<sup>30</sup> S. 1027, Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>31</sup> Vozzella, *supra* note 29.

<sup>32</sup> VA. CODE ANN. § 18.2-250.1 (2020).

<sup>33</sup> NBC12 Newsroom, *First Medical Cannabis Dispensary to Open in Virginia*, NBC12 (last updated Oct. 15, 2020), <https://www.nbc12.com/2020/10/15/first-medical-cannabis-dispensary-open-virginia/>.

purchase medical cannabis in Virginia, as bringing cannabis across state lines is still illegal.<sup>34</sup>

In 2021 another protection was added for registered medical cannabis patients. Prior to July 1, 2021, any employer could terminate or take adverse employment action against an employee who tested positive for THC on a drug screening.<sup>35</sup> Beginning July 1, 2021, registered medical cannabis patients gained limited employment protections.<sup>36</sup> Patients are now protected from adverse disciplinary actions resulting from their participation in the program.<sup>37</sup> However, this new law does not extend such protections to those who are not registered with Virginia's medical program, nor to those who are registered but impaired or in possession at work.<sup>38</sup> It also does not protect those employed by the federal government, or those whose employment would affect federal contracts, as the federal illegality of cannabis would supersede state protections.<sup>39</sup> The law also does not restrict pre-employment drug screening, meaning it only protects a registered patient who is already employed.<sup>40</sup>

As of 2021, there is one pharmaceutical processor allowed per Health Service Area, of which there are five in Virginia, and each processor may have up to five additional cannabis dispensing facilities in their Health Service Area.<sup>41</sup> As of the time of writing this article (December 2021), four pharmaceutical processors are operational: Dharma Pharmaceuticals in Abingdon, Green Leaf Medical of Virginia in Richmond, Columbia Care in Portsmouth, and Dalitso in Manassas.<sup>42</sup> The processor for the fifth health service area has been caught up in a court case since September of 2020 and has seen no progress.<sup>43</sup> Cannabis dispensing facilities have opened in Salem, Glen Allen,

---

<sup>34</sup> *Virginia Medical Cannabis FAQs*, VA. NORML <https://www.vanorml.org/faqs> (last visited Jan. 23, 2021).

<sup>35</sup> VA. CODE ANN. § 40.1-27.4 (2021).

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> VA. CODE ANN. § 54.1-3442.6 (2021).

<sup>42</sup> *Pharmaceutical Processors – Medical Cannabis*, VA. DEP'T OF HEALTH PROFESSIONS (last visited Feb. 10, 2022), <https://www.dhp.virginia.gov/pharmacy/PharmaceuticalProcessing/>.

<sup>43</sup> Julia Travers, *MedMen's PharmaCann Virginia Lawsuit Stalls Medical Cannabis in Staunton*, OUTLAW REP. (Mar. 29, 2021), <https://outlawreport.com/medmen-pharmacann-theratrue-virginia-2/>.

Sterling, and Virginia Beach.<sup>44</sup> The medical cannabis program served approximately 37,000 registered patients as of November 2021.<sup>45</sup>

### *B. Decriminalization*

For those without access to the medical cannabis program, the legal landscape changed dramatically with the passage of decriminalization legislation in the 2020 General Assembly session.<sup>46</sup> Decriminalization generally refers to the removal of criminal penalties or jail time for possession of small amounts of marijuana.<sup>47</sup> Typically, a civil penalty is enacted for those in possession of a defined amount of marijuana, which was \$25 for up to one ounce in Virginia.<sup>48</sup> Decriminalization is frequently a step in the process towards adult-use legalization efforts. Twenty-seven states and several localities have passed decriminalization measures, and fourteen of those states have subsequently legalized adult-use marijuana.<sup>49</sup>

It is well established that marijuana prohibition is and has always been a racially-motivated policy, serving as a tool to divide communities and target Black and Brown individuals.<sup>50</sup> Between 2010 and 2019, the arrest rate of Black Virginians for marijuana possession was 3.5 times higher than that of white Virginians, despite similar rates of use.<sup>51</sup> The Joint Legislative Audit and Review Commission (“JLARC”) stated in their study on legalization that while the majority of charges resulted in a conviction, the consequences “were typically not severe.”<sup>52</sup> However, this report goes on to list the escalating consequences of a marijuana arrest, such as probation and jail time.<sup>53</sup> Still, it fails to account for the significant effects that such a conviction accumulates over a person’s lifetime.<sup>54</sup> Even a misdemeanor conviction can affect a person’s employment, housing, citizenship, and personal life.<sup>55</sup> Generally,

---

<sup>44</sup> *Virginia Medical Cannabis Dispensaries*, VA. NORML, <https://www.vanorml.org/dispensaries> (last visited Jan. 22, 2022).

<sup>45</sup> Jack Jacobs, *Medical Marijuana Operators Reflect on Industry’s First 12 Months in Virginia*, RICHMOND BIZSENSE (Nov. 10, 2021), <https://richmondbizsense.com/2021/11/10/medical-marijuana-operators-reflect-on-industrys-first-12-months-in-virginia/>.

<sup>46</sup> S. 2, 2020 Gen. Assemb., Reg. Sess (Va. 2020).

<sup>47</sup> See Hartman, *supra* note 2.

<sup>48</sup> VA. CODE ANN. § 4.1-1108 (2021).

<sup>49</sup> *Decriminalization*, NORML, <https://norml.org/laws/decriminalization> (last visited Jan. 5, 2022).

