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Rohrabacher-Blumenauer Amendment, Case Law and the Department of Justice: Who Prevails in the Medical Marijuana Legalization Debate?

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INTRODUCTION

The classification of marijuana regardless of whether it is for medical or recreational use is a Schedule 1 drug under the Controlled Substances Act (CSA).[1] Medical research on the positive effects of marijuana and the shift towards acceptance of marijuana opened the floodgates for states legalizing marijuana for medical use.[2] A majority of states have enacted medical marijuana laws that permit the growth, use, and distribution of marijuana for medical purposes, as well as licensing patients to buy and use marijuana.[3] However, although these marijuana laws are legal under state laws, they nonetheless conflict with federal law.

The Rohrabacher-Farr Amendment (RFA), prohibits the federal government from using funds "to prevent states from implementing their own [state] laws that authorize the use, possession, distribution, or cultivation of marijuana."[4]

This paper examines the RFA and its relation to the cases decided in the Ninth Circuit and other courts, to determine whether there is a trend towards one line of thinking or another. Part I looks at the history of the RFA and discusses the impact from the conflict between state and federal laws and the appropriate roles for the states and the federal government in setting drug policy. Parts II and III examine the role played by the Department Of Justice (DOJ) in its evolving policy pronouncement in shaping the marijuana debate in the states. Part IV assesses the role of case law under the Ninth Circuit, exploring whether it is trite for Congress to reschedule the CSA to conform to the prevailing reality as dictated by the states or to simply formulate a method as already set forth by the DOJ whereby states will have the option to opt out of CSA. Part V looks at the possible federal marijuana reforms as well as the proposed Marijuana Act of

1. 21 U.S.C. § 841(a)(1) (2010) (meaning the CSA criminalizes marijuana as a controlled substance and consequently, it is illegal to sell, "manufacture, distribute, or dispense" the drug in any form).

2. *See* Bill Greenberg & Rebecca Greenberg, *26 USC Section 280E: Will the Dragon Now Be Slayed?*, 25 J.L. & POL. 549, 563, 566 (2017) ("In the 45 years since the CSA's enactment, extensive research evidence has emerged demonstrating that cannabis has demonstrably beneficial palliative effects for the treatment of a myriad group of medical pathologies . . . .").

3. Thirty-three states, Guam, Puerto Rico and the District of Columbia currently have laws permitting marijuana for medical use, while ten states and the District of Columbia have adopted laws legalizing marijuana for recreational use. *State Medical Marijuana Laws*, NSCL (Nov. 8, 2018), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx; *Marijuana Overview*, NSCL (Nov. 13, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

4. *See* Patricia H. Heer, *Rohrabacher-Blumenauer Amendment On Hold; FinCen Guidance Reviewed; and Cole Memo Rescinded*, DUANE MORRIS BLOGS (Jan. 20, 2018), http://blogs.duanemorris.com/cannabis/2018/01/20/rohrabacher-blumenauer-amendment-on-hold-fincen-guidance-reviewed-and-cole-memo-rescinded/#more-241.

2017. Part VI discusses whether if rescheduling is possible, will it fix the state—federal conflict over marijuana and probes into some problems that may be presented by continuing federal prosecution of businesses and individuals/patients; specifically the banking and tax connundrums.

I. HISTORY OF THE ROHRABACHER-FARR AMENDMENT

Congressman Maurice Hinchey originally introduced the RFA to the House of Representatives in 2003, who rejected it by a 152-273 vote.[5] The amendment was reintroduced for several years following the initial introduction, but the House continued rejecting it each time.[6] Finally, after being reintroduced again in 2014, the House passed it with a 219-189 vote.[7] The amendment was approved for the 2016 fiscal year.[8] Congressman Hinchey originally introduced the amendment in an effort to protect medical marijuana patients who were in compliance with their state laws.[9] The congressman felt that taxpayer's dollars were being wasted by sending seriously or terminally ill patients to jail and believed that states' rights should prevail.[10] Representative Dana Rohrabacher believed that the passage of this provision would allow states to provide their citizens access to medical marijuana without the fear of being prosecuted.[11]

Under the RFA, the DOJ is precluded from using funds to prosecute individuals and businesses that are in violation of the CSA, so long as those individuals comply with their states' medical marijuana regulations.[12]

5. *Final Vote Results For Roll Call 420*, OFF. CLERK: U.S. HOUSE REPRESENTATIVES (July 23, 2003, 2:56 PM), http://clerk.house.gov/evs/2003/roll420.xml.

6. *See, e.g.*, *Final Vote Results For Roll Call 334*, OFF. CLERK: U.S. HOUSE REPRESENTATIVES (July 7, 2004, 11:05 PM), http://clerk.house.gov/evs/2004/roll334.xml; *Final Vote Results For Roll Call 255*, OFF. CLERK: U.S. HOUSE REPRESENTATIVES (June 15, 2005, 2:51 PM), http://clerk.house.gov/evs/2005/roll255.xml; *Final Vote Results For Roll Call 333*, OFF. CLERK: U.S. HOUSE REPRESENTATIVES (June 28, 2006, 5:35 PM), http://clerk.house.gov/evs/2006/roll333.xml.

7. *Final Vote Results For Roll Call 258*, OFF CLERK: U.S. HOUSE REPRESENTATIVES (May 30, 2014, 12:22 AM), http://clerk.house.gov/evs/2014/roll258.xml.

8. *See Final Vote Results For Roll Call 283*, OFF. CLERK: U.S. HOUSE REPRESENTATIVES (June 3, 2015, 2:20 PM), http://clerk.house.gov/evs/2015/roll283.xml.

9. *House Votes 264-161 Against Hinchey Medical Marijuana Amendment*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000869 (last updated Apr. 9, 2008, 9:56 AM).

10. *Id.*

11. Press Release, Rohrabacher Hails Passage of Medical Marijuana Amendment (June 4, 2015), https://rohrabacher.house.gov/media-center/press-releases/rohrabacher-hails-passage-of-medical-marijuana-amendment.

12. H.R. 2578, 114th Cong. (2015) ("None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska,

The biggest issue with the amendment arises from the language of the amendment itself, as it seems to be open for interpretation. The DOJ reads the amendment narrowly, contending that it prevents actions against the state, not against individuals and businesses within the state.[13] The Ninth Circuit, the largest federal circuit, has numerous states which have legalized medical marijuana.[14] As such, it is appropriate to review cases from this circuit to see if the interpretation of the DOJ is consistent with case law.

Proponents believe that the intent of the amendment is clear, however, case law shows that the DOJ has continued to prosecute patients and businesses.[15] In April 2015, representatives Rohrabacher and Farr sent a letter to then Attorney General Eric Holder, addressing comments made by DOJ spokesman, Patrick Rodenbush.[16] In a Los Angeles Times article, Rodenbush said the amendment did not apply to cases against individuals or organizations, and that it only stopped the "department from impeding the ability of states to carry out their medical marijuana laws."[17] The letter goes on to express that states are best suited to investigate state violations and should be free from federal interference.[18] After considering several cases challenging the DOJ's prosecution of medical marijuana growers, the Ninth Circuit, in *United States v. McIntosh* recently held

Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin, or with respect to either the District of Columbia or Guam, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

13. Christopher Ingraham, *Federal court tells the DEA to stop harassing medical marijuana providers*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/20/federal-court-tells-the-dea-to-stop-harassing-medical-marijuana-providers/?utm_term=.6b52b9d660c2.

14. *State Marijuana Laws in 2018 Map*, GOVERNING, https://www.washingtonpost.com/news/wonk/wp/2015/10/20/federal-court-tells-the-dea-to-stop-harassing-medical-marijuana-providers/?utm_term=.6b52b9d660c2 (last updated Nov. 7, 2018) (showing that Washington, Idaho, Hawaii, Alaska, Nevada, Oregon, California, and Montana have all legalized marijuana in some way).

