Florida A & M University Law Review

Volume 10 | Number 1 Article 4

Fall 2014

High Time for Medical Marijuana or Buzz-Kill?: The Controlled Substances Act and the Sherman Antitrust Act May Cause Florida's Compassionate Medical Cannabis Act to Go Up in Smoke

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HIGH TIME FOR MEDICAL MARIJUANA OR BUZZ-KILL?: THE CONTROLLED SUBSTANCES ACT AND THE SHERMAN ANTITRUST ACT MAY CAUSE FLORIDA'S COMPASSIONATE MEDICAL CANNABIS ACT TO GO UP IN SMOKE

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INTRODUCTION

Is medical marijuana legal? Is it the next gold rush or is it a shiny nugget of "fool's gold"? Florida is the latest state to jump into the arena of medical marijuana with the passage of SB1030 on June 16, 2014. The law, named The Compassionate Medical Cannabis Act of 2014,[1] allows low-THC cannabis to be prescribed to patients suffering from cancer or physical medical conditions that chronically produce symptoms of seizures or severe and persistent muscle spasms.[2] The low-THC strain was nicknamed "Charlotte's Web" after Charlotte Figi, a then five-year-old girl suffering from pediatric epilepsy, noticed a dramatic reduction in seizures after taking the drug.[3] She has since become the unofficial poster child of medical marijuana as states across the country legalize the low-THC strain, using her story to validate marijuana's place in the apothecary.

Though passed in a bipartisan fashion with widespread popular support, SB1030 raises some troubling issues. Marijuana remains a Schedule I drug.[4] The allowance of only five dispensaries in the entire

1. FLA. STAT. § 381.986(1)–(7) (2014).

2. Tetrahydrocannibol, or "THC", is the psychoactive ingredient in marijuana. Aaron Roussell, *The Forensic Identification of Marijuana: Suspicion, Moral Danger, and the Creation of Non-Psychoactive THC*, 22 ALB. L.J. SCI. & TECH. 103, 121 (2012). Low THC cannabis is defined as "a plant of the genus Cannabis, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant; or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed only from a dispensing organization." § 381.986(1)(b).

3. Saundra Young, *Marijuana Stops Child's Severe Seizures*, CNN, http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/ (last updated Aug. 7, 2013).

4. *See infra* notes 10, 11 and accompanying text.

state of Florida[5] is forbidden by the Sherman Antitrust Act.[6] Additionally, the Controlled Substances Act[7] preempts Florida's medical marijuana legislation.[8] As a result, legal businesses, sanctioned by the state of Florida, may be subjected to criminal charges on the federal level. Banks processing monies derived from an *illega*l enterprise may be subject to federal racketeering charges. Businesses normally write off their business expenses before paying taxes on realized profits. If the IRS does not deem a marijuana dispensary a legal and legitimate business, though licensed and sanctioned by the state, these businesses may be taxed out of existence.

These legal difficulties have been blunted to a degree by statements from federal lawmakers that seemingly give the legal nod to state-sanctioned marijuana businesses, but that may not be enough. Without anything being codified at the federal level, these businesses are essentially gambling with their future. They are subject, at any point in time, to federal raids, property seizures, and even prison time, as they are, in fact, operating an illegal business in the eyes of the federal government. These risks are worth it to some due to the allure of potentially fast and "high" profits. Whether or not this is a sustainable business model without changes on the federal level remains to be seen. These issues and possible remedies will be addressed in the body of this paper.

Part I of this article discusses the evolution of marijuana regulation from strict prohibition sentiment leading to the passage of the Controlled Substances Act, to a more lax, present-day sentiment. States began passing medical marijuana laws as a result of this more lax sentiment. Following the national trend, Florida passed its own medical marijuana legislation, known as the Compassionate Medical Cannabis Act of 2014.

Part II of the article addresses the first obstacle that Florida's marijuana legislation will face: preemption under the Controlled Substances Act. The U.S. Supreme Court has ruled that the Controlled Substances Act expressly forbids any medical necessity exception for marijuana.[9] The Department of Justice and the Financial Crimes Enforcement Network have indicated that they will not crack down on

5. § 381.986(5)(b).
6. 15 U.S.C. §§ 1-7 (2012).
7. 21 U.S.C. § 802(7) (2012).
8. § 381.986(2).
9. U.S. v. Oakland Buyers' Coop., 532 U.S. 483 (2001).

state-sanctioned medical businesses;[10] however, this alone may not be enough to protect medical marijuana businesses from federal scrutiny.

Part III examines the second obstacle for Florida's marijuana legislation. The Sherman Antitrust Act expressly forbids any activity that results in the creation of a monopoly. Florida's Compassionate Medical Cannabis Act allows for the creation of only five dispensaries to serve the entire state of Florida. In applying the *California Retail Liquor Dealers Association v. Midcal Aluminum*[11] two-part test, Florida's legislation will not benefit from *Parker v. Brown* state immunity from antitrust violations.[12] In addition, applying the *United States. v. E.I. Du Ponte Nemours & Co.*'s test, individuals who open medical marijuana dispensaries under Florida's current legislation will be in violation the Sherman Antitrust Act.[13]

Part IV proposes remedies that Congress and Florida may implement to save Florida's medical marijuana legislation. First, Congress may create a McCarran-Ferguson-like exemption, which would remove state-sanctioned medical marijuana businesses from the Controlled Substances Act's reach. Second, Congress may simply reclassify or declassify marijuana under the Controlled Substances Act. Finally, Florida must allow for competition in the medical marijuana industry to prevent violating the Sherman Antitrust Act.

In sum, Florida's Compassionate Medical Cannabis Act is flawed. Entrepreneurs flocking to Florida with hopes of making it big may be stopped dead in their tracks. The federal government may, at any time, crack down on these businesses for violating either the Controlled Substances Act or the Sherman Antitrust Act. Changes need to be made to current law in order for the Florida Compassionate Medical Cannabis Act to stand.

