2018 WL 7500067 (Ohio Com.Pl.) (Trial Order)
Court of Common Pleas of Ohio.
Civil Division
Franklin County

PHARMACANN OHIO, LLC,
v.
Ohio Dept. Commerce Director Jacqueline T. WILLIAMS.

No. 17-CV-010962.
November 15, 2018.

Decision and Entry Granting Plaintiff's Motion for Summary Judgment, Filed August 24, 2018

Charles A. Schneider, Judge.

***1** Schneider, J.

This matter is before the court on the motion of Plaintiff Greenleaf Gardens, LLC for summary judgment. Defendants Ohio Department of Commerce, Harvest Grows, LLC, and Parma Wellness, LLC filed subsequent responses[1], to which Plaintiff filed its reply. After full and careful consideration of all briefing and evidence, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

I. Background

On September 8, 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. Plaintiff's Exhibit 4, ¶ 5. Within Chapter 3796, the legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. Under certain circumstances, the Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians. *Id.* at ¶ 12.

In December 2017, Plaintiff Greenleaf Gardens, LLC[2], received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. *Id.* at ¶ 22. Yet, Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC, were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group, as described in R.C. §3796.09(C). *Id.* at ¶¶ 19-27, 31.

On June 5, 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. The parties agreed to certain stipulated facts, including:

> 19. Greenleaf Gardens, LLC, Parma Wellness Center, LLC, and Harvest Grows, LLC each applied for a Medical Marijuana Cultivator Level I provisional license.
>
> 21. Greenleaf Gardens, LLC, Parma Wellness Center, LLC, and Harvest Grows, LLC each received scores making them Qualified Applicants.

***2** 22. Greenleaf Gardens, LLC received a final score of 159.64 on each of its applications. These scores placed Greenleaf Gardens, LLC twelfth on the list of Qualified Applicants.

23. Parma Wellness Center, LLC received a final score of 153.08. This score placed Parma Wellness Center, LLC fourteenth on the list of Qualified Applicants.

24. Harvest Grows, LLC received a final score of 142.04. This score placed Harvest Grows, LLC twenty-second on the list of Qualified Applicants.

25. On December 15, 2017, the Ohio Department of Commerce sent Greenleaf Gardens, LLC a Notice of Intent to Deny Application for Medical Marijuana Cultivator Provisional License and Notice of Opportunity for a Hearing.

26. Parma Wellness Center, LLC's application for a Level I cultivator provisional license was granted because Parma Wellness Center, LLC was a Qualified Applicant that satisfied the minimum requirements for licensure, and received a sufficient score to qualify it for a license as an entity that certified it was owned and controlled by one or more members of an economically disadvantaged group, as defined in R.C. 3796.09(C). However, had Parma Wellness Center, LLC not certified that it was owned or controlled by one or more members of an "economically disadvantaged group," Defendant Williams would not have awarded it a provisional Level I cultivator license.

27. Harvest Grows, LLC's application for a Level I cultivator provisional license was granted because Harvest Grows, LLC was a Qualified Applicant that satisfied the minimum requirements for licensure, and received a sufficient score to qualify it for a license as an entity that certified it was owned and controlled by one or more members of an economically disadvantaged group, as defined in R.C. 3796.09(C). However, had Harvest Grows, LLC not certified that it was owned or controlled by one or more members of an "economically disadvantaged group," Defendant Williams would not have awarded it a provisional Level I cultivator license.

31. The Ohio Department of Commerce was legally obligated to comply with and apply R.C. §3796.09(C) when it awarded the twelve Level I cultivator provisional licenses. Because Parma Wellness, LLC and Harvest Grows, LLC were Qualified Applicants that satisfied the minimum requirements for licensure and are owned and controlled by one or more members of an economically disadvantaged group as defined in R.C. §3796.09(C), the Ohio Department of Commerce was required to award both entities Level I cultivator provisional licenses and deny Greenleaf Gardens, LLC's Level I cultivator application, subject to Chapter 119 procedures.

Plaintiff's Exhibit 4.

On January 5, 2018, the Court ordered the parties to brief certain preliminary issues. Upon review of the briefing, the Court issued a decision finding "review of the constitutionality of R.C. §3796.09(C) is subject to strict scrutiny; Plaintiff asserts a proper §1983 claim; Plaintiff need not have exhausted all administrative remedies before filing the underlying matter; and R.C. §3796.09(C) is severable from the remainder of the statute." Decision and Entry Regarding Briefing Order, filed May 31, 2018. Plaintiff now moves for summary judgment on counts one, two, and four of its complaint.