15. *See* Press Release, *supra* note 11.

16. Letter from Dana Rohrabacher & Sam Farr, Members of Cong., to Eric Holder, Att'y Gen. of the U.S. (April 8, 2015); Press Release, *supra* note 11.

17. Timothy M. Phelps, *Justice Department says it can still prosecute medical marijuana cases*, L.A. TIMES (Apr. 2, 2015, 3:00 AM), http://www.latimes.com/nation/nationnow/la-na-nn-medical-marijuana-abusers-20150401-story.html.

18. Letter from Dana Rohrabacher & Sam Farr, *supra* note 16.

that, where the defendants are in compliance with state laws, federal law prohibits their prosecution.[19] In *United States v. Chavez*, the Defendant, James Chavez, filed a motion to dismiss a marijuana possession charge in which he allegedly had 118 plants in his possession while on federal land.[20] Chavez contended that the charge should be dismissed based on the amendment.[21] The Ninth Circuit court denied Chavez's motion to dismiss, stating that the amendment did not repeal federal laws criminalizing possession of marijuana nor did the amendment suggest that Congress intended to affect the federal government's exercise of police powers over federal land.[22] The court recognized the tension created from the amendment but found the defendant's argument unpersuasive.[23] The court stated: "[i]f Congress intended to legalize the possession of marijuana under federal law, they could have repealed or amended the CSA to accomplish that goal in a straightforward manner."[24]

II. MARIJUANA POLICY AND THE DOJ UNDER PRESIDENT TRUMP'S ADMINISTRATION

Previously, under the Obama Administration, Deputy Attorney General James Cole sent a memorandum (the Cole Memo) to all United States Attorneys addressing federal prosecution in states who have voted to legalize marijuana.[25] The Cole Memo discusses eight priorities for the federal government and the need for the DOJ to use its resources effectively.[26]

19. United States v. McIntosh, 833 F.3d 1163, 1169, 1178 (9th Cir. 2016).

20. United States v. Chavez, No. 2:15-cr-210-KJN, 2016 WL 916324 (E.D. Cal. Mar. 10, 2016) at *1–2.

21. *Id.* at *1. Defendant Chavez submitted paperwork showing that his medical condition warranted "cultivation of up to 99 plants and possession of up to 11 pounds of usable marijuana." *Id.* at *2. However, the government alleged and the defendant's attorney agreed, the defendant was in possession of 118 plants which exceeds the amount he was permitted. *Id.*

22. *Id.* at *1–2.

23. *Id.* at *1.

24. *Id.* (quoting United States v. Tote, No. 1:14-mj-00212-SAB, 2015 WL 3732010, at *2 (E.D. Cal. June 12, 2015)).

25. Memorandum from James M. Cole, Deputy Att'y Gen. on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

26. *Id.* at 1–2 (explainaing that the DOJ is to focus its efforts on eight priority enforcement areas considered paramount to the federal government, which include: "[p]reventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other

In April of 2016, while still under the Obama administration, the Senate Caucus on International Narcotics Control held a hearing entitled "Is the Department Protecting the Public from the Impact of State Recreational Marijuana Legalization?"[27] At this Senate hearing, then Senator Sessions stated, "[w]e need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought not to be minimized, that it's in fact a very real danger."[28] Sessions went on to say, "Colorado was one of the leading states that started the movement to suggest that marijuana is not dangerous and we're going to see more marijuana use and it's not going to be good."[29] Sessions mentioned that one of President Obama's great failures was his lax treatment and comments on marijuana, stating "[i]t reverses 20 years . . . of hostility to drugs . . . [which began] when Nancy Reagan began the Just Say No program."[30]

Since this hearing in 2016, President Trump appointed Jeff Sessions as Attorney General.[31] In a memo sent out in April, Sessions asked the Justice Department task force to review policies on marijuana and requested recommendations "no later than July 27th."[32] Steven Cook, a federal prosecutor who is said to have taken a "hard line on sentencing reform and liberalizing drug rules," is one who has been tasked with reviewing policies.[33]

In May of 2017, Sessions sent a letter asking congressional leaders to undo protections set in place by the RFA.[34] Sessions argued in his letter that this

illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.").

27. *Is the Department of Justice Adequately Protecting the Public from the Impact of State Recreational Marijuana Legalization?*, S. CAUCUS ON INT'L NARCOTICS CONTROL (Apr. 5, 2016), http://www.drugcaucus.senate.gov/content/departent-justice-adequately-protecting-public-impact-state-recreational-marijuana.

28. U.S. Senate Drug Caucus, *Protecting the Public from the Impact of State Recreational Marijuana Legalization*, YOUTUBE (Apr. 5, 2016), https://www.youtube.com/watch?time_continue=22&v=gg0bZvIS0K8.

29. *Id.*

30. *Id.*

31. *See Trump cabinet: Senate confirms Jeff Sessions as attorney general*, BBC NEWS (Feb. 9, 2017), http://www.bbc. com/news/world-us-canada-38915273.

32. Eli Watkins, *Pot activists have been holding their breath for months on Jeff Sessions*, CNN, http://www.cnn.com/ 2017/06/17/politics/jeff-sessions-marijuana/index.html (last updated June 17, 2017, 8:35 AM).

33. *Id.*

34. Christopher Ingraham, *Jeff Sessions personally asked congress to let him prosecute medical-marijuana providers*, WASH. POST (June 13, 2017), http://www.washington

amendment "inhibits the [DOJ's] authority to enforce the Controlled Substances Act."[35] Sessions stated we are in the midst of a "historic drug epidemic" and the DOJ should be in a position "to use all laws available to combat" this epidemic.[36]

In Session's May 2017 letter, he mentioned that the Ninth Circuit Court of Appeals interpreted the Rohrabacher-Farr provision broadly, citing *United States v. McIntosh*.[37] Sessions went on to say, "in the Ninth Circuit, many individuals and organizations that are operating in violation of the CSA and causing harm in their communities may invoke the rider to thwart prosecution."[38] Sessions argued individuals who are involved in criminal organizations have established marijuana operations in state-approved marijuana markets.[39] These individuals find a place within state regulatory systems.[40] Sessions uses the example of a recent raid in Denver that led to the confiscation of more than 2,500 pounds of marijuana and the indictment of sixteen people.[41] The Chief of the Drug Enforcement Agency (DEA) in Denver said that people move to Colorado "with the expressed purpose of hiding their illicit proceeds and their illicit activities in plain sight under some of the laws that we have."[42]

The Rohrabacher-Farr provisions, which were considered marijuana protections have been extended through September 30, 2017.[43] Although the provision was extended, President Trump attached a signed statement saying, "I will treat this provision consistently with my responsibility to take care that the laws be faithfully executed."[44] According to a contributor for the Washington Post, prior

post.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm_term=.43fff2ca65b8.

35. *Id*.

36. *Id.*

37. Letter from Jefferson B. Sessions III, U.S. Att'y Gen., to Congress (May 1, 2017), https://www.jennifermcgrath.com/wp-content/uploads/Jeff-Sessions-Letter-Medical-Marijuana-5.1.2017.pdf.

38. Tom Angell, *Exclusive: Sessions Asks Congress To Undo Medical Marijuana Protections*, MASSROOTS (June 12, 2017), http://www.massroots.com/news/exclusive-sessions-asks-congress-to-undo-medical-marijuana-protections.

39. Letter from Jefferson B. Sessions III, *supra* note 37.

40. *Id.*

41. *Id*.