I. EVOLUTION OF MARIJUANA REGULATION RESULTING IN FLORIDA'S PASSAGE OF THE COMPASSIONATE MEDICAL CANNABIS ACT

Marijuana has been used throughout history to manage all kinds of ailments.[14] However, starting in the early 1900s, prohibition-

10. *See infra* Part II, section B.

11. 445 U.S. 97 (1980).

12. 317 U.S. 341 (1943).

13. 351 U.S. 377 (1956).

14. Medicinal use of medical marijuana existed as far back as the Chinese Emperor Chen Hung Dynasty over 500 years ago. Marijuana was recommended for conditions such as malaria, constipation, rheumatic pain, absentmindedness, and female disorders. Lester Grinspoon, *History of Cannabis as a Medicine*, MULTIDISCIPLINARY ASS'N FOR PSYCHEDELIC

ist sentiment[15] arose in America with Harry Jacob Anslinger, the commissioner for the Federal Bureau of Narcotics, leading the charge with claims that Marijuana causes "insanity . . . [and] pushe[s] people toward horrendous acts of criminality."[16] By the mid-1930s, with the advent of drugs such as aspirin and opium derivatives, which had similar medicinal effects as marijuana, nearly all states enacted some form of regulation limiting the use of marijuana.[17]

A. Marijuana Prohibition Under the Controlled Substances Act

In 1970, Congress, using the authority given to them under the Commerce Clause of the U.S. Constitution,[18] enacted the Drug Abuse Prevention and Control Act of 1970.[19] The Controlled Substances Act ("CSA") was enacted as part of the Act. According to the CSA, a "controlled substance" is any "drug or other substance, immediate or precursor, included in schedule I, II, III, IV, or V . . . ."[20] Schedule I of the CSA includes any "drug or other substance [with] a high potential for abuse" and "has no currently accepted medical use . . . in the United States."[21] Marijuana was placed on Schedule I.[22] Government-approved research projects were the "only one express exception to the prohibitions on manufacturing and distributing"[23] of drugs listed on Schedule I. The Attorney General is authorized by federal statute to "remove any drug or other substance from the schedule if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."[24] The Attorney General has delegated this

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STUD. (Aug. 16, 2005), *available at* http://www.maps.org/mmj/grinspoon_history_cannabis_medicine.pdf.

15. Dale H. Gieringer, *The Origins of Cannabis Prohibition in California*, CALIFORNIA NORML (June 2006), *available at* www.canorml.org/background/caloriginsmjproh.pdf.

16. Brent Staples, *The Federal Marijuana Ban is Rooted in Myth and Xenophobia*, N.Y. TIMES (July 29, 2014), http://www.nytimes.com/2014/07/30/opinion/high-time-federal-marijuana-ban-is-rooted-in-myth.html?_r=1.

17. MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES (2009), *available at* www.fas.org/sgp/crs/misc/RL33211.pdf.

18. *See* U.S. CONST. art. I, § 8, cl. 3.

19. Drug Enforcement Admin., *1970-1975*, DEPT. OF JUSTICE, www.justice.gov/dea/about/history/1970-1975.pdf (last visited June 14, 2015).

20. 21 U.S.C. § 802(7) (2012).

21. The Controlled Substances Act, 21 U.S.C. § 812(b) (1970) (listing each schedule and its definition).

22. *Id.* § 812(b)(c)(10).

23. U.S. v. Oakland Buyers' Coop., 532 U.S. 483 (2001).

24. 21 U.S.C. § 811(a)(2).

authority to the Administrator of the Drug Enforcement Administration ("DEA").[25]

In an opinion by Administrative Law Judge Francis L. Young, dated September 6, 1988, she recommended, in relevant part,

> that the Administrator conclude that the marijuana plant considered as a whole has a currently accepted medical use in treatment in the United States, that there is no lack of accepted safety for use of it under medical supervision and that it may lawfully be transferred from Schedule I to Schedule II. The judge recommends that the Administrator transfer marijuana from Schedule I to Schedule II.[26]

The Administrator refused to follow the Administrative Law Judge's recommendation and declined to move Marijuana from Schedule I to Schedule II.[27] Unlike Schedule I drugs, all other Schedules "have currently accepted medical use."[28] This would allow state-sanctioned medical marijuana businesses to legally exist under federal regulation. The Administrator's decision was affirmed by the D.C. District Court of Appeals in 1994.[29]

B. A Change of the Tide: National Trend Toward Marijuana Legalization

In the 1970's, there was "a growing recognition among health care professionals and the public that marijuana had therapeutic effect."[30] Doctors found that smoking marijuana helped patients undergoing chemotherapy with nausea,[31] reduced spasticity in pa-

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25. 28 C.F.R. § 0.100(b).

26. Marijuana Rescheduling Petition, Docket No. 86-22, 68 (Drug Enforcement Agency Sept. 6, 1988) (Op. and Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of A.L.J. Francis L. Young), *available at* http://www.druglibrary.org/Schaffer/library/studies/YOUNG/index.html [hereinafter A.L.J. Op.].

27. *See* Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994) (stating that "our review of the record convinces us that the Administrator's findings are supported by substantial evidence . . . The Final Order canvasses the record at length. It recites testimony of numerous experts that marijuana's medicinal value has never been proven in sound scientific studies.").

28. 21 U.S.C. § 812(b).

29. *See Alliance for Cannabis Therapeutics*, 15 F.3d at 1131.