<sup>50</sup> See generally Alyssa Pagano, *How Racism Contributed to Marijuana Prohibition in the US*, BUS. INSIDER (Mar. 31, 2021), <https://www.businessinsider.com/racist-origins-marijuana-prohibition-legalization-2018-2>.

<sup>51</sup> J. LEGIS. AUDIT & REVIEW COMM’N, KEY CONSIDERATIONS FOR MARIJUANA LEGALIZATION, H.J. 130 2020 Gen. Assemb., Reg. Sess., at 10 (Va. 2020).

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

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

<sup>54</sup> *Id.*

<sup>55</sup> See MARK FLATTEN, GOLDWATER INST., CITY COURT: MISDEMEANOR CONVICTIONS LEAD TO LIFELONG ‘BEYOND HORRIFIC’ CONSEQUENCES 1–12 (2021).



misdemeanors must be reported when job, housing, and citizenship applications ask about criminal convictions, and may result in deportation, loss of employment or housing, and other serious enduring consequences.<sup>56</sup> Prior to the passage of Senate Bill (“SB”) 2 in 2020, Virginia only allowed for the expungement of a criminal record in the case of a *nolle prosequi* or a “not guilty” verdict.<sup>57</sup> In its 2020 study, JLARC recommended that if Virginia chose to adopt expungement, it should be done so automatically in order to reduce the burden on those with unjust criminal records.<sup>58</sup> Included in the decriminalization legislation was a provision requiring Virginia State Police to seal records related to misdemeanor possession of marijuana automatically.<sup>59</sup> As of 2021, 333,886 such records were sealed.<sup>60</sup>

## II. LEGALIZATION IN VIRGINIA

### A. *The Legislation*

SB 1406 was introduced by Senator Adam Ebbin from Alexandria in 2021 and contained many provisions for the legalization of marijuana in Virginia.<sup>61</sup> The comprehensive legislation set forth the public possession limit, personal cultivation allowances, preliminary social equity provisions, expungements, and established a new agency to oversee cannabis business licensing, regulation, and enforcement.<sup>62</sup> These provisions took effect July 1, 2021, without the establishment of a regulated retail market.<sup>63</sup> The decision was made to legalize personal possession before legal sales began in order to reduce the disproportionate enforcement of marijuana laws.<sup>64</sup> Activists pushed the Northam administration to move the timeline from January 1, 2024, to July 1, 2021, in order to prevent arrests for a substance that legislators had already agreed to legalize.<sup>65</sup>

Although well-intentioned, the law fails to define a limit for private possession, which has led to a lot of confusion among Virginians.

<sup>56</sup> *Id.* at 4–5.

<sup>57</sup> See VA. CODE ANN. § 19.2-392.2 (2020).

<sup>58</sup> J. LEGIS. AUDIT & REVIEW COMM’N, *supra* note 51 at 33–34.

<sup>59</sup> See *id.* at 34–35.

<sup>60</sup> Ned Oliver, *Virginia Seals 64,000 Marijuana Distribution Charges*, VA. MERCURY (Oct. 15, 2021), <https://www.virginiamercury.com/blog-va/virginia-seals-64000-marijuana-distribution-charges/>.

<sup>61</sup> S. 1406, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; Denise Lavoie, *Virginia Marijuana Legalization Timetable has Many Confused*, NBC WASH. (Jun. 18, 2021), <https://www.nbcwashington.com/news/local/northern-virginia/virginia-marijuana-legalization-timetable-has-many-confused/2705228>.

<sup>64</sup> Lavoie, *supra* note 63.

<sup>65</sup> Jenn Michelle Pedini, *Governor Northam Approves Expedited July 1 Enactment Date for Adult-Use Marijuana Legalization*, VA. NORML (Mar. 31, 2021), <https://www.vanorml.org/2021-03-31-governor-northam-approves-july-1-enactment-date-for-adult-use-marijuana-legalization>.

Adults aged 21 and older may now possess up to one ounce of cannabis in public, but the law is silent on any limits in private.<sup>66</sup> The new law also permits the personal cultivation of up to four plants per household so long as they are properly tagged and cannot be seen from a public way.<sup>67</sup> Since a healthy, mature cannabis plant could yield as much as a half-pound of flower, many have been confused by the one-ounce possession limit.<sup>68</sup> However, the possession limit only applies to what one may possess “on his person or in any public place,” and the law remains silent on private possession limits, creating this confusion.<sup>69</sup>

Additional expungement provisions are set to take effect in 2025.<sup>70</sup> In its current form, records pertaining to possession or misdemeanor distribution will be expunged automatically.<sup>71</sup> Expungement of felony distribution convictions as well as convictions for sale of paraphernalia will be available by petition.<sup>72</sup> However, the repeal of Virginia Code section § 18.248.1 is one of the many sections of the bill that would only become effective pursuant to reenactment. If the reenactment fails in 2022, these records will not be available for expungement.<sup>73</sup> This Code section pertains to distribution, which means that those who have been charged with possession with intent to distribute as a felony may not have their records expunged if this legislation fails in 2022.<sup>74</sup> While one of these provisions followed the JLARC recommendation for automatic expungement, the petition-based expungement for felony distribution and sale of paraphernalia did not. Those who are forced to opt for petition-based expungement must pay the cost up-front, but the costs are refunded if an expungement is ordered.<sup>75</sup>

Social equity provisions were also included in the legislation, albeit only taking effect on reenactment.<sup>76</sup> These regulations were proposed to afford those who have been harmed by the disproportionate effects of prohibition equal footing in the legal industry.<sup>77</sup> As currently written, the Cannabis

---

<sup>66</sup> VA. CODE ANN. § 4.1-1100(A) (2021).