42. Jesse Paul, *16 people indicted in massive home-grown marijuana operation across Denver area*, DENVER POST (Mar. 17, 2017, 5:34 PM), http://www.denverpost.com/2017/03/17/marijuana-grow-operation-denver-metro-area/.

43. Zach Harris, *A Brief History of Rohrabacher-Farr: The Federal Amendment Protecting Medical Marijuana*, MERRY JANE (Dec 19, 2017), https://merryjane.com/news/a-brief-history-of-rohrabacher-farr-the-federal-amendment-protecting-medical-marijuana.

44. Jeremy Berke, *Trump indicated where he stands on medical marijuana for the first time since he took office*, BUS. INSIDER (May 6, 2017, 12:15 AM), http://www.businessinsider.com/medical-marijuana-trump-administration-2017-first-statement-2017-5?op=1.

presidents have used similar statements to "ignore or undermine polices they disagree with."[45]

III. THE CHANGING ADMINISTRATION'S STANCE ON THE ISSUE OF MARIJUANA LEGALIZATION

In July 2016, a reporter asked President Trump his thoughts on Governor Chris Christie's remarks that he would use federal funding to shut down sales of recreational marijuana in states like Colorado.[46] President Trump responded that the decision should be left up to the states, calling himself a "states person."[47] In a letter addressed to President Trump, California Lieutenant Governor Gavin Newsom urged the President to stick to his campaign commitment of "honoring states' rights when it comes to marijuana legalization."[48] President Trump has not always been consistent on the issue of medical marijuana.[49] He has been known to support states' rights to choose how to legislate marijuana and has also simply said that the legal marijuana industry is a real problem.[50]

During a White House briefing in February 2017, then White House press secretary, Sean Spicer stated he expected "states to be subject to 'greater enforcement' of federal laws against marijuana use."[51] Spicer went on to say that the Trump Administration does recognize a difference between medical marijuana and marijuana for recreational use.[52]

Recently, at a Senate appropriations committee meeting in June 2017, Deputy Attorney General Rod Rosenstein alluded to changes being made as to how

45. Christopher Ingraham, *It took Jeff Sessions just one month to turn Obama-era drug policy on its head*, WASH. POST (June 2, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/02/it-took-jeff-sessions-just-one-month-to-turn-obama-era-drug-policy-on-its-head/?utm_term=.09c5a54995aa.

46. Brent Johnson, *Does Trump disagree with Christie on marijuana?*, N.J. POL. (Jul. 30, 2016), https://www.nj.com/politics/index.ssf/2016/07/does_trump_disagree_with_christie_on_marijuana.html.

47. *Id.*

48. Letter from Gavin Newsom, Cal. Lieutenant Governor, to Donald J. Trump, President of the U.S. (Feb. 24, 2017), http://ltg.ca.gov/documents/PresidentTrump22417.pdf.

49. Kris Krane, *Why President Trump Is Positioned To Be Marijuana's Great Savior & How The Democrats Blew It*, FORBES (July 11, 2018, 6:00 AM), https://www.forbes.com/sites/kriskrane/2018/07/11/why-president-trump-could-be-marijuanassavior/#79ad366620a0.

50. *See id.*

51. John Wagner & Matt Zapotsky, *Spicer: Feds could step up enforcement against marijuana use in states*, WASH. POST (Feb. 23, 2017), http://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/?utm_term=.0f1fe04c8350.

52. *Id.*

the DOJ will handle enforcement in states that have legalized marijuana.[53] At this meeting Rosenstein stated, "[w]e follow the law and the science. From a legal and scientific perspective, marijuana is an unlawful drug."[54]

On January 4, 2018, the DOJ issued a memo in which Attorney General Sessions reiterated to U.S. Attorney Generals to enforce the law relating to the prosecution of marijuana and its related activities as enacted by Congress.[55] That is, Attorney General Sessions was explicitly reversing the 2013 Cole Memo of the Obama administration on Marijuana prosecution. The 2018 Sessions memo stated in part that:

> "It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission," said Attorney General Jeff Sessions. "Therefore, today's memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."[56]

This memo rescinds multiple guidance documents issued during the Obama administration, such as the Cole Memo, which provided that when US attorneys decide on how to spend their resources on marijuana crimes, they should focus on certain high priority areas, such as the sale of marijuana to children-not on prosecuting people who were complying with their own states laws.[57] As such, the hands-off approach of the Obama administration is apparently over. The more fundamental questions are where does this leave the states that have legalized medical marijuana? Which way does the court lean in this debate?

53. Andrea Noble, *Changes forthcoming for DOJ on marijuana, Deputy AG Rosestein hints*, WASH. TIMES (June 13, 2017), http://www.washingtontimes.com/news/2017/jun/13/rod-rosenstein-hints-changes-doj-marijuana/.

54. *Id.*

55. Press Release, Jefferson B. Sessions, Attorney Gen., Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

56. Press Release, Dep't of Justice, Justice Department Issues Memo on Marijuana Enfforcement (Jan. 4, 2018) (on file with Dep't of Justice).

57. *See* Memorandum from James M. Cole, *supra* note 25.

IV. THE ROLE OF CASE LAW IN THE MARIJUANA DEBATE— THE NINTH CIRCUIT'S CONTRIBUTION

To understand the evolution and different rationales of the courts' decisions surrounding this legal debate looking at cases beginning in 2016 is helpful.

A. U.S. v. McIntosh[58]

McIntosh, a landmark decision of the Ninth Circuit, discussed 10 cases seeking consolidated interlocutory appeals and petitions for writs of mandamus.[59] These cases challenged the DOJ prosecution of medical marijuana cases that arose from orders entered by courts in California and Washington.[60] The appellants were charged with violations of federal narcotic laws although in compliance with their states' laws.[61] The appellants "moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) [was] prohibited from spending funds to prosecute them."[62]

In one of the cases addressed by *McIntosh*, five codefendants operated four marijuana stores in Los Angeles and nine indoor marijuana grow sites in San Francisco and Los Angeles.[63] Amongst conspiracy to manufacture charges, the codefendants were also indicted with intent to distribute more than 1,000 marijuana plants.[64] The DOJ sought forfeiture.[65]

In another case discussed by *McIntosh*, *Lovan*, the DEA and the Fresno County Sheriff's Office located more than 30,000 marijuana plants on a sixty-acre property.[66] "Four codefendants were indicted for manufacturing" over 1,000 marijuana plants.[67]

While in *Kynaston*, a search warrant was issued which led to the discovery of 562 growing marijuana plants and 677 pots.[68] Five codefendants were charged and indicted amongst other charges, for conspiracy to manufacture over 1000 marijuana plants.[69]

58. United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).
59. *See id.* at 1168.
60. *Id*. at n.1.
61. *See id*. at 1168–69.
62. *Id*. at 1169.
63. *McIntosh*, 833 F.3d at 1169.
64. *Id.*
65. *Id.*
66. *Id*.
67. *McIntosh*, 833 F.3d at 1169.
68. *Id.*
69. *Id*.