30. A.L.J. Op., *supra* note 26.

31. *See id.* at 11-12. Chemotherapy treatments involve "the use of highly toxic chemicals." This results in severe nausea and decreased appetite. Although there are synthetic forms of THC capsules on the market, natural marijuana is better because it is inhaled instead of ingested, achieving faster results. *Id.*

tients with multiple sclerosis,[32] managed pain associated with pseudo hypoparathyroidism,[33] and reduced spasms associated with quadraplegia.[34] Subsequently, many states began to formally acknowledge that marijuana plays an important role in cases where traditional therapies have failed. As of this writing, "[t]wenty-three states and the District of Columbia have remov[ed] criminal sanctions for the medical use of marijuana."[35] To illustrate the emerging national trends in marijuana policy, Colorado and Washington have both approved measures which go as far as allowing *any* adult over the age of 21 to possess up to one ounce of marijuana for recreational use.[36]

C. Florida's Passage of the Compassionate Medical Cannabis Act of 2014

Florida, as recently as 2010, was known as the "Pill Mill" capitol of the country.[37] Patients from out-of-state could come into Florida, doctor shop, and obtain ostensibly an endless supply of pain pills. Given this recent, dubious past, and the high risk for marijuana addiction and abuse, the legislature was extremely careful in the wording of SB1030.

Several state regulators publicly announced that they passed the Act to "ensure that children of Florida who suffer from seizures and other debilitating illnesses will have medication needed to improve their quality of life."[38] Many regulators, however, feared that passing

32. *See id.* at 40 (defining spasticity as "an involuntary and abnormal contraction of muscle or muscle fibers").

33. *Id.* at 47.

34. *See id.* at 49 (finding that there was not sufficient evidence to show that marijuana helped reduce the intraocular pressure for a glaucoma patient).

35. *The Twenty-Three States and One Federal District with Effective Medical Marijuana Laws*, MARIJUANA POL'Y PROJECT (July 25, 2014), http://www.mpp.org/assets/pdfs/library/MMJLawsSummary.pdf.

36. *Id.* at 5, 23.

37. *See Governor Scott: Florida No Longer Pill Mill Haven*, CBS MIAMI (Mar. 14, 2012), http://miami.cbslocal.com/2012/03/14/gov-scott-florida-no-longer-pill-mill-haven/; *see also* Elaine Silvestri, *Florida Heals from Pill Mill Epidemic*, TAMPA TRIBUNE (Aug. 30, 2014), http://tbo.com/news/crime/florida-heals-from-pill-mill-epidemic-20140830/. In 2010, over 1,500 patients died from Oxycodone overdose. The Legislators feared that increasing regulation would result in more cost to the state and potentially invade the patient's privacy. Despite these fears, however, the state and federal government, along with the drug companies, have made changes that resulted in a dramatic reduction in deaths related to Oxycodone overdoses and the existence of pill mills within Florida.

38. Nicole Flatow, *Almost Every Lawmaker in Florida Supports Medical Marijuana Bill, Even Rick Scott*, THINK PROGRESS (May 2, 2014), http://thinkprogress.org/justice/2014/05/02/3433610/almost-every-lawmaker-in-florida-supports-medical-marijuana-bill-even-rick-scott/.

medical marijuana would result in the "Coloradification" of Florida.[39] The Florida legislature has a substantial interest in protecting its citizens from injury as a result of criminal acts relating to marijuana use, distribution, and diversion. This sentiment was expressed by various Senators, including Senator Daryl Rouson, who stated that passing this legislation may lead to "cracking the door open" and "sending the message that it is okay to use marijuana."[40] In response to Senator Rouson's concerns, Senator Gaetz, one of the promoters of the bill, stated that the legislation would only legalize low-THC cannabis for medical use and would not allow for the administration of the cannabis by inhalation.[41] Senator Gaetz also intimated that the reason for the strict legislation is to prevent what happened in other states that have previously enacted legislation legalizing medical marijuana.[42] He stated that the problem is "most other states that have legalized any form of cannabis have been rifled with abuse, recreational use, [and] possession by minors."[43] Despite these concerns, the Act still passed by an overwhelming majority.[44]

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39. *Id.*

40. H.R. 843, 86th Fla. House, 116th Sess., (May 1, 2014), *available at* http://www.myfloridahouse.gov/Sections/HouseCalendar/broadcast.aspx [hereinafter "House Debate"].

41. *Id.* According to Senator Gaetz, administration of medication has never been interpreted to mean inhalation; *see also* House Message Summary, The Florida Senate, 1 (May 2, 2014), *available at* http://www.flsenate.gov/Session/Bill/2014/1030/Analyses/2014s1030.hms.PDF (defining "low-THC cannabis to mean a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol (THC) and more than 10 percent of Cannabidiol (CBD) weight for weight"); FLA. STAT. § 381.986(1) (2014); Sandra Young, *Marijuana Stops Child's Seizures*, CNN (Aug. 7, 2013), http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/ (reporting on Charlotte Fiji, the daughter of Matt and Paige Fiji, who suffered from a rare condition, known as Dravet Syndrome, which causes severe intractable epilepsy. She has undergone all forms of conventional therapy to no avail. As a last resort, the Fijis were able to obtain the signature of two physicians in order for Charlotte to try medical marijuana. Paige Fiji was able to purchase some marijuana, known as R4, which was high in CBD but low in THC. The oil extract from the plant has been a life changer for Charlotte. The R4 is now known as Charlotte's Web, named after Charlotte Fiji.).

42. House Debate, *supra* note 40.

43. *Id.*

44. *Bill Signing Makes Florida 22nd State to Pass Medical Marijuana Legislation*, SUNSHINE STATE NEWS (June 16, 2014), http://www.sunshinestatenews.com/story/bill-signing-makes-florida-22nd-state-pass-medical-marijuana-legislation (referencing, Kate Edwards, a bill co-sponsor in the Florida House of Representatives, stated that by passing the bill, "Florida has the opportunity to lead in the research and development of scientific breakthroughs from cannabis-derived therapies."); *see also* Bill Cotterell, *Rick Scott Signs Law Allowing Limited Medical Marijuana Use in Florida*, HUFFINGTON POST (June 16, 2014), http://www.huffingtonpost.com/2014/06/16/florida-medical-marijuana_n_5500496.html; House Debate, *supra* note 40 (quoting a statement by Senator Matt Gaetz: "there are

On June 16, 2014, Florida's Governor, Rick Scott, signed into law The Compassionate Medical Cannabis Act of 2014.[45] Under the Act, a physician may order low-THC cannabis for patients under their care who are "suffering from cancer or a physical medical condition that chronically produces symptoms of seizures or severe or persistent muscle spasms."[46] Patients who qualify for the low-THC cannabis must register with the state and obtain the medication from one of the five state-approved dispensing organizations.[47] Physicians, qualified patients, and dispensing centers and its employees will all be exempt from criminal penalties under the medical necessity defense.[48] Despite being exempt from criminal penalties under Florida's laws, these individuals may still be held criminally liable under the Controlled Substances Act. Furthermore, the dispensing organizations may be liable under the Sherman Antitrust Act for engaging in monopolistic activities.