II. Summary-Judgment Standard

***3** Under Civ.R. 56(C), summary judgment is appropriate when the moving party is entitled to judgment as a matter of law

because there is no dispute of material fact. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). The party moving for summary judgment must inform the trial court of the basis for the motion and point to parts of the record that demonstrate the absence of a genuine issue of material fact, *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996), and it must do so in the manner required by Civ.R. 56(C). *Castrataro v. Urban*, 10th Dist. No. 03AP-128, 2003-Ohio-4705, ¶ 14. Once the moving party has met this burden, the non-moving party's reciprocal burden to point to parts of the record demonstrating an issue of material fact is triggered. *Dresher* at 293. Additionally, "[s]ummary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 358-59 (1992).

III. Discussion

On counts one and four of the complaint, Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

Within the Court's decision filed May 31, 2018, the Court reviewed the prior Plaintiff, Pharmacann, LLC's, duty to exhaust administrative remedies before bringing the instant action. The Court found that the exhaustion of administrative remedies was not a condition precedent to filing a complaint in the underlying matter. Decision and Entry Regarding Briefing Order, filed May 31, 2018, p. 10. This decision is the law of the case and is binding on Plaintiff Greenleaf Gardens, as well.

Defendants Williams and Parma Wellness Center, LLC re-raise these issues, essentially seeking reconsideration of the issue through the backdoor, by using it in rebuttal to Plaintiff's motion for summary judgment. Pursuant to the law of the case, the Court finds that the exhaustion doctrine is inapplicable to the §1983 claim and the facial constitutional challenge asserted in the intervening complaint. *Id.* at pp. 10-14. The Court finds count two of Plaintiff's complaint requires exhaustion of all administrative remedies, as an "as applied" challenge. The court dismisses the same.

The Court now turns to counts one and four to determine whether R.C. §3796.09(C) is constitutional.

A. Standard of Review

As previously held, R.C. §3796.09(C) is subject to strict scrutiny. Briefing Order Decision at p. 5. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Under strict scrutiny, there are two prongs of examination. "First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant v. Jackson Bd. of Edn.*, 476 U.S. 267, 274 (1986).

Plaintiff and the Defendants dispute which side bears the heightened burden. The Defendants assert statutes must be given a presumption of constitutionality, and any doubt of that should be resolved in favor of the legislature. *State ex rel. O'Brien v. Heimlich*, 10th Dist. Franklin No. 08AP-521, 2009-Ohio-1550, ¶ 24. Plaintiff counters the Defendants' argument, citing *Dillinger v. Schweiker*, 762 F.2d 506, 508 (6th Cir. 1985), which stated, "Strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification."

Both sides are correct. Legislation is given the presumption of validity, and must be sustained when it is rationally related to a legitimate state interest. "However, a classification that singles out a suspect class or burdens a fundamental right will be subject to strict scrutiny. 'Strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification'." *Gilles v. Miller*, 501 F.Supp.2d 939, 950 (W.D.Ky.2007) (citations omitted). Yet, the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality. *Ritchey Produce Co. v. ODAS*, 85 Ohio St.3d 194, 227 (1999).

***4** There is no doubt that R.C. §3796.09(C) singles out a suspect class, specifically listing Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians. Therefore, under *Gilles*, R.C. §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

i. Compelling Government Interest

Ohio Revised Code §3796.09(C) states:

> The department shall issue not less than fifteen per cent of cultivator, processor, or laboratory licenses to entities that are owned and controlled by United States citizens who are residents of this state and are members of one of the following economically disadvantaged groups: Blacks or African Americans. American Indians. Hispanics or Latinos, and Asians. If no applications or an insufficient number of applications are submitted by such entities that meet the conditions set forth in division (B) of this section, the licenses shall be issued according to usual procedures.
>
> As used in this division, "owned and controlled" means that at least fifty-one per cent of the business, including corporate stock if a corporation, is owned by persons who belong to one or more of the groups set forth in this division, and that those owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership.