Based on the appropriations rider, appellants in *McIntosh*, *Lovan*, and *Kynaston* collectively filed a motion to dismiss or enjoin.[70] The issue presented in the three previously mentioned cases, was whether the Appropriations Act prohibited the DOJ from using funds to prevent states from implementing medical marijuana laws and to prosecute defendants for federal marijuana offenses.[71]

The court held that the appellants had standing to enjoin the DOJ from spending federal funds to prosecute them for federal marijuana offenses.[72] The DOJ violated the Appropriations Act by spending federal funds to prevent states from implementing the entirety of their medical marijuana laws.[73] The court's rational was that the Appropriations Act prohibits the DOJ from preventing states from implementing their medical marijuana laws.[74] That "[b]y officially permitting certain conduct, state laws provide for non-prosecution of individuals who engage in such conduct. If federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct."[75] Further, the court noted while the Appropriations Act prohibits the federal government from *using funds* to prevent states from implementing laws, the DOJ may still *prosecute* individuals who engage in conduct which violates state laws.[76] Moreover, if the DOJ wishes to continue with the prosecution, then the appellants are entitled to evidentiary hearings which will determine whether their conduct was authorized by state law, and the DOJ may proceed from there.[77]

It is worth noting that the appellants in *McIntosh* and *Kynaston* argued for a more expansive interpretation of the Appropriations Act.[78] The appellants argued the Appropriations Act prohibited the DOJ from bringing federal charges "against anyone licensed or authorized under state medical marijuana law for activity occurring within that state . . . ."[79] Appellants stated that prosecution by the DOJ will prohibit states from enforcing penalties which will in turn prevent states from implementing the entirety of their laws.[80] According to appellants, unless the activity is clearly outside the scope of the state's laws, the DOJ should

70. *Id*. at 1170.
71. *McIntosh*, 833 F.3d at 1169.
72. *Id*. at 1173.
73. *Id.* at 1176.
74. *Id.*
75. *Id*. at 1176–77.
76. *Id*. at 1177–78.
77. *McIntosh*, 833 F.3d at 1179.
78. *Id.* at 1177.
79. *Id*.
80. *Id*.

refrain from prosecuting.[81] The court recognized the desire for a more expansive interpretation but only considered the text of the rider.[82] The court stated that it is Congress' responsibility to expand or minimize the intent of the Appro-priations Act by providing clarity.[83]

Ultimately, the enforcement of the CSA "is estopped in the Medical Marijuana States when those who would be prosecuted are in compliance with their state laws."[84]

B. Mann v. Gullickson[85]

Although this case was a motion for summary judgment in a breach of contract claim and does not involve the DOJ per se, it did discuss the Appropriations Act and the direction the courts may be headed in.[86]

In this case, Mann, the plaintiff, sold two businesses to Gullickson, the defendant, for a specified amount to be paid in installments.[87] The businesses were consulting businesses for state-regulated marijuana licenses and an online marijuana retail operation.[88] Gullickson failed to make payments and Mann filed an action for breach of contract claim.[89] Gullickson filed a cross complaint.[90] Gullickson asserted that the agreement was void because it related to medical marijuana which is a prohibited substance under the federal controlled substances act even if legal in the states where the companies operate.[91]

The court mentioned that the government gave conflicting signals related to marijuana regulation.[92] The court also stated that "where a party challenges enforcement of a contract based on the defense of illegality under federal law," it must be addressed whether to apply state or federal law.[93]The court further discussed that "where contracts concern illegal objects, [if] it is possible for the

81. *Id.*
82. *McIntosh*, 833 F.3d at 1178–79.
83. *Id.* at 1179.
84. Robert L. Greenberg, *Medical Marijuana Post-McIntosh*, 20 CUNY L. REV. 46, 49 (2016).
85. Mann v. Gullickson, No. 15-cv-03630-MEJ, 2016 WL 6473215 (N.D. Cal. 2016).
86. *Id.* at *4.
87. *Id.* at *1.
88. *Id.*
89. *Id.*
90. *Id*. at *2.
91. *Mann*, 2016 WL 6473215, at *2.
92. *See id.* at *4.
93. *Id.* at *5.

court to enforce a contract in a way that does not require illegal conduct," the court may do so.[94]

Gullickson contended that since the contracts were for marijuana businesses and enforcement would be mandating illegal conduct, the court is prohibited from enforcing the contract.[95] While the court found no merit to this claim, the court did state that to avoid unjust enrichment to a defendant and a harsh penalty to the plaintiff, even if the object of the agreement were illegal, the contract would still be enforced.[96] That "[e]nforcing the contract in this case is not endorsing the cultivation, possession, or distribution of marijuana."[97] The court therefore denied Gullickson's motion for summary judgment.[98]

C. U.S. v. Kleinman[99]

In the recent case *United States v. Kleinman*, the Defendant, Noah Kleinman, appealed his jury conviction and sentence for "conspiracy to distribute and possess marijuana, distribution of marijuana, maintaining drug-involved premises, and conspiracy to commit money laundering."[100] Kleinman operated a marijuana storefront which he alleged complied with California state law, and which the government alleged was a conspiracy to distribute marijuana.[101] He argued that a congressional appropriations rider enjoining use of funds from the DOJ prohibited the continued prosecution of his case.[102]

Kleinman moved to dismiss the case pursuant to California medical marijuana laws, and the state charges against him were dropped.[103] Once the case was dismissed, the DEA confiscated the evidence that was in the LAPD's custody and used this evidence to indict Kleinman on charges of conspiracy to distribute and possess marijuana.[104]

Kleinman moved to suppress the evidence on the grounds that it was obtained with a search warrant that lacked probable cause.[105] The district court

94. *Id.* at *7.

95. *Mann*, 2016 WL 6473215, at *7.

96. *Id.* at *8.

97. *Id.*

98. *Id.* at *9.

99. United States v. Kleinman, 880 F.3d 1020 (9th Cir. 2017), *cert denied*, 2018 WL 2418211 (U.S. Oct. 1, 2018).

100. *Id.* at 1025.

101. *Id.* at 1025–26.

102. *Id.* at 1026.

103. *Id.*

104. *Id.*

105. *Kleinman*, 880 F.3d at 1026.

found that compliance with state law is not a defense to federal charges, and Kleinman was convicted on all counts.[106]

Shortly after being convicted and sentenced, the appropriations rider was enacted by Congress.[107]

Amongst other arguments, Kleinman asserted that "a congressional appropriations rider enjoining use of [DOJ] funds . . . prohibits continued prosecution of his case."[108] Thus, the issue presented before the court was whether Kleinman was entitled to remand for an evidentiary hearing on compliance with state law.[109] The court denied his motion to remand for a *McIntosh* hearing.[110] The court cited to *McIntosh* and 140 agreed that federal criminal defendants who are indicted in marijuana cases have standing to file appeals which seek to enjoin the DOJ's use of funds to prosecute cases.[111] However, the appropriations rider does not prohibit prosecuting individuals for conduct that is not compliant with state law.[112] The court said that this rider did not apply to two charges against Kleinman because the alleged conduct does not fully comply with state law—conspiracy to distribute marijuana and conspiracy to commit money laundering.[113] Kleinman had no state law defense for these charges.[114]

Further, the court stated that the appropriations rider prohibits use of funds in connection with a specific charge involving conduct that is fully compliant with state laws.[115] In applying the rider, the focus is on conduct forming the basis of a particular charge, which requires an analysis to determine which charges the rider restricts. The court also mentioned that the appropriations rider did not require the court to vacate convictions obtained before the rider took effect.[116] In this instance, Kleinman was convicted before the appropriations rider became law.[117] In addition, only the continued expenditure of funds related to the state-law-compliant conviction after the rider took effect would be unlawful.[118]

106. *Id.*
107. *Id.* at 1027.
108. *Id.* at 1026.
109. *Id.* at 1027.
110. *Id.* at 1029–30.
111. *Kleinman*, 880 F.3d at 1027.
112. *Id.*
113. *Id.* at 1028–29.
114. *Id.* at 1029.
115. *Id.* at 1028.
116. *Id.*
117. *Kleinman*, 880 F.3d. at 1027.
118. *Id.* at 1028.

