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BEYOND CRIMINAL PROSECUTION: HOW FEDERALIST TENSIONS IN MARIJUANA LAWS AFFECT STATE-LEGAL BUSINESSES

Gabriel Roberts[*]

INTRODUCTION

Frank and Sarah Arenas jointly owned a commercial building in Denver that consisted of two units: one where Frank grew and wholesaled marijuana, and another that the Arenas' leased out to a marijuana dispensary.[1] Both actions were legal under Colorado state law,[2] and the Arenas' complied with all state regulations.[3] After Sarah suffered a stroke in 2011, the Arenas' only source of income was her Social Security Disability Insurance, her pension fund, and the income derived from the operations of that commercial building.[4] When an eviction suit resulted in a $40,000 judgment for attorney's fees against the Arenas', they were forced to file bankruptcy.[5] But when the Arenas' filed their bankruptcy petition in February 2014, they were reminded that their actions in the commercial building remained illegal under federal law.[6] The court found that the act of administering the Arenas' estate alone would require the

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1. Arenas v. United States Tr. (*In re* Arenas), 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) [hereinafter *10th Circuit Arenas*].

2. *Id.*

3. *In re* Arenas, 514 B.R. 887, 889 (Bankr. D. Colo. 2014) [hereinafter *District Court Arenas*].

4. *Id.*

5. *10th Circuit Arenas*, 535 B.R. at 847–48.

6. *Id.* at 847.

case trustee to violate federal law and dismissed the case.[7] The Tenth Circuit Bankruptcy Appellate Panel affirmed this decision, preventing the Arenas' from getting protection from creditors, and preventing their creditors from getting a fair distribution of assets.[8] This case illustrated that the conflict between states that have legalized marijuana use and federal law still criminalizing marijuana goes beyond fear of criminal prosecution. In the areas of law primarily controlled by federal courts and law enforcement such as bankruptcy, intellectual property, and shipping, citizens engaging in action legal within their state cannot get the protection of those federal laws. The existing tension will only become more prevalent as more states join the legalization trend.

Currently, 33 states and the District of Columbia allow their citizens to use marijuana in some form; 22 allow for medical or therapeutic use: Arizona,[9] Arkansas,[10] Connecticut,[11] Delaware,[12] Florida,[13] Hawaii,[14] Louisiana,[15] Maryland,[16] Minnesota,[17] Missouri,[18] Montana,[19] New Hampshire,[20] New Jersey,[21] New Mexico,[22] New York,[23] North Dakota,[24] Ohio,[25] Oklahoma,[26] Pennsylvania,[27] Rhode Island,[28] Utah,[29] and West Virginia.[30] The District of Columbia and eleven states go further and allow for recreational use: Alaska,[31] California,[32] Colorado,[33] District of

7. *District Court Arenas*, 514 B.R. at 895.
8. *10th Circuit Arenas*, 535 B.R. at 854.
9. ARIZ. REV. STAT. § 36-2811 (LexisNexis 2019).
10. ARK. CONST. amend. 98, § 3.
11. CONN. GEN. STAT. § 21a-408a (2019).
12. DEL. CODE ANN. tit. 16, § 4903A (2019).
13. FLA. CONST. art. X, § 29.
14. HAW. REV. STAT. § 329-122 (2019).
15. LA. STAT. ANN. § 40:1046 (2019).
16. MD. CODE ANN., HEALTH–GEN. § 13-3313 (LexisNexis 2019).
17. MINN. STAT. § 152.32 (2019).
18. MO. CONST. art. 14, §1.
19. MONT. CODE ANN. § 50-46-301 (2019).
20. N.H. REV. STAT. ANN. § 126-X:2 (LexisNexis 2019).
21. N.J. REV. STAT. § 24:6I-5.1 (2019).
22. N.M. STAT. ANN. § 26-2B-4 (LexisNexis 2019).
23. N.Y. PUB. HEALTH LAW § 3369 (LexisNexis 2019).
24. N.D. CENT. CODE § 19-24.1-32 (2019).
25. OHIO REV. CODE ANN. § 3796.24 (LexisNexis 2019).
26. 63 OKL. STAT. ANN. § 420 (2019).
27. 35 PA. CONS. STAT. § 10231.102 (2019).
28. 21 R.I. GEN. LAWS § 28.6-4 (2019).
29. UTAH CODE ANN. § 58-37-3.7 (West 2019)
30. W. VA. CODE § 16A-3-2 (2019).
31. ALASKA STAT. § 17.38.020 (2019).
32. CAL. HEALTH & SAFETY CODE § 11362.1 (West 2019).
33. COLO. CONST. art. XVIII, § 16.

Columbia,[34] Illinois,[35] Maine,[36] Massachusetts,[37] Michigan,[38] Nevada,[39] Oregon,[40] Vermont,[41] and Washington.[42] Yet marijuana is still an illegal Schedule I drug at the federal level.[43]

The effects of this divergence in the law at the state and federal levels leaves citizens in a confusing, conflicted situation. Citizens can do something completely legal in their own state, but, at the same time, federal law and courts can penalize them for those actions. Not only are citizens forbidden from legally engaging in marijuana-related activities, but federal courts and agencies forbid them from getting the protection of federal laws.

This Note will look at the intersection between states that have legalized marijuana use in some form and the federal courts and agencies looking to uphold federal law that criminalizes marijuana use. This Note will not focus on criminal prosecutions for marijuana possession. Instead, the scope of this Note will be areas of law controlled primarily by federal law and how the federal illegality of marijuana does not allow citizens engaging in marijuana-related activities legal in their state to get the protection of those laws. Part I discusses the history of federal and state marijuana laws, and how those laws have tangled and clashed over time. Part II explains what constitutes an area of law under exclusive or primarily federal control. Part III continues by looking at examples of these areas—specifically, bankruptcy, intellectual property, and shipping—and how federal courts and law enforcement have responded to states that legalize marijuana in some form. Part IV presents proposed solutions for this issue. This Note will then briefly conclude.

I. HISTORY OF FEDERAL AND STATE MARIJUANA LAWS

Congress enacted the Controlled Substances Act (CSA) as part of President Nixon's "war on drugs" in 1970.[44] The CSA makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA.[45] The CSA authorizes the Attorney General to establish five schedules of controlled substances to regulate

34. D.C. CODE § 48-1201 (2019).
35. 410 ILL. COMP. STAT. 705/10-5 (2019).
36. ME. STAT. tit. 28-B § 101 (2019).
37. MASS. ANN. LAWS ch. 94C, § 32L (LexisNexis 2019).
38. MICH. COMP. LAWS SERV. § 333.27952 (LexisNexis 2019).
39. 2019 NEVADA LAWS CH. 595 (A.B. 533).
40. OR. REV. STAT. § 475b.065 (2017).
41. VT. STAT. ANN. tit. 18, § 4230e (2019).
42. WASH. REV. CODE ANN. § 69.50.4013 (LexisNexis 2019).
43. 21 U.S.C. § 812(c)(c)(10) (2012).
44. Gonzales v. Raich, 545 U.S. 1, 10 (2005).
45. *Id.* at 13.

their use, possession, and sale.[46] The CSA imposes the strictest controls and severest penalties on Schedule I and II drugs.[47] Marijuana is classified as a Schedule I drug under the CSA.[48] Drugs are classified in Schedule I because of high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.[49]

In 1973, Oregon pioneered decriminalization of marijuana by making possession of less than one ounce a civil offense.[50] The first state to legalize marijuana in some form was California in 1996 when California citizens passed Proposition 215, which became California's Compassionate Use Act, allowing medical use.[51] In 2012, Colorado and Washington became the first states to legalize the recreational use of marijuana.[52]

This developing issue of states legalizing marijuana in ways that went against the federal CSA began finding its way to the courts. Most famously, in *Gonzales v. Raich*,[53] the United States Supreme Court held that the CSA was a valid exercise of Congress's commerce power, even when used to prohibit California citizens from using medical marijuana within California in accordance with California law.[54] *Raich* dealt with California's Compassionate Use Act, which was designed to guarantee that California residents had access to marijuana for medical purposes and to encourage safe and affordable distribution of marijuana to patients in need.[55]

This increase in states differing from the federal government has caused confusion for both citizens and courts. Perhaps most emblematic of that confusion is the Tenth Circuit's divided opinion in *Fourth Corner Credit Union v. FRB*.[56] In *Fourth Corner*, a Colorado credit union sought injunctive relief after the Federal Reserve Bank of Kansas City (FRB) denied its application for a master account because of the credit union's connection to marijuana-related businesses.[57] A panel of the Tenth

46. Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 SW. U. L. REV. 447, 452 (2000).

47. *Id.*

48. 21 U.S.C. § 812(c)(c)(10) (2012).

49. 21 U.S.C. § 812(b)(1) (2012).

50. OR. REV. STAT. § 475.864(3) (2007) (repealed 2017) (incorporating the language of the 1973 decriminalization).

51. CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2018).

52. COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ANN. § 69.50.4013 (LexisNexis 2017).

53. 545 U.S. 1 (2005).

54. *Id.* at 9.

55. *Id.* at 5–6.

56. *See* Fourth Corner Credit Union v. FRB, 861 F.3d 1052, xx (10th Cir. 2017).

57. *Id.* at 1053.