II. THE CONTROLLED SUBSTANCES ACT PREEMPTS STATES' MEDICAL MARIJUANA LEGISLATION

A. The U.S. Supreme Court Rules that the Controlled Substance Act Preempts State Marijuana Legislation

All state-sanctioned medical marijuana businesses are illegal businesses in the eyes of the U.S. Supreme Court.[49] The CSA preempts any state medical marijuana legislation.[50] According to the Court, the Act does not allow for any medical necessity exception.[51] Therefore, states cannot legally create any legislation allowing for medical marijuana use or dispensing. The Internal Revenue Service agrees with the U.S. Supreme Court that these state sanctioned businesses are illegal.[52] However, the U.S. President, the Financial Enforcement

children who are racing to their deaths and I just can't balance the impact of their life against that argument because we are being as cautious as we can.").

45. *Florida Became 24th State/District to Legalize/Decriminalized Medical Marijuana Today,* FLA. MARIJUANA INFO (June 16, 2014), http://floridamarijuanainfo.org/law-featured/florida-became-23nd-state-to-legalize-medical-marijuana-today/.

46. FLA. STAT. § 381.986(2) (2014).

47. *See id.* § 381.986(5).

48. *See id.* § 381.986(7).

49. *Oakland Cannabis Buyers' Coop*, 532 U.S. at 483.

50. *Id.*

51. *Id.* at 491.

52. *See generally* 28 U.S.C.A. § 280E (2014).

Network, and the U.S. Attorney General have promised to treat such businesses as legal enterprises.[53]

Preemption may be either express or implied.[54] Express preemption exists where "Congress' command is explicitly stated in the statute's language."[55] There are two types of implied preemption: field preemption and conflict preemption.[56] Field preemption exists "where the scheme of the federal regulation 'is so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.'"[57] Whereas conflict preemption exists where "compliance with both federal and state regulations is a physical impossibility,"[58] or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[59] The U.S. Supreme Court, in *United States v. Oakland Cannabis Buyer's Coop.*, has ruled that the CSA expressly preempts any state medical marijuana legislation.[60] Specifically, the Court stated, "The Controlled Substances Act provides that '[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'"[61] The sole exception in the Act, which pertains to "Government-approved research projects," is provided in Section 823(f) of the CSA.[62] The Court refused to recognize the "medical necessity" exception defense for marijuana use under the Act, noting that "[t]he statute . . . does not explicitly abrogate the defense . . . [b]ut its provisions leave no doubt that the defense is unavailable."[63]

Consistent with the Court's conclusion that the CSA preempts all state enacted medical marijuana laws, the United States Tax Courts have ruled that the Internal Revenue Service's enforcement of Section 280E is valid.[64] Section 280E states in relevant part:

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53. *See infra* Part II, section B.

54. Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

55. *Id.*

56. *Id.*

57. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

58. *Id.* (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

59. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

60. *Oakland Cannabis Buyers' Coop*, 532 U.S. at 483.

61. *Id.* at 489 (citing 21 U.S.C. § 841(a)(1) (2010)).

62. 21 U.S.C. § 823(f) (2009).

63. *Oakland Cannabis Buyers' Coop.*, 523 U.S. at 491.

64. *See* Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r of Internal Revenue, 128 T.C. 173, 184-85 (2007) (holding that the petitioner's business consisted mainly of legal activities "unrelated to petitioner's provision of medical marijuana." There-

> 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).[65]

Congress passed this section in direct response to "the outcome of a case in which this Court allowed a taxpayer to deduct expenses incurred in an illegal drug trade."[66]

B. U.S. Attorney General Vows to Turn Blind Eye to State Marijuana Businesses

Despite the Court's ruling, Attorney General Eric Holder formally announced that "[t]he guidelines make clear that the focus of the federal resources should not be on individuals whose actions are in compliance with existing state laws . . . . It will not be a priority to use federal resources to prosecute patients with serious illnesses . . . who

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fore, petitioner was allowed to deduct all expenses relating to petitioner's care giving business. The Court based its decision in part on *Commissioner v. Heininger*, 320 U.S. 467, 474 (1943), wherein this Court noted, "[i]t has never been thought . . . that the mere fact that an expenditure bears a remote relation to an illegal act makes it non-deductible."); *see also* Olive v. Comm'r of Internal Revenue, 139 T.C. 19, 37-39 (2012) (distinguishing *Californians Helping to Alleviate Med. Problems* by stating "[w]e . . . reject petitioner's contention that section 280E does not apply because the Vapor Room was a legitimate operation under California law . . . . The taxpayer in CHAMP was a legitimate (under State law) operation that had a second business (providing caregiving services) and we applied section 280E there." The Court also stated that "[t]he dispensing of medical marijuana, while legal in California (among other States), is illegal under Federal law."); Jolie Lee, *Medical Marijuana Stores Blocked from Tax Breaks*, USA TODAY (Mar. 17, 2014), http://www.usatoday.com/story/news/nation-now/2014/03/17/marijuana-tax-breaks-irs/6367137 ("Because of 280E, the effective tax rate for marijuana businesses is 50% or more . . . ."); Peter Hecht, *Medical Marijuana Dispensary Takes on IRS over What it Calls 'Punitive' Taxes*, WASH. POST (Feb. 23, 2014), http://www.washingtonpost.com/politics/medical-marijuana-dispensary-takes-on-irs-over-what-it-calls-punitive-taxes/2014/02/23/25fa6458-9cd3-11e3-ad71-e03637a299c0_story.html (referencing Canna Care dispensary's argument that the Internal Revenue Service's enforcement of Section 280E "violates the 14th Amendment's equal protection clause. The petition [by Canna Care] argued that the IRS was 'tacitly' working to enforce U.S. drug laws against the dispensary even as it allowed Canna Care to deduct its costs of goods, the marijuana.").