In creating this provision, Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. Both the United States Supreme Court and the Supreme Court of Ohio have held remedying past and present racial discrimination to be a compelling government interest. *Richmond v. J.A. Croson*, 488 U.S. 469, 492 (1989); *Ritchey*, 85 Ohio St.3d 194, 252 (1999).

Yet, for the court to find a compelling interest exists, there must be a strong basis in evidence to support the legislature's conclusion remedial action is necessary. *Croson* at 500; *Ritchey* at 253-54. The government has the initial burden to show a strong basis in evidence exists, it then shifts to the plaintiff to rebut that showing. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir.2000). The court may rely on statistical and anecdotal evidence in making this determination. *Id.*

In support of its assertion that the legislature has a compelling interest, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. *See In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002); *DynaLantic Corp. v. United States Department of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012). Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; yet, the Western District of Tennessee has held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling." *W. Tennessee Chapter of Associated Builders & Contrs., Inc. v. Bd. of Edn.*, 64 F.Supp.2d 714, 719 (W.D.Tenn.1999). The Court finds this ruling to be the most persuasive. Even if the Court were to find post-enactment evidence permissible, it would give it weight similar to the First Circuit, which has held, "the main focus … must be the legislative findings and informational backdrop which was available to the state legislature prior to the enactment." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 743 F.Supp. 977, 1000 (N.D.N.Y.1990).

***5** The only evidence clearly considered by the legislature prior to the passage of R.C. §3796.09(C) is marijuana related

arrests. Defendant Department of Commerce's Exhibit A. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program and revising the terms. Defendants' Joint Appendix, D5. No testimony shows any statistical or other evidence was considered from the previous studies conducted for the MBE program. *Id.*

Defendants included evidence of statistical studies published by the American Civil Liberties Union in 2013. Defendants' Joint Appendix, D4. This data, in connection with the vast amount of anecdotal evidence provided by Defendants, shows the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates for crimes related to marijuana. The Court does not find this to be evidence supporting a set aside for economically disadvantaged groups, including not only Blacks or African Americans, Hispanics or Latinos, but also American Indians and Asians, who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, is not evidence supporting a finding of discrimination within the medical marijuana industry for Blacks or African Americans, Hispanics or Latinos, American Indians, and Asians.

Next, the Defendants assert the legislators considered the history of the Minority Business Enterprise Program, R.C. §125.081. In 1980, the legislature enacted Ohio's MBE program. *Ritchey Produce Co. v. ODAS*, 85 Ohio St.3d 194, 195 (1999). The evidence the legislature considered before passing the 1980 act included:

> past judicial decisions confirming the existence of discrimination in state contracting and establishing the state's acquiescence in such discriminatory practices, executive findings of discrimination in state contracting opportunities, administrative findings of the need for affirmative action, testimony of opponents and proponents of minority set-asides, and a host of relevant statistical evidence showing the severe numerical imbalance in the amount of business the state did with minority-owned enterprises.... A study by ODAS [and a report by a report issued by the Legislative Budget Office, both indicating] … a disparity in the general construction contracts awarded to minority businesses.

Id. at 262. Additionally, the legislature created a task force in 1978 to investigate the situation. *Id.* The 1978 task force submitted a report to the legislature noting, "that minority businesses constituted approximately seven percent of all Ohio businesses, but that minority businesses were receiving less than one-half of one percent of state purchasing contracts." *Id.* Both Ohio and Federal courts upheld the Ohio MBE set-aside provision, finding the *extensive evidence* considered was a strong basis to conclude that remedial action is necessary. *Id*; *Ohio Contrs. Assn. v. Keip*, 713 F.2d 167, 176 (6th Cir. 1983) ("[W]e conclude that the Ohio MBE act is sufficiently narrow in scope to satisfy the constitutional requirements found controlling in Fullilove.").

The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Defendants' Joint Appendix, D13-14, D16-17. Although Defendants reference these materials, it is clear these studies were not reviewed by the legislature for R.C. §3796.09(C), and may not have come to the legislature's attention at all.