Circuit ultimately ordered the District Court to dismiss the complaint without prejudice, but the three judges on the panel each authored their own opinion.[58] The first opinion felt that providing the relief the credit union sought would require the court to facilitate illegal activity,[59] and ultimately opined the case should be dismissed with prejudice.[60] The second opinion agreed that the case should be dismissed, but without prejudice, on ripeness grounds because the credit union attempted to alleviate the FRB's concerns over marijuana-related businesses with an amended complaint rather than a new application.[61] The third opinion disagreed that the case should be dismissed because dismissal presumed that the credit union would not follow the court's interpretation of the law.[62] What resulted from *Fourth Corner* was continued confusion over what exactly marijuana-related businesses, or financial institutions that wanted to support those businesses, should do going forward.

The Constitution makes clear that federal law is the "supreme law of the land,"[63] but, at the heart of *Fourth Corner*, was a dispute over the public policy of whether the federal government, specifically the United States Department of Justice (DOJ), wanted to interfere with these states that had legalized marijuana in some way. In August 2013, the Deputy United States Attorney General released a memorandum with guidance for United States Attorneys in federal marijuana prosecution that set out when the DOJ should interfere.[64] This 2013 memorandum updated guidance under the CSA for United States Attorneys after more states legalized the possession of small amounts of marijuana and created regulatory schemes for marijuana production, processing, and sales.[65] The 2013 memorandum set out priorities of enforcement for United States Attorneys to follow.[66] Overall, the memorandum prioritized

58. *Id.*

59. *Id.* at 1056.

60. *Id.* at 1058.

61. *Id.*

62. *Id.* at 1065.

63. U.S. CONST. art. VI, cl. 2.

64. *See generally* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to all United States Attorneys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

65. *Id.* at 1.

66. Those priorities were:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

federal prosecution and enforcement that did not interfere with the states laws legalizing marijuana.[67] This non-interference policy relied on expectations that state and local governments would implement strong and effective regulatory and enforcement systems.[68] The 2013 memorandum stressed that jurisdictions with those regulatory and enforcement systems would be less likely to threaten the priorities set out in the memorandum, and went as far as to say that those systems could address the federal priorities on their own, which would require even less federal enforcement.[69]

In February 2014, the Deputy Attorney General released a second memorandum dealing with federal marijuana prosecutions.[70] The 2014 memorandum reiterated the 2013 memorandum priorities,[71] but focused specifically on financial crimes.[72] While acknowledging the various financial crime laws that could be used against marijuana-related businesses, this memorandum stressed that the "limited" resources of the DOJ should be used to address only the most significant marijuana cases, reinforcing the non-interference policy in the 2013 memorandum.[73]

As stated, these are areas of public policy, and public policy changes. On January 4, 2018, a new Attorney General rescinded the 2013 and 2014 memorandums with his own memorandum to United States Attorneys.[74] Rather than follow the priorities set forth in the 2013 memorandum, the 2018 memorandum guided prosecutors to follow previously established

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5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associates with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property

Id. at 1–2.

67. *See id.*

68. *Id.* at 2.

69. *Id.* at 3.

70. *See generally* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to all United States Attorneys (Feb. 14, 2014), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf.

71. *Id.* at 1.

72. *Id.* at 2.

73. *Id.*

74. Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Just., to all United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download ("...previous guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.").

principles for federal prosecutions, not a non-interference policy.[75] The practical effect of rescinding the 2013 and 2014 memorandums is that it will further impair the ability of marijuana-related businesses to get the protection of federal laws.[76]

In *Fourth Corner*, the court, in discussing the 2014 memorandum, mentioned how Executive Branch decisions cannot undermine substantive law.[77] But the 2013 and 2014 memorandums were not the only guidance on this issue. In 2014, as part of the Consolidated and Further Continuing Appropriations Act, 2015 (2015 Appropriations Act), Congress included a section that forbid any funds made available to the DOJ from being used to prevent states that have legalized medical marijuana from implementing their own medical marijuana laws.[78] That section is commonly referred to as the "Rohrabacher-Farr Amendment" (RF Amendment) after its two sponsors in the House of Representatives.[79] The RF Amendment was originally interpreted by DOJ to only apply to prosecutions against state officials,[80] but the Ninth Circuit Court of Appeals later ruled that the RF Amendment forbid the use of congressional appropriations for prosecution of people using medical marijuana legally in their own state.[81]

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75. *Id.*

76. Kristina M. Wesch, *Rescission of the Cole Memorandum and Consequences for the Marijuana Industry*, N.Y. HEALTH L. BLOG (Jan. 5, 2018), https://www.nyhealthlawblog.com/2018/01/05/rescission-of-the-cole-memorandum-and-consequences-for-the-marijuana-industry/ ("It is anticipated that the rescission of the Cole Memorandum will, among other things, further impair the ability of those in the marijuana business to obtain leases, financing, and perhaps even legal assistance.").

77. Fourth Corner Credit Union v. FRB, 861 F.3d 1052, 1055–56 (10th Cir. 2017).

78. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015) ("None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, *to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.*") (emphasis added).

79. Letter from Rep. Dana Rohrabacher, Member of Cong., and Rep. Sam Farr, Member of Cong., to Eric Holder, Att'y Gen., U.S. Dep't of Just. (Apr. 8, 2015), https://american-safe-access.s3.amazonaws.com/documents/Rohrabacher-Farr_Letter_to_DOJ.pdf ("As the authors of the provision in question . . ."). The section is now known as the "Rohrabacher-Blumenauer Amendment" after Representative Farr retired and Representative Blumenauer replaced him as the co-sponsor. James Higdon, *Jeff Sessions Isn't Giving up on Weed. He's Doubling Down.*, POLITICO (Dec. 16, 2017), https://www.politico.com/magazine/story/2017/12/16/jeff-sessions-marijuana-216109.

80. Christopher Ingraham, *How the Justice Department Seems to Have Misled Congress on Medical Marijuana*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/08/06/the-justice-department-says-it-misled-congress-on-medical-marijuana/.

81. United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016).

The RF Amendment is not without critics in the Executive branch. On May 1, 2017, the Attorney General wrote a letter to Congress to oppose the inclusion of the RF Amendment in any future appropriations legislation.[82] He was not successful as Congress included the RF Amendment in the 2017 appropriations bill.[83] In a further critique of the RF Amendment, on May 5, 2017, when the President signed the 2017 Consolidated Appropriations Act, he included a note saying that he would treat the provision, "consistently with my constitutional responsibility to take care that the laws be faithfully executed."[84] While that statement does not remove the power of the RF Amendment, some have interpreted it to mean that the President will instruct the DOJ to ignore the Amendment in favor of following the CSA explicitly.[85] The Executive branch's response to the RF Amendment presents an ominous tone for those people and businesses who rely on laws in their state legalizing marijuana.

This battle of public policy featuring competing DOJ memorandums on interference with state law and Congressional limitations on spending discretion for medical marijuana prosecutions, underscores the difficulties presented when federal law says something that most states simply disagree with. Even more than a battle of policy and political views, this hurts people like the Arenas', who engage in marijuana-related activities in compliance with their state's law. Those people might be aware that their actions could lead to criminal prosecution, but they are likely unaware of how that policy limits their ability to get other legal protection.

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82. Letter from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Just., to Mitch McConnell, Majority Leader, U.S. Sen., Charles Schumer, Minority Leader, U.S. Sen., Paul Ryan, Speaker, U.S. H.R., and Nancy Pelosi, Minority Leader, U.S. H.R. (May 1, 2017) [hereinafter Sessions Letter].

83. Consolidated Appropriations Act, Pub L. No. 115-31, § 537, 131 Stat. 135, 228 (2017). Congress included the RF Amendment in the 2018 Consolidated Appropriations Act, which the President signed. Consolidated Appropriations Act, 2018, Pub L. No. 115-141, § 538, 132 Stat. 445 (2018). The 2019 Consolidated Appropriations Bill, which passed the House of Representatives as of publication time also included the RF Amendment. Consolidated Appropriations Act, 2019, H.R. 648, 116th Cong. (2019).

84. Press Release, Administration of Donald J. Trump, 2017, Presidential Statement on Signing the Consolidated Appropriations Resolution 2017 (May 5, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-h-r-244-law/ ("Division B, section 537 provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.").

85. 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.

II. AREAS OF FEDERAL JURISDICTION

In areas of the law under primarily federal jurisdiction, the concern goes beyond the fear that federal prosecutors will interfere with state-legal activities. In those areas, federal law requires that people seek any desired protection from federal agencies and courts, but it is unclear whether that protection will exist. Areas of federal jurisdiction are areas where the Constitution enumerated the power to Congress, and where Congress acted on that power with corresponding laws in the U.S. Code. This Part will focus on the actions of federal courts and agencies in interpreting those laws as they relate to the CSA and any state law at odds with the CSA.

A. *Bankruptcy*

For individuals or businesses with marijuana-related activities and their creditors, the protection of bankruptcy law does not exist. Article I, Section 8 of the U.S. Constitution gives Congress the power to establish uniform laws on bankruptcy.[86] Congress acted on its Constitutional power with Title 11 of the United States Code, which governs bankruptcy in the United States.[87] The bankruptcy system is overseen by the United States Trustee Program (USTP), a division of the DOJ.[88] The mission of the USTP is to, "promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public."[89] But for individuals and businesses that derive any income from a marijuana-related source, the USTP ensures that they will not be able to enjoy the protections of the bankruptcy system.

The Director of the USTP shared the program's view on marijuana-related bankruptcies in a statement to Congress on June 8, 2017 where he said that the USTP would move to dismiss all bankruptcies that involve marijuana assets.[90] The USTP's reason for dismissal is that the bankruptcy system cannot be used to facilitate illegal activity.[91] This statement reflected the views shared by the Director in a letter to

86. U.S. CONST. art. 1, § 8, cl. 4.

87. *See generally* 11 U.S.C. § 101 (2016).