<sup>67</sup> VA. CODE ANN. § 4.1-1101 (2021).

<sup>68</sup> See Pat Goggins, *How Much Weed Can You Get From Growing One Plant?* LEAFLY, <https://www.leafly.com/learn/growing/how-much-weed-can-you-grow-one-plant> (last visited Dec. 13, 2021).

<sup>69</sup> S. 1406, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>70</sup> *Id.* (citing VA. CODE ANN. § 19.1-392.2:1, which will be enacted July 1, 2025).

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> VA. CODE ANN. § 18.2-248.1 (2021).

<sup>75</sup> S. 1406, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

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

<sup>77</sup> See generally Robert Hoban, *The Critical Importance of Social Equity in the Cannabis Industry*, FORBES (Aug 31, 2020), <https://www.forbes.com/sites/roberthoban/2020/08/31/the-critical-importance-of-social-equity-in-the-cannabis-industry>.

Equity Reinvestment Board must promulgate regulations to assess social equity applicants within certain guidelines.<sup>78</sup> These would apply to any person who has at least 66% ownership and has lived in Virginia for at least twelve months and meets one of the following criteria: (1) has been convicted of misdemeanor possession, distribution, or sale of paraphernalia (or is the parent, child, sibling, or spouse of a convicted person); (2) lived for three of the last five years in an area that has been disproportionately policed for marijuana crimes; (3) lived for three of the last five years in an economically distressed area; or (4) graduated from a historically black college or university in Virginia.<sup>79</sup> The Cannabis Control Authority Board will determine areas of over policing and economic distress by using census tract data once the Board is ready to do so.<sup>80</sup> While these provisions are incredibly important to ensure that those who have been the most affected by the racist enforcement of marijuana laws, not everyone agrees. Delegate Glenn Davis (R-84) has described social equity as “give-a-criminal-a-company program,” and Senator Bill DeSteph (R-8) argued that these provisions were tantamount to discrimination and “diminishing the rights” of others.<sup>81</sup>

In addition to receiving an early-round of license awards, proposed social equity criteria establish that 30% of tax revenue from cannabis sales will go into the Cannabis Equity Reinvestment Fund.<sup>82</sup> This fund would provide loans to qualifying applicants to start cannabis businesses, a vital funding source as banks will typically not provide loans to cannabis businesses due to federal illegality.<sup>83</sup> This leaves businesses to find a private lender or venture capital investor, and these investors are less likely to invest in those with prior convictions or entrepreneurs of color.<sup>84</sup> The fund would provide those with prior convictions or those in “economically distressed” areas defined by the Board using Census data access to start-up capital.<sup>85</sup> In addition to

<sup>78</sup> VA. CODE ANN. § 4.1-606(b)(13) (2021).

<sup>79</sup> *Id.*

<sup>80</sup> VA. CODE ANN. § 4.1-606(b)(13)(iii)-(iv) (2021).

<sup>81</sup> See Ned Oliver, *Virginia GOP Lawmakers Open to Allowing Marijuana Sales After Taking Control of House*, MARIJUANA MOMENT (Nov. 11, 2021), <https://www.marijuanamoment.net/virginia-gop-lawmakers-open-to-allowing-marijuana-sales-after-taking-control-of-house/>; see also Ned Oliver, *Virginia Lawmakers Vote to Legalize Marijuana, But House and Senate Still Have to Agree on Details*, VA. MERCURY (Feb. 5, 2021), <https://www.virginiamercury.com/2021/02/05/virginia-lawmakers-vote-to-legalize-marijuana-but-house-and-senate-still-have-to-agree-on-details/>.

<sup>82</sup> See *Virginia Lawmakers Vote to Legalize Marijuana, But House and Senate Still Have to Agree on Details*, *supra* note 81.

<sup>83</sup> *How to Get Financing for a Marijuana Business*, FINDLAW (Mar. 31, 2020), <https://www.findlaw.com/cannabis-law/starting-a-cannabis-business/how-to-get-financing-for-a-marijuana-business.html>.

<sup>84</sup> Alana Yzola, *The Legal Cannabis Industry is Exploding, But Overwhelmingly Run by White Owners*, INSIDER (Apr. 17, 2020), <https://www.insider.com/how-big-weed-became-rich-white-business-2019-12>.

<sup>85</sup> See generally VA. CODE ANN. § 2.2-2499.8 (2021) (noting that the fund awards grants to support workforce development to those “disproportionately target by drug enforcement”).

cannabis businesses, there is funding set aside for vocational training, as not every person with a conviction for possession or distribution of marijuana wants to participate in the cannabis industry.<sup>86</sup> An important point of emphasis is that many people do not want to enter an industry that has caused so much pain in their lives. In their current life, they may rather work as a teacher, or in the tech industry, or as an attorney. We can't know everyone's history, but we can help those who have been affected by these terrible laws recover and tell a new story.