65. 28 U.S.C.A. § 280E.

66. *Californians Helping to Alleviate Med. Problems, Inc.*, 128 T.C. at 181-82 (referencing S. REP. NO. 97-494 (Vol. 1), at 309 (1982)) (stating that Congress' decision was based "on public policy grounds . . . [and] to make certain otherwise ordinary and necessary expenses incurred in [an illegal] trade or business nondeductible."); *see also* Edmondson v. Comm'r, 42 T.C.M. (CCH) 1533 (1981) (finding that the taxpayer "was self-employed in a trade or business of selling amphetamines, cocaine, and marijuana." The Court allowed the taxpayer to deduct his business expenses because they "were made in connection with . . . [the taxpayer's] trade or business and were both ordinary and necessary.").

are complying with state laws on medical marijuana, but we will not tolerate drug traffickers."[67] Deputy Attorney General James M. Cole reiterated Mr. Holder's sentiment in a memorandum written on August 29, 2013, stating that the purpose of the memorandum was to provide further guidance "in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale."[68] Mr. Cole listed eight priorities of the Department of Justice relating to enforcement of marijuana related conduct. These priorities include various activities such as distributing marijuana to minors, diversion of marijuana, and criminal enterprises relating to marijuana distribution, amongst other activities.[69] He stressed that, other than the priorities listed in the memorandum, "the federal government [will rely] on states and local law enforcement agencies to address marijuana activity . . . ."[70]

Even with the assurances of both Mr. Holder and Mr. Cole, most banks have refused to deal with such businesses for fear of being at risk of prosecution under federal "drug racketeering charges."[71] In order to allay some of these fears, the Financial Crimes Enforcement Network (FinCEN) issued guidance for banks to follow.[72] The guidance outlined seven factors for financial institutions to use "in assessing the

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67. *Attorney General Announces Formal Medical Marijuana Guidelines*, U.S. DEP'T OF JUSTICE (Oct. 19, 2009), http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html; *see also* Tierney Sneed, *Eric Holder's Unfinished Business*, U.S. NEWS (Oct. 3, 2014), http://www.usnews.com/news/articles/2014/10/03/for-eric-holders-supporters-the-attorney-general-still-has-work-to-do ("In an interview before news of his resignation broke, Holder suggested he was open to the idea of rescheduling marijuana - meaning reclassifying it as a drug less dangerous than heroin or LSD, for example, and thus easing some of the federal regulations regarding its production and trafficking."). *But see* Sacramento Nonprofit Collective v. Holder, 855 F. Supp. 2d 1100, 1111 (E.D. Cal. 2012) (concluding "[a] reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.") (referencing Mont. Caregivers Ass'n v. United States, 841 F. Supp. 2d 1148, 1149 (D. Mont. 2012)).

68. Memorandum from the Deputy Att'y Gen James M. Cole to all U.S. Att'ys, *Guidance Regarding Marijuana Enforcement* 1 (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

69. *Id.*

70. *Id.* at 2.

71. Pete Yost, *Feds Let Banks and Marijuana Sellers Do Business*, ASSOCIATED PRESS (Feb. 14, 2014), http://bigstory.ap.org/article/govt-issues-roadmap-banks-marijuana-business.

72. *BSA Expectations Regarding Marijuana-Related Businesses*, DEP'T OF TREASURY CRIMES ENFORCEMENT NETWORK 1 (Feb. 14, 2014), http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

risk of providing services to a marijuana-related business . . . ."[73] FinCEN encouraged the financial institutions to "consider whether a marijuana-related business implicates any of the Cole Memo priorities or violates state law."[74] Financial institutions were directed to file a Suspicious Activity Report if:

> the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[75]

The signals coming out of Washington regarding medical marijuana have been mixed. Despite these conflicting decisions and actions by the federal government, states continue to pass medical marijuana laws. Florida, like many other states, continues to classify marijuana as a Schedule I drug,[76] consistent with the classification as set out under the CSA. However, Section 381.986 of the Florida Statutes, along with several other Florida court cases[77] have recognized the medical marijuana defense.

III. Applicability Of The Sherman Antitrust Act

One of the factors that differ among state laws is the source from which qualified patients may obtain their marijuana supply. These sources range from patient home-grown, state-approved non-profit dispensaries, and state-approved for-profit dispensaries to unnamed sources.[78] Unlike other states, Florida has settled on the state approved *for-profit* dispensary model. Section 381.986(5)(b) of the Florida Statutes imposes on the Department of Health the duty to

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73. *Id.* at 3.

74. *Id.*

75. *Id.*

76. Fla. Stat. § 893.03(1)(c) (2014).

77. Jenks v. State, 582 So. 2d 676, 678 (Fla. Dist. Ct. App. 1991) (creating the test for medical necessity: "[t]he pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it."); *see also* Sowell v. State, 738 So. 2d 333 (Fla. Dist. Ct. App. 1998) (agreeing with Jenks' medical necessity ruling).

78. *Bill Analysis and Fiscal Impact Statement*, Fla. Senate (Apr. 24, 2014), http://www.flsenate.gov/Session/Bill/2014/1030/Analyses/2014s1030.ap.PDF.

"[a]uthorize the establishment of five dispensing organizations" by January 1, 2015. These dispensing organizations are to cultivate, manufacture, and dispense the low-THC marijuana directly to the patient.[79] Given that the state plans to license only five dispensaries and these dispensaries are for-profit, Florida has created five state-sanctioned monopolies.