***6** The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. Defendants' Joint Appendix, D5. This evidence is tenuous at best. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. Although the Defendants argue the legislators do not craft statutes in a vacuum, the legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §3796.09(C) passed. Even if a few legislators might have seen the MBE evidence, because it was not included in the referenced materials, the Court cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the Court could find this evidence was considered by the legislature in support of R.C. §3796.09(C), the

materials from R.C. §125.081 pertain to government procurement contracts only. The law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. *Croson*, 488 U.S. at 500; *Ritchey*, 85 Ohio St.3d at 242. Although the Defendants try to explain away the fact that the medical marijuana industry is new, such newness necessarily demonstrates that there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence is post-enactment. As stated previously, the Court will not review this evidence as support for a compelling interest. If the Court were to review the evidence, it would be given a lesser weight than that of pre-enactment evidence.

Defendants assert the Court should take into consideration post-enactment evidence showing disparities perpetuated in other states' marijuana programs. Defendants cite a few newspaper articles in support. Defendants' Joint Appendix, D20. Defendants also reference the remedial measures of other states' marijuana programs. Defendants' Memorandum Contra, p. 12. None of the programs referenced have a mandatory set aside, like R.C. §3796.09(C). *Id.* Illinois's program allots additional points if 51% of an applicant is owned by a minority, female, veteran, or disabled person. 68 III. Adm. Code §1290.70(d)(7). Pennsylvania includes general requirements for businesses to include diversity plans and requirements of the government to foster the submission of diverse applications. 28 Pa. Code §1141.32.

Similarly, Maryland's law includes requirements that the government shall encourage diverse applicants and "[t]o the extent permitted by federal and State law, actively seek to achieve racial, ethnic, gender, and geographic diversity when licensing medical cannabis growers[.]" Md.Code Ann., Health-Gen. 13-3306. Florida does not include a broad minority set aside, like Ohio, but a provision focusing solely on Black farmers who are members of the Black Farmers and Agriculturalists Association-Florida Chapter, due to the District of Columbia's District Court holdings in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), and *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). Fla.Stat. §381.986.

None of these laws resemble R.C. §3796.09(C). This, in addition to the diminished weight of the evidence, leads the Court to find this evidence to be minimally supportive of the Defendants' arguments.

Considering all the evidence put forth, the Court finds there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, a compelling government interest does not exist.

ii. Narrowly-Tailored Remedy

Even if the Court found a compelling state interest existed, the Court finds R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. In assessing whether the race-conscious remedy is narrowly tailored, courts must look to several factors, including:

> ***7** [T]he efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

United States v. Paradise, 480 U.S. 149, 171 (1987).

a. Alternative Remedies

Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting

race-conscious remedies. *Ritchey*, 85 Ohio St.3d at 267 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). Neither party can direct this court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). Instead, the Defendants rely on the analysis and previous efforts of the MBE program. Defendants' Memorandum Contra, p. 26. They state the prior efforts to increase minority participation in the MBE program give a "sound basis for the General Assembly to conclude at the outset of [R.C. §3796.09(C)] that it was necessary to adopt" a racially based licensure requirement. *Id.*

Additionally, Defendant Harvest Grows cites two government contracting studies — one from 2001 and another from 2015 — in support of the need to not implement alternative remedies. Defendant Harvest Grows' Memorandum Contra, pp. 5-7, 23-24. Defendant Harvest Grows argues these studies show race-neutral remedies fail and would fail if implemented in the medical marijuana industry. *Id.* at p. 24.

This evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant Harvest Grows cites relate to the medical marijuana industry, or marijuana in general. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The Court believes alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

b. Flexibility and Duration of the Relief

The Defendants assert R.C. §3796.09(C) is flexible due to the legislature's drafting to include a waiver provision, so that the State need not award licenses to minority applicants who do not meet the minimum requirements. It is evident that the House added a clarification to the original draft of R.C. §3796.09(C), so "the Commission won't have to grant a license to an applicant that doesn't meet the criteria just to fill a quota." Defendants' Joint Appendix, D5. The final version of R.C. §3796.09(C) includes a waiver provision, stating, "If no applications or an insufficient number of applications are submitted by such entities that meet the conditions set forth in division (B) of this section, the licenses shall be issued according to usual procedures."

Additionally, Defendants assert R.C. §3796.09(C) is flexible because it is similar, if not identical, to R.C. §125.081, which was upheld by the Supreme Court of Ohio as "unquestionably flexible." In *Ritchey*, the Supreme Court found this flexibility was due to the legislature's allowance that the set-aside requirements be approximated and applied in a flexible manner, and included a waiver provision. *Ritchey*, 85 Ohio St.3d at 268.