### B. 2021 Session

The 2021 General Assembly session was unique in many ways. The effects of COVID-19 (“COVID”) led to the House of Delegates conducting a virtual session, while the Senate met at the Science Museum of Virginia, and the odd-year short session had to be forcibly extended by a special session convened by Governor Northam.<sup>87</sup> With considerable preparation, the road to legalization in the 2021 General Assembly session was measured, timed, and by no means happenstance. First, a study was undertaken by JLARC in 2020 to explore how Virginia could best go about legalizing marijuana and the different models available from which to pull the best policies and practices.<sup>88</sup> Then, two legislative workgroups were convened to study both medical and adult-use cannabis policies, including the expansion of the medical program and undoing the harms of prohibition.<sup>89</sup>

The JLARC study concluded that if the General Assembly ultimately chose to legalize adult-use cannabis, it would take at least two years for Virginia to create a regulated marketplace.<sup>90</sup> This conclusion was made after looking at states like Illinois, which moved “exceptionally fast.”<sup>91</sup> Moving fast allowed states like Nevada and Illinois to use revenue from retail sales to fund the regulatory structure.<sup>92</sup> However, this benefit appeared outweighed by challenge, and JLARC concluded that since Virginia had the benefit of time – time should be taken.<sup>93</sup>

---

<sup>86</sup> See generally *id.* (noting that the fund provides vocational resources for “historically marginalized persons”).

<sup>87</sup> Gregory S. Schneider, *Virginia House of Delegates to Meet Online in 2021 as Coronavirus Cases Rise*, WASH. POST (Nov. 16, 2020), [https://www.washingtonpost.com/local/virginia-politics/virginia-house-session-online-coronavirus/2020/11/16/aaa69ea8-2816-11eb-9b14-ad872157ebc9\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-house-session-online-coronavirus/2020/11/16/aaa69ea8-2816-11eb-9b14-ad872157ebc9_story.html).

<sup>88</sup> J. LEGIS. AUDIT & REVIEW COMM'N, *supra* note 51 at 167.

<sup>89</sup> S. 2, 2020 Gen. Assemb., Reg. Sess (Va. 2020).

<sup>90</sup> J. LEGIS. AUDIT & REVIEW COMM'N, *supra* note 51 at 152–53.

<sup>91</sup> *Id.* at 152–53.

<sup>92</sup> See *Cannabis Tax Revenue in States That Regulate Cannabis for Adult Use*, MPP (last updated Jan. 5, 2022), <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/>.

<sup>93</sup> J. LEGIS. AUDIT & REVIEW COMM'N, *supra* note 51 at 153.

Additionally, the legislative workgroup convened as a result of the decriminalization legislation concluded that a regulated retail market was necessary for public and consumer safety, should the legislature choose to enact legalization.<sup>94</sup> Ultimately, it was decided that it would take at least two years to establish a commercial marketplace in the Commonwealth, which would allow for legal sales to begin in 2023.<sup>95</sup> However, it was suggested that if a new agency was created, a two-and-a-half-year timeline would be more appropriate.<sup>96</sup> The legislature concluded that the creation of the Virginia Cannabis Control Authority was a better fit for the regulation of cannabis than the Alcoholic Beverage Control, and the date for legal sales was amended to January 1, 2024.<sup>97</sup>

### C. COVID Impacts

The 2021 General Assembly session was virtual not only for the House of Delegates but for activists and lobbyists as well.<sup>98</sup> With the closure of the Capitol and Pocahontas Buildings (where the General Assembly offices are temporarily located during renovations of the General Assembly building), those who wanted to influence public policy had to pivot and figure out new strategies on the fly.<sup>99</sup> For groups that use the internet to mobilize grassroots followers to engage with their legislators like NORML, the closure had minimal effect on their lobbying efforts. Over 7,100 Virginians used NORML's email system to send messages to their legislators about expediting the date of legal possession from January 1, 2024, to July 1, 2021.<sup>100</sup>

When there are last-minute changes to bills or vote counts while session is being held in person, it is far easier to whip votes and reach compromises face-to-face. When changes are happening, and the Delegates are all at their houses and the Senators are at the Science Museum, the conversations are all the more difficult. Powerful constituent contact platforms, like ActionNetwork, became essential, and fortunately for Virginians were available to make their voices heard.<sup>101</sup>

<sup>94</sup> *Id.* at 157.

<sup>95</sup> *Id.* at 152–53.

<sup>96</sup> *Id.* at 153.

<sup>97</sup> *Id.* at 152–53; VA. CODE ANN. § 4.1-601 (2021).

<sup>98</sup> Amy Friedenberger, *Short Session, Long To-Do List: Virginia General Assembly Kicks Off Wednesday*, ROANOKE TIMES (Jan 9, 2021), [https://roanoke.com/news/short-session-long-to-do-list-virginia-general-assembly-kicks-off-wednesday/article\\_3a8b7c28-5201-11eb-8467-0bfff682a8e5.html](https://roanoke.com/news/short-session-long-to-do-list-virginia-general-assembly-kicks-off-wednesday/article_3a8b7c28-5201-11eb-8467-0bfff682a8e5.html).

<sup>99</sup> Schneider, *supra* note 87.

<sup>100</sup> Pedini, *supra* note 65.

<sup>101</sup> ActionNetwork allows activist groups to set up pre-made emails for members to send to their representatives *en masse*. *Toolset*, ACTIONNETWORK, <https://actionnetwork.org/toolset> (last visited Feb. 25, 2022).