88. 28 U.S.C. § 586 (2012).

89. DEP'T OF JUST., U.S. TR. PROGRAM STRATEGIC PLAN & MISSION FY 2012–2016, https://www.justice.gov/ust/strategic-plan-mission.

90. *A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program: Hearing before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 4-5 (2017) (statement of Clifford J. White III, Dir., Exec. Office for U.S. Trs., U.S. Dep't of Just.).

91. *Id.*

individual case trustees on April 26, 2017.[92] In that letter, the Director told those case trustees to notify the USTP if a marijuana-related bankruptcy was filed, and that the USTP would move to dismiss the case, claiming the bankruptcy laws do not allow the administration of marijuana-related assets.[93]

This position by the USTP is a relatively recent development that goes against historical cases where Bankruptcy courts administered marijuana assets with no difficulty. In both *Department of Revenue v. Kurth Ranch*[94] and *United States v. Klein (In re Chapman)*[95] the courts administered marijuana-related assets.[96] In *Kurth Ranch*, the Kurths filed a bankruptcy petition after Montana tried to implement a state tax against the Kurths for the possession of drugs.[97] The case made its way to the Supreme Court on the issue of whether this tax violated double jeopardy for taxing the Kurths after imposing a criminal penalty.[98] Nowhere was the issue of the bankruptcy courts overseeing an estate with marijuana-related assets brought forward.[99] In *Klein*, the debtor filed bankruptcy after the United States filed a civil forfeiture proceeding to seize his home for the alleged manufacture and distribution of marijuana within the home.[100] During the administration of the bankruptcy case, the trustee sold the house, creating the issue of whether the bankruptcy estate or the government owned the property, which brought the case before the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals.[101] Again, nowhere in the case did the Court discuss the issue of the bankruptcy court handling marijuana-related assets.[102]

Despite this, bankruptcy courts have followed the USTP's argument that they should dismiss cases involving marijuana-related assets. In *Arenas*, the Tenth Circuit Bankruptcy Appellate Panel stated succinctly that a debtor in a marijuana-related bankruptcy cannot obtain relief in a federal bankruptcy court.[103] Despite the earlier cases where bankruptcy courts handled debtors with illegal marijuana assets, the court made clear that, because marijuana-related activities are a federal crime, debtors

92. Letter from Clifford J. White III, Dir., Exec. Office for U.S. Trs., U.S. Dep't of Just., to Chapter 7 and Chapter 13 Trs. (Apr. 26, 2017).

93. *Id.*

94. 511 U.S. 767 (1994).

95. 264 B.R. 565 (2001).

96. *Kurth Ranch*, 511 U.S. at 773; *In re* Chapman, 264 B.R at 567.

97. *Kurth Ranch*, 511 U.S. at 773.

98. *Id.* at 769.

99. *See generally* Dep't of Rev. v. Kurth Ranch, 511 U.S. 767 (1994).

100. *In re Chapman*, 264 B.R. at 567.

101. *Id.* at 567–68.

102. *See generally In re* Chapman, 264 B.R 565 (2001).

103. Arenas v. United States Tr. (*In re* Arenas), 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015).

cannot obtain bankruptcy relief.[104] Without referencing the Director's letter to the individual case trustees, the court followed the letter's logic, citing the burden of requiring a case trustee to possess, sell, and distribute marijuana assets in violation of federal law.[105] The *Arenas* court did acknowledge that the debtors were in an unfortunate position caught between state and federal law,[106] but, regardless of how unfortunate the court found the situation, it still chose to not protect the Arenas' from their creditors, or ensure that those creditors got some equitable distribution of the Arenas' assets.[107]

While *Arenas* illustrated the unfortunate position of debtors, *In re Medpoint Mgmt.*,[108] from Arizona, illustrated how this negatively impacts creditors.[109] In *Medpoint Mgmt.*, a group of creditors filed an involuntary petition, forcing Medpoint Management, LLC ("Medpoint") into bankruptcy on October 7, 2014.[110] Medpoint, which managed a nonprofit medical marijuana dispensary,[111] defaulted on various agreements and failed to make monthly payments, leading its creditors to force Medpoint into bankruptcy to try and recoup some value from the agreements.[112] The court framed the issue as whether it should allow the involuntary petition by the creditors to force Medpoint into bankruptcy despite the fact that Medpoint's actions were illegal under federal law.[113] Relying on *Arenas*, the court decided to not grant the involuntary petition and dismissed the case.[114] The court further found that allowing the case to go forward would pose a risk of forfeiture or seizure to the individual case trustee and the estate.[115] In conclusion, the *Medpoint* court illustrated the underlying issue in these cases: federal courts feel forced to adhere to federal law.[116] As a result of that adherence, the creditors of Medpoint were denied the ability to have a bankruptcy court enforce their obligations against Medpoint.

Arenas and *Medpoint* are instructive because they illustrate how this disagreement of federal and state laws impacts both individuals and businesses looking for protection from their creditors and creditors

104. *Id.* at 849–50.
105. *Id.* at 852; *supra* note 88.
106. *Id.* at 854.
107. *Id.* at 849–50.
108. 528 B.R. 178 (Bankr. D. Ariz. 2015).
109. *Id.* at 186–87.
110. *Id.* at 180. Under 11 U.S.C. § 303, a creditor may use an involuntary petition to force a debtor into bankruptcy.
111. *Id.*
112. *Id.* at 182.
113. *Id.*
114. *Id.* at 184.
115. *Id.* at 185.
116. *Id.* at 188.

looking for satisfaction of their agreements with individuals and businesses. The protection of bankruptcy laws is an illusion in situations involving marijuana-related assets. In these cases, the USTP does not act on its mission to serve debtors, creditors, and the public, but instead leaves debtors and creditors unprotected. Federal courts, following the logic that they cannot distribute marijuana assets despite past examples of just that happening, assist the USTP in this new mission. The practical result is that debtors will be unable to have the bankruptcy court insulate them from creditors and creditors will be unable to have their usual mechanism to compel the payment of obligations.

B. *Intellectual Property*

The legal marijuana industry had sales of approximately $10 billion in 2017.[117] An industry of that size attracts businesses that may look to compete in the industry using intellectual property that protects their ideas.[118] However, federal intellectual property protection is generally not available to marijuana-related businesses.[119]

Article I, Section 8 of the U.S. Constitution gives Congress the power to promote the progress of science and arts by securing exclusive rights to authors and investors.[120] Congress acted on this constitutional power with Title 35 of the U.S. Code, which governs the United States patent process,[121] and Title 15, Chapter 22 of the U.S. Code, which governs trademarks.[122] Patent law exists to protect new, unobvious, and useful inventions and manufacturing processes.[123] The statutory definition of a trademark is "virtually limitless,"[124] and includes any word, name, symbol, device or combination thereof, used by a person or which a person has a bona fide intention to use in commerce, to identify and distinguish their goods from those manufactured or sold by others and to indicate the source of the goods.[125] The United States Patent and Trademark Office (USPTO) is responsible for granting and issuing patents and registering trademarks.[126] The USPTO's mission is to foster

117. Diamond Naga Siu, *How Much Was the Legal Weed Business Worth in 2017? About $10 Billion.*, VICE NEWS (Dec. 7, 2017), https://news.vice.com/en_us/article/5955ga/how-much-was-the-legal-weed-business-worth-in-2017-about-10-billion.

118. 1-2 Business of Intellectual Property § 2.01 (Matthew Bender, rev. ed. 2013) ("intellectual property has become one of the keys to competition").

119. Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 220 (2016).

120. U.S. CONST. art. I, § 8, cl. 8.

121. 35 U.S.C. § 1 (2000).

122. 15 U.S.C. § 1051 (2002).

123. 1 CHISUM ON PATENTS § 1 (2017).

124. 1 GILSON ON TRADEMARKS § 1.02(1)(a) (2017).

125. 15 U.S.C. § 1127 (2006).

126. 35 U.S.C. § 2(a)(1) (2012).

innovation, competitiveness, and economic growth, and to guide intellectual property policy.[127] The advent of a legal marijuana industry presents the opportunity for the USPTO to guide intellectual property policy in accordance with its mission; however, as discussed below, with few exceptions, it has failed to foster the competition that intellectual property law allows businesses to enjoy.[128]

For patents, marijuana-related inventions could fail the utility requirement of patentability, one of the statutory requirements for an invention to get patent protection.[129] Historically, to meet utility, the law only required that "the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society."[130] Today, although not applied broadly, the principle still stands that inventions without a lawful use lack utility.[131]

Despite the utility standard requiring a lawful use, the USPTO has granted patents related to marijuana. One researcher found over five hundred active cannabis-related patents[132] while a patent law professor noted how the USPTO has granted "dozens" of patents to the growing marijuana industry.[133] Even the federal government is the owner of a marijuana-related patent.[134] Cannabinoids as Antioxidants and Neuroprotectants, granted on October 7, 2003, was assigned to the U.S. Department of Health and Human Services (HHS).[135] After granting a patent titled Breeding, Production, Processing and Use of Specialty

127. U.S. PATENT AND TRADEMARK OFFICE, USPTO 2014-2018 STRATEGIC PLAN, https://www.uspto.gov/sites/default/files/documents/USPTO_2014-2018_Strategic_Plan.pdf (The full mission is, "[f]ostering innovation, competitiveness and economic growth, domestically and abroad by delivering high quality and timely examination of patent and trademark applications, guiding domestic and international intellectual property policy, and delivering intellectual property information and education worldwide, with a highly-skilled, diverse workforce.").