D. U.S. v. Daleman[119]

In this case, the defendant, Richard Daleman was charged with "conspiracy to cultivate 1,000 or more marijuana plants . . . cultivation of more than 50 but less than 100 marijuana plants . . . and possession of 100 more kilograms of marijuana with the intent to distribute."[120]

Daleman negotiated the sale of 190 pounds of marijuana for over $200,000 with an undercover detective.[121] A search warrant was executed which resulted in over two thousand marijuana plants and hundreds of pounds of processed marijuana being seized.[122] A federal indictment was returned.[123] Daleman submitted several motions, which were all denied.[124] Daleman then submitted a motion to enjoin the DOJ from spending funds to continue his prosecution.[125] Thus, the issue presented was whether the DOJ's use of funds to prosecute this case violated the appropriations clause of the constitution.[126]

In its holding, the court denied Daleman's motion to enjoin the expenditure of funds by the DOJ.[127] The court reasoned that prosecuting "individuals who do not strictly comply with all state law conditions regarding the use, distribution, possession, and cultivation of medical marijuana" does not violate the appropriations rider.[128]

The Ninth Circuit emphasized that at an evidentiary hearing, a defendant must establish that he strictly complied with all conditions of state law in order to prohibit the DOJ's expenditure of funds.[129] Daleman failed to show this.[130] Even if Daleman had been effectively operating a dispensary, the negotiated sale with the undercover detective was not in compliance with state law.[131]

119. United States v. Daleman, No. 1:11-CR-00385-DAD-BAM, 2017 WL 1256743 (E.D. Cal. Feb. 17, 2017).

120. *Id.* at *1.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Daleman*, 2017 WL 1256743, at *1.

125. *Id.*

126. *Id*. at *2.

127. *Id.* at *2.

128. *Id.*

129. *Id*.

130. *Daleman*, 2017 WL 1256743, at *7.

131. *Id.*

E. U.S. v. Nixon[132]

Alan Nixon, the defendant, "pled guilty to aiding and abetting the maintenance of a drug-involved premise . . . ."[133] As a result, Nixon was sentenced to probation.[134] A condition of Nixon's probation required him to "refrain from unlawful use of a controlled substance and [to] submit to periodic drug testing."[135] Nixon moved the court to modify his conditions of probation on the ground that the appropriations rider required that he be allowed to use medical marijuana while on probation in compliance with California's Compassionate Use Act.[136]

After Nixon was sentenced, Congress enacted an appropriations rider that prohibits the DOJ from using funds to prevent states from implementing state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[137] The district court denied Nixon's motion, finding that the rider had "no effect on the court or the Probation Office . . . ."[138] Nixon appealed.[139] "Nixon argued that the appropriations rider suspended the [CSA]" in relation to individuals using marijuana "in compliance with the Compassionate Use Act."[140]

At issue was whether a federal district court is prohibited from restricting the use of medical marijuana as a condition of probation as a result of a congressional appropriations rider prohibiting the DOJ from using funds to prosecute individuals who are in compliance with state marijuana laws.[141]

In its holding, the court affirmed the district court's denial of Nixon's motion for modification.[142] The court addressed the appropriations rider in stating that while the rider restricts the DOJ from using certain funds for prosecution, individuals still face the possibility of being prosecuted under the CSA.[143] According

132. United States v. Nixon, 839 F.3d 885 (9th Cir. 2016).

133. *Id.* at 886.

134. *Id.*

135. *Id.*

136. *Nixon*, 839 F.3d at 887.

137. *Id.* at 886–87.

138. *Id.* at 887.

139. *Id.*

140. *Id.*; *see* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (1996); *see also* Mann v. Gullickson, No. 15-cv-03630-MEJ, 2016 WL 6473215, at *3 (N.D. Cal. Nov. 2, 2016) ("Cal. Health & Safety Code § 11362.5 . . . gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession.").

141. *Nixon*, 839 F.3d at 886.

142. *Id.* at 888.

143. *Id.*; *see also* HEALTH & SAFETY § 11362.5.

to the court, the appropriations rider does not "provide immunity from prosecution for marijuana offenses.[144] The CSA prohibits the manufactur[ing], distribution, and possession of marijuana."[145] Also, the court goes on to state that no state law legalizes marijuana manufacturing, possession, or distribution.[146] In addition, "state laws cannot permit what federal law prohibits."[147]

In another federal case, *U.S. v. Marlin Alliance for Medical Marijuana* (MAMM), the court held that the prosecution of medical marijuana defendants must meet the RFA.[148] Consequently, the judge ruled that the DOJ could not enforce an injunction against MAMM as it was operating in compliance with California state law.[149] That is, because the providers were acting in compliance to state law, the DOJ could not shut down this state legal provider.[150] In 2016, a case against a massive Oakland, California medical marijuana collective was dropped, just one year after the renewal of the RFA.[151]

Since these cases, especially those from the Ninth Circuit, generally support the implementation of the RFA, the question is whether it is time to really reconsider a federal marijuana reform. Looking at the recent amendment proposed by Senator Cory Booker may shed some light as to where the marijuana debate may lead in relation to state and federal laws.[152]

V. FEDERAL MARIJUANA REFORM: A TIME TO RECONSIDER?

As stated above, the CSA of 1970 made it illegal to manufacture, distribute, and possess marijuana, classified under the act as a Schedule 1 narcotic.[153] As a Schedule 1 narcotic, it is said to have no medical use, and therefore doctors are not to prescribe it.[154] The United States Supreme Court recognizes the power of

144. *Nixon*, 839 F.3d at 888.

145. *Id*.

146. *Id.*

147. *Id.*

148. United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1047–48 (N.D. Cal. 2015).

149. *Id.* at 1043, 1047–48.

150. *See id.*

151. Mollie Reilly, *Feds Drop Case Against Influential Medical Marijuana Dispensary*, HUFFINGTON POST (May 3, 2016, 3:26 PM), https://www.huffingtonpost.com/entry/harborside-health-center-case-dropped_us_5728d2d1e4b016f37893a9c2 (noting though the U.S. Attorney's Office did not comment on the reason the case was dropped, it is speculated the renewal of the RFA and dismissal of a similar case are to blame).

152. S. 1689, 115th Cong. (2017).

153. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulations*, 62 UCLA L. REV. 74, 82–83 (2015).

154. *Id*. at 83.

the federal government to regulate marijuana as a whole in all fifty states.[155] Consequently, the growing and use of marijuana in any state may invite the scrutiny of the federal government. There have been suggestions that the DEA reschedule marijuana from a Schedule 1 classification, but this has been met with resistance.[156] This resistance has been supported by the U.S Court of Appeals for the District of Columbia in recognizing that the refusal of the DEA to reschedule "is not arbitrary and capricious."[157]

In 1996, state marijuana policy started to shift when states began to consider factors such as the amount of resources employed for the enforcement of the laws, the fact that the drug was widely available and prohibition did not make sense, the fact that there was increase support, politically and otherwise to employ medical marijuana to treat seriously ill persons.[158] In consideration of this policy shift, the state of California paved the way by becoming the first state to allow the use of medical marijuana.[159] Since then 29 other states have followed suite with eight other states also supporting the use of recreational marijuana.[160]

In an attempt to resolve the impasse between state and federal treatment of marijuana, bills have been introduced in Congress with little or no permanent success.[161] Some of the recent past proposed bills deal with issues such as:

> Rescheduling marijuana to permit marijuana for medical use in those states in which it has been legalized;[162] providing an affirmative defense for medical marijuana related activities carried out in compliance with state law and obligate the return of property seized by the federal government in relation to marijuana prosecutions;[163] prohibiting the DEA and the DOJ from spending taxpayer money to attack, arrest or prosecute medical marijuana patients and providers in states with legalized medical marijuana laws;[164]providing legal immunity from criminal

155. *Id.*

156. *Id.*

157. *Id.*; *see also* Controlled Substance Act, 21 U.S.C. § 811(a)-(b) (2015) (outlining that under the CSA, after a formal rule making, scientific, and medical evaluation, and on the recommendation of the secretary of Health and Human Services, the Attorney General is authorized to transfer a drug between Schedules or remove any drug from a Schedule).