***8** R.C. §3796.09(C) appears to be somewhat flexible, in that it includes a waiver provision. Yet, the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15% of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the Court finds R.C. §3796.09(C) is not flexible.

c. Relationship of the Numerical Goals to the Relevant Labor Market

Next, the Defendants assert the numerical goals in R.C. §3796.09(C) are directly related to those upheld in *Ritchey*, and, therefore, are associated to the relevant labor market. In *Ritchey*, the Supreme Court of Ohio found the MBE goal of 15%,

articulated in R.C. §125.081, was directly related to the Ohio contracting market. *Ritchey* at 268. Defendants admit that the 15% stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants' Memorandum Contra, p. 27. Defendants argue that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. *Id.* (citing Defendants' Joint Appendix, D18). The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the Court finds this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) have little weight, if any.[3]

Regarding the statistics the legislature did review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities are not directly related to the values listed within the statute. Much of the statistics referenced are based on county divisions, general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. Defendants' Exhibit A. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. Within the 2013 ACLU study, "The study found that black Ohioans were arrested 41 times more often for marijuana possession than white Ohioans in 2010." *Id.* at 17; Defendants' Joint Appendix, D4. This number is the evidence most directly related to the effects of discrimination based on marijuana arrests in Ohio statewide. Yet, this statistic, or any of the other statistics cited in the materials, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrests in Ohio. Therefore, the Court can only conclude the numerical value was selected at random by the legislature, and not based on the evidence provided.

d. Impact on Third Parties

Defendants argue third parties are minimally impacted. Under R.C. §3796.09(C), non-minority contractors are not wholly excluded from participating in the licenses set aside for economically disadvantaged groups, as non-minorities can own up to 49% of the minority owned company. The Supreme Court of Ohio analyzes R.C. §125.081 in a similar manner in *Ritchey*, 85 Ohio St. 3d at 268. In *Ritchey*, the Supreme Court found, "The definition of 'minority business enterprise' in R.C. 122.71(E) encourages legitimate collaborative partnerships and joint ventures between nonminority contractors and minority group members." *Id.* at 268-69. Because of this potential interaction between minority and non-minority members, the Court held that "the burdens placed on those not entitled to participate in the benefits of the MBE program are diffused, to a considerable extent, to a wide group of individuals and entities, and that the burdens are minimal[.]" *Ritchey* at 270. Additionally, the Court found that the burdens created on non-minorities due to R.C. §125.081 are an incidental consequence of the program, as they are not part of the program's objective. *Id.*

***9** The Court's reasoning in *Ritchey* and the Defendants' argument that the set aside is de minimis and an incidental consequence of R.C. §3796.09(C) might hold water if the licenses were unlimited or reflective of the demands of the market. "Depending on the industry in question, the degree of minority participation, and the extent to which the city's patronage amounts to a significant share of the market for the particular good or service, the burden imposed by the ordinance will vary." *Associated Gen. Contrs., Inc. v. San Francisco*, 813 F.2d 922, 936 (9th Cir. 1987). Accordingly, the Court must take into consideration the differences in the markets when determining the burden placed on third parties.

Under R.C. §125.081, potential contracts are constantly being generated and are available for bidding by both minority owned and non-minority businesses. Under R.C. §3796.09(C), that is not the case. Ohio Administrative Code §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a fifteen percent set aside, over fifteen percent of the licenses are given to lower qualified applicants solely on the basis of race. The Court recognizes that the Department of Commerce has the power to award more licenses in the future, but concurs with Plaintiff's statement that those licenses will continue to be impacted by the set aside requirement, reserving more licenses for applicants solely on the basis of race. The Court finds the fifteen percent set aside is not insignificant and the burden to be excessive for a newly

created industry with limited participants.

e. Additional Factors

Along with the factors of narrow tailoring cited in *Paradise*, 480 U.S. 149, the Ohio Supreme Court in *Ritchey* takes into account additional measures, further bolstering the Ohio MBE statute. Those measures include: (1) ensuring participation by qualified MBEs only; (2) penalties for misrepresentation of an MBE; (3) appropriate geographic limitations; and (4) reassessment and reevaluation of the program. *Ritchey*, 85 Ohio St. 3d at 269-70.