128. 1-2 Business of Intellectual Property Law, *supra* note 118, at 12.

129. 35 U.S.C. § 101 (1952).

130. Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817), *abrograted by In re* Fisher, 421 F.3d 1365 (Fed. Cir. 2005).

131. Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366–67 (Fed. Cir. 1999) ("[T]he principle that inventions are invalid if they are principally designed to serve immoral or illegal purposes has not been applied broadly in recent years."). The USPTO also awards patents to plant species that are non-naturally occurring, which this Note will not address. For an in-depth discussion of marijuana-related plant patents, see Kaylee Willis, *Avoiding the Chaos of Maryjane - A Conventional Approach to Intellectual Property Protection of Marijuana*, 17 J. MARSHALL REV. INTELL. PROP. L. 278 (2017).

132. Julie Weed, *US Patent Office Issuing Cannabis Patents To A Growing Market*, FORBES (July 24, 2017, 8:42 AM), https://www.forbes.com/sites/julieweed/2017/07/24/us-patent-office-issuing-cannabis-patents-to-a-growing-market/#6ce9d42268d4.

133. Craig Nard, *Companies are quietly patenting marijuana, and it could lead to a messy legal future*, BUS. INSIDER (July 8, 2017, 9:00 AM), https://www.businessinsider.com/companies-are-patenting-pot-and-it-could-lead-to-a-messy-legal-future-2017-7.

134. *See, e.g.*, U.S. Patent No. 6,630,507 (filed Apr. 21, 1999) (issued Oct. 7, 2003).

135. *Id.*

Cannabis on August 4, 2015,[136] a spokesperson for the USPTO stated that the USPTO generally issues utility and plant patents to all plants, including cannabis, provided they meet all statutory patent requirements.[137] The spokesperson went on to state that there are no additional restrictions applied to marijuana plants.[138]

While the statement by the USPTO spokesperson and the history of marijuana-related patents provide hope for the patent protection of marijuana-related inventions, a cautionary aspect remains. Federal courts have not had the chance to review the USPTO decisions to grant these marijuana-related patents.[139] A defendant in a patent infringement suit can escape liability by claiming the patent is invalid for failing to meet one of the statutory requirements, which requires the court to review the granting of the patent.[140] Further, courts may inquire into the validity of a patent even if there is no claim of infringement.[141] In the marijuana context, if an owner of a marijuana-related patent sought to enforce their patent against a marijuana grower, the grower could argue that the patent is unenforceable as a violation of federal law.[142] It is likely that a court reviewing that argument would rely on the utility requirement to say that the patent lacks any lawful use, making the patent invalid.[143]

Therefore, just as the protection of bankruptcy law is an illusion in cases involving marijuana-related assets, these marijuana-related patents are also illusions because of their potential unenforceability under federal court review. Even though the USPTO routinely grants marijuana-related patents, these patents may be a patent in name only, carrying no power of enforceability should an alleged infringer argue that the patent lacks any lawful use.[144]

Like patents, trademarks require that the use of the mark in commerce be a lawful use.[145] Unlike patents, trademark courts have had the ability to review marijuana-related marks. In *In re Morgan Brown*, the Trademark Trial and Appeal Board (TTAB) upheld a denial of federal

136. U.S. Patent No. 9,095,554 (filed Mar. 17, 2014) (issued Aug. 4, 2015).

137. Greg Walters, *What a Looming Patent War Could Mean for the Future of the Marijuana Industry*, VICE NEWS (Apr. 20, 2016, 12:55 PM), https://news.vice.com/article/a-patent-for-cannabis-plants-is-already-a-reality-and-more-are-expected-to-follow.

138. *Id.*

139. Nard, *supra* note 133.

140. 6A DONALD S. CHISUM, CHISUM ON PATENTS § 19.01 (2018).

141. *Id.*

142. Nard, *supra* note 133.

143. Manuela Cabal Carmona, *Dude, Where's My Patent?: Illegality, Morality, and the Patentability of Marijuana*, 51 VAL. U.L. REV. 651, 676–77 (2017).

144. *See generally* John Mansfield, *Mystery Cannabis Litigation Theatre 2017: Future Enforcement of Pot Patents*, CANNALAW BLOG (Nov. 5, 2017), https://www.cannalawblog.com/mystery-cannabis-litigation-theatre-2017-future-enforcement-of-pot-patents/.

145. *In re* Morgan Brown, 119 U.S.P.Q.2d 1350, 1 (T.T.A.B. 2016).

trademark protection to Morgan Brown, a resident of Washington, for the mark, "Herbal Access" because Brown's retail store sold marijuana.[146] While Brown's application did not make any direct references to marijuana, the examining attorney for the USPTO discovered marijuana references on Brown's website.[147] The TTAB found that evidence enough to support the conclusion that Brown engaged in the provision of marijuana.[148] Importantly, the TTAB was explicit in stating that it was "irrelevant" that Washington legalized marijuana.[149]

Morgan Brown stands out for the TTAB's willingness to find a marijuana reference when the application did not explicitly mention marijuana. The TTAB stated that is was proper for USPTO attorney to review evidence such as Brown's website to determine that the mark included marijuana references.[150] This differed from earlier practice where the registration of marijuana-related trademarks such as grow lights, publications, and even pipe and rolling papers were allowed because the trademarks refrained from referencing marijuana in the application.[151]

In *Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLC*,[152] the District Court for the Northern District of Illinois was presented with the question of whether to cancel a trademark that related to marijuana use.[153] *Republic Techs.* was a trademark dispute between two makers of cigarette rolling papers in which one party argued that the court must cancel the other party's trademarks because of their marijuana connections.[154] The court agreed that it must cancel a trademark where a trademark's use in commerce is not lawful.[155]

Morgan Brown remains the law for marijuana-related trademarks.[156] As such, businesses seeking federal trademark protection will be unable to get that protection if they operate a marijuana-related business, regardless of the business being legal in the state that it operates. A trademark serves the owner of the mark by expressing the standard of

146. *Id.* at 5.

147. *Id.* at 2.

148. *Id.* at 3.

149. *Id.* at 1 ("[T]he fact that the provision of a product or service may be lawful within a state is irrelevant to the question of federal registration when it is unlawful under federal law.").

150. *Id.* at 4.

151. Rebeccah Gan, *Roll Another (Serial) Number for the Road*, 7 LANDSLIDE 18, 19 (2015).

152. 262 F. Supp. 3d 605 (N.D. Ill. 2017).

153. *Id.* at 607.

154. *Id.* at 606.

155. *Id.* at 607. But the court avoided the issue by finding that a question of fact still remained as to whether the device constituted drug paraphernalia under the CSA, and stating that it would not decide a question of fact at the motion to dismiss stage. *Id.* at 608.

156. *E.g.*, *In re* PharmaCann LLC, 123 U.S.P.Q.2D (BNA) 1122, 2 (T.T.A.B. 2017) (citing *Morgan Brown* for requirement that use of mark in commerce be "lawful").

quality of the product or service and advertising, and a trademark protects the public from confusion and deception.[157] Without federal trademark protection, marijuana-related businesses cannot separate from the competition, and marijuana consumers in the public are unprotected.

C. *Postal Service*

The shipment of marijuana through the mail is illegal under the CSA.[158] Article 1, Section 8 of the Constitution gives Congress the power to establish post office and post roads.[159] Congress acted on its Constitutional power to establish post offices with Title 39 of the United States Code, which governs the United States Postal Service (USPS).[160] The U.S. Postal Inspection Service (USPIS) is tasked with enforcing the laws related to the shipment of marijuana through the USPS.[161] Testifying before the Senate Appropriations Committee on April 3, 2014, the then-Attorney General cited how the postal service was being used to facilitate drug dealing, and stated the DOJ needed to work with the USPS to solve the problem of drug dealing through the mail.[162] When contacted in regard to these comments, the USPS responded that the USPIS is committed to "eradicating" illegal drugs from the mail.[163] The USPS reiterated that it is illegal to send marijuana through the mail.[164]

In 2016, the USPIS, according to its annual report, made 1,850 arrests and 1,571 convictions for "Prohibited Mail Narcotics," which included narcotics, steroids, and drug proceeds and paraphernalia.[165] The annual report further highlighted that inspectors seized mail containing more than 37,000 pounds of illegal narcotics and $23.5 million in proceeds.[166] Marijuana-mail intercepts increased 18.4% in 2016, which the USPIS attributed to better detection strategies and collaboration with other federal agencies.[167] It is difficult to parse out how many of those intercepts and arrests related to citizens of states where marijuana is

157. 1-1 JEROME GILSON & ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 1.03 (2017).

158. 21 U.S.C. § 841(a)(1)-(2) (2010).

159. U.S. CONST. art. 1, § 8, cl. 7.

160. 39 U.S.C. § 101(a) (2008).

161. *About Us*, U.S. POSTAL INSPECTION SERV. (last visited Mar. 4, 2018), https://postalinspectors.uspis.gov/aboutus/laws.aspx.

162. RossScully, *Can You Get Away With Mailing Cannabis Through the USPS?*, LEAFLY: CANNABIS 101 (July 26, 2016), https://www.leafly.com/news/cannabis-101/mailing-cannabis-through-usps.

163. *Id.*

164. *Id.*

165. *United States Postal Inspection Service Annual Report 2016*, U.S. POSTAL INSPECTION SERV., 1, 41 (2017), https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL_web .pdf.

166. *Id.* at 7.