158. Chemerinsky et al., *supra* note 153, at 84–85.

159. *Id.* at 85 ("Proposition 215 permitted marijuana use by those who received an oral or written recommendation from a doctor.").

160. Clay Dillow, *Paying taxes in cash, marijuana companies have a lot to hash out with IRS*, CNBC (Apr. 18, 2017 9:59 AM), http://www.cnbc.com/2017/04/18/marijuana-companies-sending-a-huge-cash-roll-to-irs-on-tax-day.html.

161. *See* Chemerinsky et al., *supra* note 153, at 113–14.

162. States' Medical Marijuana Patient Protection Act, H.R 689, 113th Cong. (2013).

163. Truth in Trials Act, H.R 710, 113th Cong. (2013).

164. 160 CONG. REC. 1034 (2014) (statement of Hon. Alcee L. Hastings)

prosecution to banks and credit unions that provide financial services to marijuana-related businesses operating in compliance with state laws;[165] to prohibit any provision of CSA from applying to anyone acting in compliance with state marijuana law;[166] and to amend the CSA preemption provision section 903[167] to stipulate that CSA not be interpreted to mean that Congress intended to occupy the field of marijuana enforcement or preempt state marijuana law.[168]

Taking a look at the recent Marijuana Justice Act of 2017, including the broad and legitimate discussions raised by this bill, would expand our understanding of the related issues brought to the forefront.

A. *Marijuana Justice Act of 2017*[169]

Reconsidering the marijuana trajectory, the Marijuana Justice Act of 2017 (MJA) was introduced by Senator Cory Booker of New Jersey.[170] The MJA has a provision that punishes states that overwhelmingly arrest low–income and minorities.[171] This unusual proposal by Senator Booker highlights major policy issues regarding the past and future of marijuana legalization.[172]

1) The proposal removes marijuana from the list of controlled substances as provided in the CSA.[173] Following this proposal would undoubtedly result in the

165. Marijuana Business Access to Banking Act of 2013, HR 2652, 113th Cong. § 3 (2013).

166. Respect State Marijuana Laws Act of 2013, H.R.1523, 113th Cong. § 2 (2013).

167. 21 U.S.C. § 903 (2012) (setting out the circumstances under which CSA will preempt state law).

168. Respect States' and Citizens' Right Act of 2013, H.R. 964, 113 Cong. § 2(b) (2013).

169. Marijuana Justice Act of 2017, S. 1689, 115th Cong. (2017).

170. *See Drug Policy—Marijuana Justice Act of 2017—Senator Cory Booker Introduces Act to Repair the Harms Exacted by Marijuana Prohibition.—Marijuana Justice Act of 2017, S. 1689, 115th Con. [hereinafter Drug Policy—Marijuana Justice Act of 2017]*, 131 HARV. L. REV. 926, 926 (2018).

171. S. 1689 § 3(b)(1).

172. *See Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 926.

173. *See e.g.*, H.R. 2020, 115th Cong. § 1 (2017) (reflecting that prior bills tend to seek to reschedule marijuana to a lower-penalized category and not outright removal like the Booker proposal).

avoidance of federal prosecution, as well as reduce the consequences for businesses associated with marijuana legalization.[174] For example, marijuana businesses could legally have access to banking services.[175]

2) The MJA would allow the Attorney General to pinpoint states with disproportionate arrest and incarceration rates and reduce federal funding for the prisons and police in those communities/states.[176] That is, states that are ineligibile under this criteria due to their racial and/or class bias in arrest and incarceration practices may not receive federal funds for the construction or staffing of their prisons or jails.[177]

The MJA envisioned that any savings resulting from such reductions should be redirected to a Community Reinvestment Fund, to be managed by the Housing and Urban Development (HUD) secretary who could distribute said savings as grants to communities that have been impacted by drug laws.[178] However, the MJA has been criticized by a Harvard article for not going far enough in also addressing issues relating to the profits that would result from marijuana legalization.[179] The article suggest that the MJA includes provision arming the cities and states with authority to prioritize those persons who have been hurt by the criminalization of marijuana law to be given a first chance to acquire permits and licenses for growing, distributing and selling marijuana.[180]

3) The MJA also requires that marijuana related convictions be expunged and those civilians who have been impacted by such convictions be given a right to sue for the harsh punishment suffered as a result.[181] The MJA provides that those currently serving a prison term involving marijuana be eligible for sentence reduction through sentences reconsideration.[182] This would reduce the harsh impact on those convicted for marijuana related violations by restoring some of their rights realting to voting, jury service, employment, immigration and more.[183]

174. *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 929.

175. *See generally* Florence Shu-Acquaye, *The Unintended Consequences to Legalizing Marijuana Use: The Banking Conundrum*, 64 CLEV. STATE L. REV. 315, 324–27 (2016) (for a detailed discussion on marijuana businesses' access to banking services).

176. *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 929.

177. Marijuana Justice Act of 2017, S. 1689, 115th Cong. § 3(a) (2017).

178. S. 1689 § 4(c); *see Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 929–30; Brentin Mock, *What Does Marijuana Justice Actually Look Like?*, CITYLAB (Jan. 11, 2018), http://www.citylab.com/equity/2018/01/what-does-marijuana-justice-actually-look-like/550328/.

179. *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 927, 930–31.

180. *Id.* at 932.

181. *Id.* at 930.

182. S. 1689 § 3(d).

183. *See Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 930.

4) The Harvard article suggest that the MJA missed out on including tax revenue derived from legal marijuana sales,which may have helped achieve a level playing field in marijuana justice.[184] Including the tax revenue could have resulted in some legal marijuana sales tax to compensate those whose lives have been shattered due to the past arrests and imprisonment for marijuana law violations.[185]

Although, the future of this Act seems bleak in terms of the support needed for it to pass, it does appear to have addressed some important issues, like reducing or resentencing, but it is criticized as having failed to deal with the regulation of the legal marijuana market to effectively achieve those goals and objectives intended in the MJA.[186] Thus, without a regulatory framework, the critic says, the harm inherent in marijuana prohibition in reducing the racial and economic inequality that prevails at the moment will likely continue.[187] Of the over 3,000 storefront marijuana dispensaries in the United States, fewer than three dozen are owned by black people.[188] Projections that the legal marijuana market will get to 18 billion by 2020[189] drives the reality home. The Harvard article aptly articulated this defect when it stated that:

> Racial inequality remains a pernicious reality of current legalization efforts around the country. Black and Latino victims of the drug war are noticeably absent from current legal marijuana markets. . . . After a long history of pervasive discrimination in employment and education, black and Latino Americans are far less likely to be able to raise the money necessary to start marijuana businesses.[190]

Looking at the city of Oakland's approach may be useful in this marijuana debate on how states that legalize marijuana may consider its regulation via reparations.

184. *Id*. at 933.

185. *Id.*; Mock, *supra* note 178.

186. *See Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 930; Mock, *supra* note 178.

187. *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 930.

188. *Id*. at 931; Amanda Chicago Lewis, *America's Whites-Only Weed Boom*, BUZZFEED NEWS (Mar. 16, 2016, 10:01 PM) https://www.buzzfeednews.com/article/amanda chicagolewis/americas-white-only-weed-boom.

189. ARCVIEW MKT. RESEARCH, THE STATE OF LEGAL MARIJUANA MARKETS: EXECUTIVE SUMMARY 3 (5th ed. 2017); *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 931–32.