*D. Disagreements About the Bill*

It is important to note that while a majority of Virginians support marijuana legalization, not all advocates for legalization agreed with the legislation put forth.<sup>102</sup> Many believed that it did not go far enough in setting aside revenue to support social equity provisions and rightly acknowledged that it did not include resentencing for those currently incarcerated for marijuana possession.<sup>103</sup> Groups like NORML also advocated against the inclusion of the reenactment clauses, which now require many provisions of the bill to be debated and voted on again in the 2022 General Assembly.<sup>104</sup> Additionally, activists opposed a measure to allow localities to prohibit legalization altogether.<sup>105</sup> This measure would have allowed localities to opt-out of legalizing marijuana by holding a voter referendum, which could have created a confusing and dangerous landscape for Virginians.<sup>106</sup> This legislation was thankfully left in the House Courts of Justice Committee, and possession of up to one ounce of marijuana is legal in all localities.<sup>107</sup>

*i. Economic Disagreements*

The taxes from the sale of cannabis are set to be allocated to pre-kindergarten programs, the Cannabis Equity Reinvestment Fund, the Department of Behavioral Health and Developmental Services (for distribution to substance abuse treatment facilities and programs), and to public health programs such as public service announcements against drugged driving.<sup>108</sup> Currently, 40% of the tax revenue will fund underserved and at-risk pre-kindergarten programs, while 30% will fund the Cannabis Equity Reinvestment Fund.<sup>109</sup> This fund will allow prospective licensees who meet predetermined criteria, such as having a cannabis-related conviction, to have an opportunity to receive grant money for vocational training or business opportunities.<sup>110</sup> Many believe that more funding is needed to truly give

---

<sup>102</sup> Kyle Jaeger, *Virginia Voters Support Legalizing Marijuana in New Poll as Lawmakers Rapidly Advance Bills*, MARIJUANA MOMENT (Feb. 2, 2021), <https://www.marijuanamoment.net/virginia-voters-support-legalizing-marijuana-in-new-poll-as-lawmakers-rapidly-advance-bills/>.

<sup>103</sup> Whitney Evans & Ben Paviour, *Virginia's House and Senate Try to Reach Compromise Over Marijuana Legalization*, NPR (Feb. 25, 2021) <https://www.npr.org/2021/02/25/971525853/virginias-house-and-senate-try-to-reach-compromise-over-marijuana-legalization>; Ned Oliver, *Virginia Legalized It, but People in Prison on Marijuana Charges Will Stay There Under New Law*, VA. MERCURY (Apr. 23, 2021), <https://www.virginiamercury.com/2021/04/23/virginia-legalized-it-but-people-in-prison-on-marijuana-charges-will-stay-there-under-new-law/>.

<sup>104</sup> Monique Calello, *Virginia Marijuana Legalization: What to Know and What's Next*, NEWSLEADER (Dec. 8, 2021) <https://www.newsleader.com/story/news/2021/12/08/marijuana-legalization-virginia-2022-general-assembly-plans-weed-cannabis-recreation/8826559002/>.

<sup>105</sup> H.R. 2315, Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; VA. CODE ANN. § 4.1-1100 (2021).

<sup>108</sup> VA. CODE ANN. § 4.1-614 (2021).

<sup>109</sup> *Id.*

<sup>110</sup> VA. CODE ANN. § 2.2-2499.8 (2021).

qualifying applicants a fair and equitable opportunity to participate in the new industry.

Traditional banks often will not work with cannabis businesses due to the federal illegality of cannabis. Although some state-chartered banks and investment banks will, most businesses are initially funded with venture capital.<sup>111</sup> Historically, Black-owned businesses have not had the same access to capital as do white-owned businesses, an important consideration when building a social equity program.<sup>112</sup> When Virginia's program was created, Illinois presented the strongest model, with a 25% investment in a similar community fund.<sup>113</sup> During the passage of Virginia's law, New York included an equity program in its legalization legislation, with 40% going toward its reinvestment fund.<sup>114</sup> Amid comments from detractors about giving criminals business licenses, a 30% investment in social equity that is not attached to a reenactment clause may not be the commitment to equity that people hoped for, but it was a serviceable start to a community fund that will hopefully change the lives of many Virginians.<sup>115</sup>

#### *ii. Disagreements on Resentencing*

The absence of any provisions for resentencing those who are incarcerated for marijuana-related offenses also caused disagreement. Legislators attempted to reach a compromise on the issue, but failed to do so before the end of the legislative session.<sup>116</sup> Activists were disheartened to see that possessing and growing marijuana would be legal on January 1, 2021, but people convicted of possessing and growing marijuana before that date would remain incarcerated.<sup>117</sup> Advocates noted the irony and injustice of having a

<sup>111</sup> Bob Lewis, *Done Right, Legal Pot Could Bring Social Equity and Opportunity to Virginia*, VA. MERCURY (Apr. 5, 2021), <https://www.virginiamercury.com/2021/04/05/done-right-legal-pot-could-bring-social-equity-and-opportunity-to-virginia>.

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

<sup>113</sup> Robert McCoppin, *Illinois Awards \$31 Million in Grants Funded by Pot Taxes for Violence Prevention, Reentry and Development in Areas Hurt by the War on Drugs*, CHICAGO TRIBUNE (Jan. 22, 2021), <https://www.chicagotribune.com/marijuana/illinois/ct-illinois-marijuana-grants-awarded-20210122-am2meyrwlbdkhc62on3f5dnfjq-story.html>.

<sup>114</sup> Aleece Burgio, *New York Cannabis Law Prioritizes Social, Economic Equity*, BLOOMBERG L. (Apr. 29, 2021), <https://news.bloomberglaw.com/cannabis/new-york-cannabis-law-prioritizes-social-economic-equity>; Lavoie, *supra* note 63.