167. Steven Nelson, *Pot Mail Intercepts 18 Percent Higher Last Year*, U.S. NEWS (Mar. 3, 2017), https://www.usnews.com/news/articles/2017-03-03/pot-mail-intercepts-18-percent-higher-last-year.

legalized in some form because the USPIS does not track the state of origin for the packages, and the data includes international shipments.[168] *Raich* made clear that marijuana prosecution is within Congress's Commerce power because of the potential effects on interstate commerce.[169] Shipments across state or country borders are clearly within the purview of the federal government. However, shipments within, or to, a state where marijuana is legalized in some form raise the issue of federal law prohibiting citizens from enjoying their state law in a way that goes beyond criminal prosecution.

As for alternatives to the USPS, the three largest private shipping companies—United Parcel Service (UPS), Federal Express (FedEx), and DHL Express (DHL)—all include in their policies restrictions against mailing marijuana-related items.[170] Further, USPS is a preferred shipping method because First-Class letters and parcels are protected against search and seizure under the Fourth Amendment to the Constitution, and, as such, cannot be opened without a search warrant.[171] For marijuana shipped through a private shipping company, the "third-party doctrine" allows the government to search those packages without a warrant because the sender voluntarily turned the package over to a third-party, lowering their expectation of privacy.[172] The USPS does make efforts to meet its heightened warrant requirement by offering a $50,000 reward for

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168. *Id.*

169. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

170. *List of Prohibited Articles for Shipping*, UNITED PARCEL SERVICE, https://www.ups.com/us/en/help-center/shipping-support/prohibited-items.page (listing "Marijuana, including marijuana intended for medicinal use" under "the following articles are prohibited from shipment to all countries served by UPS"); *FedEx Freight 100-R Rules Tariff*, FEDEX FREIGHT, 41, http://www.fedex.com/us/freight/rulestariff/prohibited_articles.html (listing "Any substance that has not been approved for a medical use by the U.S. Food and Drug Administration and also has been listed as a Drug or Chemical of Concern by the U.S. Drug Enforcement Administration" under "Prohibited Items"); TERMS AND CONDITIONS OF CARRIAGE, DHL WORLDWIDE EXPRESS, https://importexpressonline.dhl.com/iea/html/US/en/ShipmentTermsAndConditions.html ("Shipper agrees that its Shipment is acceptable for transportation and is deemed unacceptable if: ... DHL decides it cannot transport an item safely or legally (such items include but are not limited to: animals, bullion, currency, bearer form negotiable instruments, precious metals and stones, firearms, parts thereof and ammunition, human remains, pornography and illegal narcotics/drugs).").

171. *Frequently Asked Questions*, U.S. POSTAL INSPECTION SERV., https://www.uspis.gov/press-kit/.

172. United States v. Miller, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."). In November 2017, the Supreme Court heard arguments in a case challenging the applicability of the third-party doctrine to cell phone location data. *See* Ian Samuel, *Carpenter and Our Third-Party Future*, HARV. L. REV. BLOG (Oct. 27, 2017), https://blog.harvardlawreview.org/carpenter-and-our-third-party-future/.

information leading to the arrest and conviction of anyone under the CSA.[173]

The prosecution of marijuana shipment through the mail is more than the stopping of large-scale drug rings furthering their business through international shipment.[174] It has a decidedly local feel, and it suppresses the ability of people in states that have legalized marijuana in some way to exercise that right.[175] Despite the number of marijuana-mail intercepts increasing by 18.4% in 2016, the average weight of those intercepts dropped to under four pounds, down 27% from 2012.[176] John Rooney, who led counter-narcotics efforts for USPIS in Philadelphia before retiring in 2001, noted that in the 1990s, USPIS would not investigate anything below 10 pounds because it was not worth their limited resources.[177] The drop in average weight signifies that, with advances in detection technology, lower weight packages are now worth the USPIS's time, which only increases the odds of smaller, local prosecutions by federal enforcement.

III. PROPOSED SOLUTIONS

There are many practical solutions that range from de-, or re-, scheduling marijuana under the CSA to reinstituting enforcement policies like the 2013 and 2014 memorandums that would provide some guidance and clarity to citizens participating in the legal marijuana industry of their state. While many of these solutions have failed in the past, the shifting tide of more states legalizing marijuana makes them worth considering again. In addition to the now 30 states and the District of Columbia that have legalized marijuana in some form,[178] 61% of Americans support legalization of marijuana.[179] The views of the public require a change in the policy.

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173. Poster 296 - Notice of Reward, U.S. POSTAL SERV. (July 2006), http://about.usps.com/posters/pos296/welcome.htm.

174. *Compare* John Saul, *Drug Ring That Used Fedex Shipped $22 Million Worth of Marijuana from California to New York*, NEWSWEEK, Oct. 19, 2017, http://www.newsweek.com/drug-ring-marijuana-new-york-california-fedex-shipped-packages-millions-688965, *with Wesleyan Student Arrested After Receiving Marijuana in Mail: Middletown Police*, NBC CONNECTICUT, Feb. 13, 2018, https://www.nbcconnecticut.com/news/local/Wesleyan-Student-Arrested-After-Receiving-Marijuana-in-Mail-Middletown-Police-473910973.html.

175. Tom Lloyd, *Medical pot can be 'godsend' for chronic pain sufferers*, MELBOURNE BEACHSIDER, Feb. 8, 2018, at 26, 27 (noting the wait for people in a small Florida town with no local medical marijuana dispensary and the illegality of shipping through USPS).

176. Nelson, *supra* note 167.

177. *Id.*

178. *Supra* notes 9–42 and accompanying text.

179. Abigail Geiger, *About six-in-ten Americans support marijuana legalization*, PEW RESEARCH CENTER (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/.

A. *Changes Under the CSA*

Of course, the broadest solution would be legalizing marijuana in some way at the federal level by rescheduling it from a Schedule I drug under the CSA. Schedule I is the most restrictive schedule, reserved for drugs with a high potential for abuse, no accepted medical use in the United States, and a lack of accepted safety for use under medical supervision.[180] Schedules II through V have lowered versions of similar requirements.[181] There are two ways that marijuana could be rescheduled:

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180. 21 U.S.C. § 812(b)(1) (2012).

181. 21 U.S.C. § 812(b)(2)-(5) (2012). Specifically, the requirements for each schedule are:

> (2) SCHEDULE II.
>
> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
>
> (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.
>
> (3) SCHEDULE III.
>
> (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
>
> (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.
>
> (4) SCHEDULE IV.
>
> (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
>
> (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.
>
> (5) SCHEDULE V.
>
> (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
>
> (C) Abuse of the drug or other substance may lead to limited physical

(1) administratively by Attorney General rulemaking or (2) legislatively through passage of a bill by Congress.

1. Administrative Rescheduling

The CSA provides a process for administrative rescheduling through an Attorney General rulemaking procedure.[182] Under the procedure, the Attorney General may add or remove any drug from the schedules, or transfer any drug between schedules, if they do not believe the drug meets the requirements of the schedule.[183] Before making that determination, the Attorney General must request from the Secretary of Health and Human Services (HHS) a scientific and medical evaluation and the recommendations of the Secretary.[184] The Attorney General must also follow international treaties in determining whether to schedule or remove a drug.[185] The Attorney General delegated this authority to the Drug Enforcement Agency (DEA), a division of the DOJ.[186] Any interested person may submit a petition for rescheduling to the DEA.[187]

There have been six petitions since the passage of the CSA in 1970. None have been successful, but the first petition, filed less than two years after the CSA became law, resulted in a 22-year legal battle, and set the standards for how this procedure occurs.

The National Organization for the Reform of Marijuana Laws (NORML) submitted the first petition in 1972.[188] The DEA (then known as the Bureau of Narcotics and Dangerous Drugs) originally rejected the filing of the petition because the DEA believed that NORML did not have the authority to initiate the proceedings.[189] The basis for the rejection relied on the Single Convention on Narcotics Drugs (Single Convention), an international treaty, and the requirements under the CSA to establish

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> dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Id.

182. 21 U.S.C. § 811(a) (2015).

183. *Id.*

184. 21 U.S.C. § 811(b) (2015).

185. 21 U.S.C. § 811(d)(1) (2015) ("If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 202(b) [21 USCS § 812(b)] and without regard to the procedures prescribed by subsections (a) and (b) of this section.").

186. 28 C.F.R. § 0.100(b) (2003).

187. 21 C.F.R. § 1308.43(a) (2010).

188. Nat'l Org. for Reform of Marijuana Laws (NORML) v. Ingersoll, 497 F.2d 654, 655 (D.C. Cir. 1974).

189. *Id.* at 656.

controls that follow international treaties.[190] In 1974, the Circuit Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed this decision to reject the petition for filing, and remanded the petition to the DEA to accept and review the petition on its merits.[191] Specifically, the D.C. Circuit said that in view of the Single Convention's exclusion of marijuana leaves from the terms "cannabis" and "cannabis resin," the DEA should consider rescheduling marijuana leaves.[192] The D.C. Circuit suggested that the DEA conduct the review in two phases: in the first phase, consider whether there is any "latitude" consistent with treaty obligations; and in the second phase, if some latitude was found, consider how the executive discretion should be exercised.[193]

Three years later, the same parties were before the D.C. Circuit again, this time on the issue of the scientific and medical evaluation required under the CSA rescheduling procedure.[194] In the intervening years, the DEA held a hearing before an Administrative Law Judge (ALJ) on those first phase issues.[195] The ALJ held that, consistent with the Single Convention, cannabis and cannabis resin could be rescheduled to Schedule II, cannabis leaves could be rescheduled to Schedule V, and cannabis seeds and synthetic cannabis could be decontrolled.[196] Further, the ALJ rejected the DEA's interpretation of the section requiring referral for a scientific and medical examination and required that the DEA follow the referral and hearing procedures.[197]

On appeal from that ALJ order, the Acting Administrator of the DEA denied NORML's petition.[198] While the Acting Administrator agreed that certain aspects of marijuana could be rescheduled, he relied on a letter from the Acting Assistant Secretary of Health to say that there is no accepted medical use of marijuana; therefore, it could not be removed from Schedule I.[199] The D.C. Circuit again reversed this DEA decision, and remanded the case back to the DEA, requiring the agency to follow through on the scientific and medical examination referral requirement.[200] The D.C. Circuit specifically instructed the Secretary of HHS to make "separate evaluations and recommendations" for various

190. *Id.*

191. *Id.* at 660.