190. *Drug Policy—Marijuana Justice Act of 2017*, *supra* note 170, at 931.

B. *The Case of Oakland, California*

On November 8, 2016, California voters passed Proposition 64, the Adult Use of Marijuana Act legalizing the personal use of marijuana for adults over 21, and creating a regulatory program for nonmedical cannabis.[191] "These regulations included a state licensing program for commercial nonmedical cannabis, which largely mirrored the licensing system for medical cannabis in the Medical Cannabis Regulation and Safety Act."[192] On the strength of Proposition 64, in May 2017, the city of Oakland "rolled out a new permit program for cannabis businesses," prioritizing individuals "convicted of a marijuana charge in the city of Oakland, or who were long-time residents of neighborhoods with the highest numbers of weed-related arrests."[193]

To increase the feasibility of the equity program, the city "earmarked $3.4 million from cannabis license tax revenue for no-interest loans and technical assistance for equity applicants."[194] Further, the city is to "issue a request for proposals to help equity applicants work on their business plans, obtain loans and prepare their applications for a license."[195] The major hurdle faced in this new program is that some applicants are unable to produce the required documentation demonstrating eligibility for equity status.[196] However, city officials are working to expand the acceptable documents.[197]

As to the effectiveness of this program, only time will tell, but there is no doubt that giving an economic opportunity to those who had been scarred by past marijuana violations is nothing short of a second chance to be better productive and integrated people in their communities. Perhaps a successful implementation of this program may serve as a model for other states and communities as they navigate this somewhat complex marijuana legalization debate.

191. Assemb. B. 64, 2017-2018 Leg., Reg. Sess. (Cal. 2016).

192. *Overview Of The California's Cannabis Legal Systems*, RINGGENBERG L. FIRM https://www.ringgenberglaw.com/n-mcrsa-overview (last visited Mar. 23, 2018).

193. Tammerlin Drummond, *A call for pot entrepreneurs, Oakland test drives new marijuana permit program*, E. BAY TIMES (Aug. 1, 2017, 4:11 PM), http://www.eastbaytimes.com/2017/07/28/a-call-for-pot-entrepreneurs-oakland-test-drives-new-cannabis-permit-program.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

VI. CONSEQUENCES OF CONTINUED FEDERAL PROHIBITIONS: THE BANKING AND TAX CONUNDRUMS

A. *The Banking Conundrum*

Unfortunately, for many legal marijuana businesses "banking in the traditional sense is an aspiration rather than the norm."[198] This is a real problem for an industry that is expected to boom to $21 billion by 2021.[199]

One major unintended consequence of the state marijuana legalization is that marijuana businesses face the challenge of creating a bank account, or obtaining loans, and therefore must hoard their cash, which itself is a high risk.[200] As a practical matter, the businesses are an easy target for thieves who are conversant with the fact that these businesses have no access to banking services.[201] This is compounded by the fact that the banks could be subject to prosecution for money laundering and anti-trafficking laws.[202] Thus, banks are reluctant to extend their services to marijuana dispensaries that operate under legal state laws.[203]

Although the 2014 Cole Memo from the then Attorney General Holder seems to somewhat water down this inherent fear of prosecution by stating that marijuana businesses should have access to banking services, it still did not alleviate the problem because the banks would still be subject to prosecution, given no substantive change in federal drug law.[204] Needless to say, the executive branch can do very little on its own to effectuate change in curtailing the banking restrictions on the marijuana industry.[205] This is even so, given the fact that, even if the banks were to give a carte blanch to marijuana businesses using their banking services, the CSA still remains the law of the land and therefore the assets of the businesses could still be seized under the CSA.[206]

198. Dillow, *supra* note 160.

199. *Id.*

200. *Id.* (explaining that the lack of banking services also invariably creates innumerable logistical problems within the day-to-day operations of what are otherwise traditional production and retail operations).

201. Chemerinsky et al., *supra* note 153, at 91.

202. Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 AM. CRIM. L. REV. 215, 217–18 (2016).

203. *See id*.; *see also* Julie Anderson Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 610 (2015) (discussing Federal Anti-Laundering Statutes and in particular the Money Laundering Control Act, which subjects entities and individuals to criminal liability for money laundering).

204. *See* Hill, *supra* note 203, at 610.

205. *See id.* at 616–17.

206. *Id*. at 610.

The 2018 Jeff Session memo explicitly undoes any attempt by the Obama administration to alleviate the marijuana banking issue.[207] The memo empowers local federal prosecution with the discretion to "weigh all relevant considerations" in following marijuana offenders in their jurisdictions.[208] This is the proverbial last nail in the coffin, dashing any hopes and indicating that the continued risk of prosecution undermines state goals in legalization.[209] Perhaps the reason why the Colorado Banker's Association found the guidance to be '"a red light' that amounts to 'serve customers at your own risk,'" and suggested banks should not comply.[210]

The statement by Lance Perryman, founder and CEO of Next Harvest, a Marijuana company in Colorado, aptly makes the point on the issue of banking and regulation when he stated that "[t]he lack of financial infrastructure makes it difficult for cannabis companies to establish exactly the kind of fiscal paper trail that federal and state regulators could use to help enforce regulatory compliance."[211] Marijuana Banking will require the federal financial regulators to set clear and achievable due diligence requirements for marijuana business customers.

B. *The Tax Conundrum*

Marijuana, as earlier stated, is categorized as a Schedule I substance under the CSA.[212] Consequently, even legal marijuana businesses have to pay taxes under IRS code 280E, the same category reserved for illegal drug traffickers.[213] Although 29 states in the U.S. have legalized some form of medicinal marijuana, and a few have passed laws allowing recreational marijuana use, those marijuana operated businesses in those states are nonetheless violating federal law, and therefore are subject to the consequences, including section 280E of the IRS code.[214]

207. Press Release, Sessions, *supra* note 55.

208. Mikosra, *Jeff Sessions Rescinds Obama-Era Enforcement Guidance: Five Observations*, VAND. U. (Jan. 5, 2018), https://my.vanderbilt.edu/marijuanalaw/2018/01/jeff-sessions-rescinds-obama-era-enforcement-guidance-six-observations/.

209. *See* Winn, *supra* note 202, at 231.

210. *Id*. at 231–32.

211. *See* Dillow, *supra* note 160.

212. Chermerinsky et al., *supra* note 153, at 82.

213. Will Yakowicz, *The Sexiest Story of Taxes and Marijuana: The History of Tax Code 280E*, INC (June 29, 2016), https://www.inc.com/will-yakowicz/how-cpas-tax-lawyers-fighting-irs-for-marijuana.html.

214. Harborside Health Ctr., *Fighting the Feds, Round Two: Harborside vs. the IRS*, GLOBE NEWS WIRE (June 4, 2016, 11: 31 AM), http://globenewswire.com/news-release/2016/06/04/846107/10163270/en/Fighting-the-Feds-Round-Two-Harborside-vs-the-IRS.html.

Under Federal Tax Rule 280E, any trade or business that is carried out in violation of federal drug law will pay federal income tax under less favorable conditions.[215] Section 280E prohibits drug trafficking organizations (DTOs) from "taking the normal and necessary deductions allowed to all other businesses . . . including expenses for labor, rent, utilities, insurance, professional fees," and more.[216] When applicable, "[t]he IRS application of Section 280E to medical cannabis businesses can result in a very high federal tax rate of 60 to 90 percent," which is said to be greater than their margin of profit in many cases.[217] In other words, a marijuana seller's income is overtaxed.