Defendants assert that R.C. §3796.09(C) includes all these factors, as well. Under R.C. §3796.09(C), minority applicants must certify their status as a member of an economically disadvantaged group as listed in the statute. Ohio Admin. Code 3796:2-1-03(C)(4), 3796:2-1-06(A). Penalties, including fines and revocation of the license, are available if an applicant misrepresents their status as an economically disadvantaged group member. Ohio Admin. Code 3796:5-6-02(B)(1). Revised Code §3796.09(C) includes geographic restrictions, similar to those cited by the *Ritchey* court, "to entities that are owned and controlled by United States citizens who are residents of this state[.]" Upon review of R.C. §3796.09(C), the Court finds these additional factors are met by the legislature in their drafting of R.C. §3796.09(C).

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. In *Ritchey*, the Court found reassessment and reevaluation of the program to be an important factor for the court to consider, as "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Ritchey* at 222. The Court reviewed the lineage of the statute and the numerous times the legislature reviewed and evaluate it, stating, "The General Assembly has, for example, revisited the provisions of R.C. 123.151 on six separate occasions since 1980." *Id.* at 269-70. As R.C. §3796.09(C) was implemented two years ago and has only been utilized during one round of applications, the Court cannot find that reassessment and reevaluation is a continual focus of the legislature. Defendants cite a letter the Department of Commerce received from the Ohio Legislative Black Caucus inquiring about the implementation of R.C. §3796.09(C), but the Court cannot glean from this one letter that the legislature shall have a continual focus leading to a reevaluation and reassessment program. Defendants' Joint Appendix, D19. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the Court cannot conclude that this factor is fulfilled.

f. Final Review of Narrowly-Tailored Remedy Factors

***10** Upon review of all factors together, the Court finds failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C). Therefore, even if there was a strong basis in evidence to support race-based remedial measures, the Court cannot find the statute was narrowly-tailored.

IV. Conclusion

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the Court finds Plaintiff has met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is

unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The Court previously held R.C. §3796.09(C) to be severable from the remainder of the statute. Decision and Entry Regarding Briefing Order, filed May 31, 2018, p. 17. Although Defendant Harvest Grows argues the listing of the races can be severed from the section (C), so as to preserve section (C) and leave the terms "economically disadvantaged" within the statute, the Court finds this option would leave the second paragraph inconsistent with the first and would require additional words to be inserted into the second paragraph to create consistency. Under *Geiger v. Geiger*, 117 Ohio St. 451 (1927), the Court cannot sever the statute if insertion of words or terms is necessary. Accordingly, the Court disregards the portions of the statute Defendant Harvest Grows advocates to be severed.

As previously held, the intention of the legislature was to provide access to legal medical marijuana for Ohioans suffering from chronic or serious ailments. As subsection (C) only concerns preference for certain "economically disadvantaged groups," the Court can only find that removal of this provision would not affect the implementation of R.C. §3796 in providing access to legal medical marijuana for ailing Ohioans.

Therefore, the Court orders the entirety of R.C. §3796.09(C) to be severed and stricken from R.C. §3796.09.

IT IS SO ORDERED.

THIS IS A FINAL, APPEALABLE ORDER. THERE IS NO JUST REASON FOR DELAY.

Copies to:

All counsel of record.

It Is So Ordered.

<<signature>>

/s/ Judge Charles A. Schneider

Footnotes

[1] As the defendants each filed a separate memorandum contra, as well as concurred with the main response provided by Defendant Department of Commerce, the Court shall refer to all defendants collectively as "Defendants" when all defendants concurred, and will differentiate with specific names as needed.

[2] The underlying case was originally filed by former Plaintiff PharmaCann Ohio, LLC. PharmaCann initially received a final score of 158.56, placing PharmaCann twelfth on the list of qualified applications. Undisputed Facts, filed February 2, 2018, ¶ 20. In early 2018, the Department of Commerce discovered some scoring errors had occurred and began rescoring the applicants. The Department of Commerce determined that PharmaCann was entitled to receive a higher score, moving it to the eighth highest qualified applicant and entitling it to a Level I license. Agreed Order, filed June 4, 2018. Accordingly, PharmaCann's original claims became moot and were dismissed. *Id.*

[3] Additionally, the Court finds Defendants' reliance on the MBE program studies to be peculiar, as these studies do not pertain to marijuana arrest rates whatsoever, which is where nearly all the legislature's supportive evidence arises from.