The Sherman Antitrust Act was passed "in 1890 to combat anticompetitive practices, reduce market domination by individual corporations, and preserve unfettered competition."[80] Congress passed two additional anti-trust laws in 1914— the Federal Trade Commission Act, which created the FTC, and the Clayton Act—which governs "specific practices that the Sherman Act does not clearly prohibit."[81] The purpose of passing antitrust provisions was primarily for the "protection of competition."[82] "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [T]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be . . . ."[83]

The first section of the Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."[84] Section two of the Act prohibits actions of "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ."[85] Section 7 of the Sherman Act states, "[t]he word "person," or "persons," wherever used . . . shall be deemed to include corporations and associations existing under or authorized by the laws . . . of any State . . . ."[86]

Senator George Hoar of Massachusetts, one of the authors of the Sherman Antitrust Act of 1890, defined monopoly as "the sole engrossing to a man's self by means which prevent other men from

79. FLA. STAT. §§ 381.986(5)-(6) (2014).

80. *Antitrust*, CORNELL L. SCH. LEGAL INFO. INST., http://www.law.cornell.edu/wex/antitrust (last visited May 20, 2015).

81. *The Antitrust Laws*, FED. TRADE COMM'N, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited June 14, 2015) (stating that the Clayton Act prohibits actions such as "mergers and interlocking directorates" (that is, the same person making business decisions for competing companies)).

82. Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962).

83. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 68 S. Ct. 996, 1006 (1948).

84. 15 U.S.C. § 1 (1890).

85. *See id.* § 2.

86. *See id.* § 7.

engaging in fair competition with him."[87] He went on to say that "[o]f course a monopoly granted by the King was a direct inhibition of all other persons to engage in that business . . . [this man] had a monopoly granted to him by the sovereign power."[88] However, "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist . . . ."[89]

The Florida Antitrust Act of 1980 has language that mirrors sections one and two of the Sherman Antitrust Act of 1890.[90] Section 542.32, Florida Statutes, states, "[i]t is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."[91]

The Court in *Parker v. Brown* has ruled that states are immune from the effects of the Sherman Antitrust Act.[92] However, state immunity is not absolute.[93] It is subject to the two-prong test as stated in *California Retail Liquor Dealers Association v. Midcal Aluminum*.[94] But even if the state's legislation benefits from the *Parker* immunity, individuals will still be held to have violated the Sherman Antitrust Act if they engage in monopolistic business practices.

A. Florida's Five Dispensary Limitation Does Not Qualify for Parker v. Brown *State Immunity*

The U.S. Supreme Court has long recognized that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over

87. JAMES ARTHUR FINCH, BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS, 50th-57th Cong. 279 (1st Sess. 1903) (digitalized by Google Books) (original from Harvard Univ.), *available at* http://books.google.com/books?id=OsssAAAAYAAJ&pg=PA279&lpg=PA279&source=bl&ots=#v=onepage&q&f=false.

88. *Id.*

89. *Id.*

90. "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." FLA. STAT. § 542.18 (2014).

91. *See id.* § 542.32 (2014); *see also* COMM'N ON BANKING & INS., APPLYING THE FLA. ANTITRUST ACT TO THE BUS. OF INS., INTERIM S. REP. NO. 2009-104, at 1 (2008), *available at* http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-104bi.pdf.

92. 317 U.S. at 351-52.

93. *Id.*

94. 445 U.S. at 105 (1980).

its officers and agents is not lightly to be attributed to Congress."[95] The state legislature may use its authority to enact statutes and prescribe conditions for its application.[96] In Florida, the state legislature has decided that it will allow for the cultivation, production, and distribution of low-THC cannabis by "five dispensing organizations."[97] The legislature has also imposed various conditions for qualifying to be a "dispensing organization," including "[t]he technical and technological ability to cultivate and produce low-THC cannabis[,] a valid certification of registration issued by the Department of Agriculture and Consumer Services . . . for the cultivation of more than 400,000 plants . . . and [must] have been operated as a registered nursery in this state for at least 30 continuous years."[98] The dispensing organizations must also provide sufficient security to the dispensing centers and have the ability to conduct sufficient background checks on employees.[99] Finally, both prescribing physicians and qualified patients are required to register with a state-wide registry.[100]

> At first blush, the Florida statute, allowing for only five regional dispensaries, seems to violate both federal and Florida antitrust laws because it allows for the creation of regional monopolies. However, the U.S. Supreme Court has recognized "state immunity" as it applies to the Sherman Antitrust Act.[101] The Court reasoned that the Sherman Antitrust Act did not specifically mention any intent to restrain state action or official action directed by the state, therefore, the Act is applicable only to "persons including corporations."[102] The Court stated that [a] state statute, when considered in the abstract, may be condemned under antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of those laws in *all* cases, or it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.[103]

Sections 385.212(1) and (2) of the Florida Statutes impose a duty on the Department of Health to establish an Office of Compassionate Use. The purpose of creating this Office is to "enhance access to investigational new drugs for Florida patients through approved

95. *Parker*, 317 U.S. at 350.
96. *Id.*
97. FLA. STAT. § 381.986(5)(b) (2014).
98. *See id.* § 381.986(5)(b)(1).
99. *Id.*
100. *See id.* § 381.986(5)(b).
101. *Parker*, 317 U.S. at 350.
102. *Id.* at 351.
103. Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982) [Emphasis added].

clinical treatment plans or studies."[104] Qualified patients may obtain medical marijuana through these treatment centers. This creates an alternative avenue for the distribution of medical marijuana and may serve to alleviate the risk of regional monopolies. According to the Court, if there is no antitrust violation in all situations, the law would not be invalid.[105] But even if the statute is not invalid dispensing organization's "invocation of the . . . statute . . . [may still] be subject in all cases to a per se rule of illegality under the Sherman Act."[106]