192. *Id.* at 658, 660.

193. *Id.* at 661, n.17.

194. Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enf't Admin., U. S. Dep't of Justice, 559 F.2d 735, 738 (D.C. Cir. 1977).

195. *Id.* at 742.

196. *Id.*

197. *Id.*

198. *Id.*

199. Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enf't Admin., U.S. Dep't of Justice, 559 F.2d 735, 742–43 (D.C. Cir. 1977).

200. *Id.* at 757.

marijuana-related substances.[201] In 1980, three years later, the D.C. Circuit again ordered the DEA to refer all the substances at issue to HHS for scientific and medical findings and recommendations on scheduling, as required by the CSA.[202]

On August 21, 1986, 14 years after the filing of the petition, hearings began in front of an ALJ on NORML's petition.[203] The hearings lasted almost two years, concluding on June 10, 1988.[204] The ALJ found it clear that many people believed marijuana has an accepted medical use in treatment in the United States.[205] The ALJ concluded that CSA not only permitted, but required, the transfer of marijuana from Schedule I to Schedule II.[206] The DEA rejected the recommendation of the ALJ, and maintained marijuana as a Schedule I drug.[207] This decision again reached the D.C. Circuit, which remanded the case back to the DEA once more because the court was unclear how much weight the DEA gave to certain factors the court found logically impossible.[208] On remand, the DEA concluded that they had not relied on two of the impossible factors, explained the other, and again denied the petition.[209] That decision was appealed to the D.C. Circuit, which in 1994, released its fifth and final opinion related to NORML's petition, siding with the DEA and denying the petition for review.[210] In 1994, 22 years after NORML originally petitioned the DEA to reschedule marijuana, the petition was finally dead.[211]

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201. *Id.*

202. NORML v. DEA, No. 79-1660, (D.C. Cir. Oct. 16, 1980) (unpublished order).

203. Marijuana Rescheduling Petition, Docket No. 86-22 (Dep't Justice D.E.A., Sept. 6, 1988) (decision of Adm. Law Judge), http://www.druglibrary.org/olsen/MEDICAL/YOUNG/young1.html.

204. *Id.* at 4–5.

205. *Id.* at 26.

206. *Id.* at 67.

207. All. for Cannabis Therapeutics v. Drug Enf't Admin., 930 F.2d 936, 938 (D.C. Cir. 1991).

208. *Id.* at 940–41.

209. All. for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131, 1134 (1994); *see also* Marijuana Scheduling Petition; Denial of Petition; Remand 57 Fed. Reg. 10,499, 10,507 (Mar. 26, 1992).

210. All. for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131, 1133 (1994).

211. *Id.*

Five other petitions have since followed the NORML petition.[212] The DEA denied all five petitions,[213] with the most recent petition currently awaiting a response to a petition for review to the D.C. Circuit.[214] The consistent denial of petitions gives the impression that the categorical ban on marijuana is here to stay for the foreseeable future.[215]

The history of the DEA petition process shows the difficulty in rescheduling marijuana through this procedure. Given that the DEA is a component of the DOJ, and the discussion above regarding the shifting policy of the DOJ towards marijuana enforcement, the likelihood of changing marijuana's placement under the CSA through petitions to the DEA appears unlikely. However, if that policy were to shift again, the D.C. Circuit and ALJs have shown that this procedure is not without hope because both have made clear that marijuana does not meet the requirements of a Schedule I substance.

2. Legislative Proposals

The CSA is federal legislation, so Congress could also amend the scheduling of marijuana through legislation directed at that goal. On June 23, 2011, Representative Barney Frank (D.-Mass.), along with five other representatives—one Republican and four Democrats—introduced House Resolution 2306, the "Ending Federal Marijuana Prohibition Act of 2011."[216] The Ending Federal Marijuana Prohibition Act amends the CSA by striking marijuana from its prohibitions except as they relate to

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212. In chronological order, those petitions were: 1995 by John Gettman and High Times magazine, Gettman v. DEA, 290 F.3d 430, 432 (D.C. Cir. 2002); 2002 by the Coalition for Rescheduling Cannabis, Press Release, The Coal. for Rescheduling Cannabis, Nat'l Coal. Seeks Recognition of the Accepted Medical Use of Cannabis in the U.S.; Petition Provides Scientific Argument For Rescheduling (Oct. 9, 2002), http://www.drugscience.org/PR/10-9-02_filing.htm; 2009 by Bryan Krumm, a psychiatric nurse practitioner, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767, 53,767 (Aug. 12, 2016); 2011 by Lincoln D. Chaffe and Christine O. Gregoire, the governors of Rhode and Washington, respectively, Petition from Lincoln D. Chafee, Governor, Rhode Island, and Christine O. Gregoire, Governor, Washington, to Michelle Leonhart, Acting Administrator, Drug Enforcement Agency (Nov. 30, 2011); 2017 by Krumm, Letter from Robert W. Patterson, Acting Administrator, Drug Enforcement Agency, U.S. Dep't of Just. To Bryan A. Krumm (Jan. 16, 2018).

213. *Gettman*, 290 F.3d at 431, 436; Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,552 (July 8, 2011) (upheld by Ams. for Safe Access v. DEA, 706 F.3d 438, 440 (D.C. Cir. 2013); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. at 53,767; Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,688 (Aug. 12, 2016); Patterson, *supra* note 212, at 1–2.

214. Petition for Review of an Order of the United States Drug Enforcement Agency, Krumm v. U.S. Drug Enforcement Agency, No. 18-1058 (D.C. Cir. Feb. 12, 2018).

215. David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 573 n.14 (2013).

216. *Id.*

shipping or transporting marijuana into states where it is still illegal.[217] The 2011 version of the Ending Federal Marijuana Prohibition Act died in committee,[218] but a version of the same bill has been introduced again in 2013,[219] 2015,[220] and 2017.[221] The 2013[222] and 2015[223] versions of the bill were not enacted. The 2017 version is still pending.[224]

The Ending Federal Marijuana Prohibition Act was the first bill introduced to completely end federal marijuana prohibition.[225] But it was not the first bill introduced to address the issues of marijuana prosecution. On September 16, 1981, Representatives Stewart McKinney (R.-Conn.) and Newt Gingrich (R.-Ga.) introduced House Resolution 4498 in the 97th Congress, titled "A bill to provide for the therapeutic use of marijuana in situations involving life-threatening illnesses and to provide adequate supplies of marijuana for such use."[226] H.R. 4498 would have permitted the distribution of medical marijuana to hospitals and pharmacies for the purposes of treating glaucoma or nausea for cancer patients, or for research.[227] Despite signing on 84 co-sponsors—53 Democrats, 31 Republicans, and one Independent—the bill died in committee.[228] Representative McKinney introduced similar legislation in the 98th[229] and 99th[230] Congresses.

On November 10, 1995, during the 104th Congress, Representative Frank brought back McKinney's bill with H.R. 2618, 104th Cong. (1995). H.R. 2618 featured 18 co-sponsors—14 Democrats, 3 Republicans, and one Independent[231]—but it did not survive

217. H.R. 2306, 112th Cong. (2012).

218. *H.R. 2306 (112th): Ending Federal Marijuana Prohibition Act of 2011*, GOVTRACK, https://www.govtrack.us/congress/bills/112/hr2306 (last visited Apr. 13, 2018).

219. H.R. 499, 113th Cong. (2013).

220. S. 2237, 114th Cong. (2015).

221. H.R. 1227, 115th Cong. (2017).

222. *H.R. 499 (113th): Ending Federal Marijuana Prohibition Act of 2013*, GOVTRACK, https://www.govtrack.us/congress/bills/113/hr499 (last visited Apr. 13, 2018).

223. *S. 2237 (114th): Ending Federal Marijuana Prohibition Act of 2015*, GOVTRACK, https://www.govtrack.us/congress/bills/114/s2237 (last visited Apr. 13, 2018).

224. *H.R. 1227: Ending Federal Marijuana Prohibition Act of 2017*, GOVTRACK, https://www.govtrack.us/congress/bills/115/hr1227 (last visited Apr. 13, 2018).

225. Joel Connelly, *Reps. Frank and Paul: Let states legalize pot*, SEATTLEPI (June 22, 2011, 12:44PM), https://blog.seattlepi.com/seattlepolitics/2011/06/22/reps-frank-and-paul-let-states-legalize-pot/.