<sup>115</sup> See Monique Calello, *Virginia Marijuana Legalization: What Worked, What Hasn't Worked, and What's Ahead in 2022*, NEWS LEADER (Dec. 9, 2021), <https://www.news-leader.com/story/news/2021/12/08/marijuana-legalization-virginia-2022-general-assembly-plans-weed-cannabis-recreation/8826559002/>.

<sup>116</sup> Julia Travers, *Virginians Jailed for Weed Will Stay Locked Up Even After Legalization*, OUTLAW REPORT (May 3, 2021), <https://outlawreport.com/virginia-legalization-incarcerated>.

<sup>117</sup> Ned Oliver, *Resentencing for Virginia Marijuana Prisoners Should be Next Step, Governor Says*, MARIJUANA MOMENT (Apr. 26, 2021), <https://www.marijuanamoment.net/resentencing-for-virginia-marijuana-prisoners-should-be-next-step-governor-says>.

cannabis dispensary in the same communities where incarcerated individuals have lost their lives and freedom for the very same activity.<sup>118</sup>

It is well-known that enforcement of marijuana prohibition was racially disproportionate.<sup>119</sup> While arrest rates were generally decreasing after decriminalization took effect, over 1,000 people were still charged with distribution of more than a half-ounce but less than five pounds, while over 4,500 adults were charged with simple possession.<sup>120</sup> Of those distribution charges, 67.5% of these people were sentenced to time in jail or prison for something that is now legal.<sup>121</sup> As for the simple possession charges, 52% of the charges were Black people, despite only making up 20% of Virginia's population.<sup>122</sup> When the goal of legalization is to undo the harms of prohibition and right the wrongs of the past, resentencing those who have experienced disproportionate incarceration and policing should be at the forefront of the list of priorities.

### *E. Expediting Legalization of Possession*

The Northam Administration initially proposed January 1, 2023, as the date for legalization, and the legislature moved that date back by one year to January 1, 2024.<sup>123</sup> Advocates were hard-pressed to agree to a date so far into the future while Virginians continued to be convicted and incarcerated for something that lawmakers decided would be legal – just in the future. The Legislature was hesitant to move back the date of legal possession out of fear that it would confuse the public if people could possess, but not buy, marijuana.<sup>124</sup> Virginia would not be the first state to legalize possession before starting up a retail market, and instead, it would have been the odd one out if it had tied the two together.<sup>125</sup>

The public made it very clear that they would not be confused by legal possession without legal sales and let the legislature and the Administration know as much by contacting their representatives.<sup>126</sup> From NORML alone,

---

<sup>118</sup> Hannah Schuster & Jonah Grinkewitz, *Marijuana is Legal in Virginia, But Criminal Justice Advocates Say There's More Work to Do*, WHRO (Jul. 1, 2021), <https://whro.org/news/local-news/21176-marijuana-is-legal-in-virginia-but-criminal-justice-advocates-say-there-s-more-work-to-do>.

<sup>119</sup> J. LEGIS. AUDIT & REVIEW COMM'N, *supra* note 51 at 11.

<sup>120</sup> Schuster & Grinkewitz, *supra* note 118; Travers, *supra* note 116.

<sup>121</sup> Travers, *supra* note 116.

<sup>122</sup> Schuster & Grinkewitz, *supra* note 118.

<sup>123</sup> Ned Oliver, *Marijuana Legalization Advances in Virginia, But Lawmakers Push Start Date to 2024*, VA. MERCURY (Feb. 3, 2021), <https://www.virginiamercury.com/2021/02/03/marijuana-legalization-advances-in-virginia-but-lawmakers-push-start-date-to-2024/>.

<sup>124</sup> Lavoie, *supra* note 63.

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

<sup>126</sup> Jenn Michelle Pedini, *Virginia: Governor Approves Expedited July 1 Enactment Date for Adult-Use Marijuana Legalization*, NORML (Mar. 31, 2021), <https://norml.org/blog/2021/03/30/virginia-governor>.



over 7,100 emails were sent to call for the expediting of legal possession and the end to prohibition in Virginia.<sup>127</sup> This does not account for emails sent through other organizations and those sent by unaffiliated citizens who simply wanted to let their representatives know that needlessly continuing the harms of prohibition for another three years was unacceptable. While the bill made it to the Governor's desk with a January 1, 2024, legalization date, including possession and personal cultivation, the Governor sent the bill back with several amendments, including moving the date for personal possession and cultivation to July 1, 2021.<sup>128</sup>

### III. IMPLICATIONS OF LEGALIZATION

While possession of cannabis is now allowed in Virginia and legal sales are on the horizon, that does not mean that everyone will be rushing to participate in the new legal market. Marijuana is still illegal at the federal level, and possession and use still have consequences for those who rely on federal funding for employment or housing. Those Virginians who are employed by the federal government, hold a commercial driver's license ("CDL"), or live in public housing will likely think twice before reaching for a joint.<sup>129</sup> There are also no employment or parental protections for those who choose to consume legal cannabis.<sup>130</sup> Today, if an adult Virginian consumes cannabis in their free time, they still risk losing their job, housing, and custody of their children.<sup>131</sup>

#### A. Federal Illegality

Virginia has a large population of people employed by the federal government; 4.6% of the workforce was employed by a federal agency in 2019.<sup>132</sup> Those who work for the federal government must abide by the Drug-Free Workplace Act of 1988, which requires employees to refrain from the use of controlled substances.<sup>133</sup> The Office of Personnel Management released a