The Court, in *California Retail Liquor Dealers*,[107] created a two-prong test in determining whether a state statute is eligible for antitrust immunity as stated in *Parker*.[108] "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[109] As a matter of public policy, the second prong was probably added by the Court to prevent the creation of "natural monopolies," which "are common in markets for 'essential services' that require an expensive infrastructure to deliver the good or service, such as the case of water supply, electricity, and gas, and other industries . . . ."[110] If left unchecked, these businesses have a potential for making large profits while becoming very inefficient.[111]

In order to analyze the first prong of the *California Retail Liquor Dealers* case, one must first look at Florida's recent history. Allowing only five dispensing organizations in the State of Florida was part of a comprehensive plan by the state legislature to balance the need for medical marijuana with the need to keep Floridians safe by not allowing for another "Pill Mill" scenario.[112] Although not specifically stated, another reason for the limitation could include the fact that larger numbers of dispensing centers would result in higher costs due to increased "workload associated with the enforcement and regulation,"[113] which would ultimately lead to higher regulatory costs.

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104. FLA. STAT. § 385.212(2) (2014).

105. *Rice*, 458 U.S. at 661.

106. *Id.*

107. 445 U.S. at 105.

108. 317 U.S. at 350-51.

109. *California Retail Liquor Dealers Assoc.*, 445 U.S. at 105 (citing City of Lafayette v. L.A. Power & Light Co., 435 U.S. 389, 410 (1978)).

110. *Natural Monopolies*, ECONOMICS ONLINE, http://www.economicsonline.co.uk/Business_economics/Natural_monopolies.html (last visited June 14, 2015).

111. *Id.*

112. Flatow, *supra* note 38.

113. FLA. SENATE, BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 114, 1st Sess., at 9 (Apr. 24, 2014), *available at* http://www.flsenate.gov/Session/Bill/2014/1030/Analyses/2014s1030.ap.PDF.

Analysis of the statute itself, Florida history, Florida Senate and House debate, and various other publications posted by numerous Florida governmental agencies reveals that the public policy in restricting the amount of dispensing organizations to five was to protect against marijuana abuse.[114]

The second prong of the test, as set out in *California Retail Liquor Dealers*, requires the state to "actively supervise" the industry.[115] Florida law not only provides patients with the ability to legally obtain marijuana, physicians with the ability to prescribe marijuana, and for a place for patients to safely and legally obtain marijuana for medical purposes, but it also sets strict guidelines for when a patient will be eligible to obtain the medical marijuana, the annual continuing education requirements for prescribing physicians, and orders the Department of Health to set up a patient registry and establish guidelines for the creation of five dispensing organizations by January 1, 2015.[116]

The Florida Department of Health has released some very extensive proposed rules concerning the qualifications needed in order to be eligible to obtain a dispensing center license, including the initial application fee, the renewal fee per biennium, sanitation protocols, employee background checks, and the extensive Department of Health monitoring of patients, physicians, and dispensing centers.[117] There are also very strict regulations as to how Schedule I and Schedule II drugs are to be prescribed and dispensed.[118]

The extensive, detailed regulation is proof that the state intends to stay actively involved in the cultivation, manufacturing, prescribing, and dispensing of medical marijuana. Despite the comprehensive regulation, the second prong of the test has not been met as the state fails to take an active role in regulating the pricing of medical marijuana by the dispensaries.

According to the Kaiser foundation, "for patients who use marijuana to help alleviate chronic pain and nausea and stimulate appetite, legalization is only part of the battle. Health insurance rarely, if ever, covers its use; some patients spend hundreds of dollars a month or

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114. *See generally* § 381.986; House Debate, *supra* note 40.

115. *California Retail Liquor Dealers Assoc.*, 445 U.S. at 105 (citing City of Lafayette v. L.A. Power & Light Co., 435 U.S. 389, 410 (1978)).

116. *See* FLA. STAT. § 381.986 (2014).

117. 40 Fla. Admin. Weekly 3860-65 (Sep. 9, 2014), *available at* https://www.flrules.org/Faw/FAWDocuments/FAWVOLUMEFOLDERS2014/40175/40175doc.pdf.

118. FLA. STAT. §§ 893.04(1)(f), 893.04(2)(b) (2014).

more on the drug."[119] Florida law is silent on whether these dispensing centers are to be for profit or non-profit.[120] Florida legislators, in creating The Compassionate Medical Cannabis Act of 2014, failed to make any mention of the cost of medical marijuana to the end user. The Department of Health has also failed to make any mention of any regulation to actively monitor retail prices. As a result, dispensing organizations will be free to charge whatever price they wish. The Florida legislation fails the second prong test as noted in *California Retail Liquor Dealers* since it

> plays no role whatever in setting the retail prices. The prices are established by producers according to their own economic interests, without regard to any actual or potential anti-competitive effect . . . . There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy.[121]

Florida stands to profit immensely from the sales tax revenue generated by marijuana sales, particularly if retail prices are kept high.[122] Also, given the high costs of entry into the business, coupled with a relatively small amount of "qualified patients," dispensing organizations and their investors are going to be highly motivated to keep prices elevated. This might lead one to question how "compassionate" the act really is.

In considering the two-prong test as previously stated in *California Retail Liquor Dealers*, it is clear that the Florida legislation has

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119. Michelle Andrews, *Advocates of Medical Marijuana Face Another Hurdle: Insurance Coverage*, KAISER HEALTH NEWS (Nov. 19, 2012), http://www.kaiserhealthnews.org/features/insuring-your-health/2012/112012-michelle-andrews-on-medical-marijuana.aspx; *see also* Brian Montopoli, *Will Health Coverage Pay for Medical Marijuana?*, CBS NEWS (Oct. 20, 2009), http://www.cbsnews.com/news/will-health-coverage-pay-for-medical-marijuana/ (according to Susan Pisano of America's Health Insurance Plans and Bruce Mirken of the Marijuana Policy Project, insurance companies, including Medicare and Medicaid, will not cover medical marijuana until it has gone through the FDA drug approval process. This will not happen because according to the federal government, marijuana is a Schedule I drug with no accepted medical use.).