226. H.R. 4498, 97th Cong. (1981).

227. *Id.*

228. *Id.*

229. H.R. 2282, 98th Cong. (1983).

230. H.R. 2232, 99th Cong. (1985).

231. *Cosponsors: H.R.2618—104th Congress (1995-1996)*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/house-bill/2618/cosponsors (last visited Apr. 13, 2018).

committees.[232] In the next Congress, the 105th, on June 4, 1997, Representative Frank introduced H.R.1782, the "Medical Use of Marijuana Act," which sought to reschedule marijuana from Schedule I to Schedule II.[233] Representative Frank introduced the same bill, under various names, in the 106th Congress,[234] 107th Congress,[235] 108th Congress,[236] and 109th Congress.[237] In the 110th Congress, on April 17, 2008, Representative Frank introduced the "Medical Marijuana Patient Protection Act," which prohibited any provision of the CSA from interfering with the medical use of marijuana in states where the state legalized the use.[238] The "Medical Marijuana Patient Protection Act" was reintroduced in the 111th Congress,[239] the 112th Congress,[240] and the 113th Congress.[241]

The above bills are only a few examples of attempted legislative action to change federal marijuana laws. A review of legislation shows that, since 2012 when Colorado and Washington legalized marijuana recreationally, 89 bills have been introduced in either chamber of Congress directed at changing the federal marijuana law.[242] None of the

232. *All Actions H.R.2618—104th Congress (1995-1996)*, CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/house-bill/2618/all-actions (last visited Apr. 13, 2018).

233. H.R. 1782, 105th Cong. (1997).

234. H.R. 912, 106th Cong. (1999).

235. H.R. 1344, 107th Cong. (2001); H.R. 2592, 107th Cong. (2001).

236. H.R. 2233, 108th Cong. (2003).

237. H.R. 2087, 109th Cong. (2005).

238. H.R. 5842, 110th Cong. (2008).

239. H.R. 2835, 111th Cong. (2009).

240. H.R. 1983, 112th Cong. (2011).

241. H.R. 689, 113th Cong. (2013).

242. The proposed legislation was: States' Medical Marijuana Property Rights Protection Act, H.R. 6335, 112th Cong. (2012); National Commission on Federal Marijuana Policy Act of 2013, H.R. 1635, 113th Cong. (2013); Respect State Marijuana Laws Act of 2013, H.R. 1523, 113th Cong. (2013); Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013); Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. (2013); Marijuana Tax Equity Act of 2013, H.R. 501, 113th Cong. (2013); States' Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. (2013); States' Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. (2013); Lucid Act, H.R. 4179, 113th Cong. (2014); LUMMA, H.R. 4498, 113th Cong. (2014); Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015); Marijuana Tax Revenue Act of 2015, H.R. 1014, 114th Cong. (2015); CARERS Act of 2015, H.R. 1538, 114th Cong. (2015); Compassionate Access Act, H.R. 1774, 114th Cong. (2015); Respect State Marijuana Laws Act of 2015, H.R. 1940, 114th Cong. (2015); Marijuana Businesses Access to Banking Act of 2015, H.R. 2076, 114th Cong. (2015); LUMMA, H.R. 2373, 114th Cong. (2015); Lucid Act of 2015, H.R. 2598, 114th Cong. (2015); States' Medical Marijuana Property Rights Protection Act, H.R. 262, 114th Cong. (2015); Respect States' and Citizens' Rights Act of 2017, H.R. 3629, 114th Cong. (2015); State Marihuana And Regulatory Tolerance Enforcement Act, H.R. 3746, 114th Cong. (2015); Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015); Marijuana Business Access to Banking Act of 2015, S.1726, 114th Cong. (2015); MAILS Act, H.R. 4467, 114th Cong. (2016); CBD Oil Act of 2016, H.R. 4779, 114th Cong. (2016); Medical Marijuana

bills have been successful, but this increasing awareness by members of Congress on both sides of the aisle shows some hope that legislation may be the route to amending the schedules under the CSA. Pressure from states may also increase the likelihood of success from this route. On

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Research Act of 2016, H.R. 5549, 114th Cong. (2016); MAILS Act, S. 2504, 114th Cong. (2016); MEDS Act, S. 3077, 114th Cong. (2016); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017); Marijuana Revenue and Regulation Act, H.R. 1823, 115th Cong. (2017); Responsibly Addressing the Marijuana Policy Gap Act of 2017, H.R. 1824, 115th Cong. (2017); Regulate Marijuana Like Alcohol Act, H.R. 1841, 115th Cong. (2017); To provide for the rescheduling of marijuana into schedule III of the Controlled Substances Act., H.R. 2020, 115th Cong. (2017); SAFE Act of 2017, H.R. 2215, 115th Cong. (2017); Charlotte's Web Medical Access Act of 2017, H.R. 2273, 115th Cong. (2017); Respect States' and Citizens' Rights Act of 2017, H.R. 2528, 115th Cong. (2017); CARERS Act of 2017, H.R. 2920, 115th Cong. (2017); States' Medical Marijuana Property Rights Protection Act, H.R. 331, 115th Cong. (2017); Medical Marijuana Research Act of 2017, H.R. 3391, 115th Cong. (2017); State Marihuana And Regulatory Tolerance Enforcement Act, H.R. 3534, 115th Cong. (2017); LUMMA, H.R. 714, 115th Cong. (2017); Compassionate Access Act, H.R. 715, 115th Cong. (2017); Respect State Marijuana Laws Act of 2017, H.R. 975, 115th Cong. (2017); Therapeutic Hemp Medical Access Act of 2017 S. 1008, 115th Cong. (2017); CARERS Act of 2017, S. 1374, 115th Cong. (2017); Marijuana Justice Act of 2017, S. 1689, 115th Cong. (2017); CARERS Act of 2017, S. 1764, 115th Cong. (2017); Marijuana Revenue and Regulation Act, S.776, 115th Cong. (2017); Responsibly Addressing the Marijuana Policy Gap Act of 2017, S.780, 115th Cong. (2017); Marijuana Justice Act of 2018, H.R. 4815 (2018); MEDS Act, H.R. 4825, 115th Cong. (2018); Sensible Enforcement of Cannabis Act of 2018, H.R. 5050, 115th Cong. (2018); Jobs and Justice Act of 2018, H.R. 5785, 115th Cong. (2018); STATES Act, H.R. 6043, 115th Cong. (2018); STATES Act, S. 3032, 115th Cong. (2018); Marijuana Freedom and Opportunity Act, S. 1374, 115th Cong. (2018); Veterans Medical Marijuana Safe Harbor Act, S. 3409, 115th Cong. (2018); MAPLE Act of 2018, H.R. 7275, 115th Cong. (2018); CARERS Act of 2019, H.R. 127, 116th Cong. (2019); LUMMA, H.R. 171, 116th Cong. (2019); Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. (2019); Sensible Enforcement of Cannabis Act of 2019, H.R. 493, 116th Cong. (2019); Marijuana Revenue and Regulation Act, S. 420, 116th Cong. (2019); Responsibly Addressing the Marijuana Policy Gap Act of 2019, S. 421, 116th Cong. (2019); Responsibly Addressing the Marijuana Policy Gap Act of 2019, H.R. 1119, 116th Cong. (2019); Marijuana Revenue and Regulation Act, H.R. 1120, 116th Cong. (2019); Veterans Medical Marijuana Safe Harbor Act, H.R. 1151, 116th Cong. (2019); Veterans Medical Marijuana Safe Harbor Act, S. 445, 116th Cong. (2019); Tribal Marijuana Sovereignty Act of 2019, H.R. 1416, 116th Cong. (2019); Marijuana Justice Act of 2019, H.R. 1456, 116th Cong. (2019); Marijuana Justice Act of 2019, S. 597, 116th Cong. (2019); Ending Federal Marijuana Prohibition Act of 2019, H.R. 1588, 116th Cong. (2019); SAFE Banking Act of 2019, H.R. 1595, 116th Cong. (2019); Next Step Act of 2019, S. 697, 116th Cong. (2019); Veterans Equal Access Act, H.R. 1647, 116th Cong. (2019); Next Step Act of 2019, H.R. 1893, 116th Cong. (2019); Respect States' and Citizens' Rights Act of 2019, H.R. 2012, 116th Cong. (2019); Secure And Fair Enforcement Banking Act of 2019, S. 1200, 116th Cong. (2019); MAPLE Act of 2019, H.R. 2703, 116th Cong. (2019); Marijuana Freedom and Opportunity Act, H.R. 2843, 116th Cong. (2019); Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong. (2019); Homegrown Act of 2019, H.R. 3544, 116th Cong. (2019); State Cannabis Commerce Act, H.R. 3546, 116th Cong. (2019); Removing Marijuana from Deportable Offenses Act, S. 2021, 116th Cong. (2019); State Cannabis Commerce Act, S. 2030, 116th Cong. (2019); CLAIM Act, S. 2201, 116th Cong. (2019); Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. (2019); MORE Act of 2019, S. 2227, 116th Cong. (2019); CLAIM Act, H.R. 4074, 116th Cong. (2019).

September 22, 2017, the California Senate formally voted to request that the federal government reschedule marijuana from Schedule I.[243] This request by the California Senate will be sent to the President, Vice President, Senate Majority Leader, Speaker of the House, California's two Senators, and California's 53 Representatives, meaning that it could spur the introduction of another bill with more popular support.[244]

B. *Changes to Enforcement Policy*

The DOJ can advise its attorneys and the other federal agencies it works with on how to enforce marijuana-related laws. The 2013, 2014, and 2018 memorandums discussed above are examples of this guidance.[245] This guidance extends beyond criminal prosecution for U.S. Attorneys and into non-criminal consequences of the law, the subject of this Note. The USTP is a division of the DOJ.[246] The USPIS works with the U.S. Attorneys when enforcing shipping.[247] The USPTO has worked closely in the past with other federal agencies, including the DOJ.[248]

On January 25, 2018, 54 members of Congress—10 Senators and 44 Representatives; 49 Democrats and five Republicans—signed a letter to the President regarding the guidance in the 2018 memorandum.[249] The letter warned that rescinding the 2013 and 2014 memorandums put "jobs, small businesses, state infrastructure, consumers, minorities, and patients at risk."[250] The letter requested that the President urge the reinstatement of the non-interference policy.[251]

The guidance does not only come from the DOJ. On December 14, 2016, ten Senators—seven Democrats, two Independents, and one Republican—sent a letter to the Acting Director of the Financial Crimes Enforcement Network (FinCEN), asking FinCEN to provide guidance to

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243. Tom Angell, *California Officially Calls on Feds to Reclassify Marijuana*, FORBES (Sept. 18, 2017, 10:15 AM), https://www.forbes.com/sites/tomangell/2017/09/18/california-officially-calls-on-feds-to-reclassify-marijuana/#6ead99a8427a; *see also* S.J. Res. 5 (Cal. 2017).