---

<sup>127</sup> *Id.*

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

<sup>129</sup> Federal Drug Free Workplace Act of 1988, 41 U.S.C. § 8102-3 (2019) (setting forth requirements for controlled substances for federal contractors and grantees); 49 C.F.R. § 40.151(e) (2020) (stating that state-legal medical marijuana is not a valid explanation for a CDL holder's positive drug test); 49 C.F.R. § 391.15(c)(2)(ii)-(iii) (2020) (stating that possession, transport, or use can disqualify a CDL holder); Gaspard Le Dem, *Virginia Legalized Cannabis. For Public Housing Residents, It's Still Banned*, OUTLAW REPORT (Jul. 13, 2021); <https://outlawreport.com/virginia-public-housing-cannabis> (highlighting the uncertainty in how the federal law conflicts with state legalization).

<sup>130</sup> H.B. 1862 only protects those with a valid recommendation per the medical program in Virginia and only after they are employed. Gen. Assemb., Spec. Sess. (Va. 2021).

<sup>131</sup> Le Dem, *supra* note 129.

<sup>132</sup> Mike Maciag, *Federal Employees by State*, GOVERNING, <https://www.governing.com/archive/federal-employees-workforce-numbers-by-state.html> (Jan. 25, 2019).

<sup>133</sup> 41 U.S.C. §§ 8102-8103 (2019).

memo in February 2021 stating that prior marijuana use would no longer disqualify federal employees as long as there was evidence of rehabilitation.<sup>134</sup> The evidence of rehabilitation would be evaluated on a case-by-case basis and could be as simple as a declaration that the prospective employee would no longer consume cannabis.<sup>135</sup> However, the language in the memo makes it clear that continuing cannabis use would not be tolerated. The memo requires agencies to assess the frequency and recency of use, as well as the likelihood that marijuana use will happen again, while still reasserting that federal agencies are bound by Drug-Free Workplace requirements.<sup>136</sup>

The federal government is not the only employer required by law to test employees for marijuana.<sup>137</sup> Non-federal employers, such as Amazon who are regulated by the Department of Transportation (“DOT”) must also test CDL holders.<sup>138</sup> Generally, these CDL holders are truck drivers and drivers of other commercial vehicles who are not employed by the federal government but whose CDL is regulated by the federal government.<sup>139</sup> Since the DOT requires these drivers to be tested for drug use and impairment at the time of hiring and again after any accident, marijuana legalization has caused many issues in this line of work.<sup>140</sup> The DOT also explicitly states that state marijuana laws do not impact testing requirements for CDL holders and that compliance with a state-legal medical program will not be considered a valid excuse for testing positive for THC.<sup>141</sup> In June 2020, Amazon indicated that it would no longer test employees for marijuana, with the exception of positions that are regulated by the DOT.<sup>142</sup> Despite not being a part of the federal government, Amazon is still bound by these DOT regulations and must drug test these employees.<sup>143</sup> Therefore, even when an employer does not necessarily

---

<sup>134</sup> Memorandum from U.S. Office of Personnel Mgmt. to Heads of Dept’s. & Agencies, 1–2 (Feb. 25, 2021).

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.* at 3–4.

<sup>137</sup> See 49 C.F.R. § 382.507 (2020).

<sup>138</sup> *What Tests Are Required and When Does Testing Occur?*, FMCSA, <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/what-tests-are-required-and-when-does-testing-occur> (last updated July 22, 2021) (summarizing the regulations requiring pre-employment and post-accident drug testing).

<sup>139</sup> *Commercial Driver’s License Program*, FMCSA, <https://www.fmcsa.dot.gov/registration/commercial-drivers-license> (last updated Sept. 15, 2021) (summarizing regulations defining who must apply for a commercial driver’s license).

<sup>140</sup> See Lancer Insurance, *Using Marijuana Is Legal in Some States, but Not for CDL Holders*, LANCER INSURANCE (Jan. 23, 2020), <https://www.lancerinsurance.com/safety/marijuana-not-for-cdl>.

<sup>141</sup> 49 C.F.R. § 40.151(e).

<sup>142</sup> Bill Chappell, *Amazon Will Stop Testing Job Seekers for Marijuana and Now Backs Legalizing Weed*, NPR, <https://www.npr.org/2021/06/02/1002409858/amazon-wont-test-jobseekers-for-marijuana> (last updated June 2, 2021).

<sup>143</sup> See 49 C.F.R. § 382.507 (2020).

want to drug test employees, the DOT can require testing of those individuals subject to their regulations.

The federal Housing and Urban Development (“HUD”) agency has said that local governments have discretion over evictions for drug-related offenses.<sup>144</sup> The local government agencies say that they do not have such discretion over evictions, and they must evict marijuana users.<sup>145</sup> However, in late 2021, Representative Eleanor Norton of D.C. asked HUD to stop denying cannabis users housing. The agency denied the request stating that it was required to do so by federal law.<sup>146</sup> This back-and-forth between HUD and local housing authorities does nothing to clarify the law or provide housing for low-income residents. It only serves to further stigmatize and alienate those seeking housing while discriminating against an activity that is now legal for others in the Commonwealth.