This 280E rule was tested in the long and outdrawn case between the IRS and Harborside Health Center of Oakland, California.[218] Harborside Health Center is a nonprofit medical-marijuana dispensary.[219] The Center's Oakland branch was audited by IRS in 2010.[220] Although the IRS found "Harborside's financial records to be in order, the IRS [still] slapped the center with a back-tax bill to the tune of $2.4 million."[221] The IRS alleged that the Center was precluded from legally claiming many of the deductions and expenses because of section 280E.[222] The IRS alleged, as a marijuana business, under 280E, the Center was barred from the "normal and necessary" deductions that are otherwise allowed for any other kind of business.[223] In June 2016, the Center tried to get the IRS to drop the back pay charges of $2.4 million.[224] The Center's lead attorney stated that the intent of Congress when the Act was passed is not being met today, because "Section 280E was passed during the height of the War on Drugs, many years before California and 24 other states legalized the use of medical cannabis."[225] He also said the Act was meant to apply to "drug dealers, not state-

215. I.R.C. § 280E (2012). ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business, or the activities which comprise such trade or business, consists of trafficking in controlled substances, within the meaning of Schedule I and II of the Controlled Substances Act, which is prohibited by federal law or the law of any state in which such trade or business is conducted.").

216. Harborside Health Ctr., *supra* note 214.

217. *Id*.

218. *Id*.

219. *See id.*

220. *Id*.

221. Guillermo Jimenez, *Historic Ruling in Legal Marijuana vs. IRS Could Be Just Around the Corner*, TAX REVOLUTION INST. (Sept. 30, 2016), http://taxrevolution.us/historic-ruling-legal-marijuana-vs-irs-just-around-corner/.

222. *Id*.

223. *Id.*

224. *Id*.

225. *Id*.

sanctioned cannabis dispensaries" and "[i]gnoring the intent of Congress, the IRS has chosen to apply 280E to legitimate cannabis businesses."[226] So, while the outcome of the decision is pending, it is bound to send a decisive message to state businesses regardless of the outcome.

In the interim, Pete Stark (D-CA) the original sponsor of Section 280E, has vehemently requested in public that state-legal marijuana businesses be excluded from the applicability of 280E.[227] Stark says that the IRS's interpretation of section 280E "undercuts legal medical marijuana dispensaries by preventing them from taking the full range of deductions allowed for other small businesses . . . [and] punishes the thousands of patients who rely on them for safe, legal, reliable access to medical marijuana as recommended by a doctor."[228]

Like removing marijuana classification from Schedule 1 of the CSA, it would be difficult to reverse the applicability of 208E on businesses classified as marijuana businesses under the CSA. However, only time and the forthcoming Harborside decision will tell whether United States tax authorities will treat medical cannabis as a legitimate enterprise or still as illicit drug trafficking.

VII. ISSUES WITH A FEDERAL MARIJUANA REFORM

Although the DOJ non-enforcement policy does not really seem to stop states from legalizing marijuana per se, it is only an interim solution because the policy could easily be changed from one administration to the next, as seen with the recent Sessions memo.[229]

Operating a marijuana business under the guise that the federal government would not go after the business entity or individual because of a guidance memo is relying only on a short-term fix.[230] Even if the DOJ non-enforcement policy was to protect marijuana business from federal criminal prosecution, the current conflict between state and federal law does not just disappear.[231] For example, a marijuana business operating in a state that has legalized marijuana does not automatically have access to banking services.[232]

226. Jimenez, *supra* note 221.

227. *Id.*

228. *Id.*

229. JONATHAN P. CAULKINS ET AL., OPTIONS AND ISSUES REGARDING MARIJUANA LEGALIZATION 3 (2015), https://www.rand.org/pubs/perspectives/PE149.html.

230. *Id.*

231. *See* Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 690 (2015).

232. Robin Abcarian, *Your business is legal, but you can't use banks. Welcome to the cannabis all-cash nightmare*, L.A. TIMES (Jan. 29, 2017, 3:00 AM), https://www.latimes.com/local/abcarian/la-me-abcarian-cannabis-cash-20170129-story.html; Aaron Klein, *Banking*

The guidance Policy Memo does not empower banks to deal with the marijuana business. On the contrary, the banks, if they were to transact business with that marijuana business entity or individual, will be running afoul of other federal banking laws.[233]

In the same vein, steep penalties would apply to marijuana businesses under Rule 280E, regardless of whether a guidance memo was in favor of operating the business under state law.[234] The longer the federal government abstains from getting involved in the prosecution of marijuana businesses because of a policy memo, the more permanent the policy becomes, as it may simply just continue in perpetuity. This indefinite non-enforcement scenario would tantamount to the executive branch exceeding its proper role as it effectively suspends a federal statute, thereby encroaching into the constitutional role of Congress.[235]

Lastly, issues arise when federal marijuana laws are not applied consistently in the same manner in all the states resulting in citizens of states who have not legalized marijuana being subjected to incarceration, while citizens in states that have legalized it could be making millions by engaging in the same activity.[236]

These issues show undoubtedly that the DOJ memos are nothing but a temporary fix to the state and federal marijuana conflict. Perhaps this is why other suggestions on how to resolve this state federal conflict have been made and pursued, including:

> 1) Preventing the DOJ from spending money to interfere with state marijuana laws; 2) providing an affirmative defense based on compliance with state marijuana laws; 3) allowing states to opt out of federal marijuana provisions; and 4) ending the federal ban on marijuana and replacing it with some sort of federal regulatory structure. [237]

Each of these options undoubtedly have pros and cons, but taking these options into consideration in moving forward in the marijuana state and federal debate is better than doing nothing.

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regulations create mess for marijuana industry, banks, and law enforcement, OR. LIVE (Apr. 20, 2018), https://www.oregonlive.com/opinion/index.ssf/2018/04/banking_regulations_create_mess.html.

233. *See, e.g.*, Hill, *supra* note 203, at 608 (explaining that according to federal law, any bank that provides marijuana related businesses with a checking account, debit or credit card, a small business loan, or any other services could be found guilty of money laundering or conspiracy).

234. *See* Harborside Health Ctr., *supra* note 214 (discussing the Tax Conundrum).

235. Kreit, *supra* note 231, at 695.

236. *See id.* at 696.

237. *Id.* at 699–700.

CONCLUSION

The pertinent question in the marijuana industry is what marijuana businesses should currently expect in terms of prosecution under federal law, given that on January 4, 2018, Attorney General Sessions rescinded the Cole Memo.[238] Perhaps the industry should be comforted by the facts that U.S. Attorneys have the discretion to determine which marijuana operations to prosecute.[239] How this will unfold, will only be seen with the passing of time.

Case law, *U.S vs. McIntosh* in particular, has held that the Rohrabacher-Farr Amendment prevents federal prosecution of conduct that is in compliance with state marijuana laws.[240] The court emphasized that medical marijuana is still illegal under the CSA and remains the law of the land and the decision of the court really does not change this underlying law.[241]

The 2017 Act, on the other hand, has some interesting and innovative issues presented that could be feasible in addressing the legality of marijuana businesses and federal law, but however fails to provide a regulatory framework and as such leaves a vacuum. The question remains, what is left to deal with this state-federal impasse?

Change in federal marijuana law does not appear to be imminent, but it is inevitable. With 29 states already having some form of marijuana legislation and with that seeming plausible for others, federal marijuana prohibitions days are short-lived. The tides will change, it is just a matter of time. If the ultimate goal is to address the state and federal law conflict, Congress cannot continue to turn a blind eye, but rather simply remove marijuana from the CSA, and proceed to regulate the market. On the other hand, Congress could completely do away with federal marijuana prohibitions, while giving the states the option to prohibit it.

238. Press Release, Sessions, *supra* note 55.

239. *Id*.

240. *See e.g.*, United States v. McIntosh, 833 F.3d 1163, 1179 (9th Cir. 2016).

241. *Id*. at 1169, 1176.