244. Angell, *supra* note 243.

245. *See supra* notes 64–75 and accompanying text.

246. *The United States Trustee Program*, U.S. DEP'T OF JUST., https://www.justice.gov/ust/about-program (last updated May 12, 2016) ("The United States Trustee Program is a component of the Department of Justice...").

247. *Mission Statement*, U.S. POSTAL INSPECTION SERV., https://postalinspectors.uspis.gov/aboutus/mission.aspx ("Inspectors work with U.S. Attorneys, other law enforcement, and local prosecutors to investigate cases and prepare them for court.").

248. *Federal Agencies Tackling Trademark Scams*, U.S. PATENT AND TRADEMARK OFFICE (Aug. 2, 2017), https://www.uspto.gov/blog/director/entry/federal_agencies_tackling_trademark_scams.

249. Letter from Sen. Elizabeth Warren, ET. AL., to U.S. President Donald J. Trump (Jan. 25, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-polis-colleagues-lead-bipartisan-letter-to-president-trump-urging-action-to-protect-state-marijuana-laws.

250. *Id.* at 1.

251. *Id.* at 2.

financial institutions on their ability to provide services to the state-sanctioned marijuana industry.[252] This letter stressed that, despite the growing number of states that have legalized marijuana, "many legal businesses are forced to operate in cash, which jeopardizes community safety, limits economic growth, and greatly expands the opportunity for tax fraud."[253]

Both letters represent relatively easy solutions the federal executive branch could implement. By reinstating the non-interference policy of the earlier memorandums, while also providing guidance to financial institutions that seek to serve legal marijuana businesses, the federal government would be providing some reassurance and clarity to people who are in danger for doing something their state has deemed legal.

Additionally, proposals—like the RF Amendment—can limit the enforcement capabilities of the DOJ. For example, on February 18, 2018, a bill was introduced that requests the Attorney General to not enforce the CSA against people who are using marijuana medically or recreationally in a state that has legalized such use.[254] The RF Amendment, discussed above,[255] was first included in the 2015 Appropriations Act, and was still included in the most recent appropriations act, funding the government through September 2018.[256]

In *United States v. McIntosh*,[257] the Ninth Circuit Court of Appeals held that the RF Amendment prohibited DOJ from spending funds from the appropriation acts for the prosecution of individuals who engaged in conduct permitted by their state's medical marijuana laws.[258] *McIntosh* provides another solution for people in marijuana-related industries in states that allow marijuana use. This was something that the Attorney General warned Congress of when he requested that they remove the RF Amendment from future appropriations bills.[259] The Attorney General's letter forecasted that individuals and organizations violating the CSA would invoke the RF Amendment to avoid prosecution.[260] As evidenced by the continuing inclusion of the Amendment in later appropriations bills, Congress did not buy that allowing people to avoid federal prosecution for following state laws would cause harm in their communities like the Attorney General warned.

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252. Letter from Sen. Jeffrey A. Merkley, et al., to Jamal El-Hindi, Acting Dir., Fin. Crimes Enf't Network (Dec. 14, 2016), https://dennyheck.house.gov/sites/dennyheck.house.gov/files/FINCEN%20MJ%20Guidance%20Letter%20FINAL.pdf.

253. *Id.* at 1.

254. Sensible Enforcement of Cannabis Act of 2018, H.R. 5050, 115th Cong. § 2(a) (2018).

255. *See supra* text accompanying note 77.

256. Consolidated Appropriations Act, Pub L. 115-141, § 538, 132 Stat. 348, 445 (2018).

257. 833 F.3d 1163 (9th Cir. 2016).

258. *Id.* at 1177.

259. Sessions Letter, *supra* note 82.

260. *Id.*

Under the RF Amendment, as interpreted by the Ninth Circuit in *McIntosh*, no DOJ funding may be used to enforce the CSA against someone following the medical marijuana laws in their own state.[261] *McIntosh* has so far been applied only to enjoin criminal prosecutions to have an evidentiary hearing on whether the defendant was in compliance with state medical marijuana laws,[262] and to find that a contract related to medical marijuana dispensaries is not void for illegality.[263] In that contractual dispute, the District Court noted the "seemingly continued erosion of any clear and consistent federal public policy in this area,"[264] which truly underscores the issue in these cases.

In *Groff v. Turner (In re Turner)*,[265] the Arizona Bankruptcy Court declined to apply *McIntosh* to a marijuana-related bankruptcy because the court had clearly found that the actions were in violation of state law as well as federal law.[266] That is distinguishable from the issues presented in this note, which only involve people in compliance with their state laws. In a case like *Arenas*, where the Arenas' were following all requirements of Colorado state law,[267] *McIntosh* is applicable, meaning that the USTP, a division of the DOJ, cannot spend any appropriated funds to interfere with the state's medical marijuana laws. In *In re PharmaCann LLC*,[268] the TTAB found the use of *McIntosh* to support granting a marijuana-related trademark "unavailing."[269] In *PharmaCann* the TTAB focused on the temporary nature of the RF Amendment, following a footnote in *McIntosh* that discussed how Congress could restore funding whenever it wanted to, allowing the government to prosecute freely again.[270] The Arizona Bankruptcy Court in *Medpoint*, discussed above, followed a similar temporary rule logic[271] and further noted that there are other sources of funding the DOJ could rely on outside of Congressional appropriations.[272]

That temporary aspect of the RF Amendment should not stop attorneys who represent medical marijuana businesses from invoking

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261. United States v. McIntosh, 833 F. 3d 1163, 1177 (9th Cir. 2016).

262. *See, e.g.*, United States v. Samp, 2017 U.S. Dist. LEXIS 46291 at *2 (E.D. Mich. Mar. 29, 2017); United States v. Gentile, 2017 U.S. Dist. LEXIS 61919 at *6 (E.D. Cal. Apr. 24, 2017).

263. Mann v. Gullickson, 2016 U.S. Dist. LEXIS 152125 at *33–34 (N.D. Cal. Nov. 2, 2016).

264. *Id.* at *16–17 (internal quotations omitted).

265. *See generally In re* Turner, 2016 Bankr. LEXIS 3869 (Bankr. D. Ariz. Nov. 1, 2016).

266. *Id.* at 34–35.

267. *In re* Arenas, 514 B.R. 887, 889 (Bankr. D. Colo. 2014).

268. U.S.P.Q.2D (BNA) 1122 (T.T.A.B. 2017).

269. *Id.* at 1126.

270. *Id.* at 1127 (quoting United States v. McIntosh, 833 F. 3d 1163, 1180, n.5 (9th Cir. 2016)).

271. *In re* Medpoint Management LLC, 528 B.R. 178, 185–86 (Bankr. D. Ariz. 2015).

272. *Id.*

McIntosh when their client is following all applicable state laws. After all, Congress still included the RF Amendment in the latest appropriations bill, meaning Congress still forbids DOJ from using funding against medical marijuana users in states that legalize that use.[273] Changing the enforcement policy does not have the same permanent effect as rescheduling marijuana, but it presents a more efficient process that has already taken place with each DOJ memorandum or Appropriations Act.

CONCLUSION

The issues above will only advance and develop as the legal marijuana industry grows and more states legalize its use in some way. Other areas of federal law could become more implicated over time as well. Recently, the New York Stock Exchange listed its first marijuana-related business, a Canadian weed producer.[274] Airports, too, represent a gray area because they are locally owned and operated, but subject to federal law.[275]

This Note discussed areas of federal law outside of criminal prosecution where the continuing illegality of marijuana at the federal level hurts people in states that have legalized it. The divergence of state and federal laws keeps people following their state's law from filing bankruptcy, gaining intellectual property protection, or using the mail. Many potential solutions exist to solve this divergence. The broadest solution is to reschedule marijuana from Schedule I of the CSA through either administrative rulemaking or legislative action. But changes to the enforcement policy that allow states to enforce their own laws, or limits the enforcement against people who are following their own state's laws, would also protect interests.

This is a growing and changing area of the law, and pressure from more states legalizing marijuana in some way only increases the likelihood of response. Those responses should incorporate knowledge of all the harm that continued federal and state divergence creates.

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273. Consolidated Appropriations Act, Pub L. 115-141, § 538, 132 Stat. 348, 445 (2018).

274. Vanmala Subramaniam, *A major U.S. stock exchange is listing a weed company for the first time ever*, VICE NEWS (Feb. 26, 2018), https://news.vice.com/en_ca/article/j5ba3b/a-major-us-stock-exchange-is-listing-a-weed-company-for-the-first-time-ever.

275. Leslie Josephs, *Marijuana is now legal in California. What about at the state's airports?*, CNBC (Dec. 30, 2017), https://www.cnbc.com/2017/12/30/traveling-with-legal-marijuana-from-california-airports-is-gray-area.html.