### *B. Arrest Rates*

Not all of the implications of legalization are negative; in fact, some are incredibly positive. The JLARC study undertaken in 2020 predicted that legalization would decrease arrests in Virginia by over 80%, with the creation of a commercial market putting illegal distributors out of business.<sup>147</sup> In reality, the arrest rate has decreased by 90% since the law took effect in July 2021.<sup>148</sup> Between July 2018 and July 2020, over 1,000 people were charged with distribution of more than half an ounce but less than five pounds.<sup>149</sup> After decriminalization took effect in 2020, arrest rates dropped by 48%.<sup>150</sup> This was lower than what JLARC expected but exactly what policy experts at NORML anticipated based on historical data.<sup>151</sup>

### CONCLUSION

While marijuana laws in Virginia have steadily changed over the last several years, there is still much more work to be done. Because many of the new provisions intended to redress the harms of prohibition are not set to take effect for several years (if at all), the new law is lacking in key areas. Nevertheless, legalization and a regulated adult-use marketplace will bring immense benefits to the Commonwealth and its people. As the data have

<sup>144</sup> Le Dem, *supra* note 129.

<sup>145</sup> *Id.*

<sup>146</sup> Jaeger, *supra* note 102.

<sup>147</sup> J. LEGIS. AUDIT & REVIEW COMM’N, *supra* note 51 at 14.

<sup>148</sup> Kennett, *supra* note 19.

<sup>149</sup> Ned Oliver, *Marijuana Will Be Legal in Virginia on July 1. Here’s What Is and Isn’t Permitted Under the New Law*, VA. MERCURY (Apr. 7, 2021), <https://www.virginiamercury.com/2021/04/07/marijuana-will-be-legal-in-virginia-on-july-1-heres-what-is-and-isnt-permitted-under-the-new-law/>.

<sup>150</sup> Kennett, *supra* note 19.

<sup>151</sup> J. LEGIS. AUDIT & REVIEW COMM’N, *supra* note 51 at 14; Kennett, *supra* note 19. As of writing in early January 2022, arrest data for the full year following adult-use legalization is not yet available.

demonstrated, the legalization of personal possession and cultivation have already significantly reduced marijuana-related arrests. So, while Virginians with prior convictions may not be seeing the full benefits of decriminalization just yet, we are at least ensuring that far fewer will suffer under unjust cannabis laws.

The 2021 General Assembly session may have presented new and unusual challenges for legislators, policy experts, and advocates, but it also showed that Virginia is ready for a real change. After years of careful consideration, workgroups, legislative studies, and baby steps forward, Virginia was ready to take a step towards adult-use legalization. Many legislators argued that Virginia was not ready for such a change and that we were sending a terrible message to children.<sup>152</sup> Other legislators argued that we had waited too long and that Virginia was long overdue for this change, with Senator Janet Howell (D-32) stating that she wanted to expedite the date of legal possession because “if we have to wait another three years, I’ll be in my 80s before I can do legally what I was doing illegally in my 20s.”<sup>153</sup> Regardless of their reasons, on April 7, 2021, 20 state senators voted yes, and 20 voted no on the Governor’s amendments to Senate Bill 1406, with Lieutenant Governor Justin Fairfax breaking the tie.<sup>154</sup> Later the same day, fifty-three delegates voted yes, and forty-four voted no on the same amendments (two abstained), officially legalizing possession of marijuana in Virginia on July 1, 2021.<sup>155</sup> For a legislature used to baby steps, this was quite the move.

It may not have been the move advocates wanted nor the move that citizens expected. However, for those who had been watching the entire process unfold, it was far from unexpected. A measured, careful approach to adopting policies that reflect Virginia’s values while attempting to avoid the pitfalls that other states have fallen into is what policy experts predicted from the start. No state has had legal possession, and legal sales begin at the same time. So it is no surprise that Virginia chose to legalize possession before a regulated market was established.<sup>156</sup> The inclusion of a social equity plan that invests tax revenue into a grant fund for licensing as well as vocational training will help to undo the harms of prohibition and the inequities in our

---

<sup>152</sup> Calello, *supra* note 115.

<sup>153</sup> Oliver, *supra* note 149.

<sup>154</sup> Legislative Information System, *Senate Concurred in Governor’s Recommendation (20-Y 20-N)*, LEGIS. INFO. SYS. (Apr. 7, 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+vot+SV0605SB1406+SB1406>.

<sup>155</sup> Legislative Information System, *House: Vote: Agree To (53-Y 44-N 2-A)*, LEGIS. INFO. SYS. (Apr. 7, 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+vot+HV2098+SB1406>.

<sup>156</sup> See Lavoie, *supra* note 63 (explaining why legalized possession of marijuana occurred before legalized sale of marijuana in Virginia).

criminal legal system as they apply to cannabis offenses.<sup>157</sup> Including and prioritizing social equity provisions, despite pushback from some legislators, shows that citizen and advocate voices were heard and considered in the making of this legislation.

Ultimately, the harms of prohibition can never be reversed entirely. People can never regain the years of their lives spent incarcerated, regain the opportunities that were missed due to their convictions, or forget the pain caused by years of over-policing. However, we can do our best to make sure that the next generation does not have to endure this treatment. The sun will rise tomorrow on a better Virginia for everyone.

---

<sup>157</sup> See NEW YORK OFFICE OF CANNABIS MANAGEMENT, WHAT IS IN THE LAW SOCIAL AND ECONOMIC EQUITY 1 (2021) [https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-social-equity-04\\_0.pdf](https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-social-equity-04_0.pdf) (explaining what such a social equity plan would do and what its purported benefits would be).