120. § 381.986.

121. *California Retail Liquor Dealers Assoc.*, 445 U.S. at 106 (distinguishing this case from *Parker*, stating that the state had extensive oversight over the prorate program and noting that "[w]ithout such oversight, the result could have been different."); *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 780 (1975) (concluding that the fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore, were not immune from ethical antitrust attacks.).

122. Office of Economic & Demographic Research, *Financial Impact Estimating Conference: Use of Marijuana for Certain Medical Conditions*, FLA. DEP'T OF HEALTH, at 9 (Oct. 31, 2013), *available at* http://edr.state.fl.us/Content/constitutional-amendments/2014Ballot/UseofMarijuanaforCertainMedicalConditions/NotebookUpdates_11-4-13.pdf.

met the first prong of the test. It is unclear, however, as to whether the requirements of the second prong have been met. Failure of the Florida legislation to pass the two-prong test would result in Florida's legislation, allowing only five dispensing centers to serve the entire state of Florida, to be found invalid, under the Sherman Antitrust Act. Florida legislation clearly states the purpose of having five dispensaries is to allow for adequate access to medical marijuana by the consumer.[123] There are also very strict guidelines and monitoring programs that will be set in place to prevent "diversion" or any other illegal activities associated with marijuana sale.[124] However, the state legislation fails to put in place any regulatory or monitoring programs to ensure that the five private individuals, with whom the state grants *all* of the authority to cultivate, manufacture, and sell the medical marijuana for the entire state of Florida, are not in violation of the Sherman Antitrust Act. The Florida regulation, as it stands, provides for an environment highly conducive to the creation of a monopoly.[125]

Assuming that the statute passes muster and receives immunity protections as outlined in *California Retail Liquor Dealers*, the U.S. Supreme Court has stated that, even if the state benefits from antitrust immunity, "a state does not give immunity to those who violate the Sherman Antitrust Act by authorizing them to violate it or, by declaring that their action is lawful."[126]

123. FLA. STAT. § 381.986(5)(b) (2014).

124. *Id. See also* FLA. ADMIN. CODE ANN. r. 64-4.005(1) (2015) (stating "[s]ubmission of an application for Dispensing Organization approval or renewal constitutes permission for entry by the department at any reasonable time during the approval or renewal process, into any Dispensing Organization facility to inspect any portion of the facility; review the records required pursuant to Section 381.986, F.S., or this chapter; and identify samples of any low-THC cannabis or Derivative Product for laboratory analysis, the results of which shall be forwarded to the department").

125. *See Goldfarb*, 421 U.S. at 781-82 (stating "[a] title examination is indispensable in the process of financing a real estate purchase, and since only an attorney licensed to practice in Virginia may legally examine title . . . consumers could not turn to alternative sources for necessary service." The regulation in this case did not benefit from the *Parker* "state action" exemption.).

126. *Parker*, 317 U.S. at 351 (referencing Northern Sec. Co. v. U.S, 193 U.S. 197, 332, 344 (1904) and Olson v. Smith, 195 U.S. 332, 344-45 (1904)) (concluding that "the state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.").

B. The Sherman Antitrust Act's Applicability to Private Individuals

Section one of the Sherman Antitrust Act does not apply in this situation, as there is no evidence of any "*contract*, combination in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce . . . ."[127] According to Ben Bolusky, CEO of Florida Nursery, Growers and Landscape Association, who assisted the legislature in creating the medical marijuana law, the reason his association pushed for such a restrictive requirement was to "ensure Florida agriculture, and especially nurseries that have greenhouse infrastructure, are not left on the cutting floor."[128] There does not appear to be any blatant agreement between legislators, individuals, or corporations to enter into an agreement to restrict competition. However, Section two of the Sherman Antitrust Act could apply in this situation as there is a high potential for the creation of a monopoly.

1. *Swift & Co. v. U.S.* Defines Monopoly

Section two of the Sherman Antitrust Act never defined what constitutes a monopoly.[129] This leaves the door open for the courts to define the term. In *Swift & Co. v. U.S.*, the U.S. Supreme Court defined a monopoly as:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, -for instance, the monopoly, -but require further acts in addition to the mere forces of nature to bring that result to pass, an *intent* to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.[130]

The Court has divided the monopoly offense in Section two of the Sherman Antitrust Act into "two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a

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127. 15 U.S.C. § 1 (1890) [emphasis added].

128. Mary Wozniak, *Florida Nurseries Seek Piece of Pot Pie*, NEWS-PRESS (May 20, 2014), http://www.news-press.com/story/news/2014/05/19/growing-medical-pot-picnic/9310269/.

129. 15 U.S.C. § 2.

130. Swift & Co. v. U.S., 196 U.S. 375, 395-97 (1905) (using Commonwealth v. Peaslee, 177 Mass. 267, 272 (Mass. 1901)) [emphasis added].

consequence of superior product, business acumen, or historic accident."[131]

The Court surmised that pure competition exists where buyers and sellers may "deal freely in a standardized product."[132] "A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station, or because no one else makes a product of just the quality or attractiveness of his product . . . ."[133] A monopoly may exist in these situations, however, these are not the types of monopolies that would be considered illegal.[134] Illegal monopoly power exists where there is "the power to control prices or exclude competition."[135]

"A monopolist willfully acquires or maintains monopoly power when it competes on some basis other than merits."[136] The Court listed three elements that may be used to prove attempted monopolization. These include: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[137] "In order to determine whether there was a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in the market."[138]

2. Florida's Five Dispensing Organizations Violate the Sherman Antitrust Act under the *U.S. v. E.I. Du Ponte Nemours & Co.* Test

The first step in determining whether an illegal monopoly exists is to define the relevant market. "Determination of the competitive

131. U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (referencing United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956), in defining monopoly as "the power to control prices or exclude competition." Such power "may be inferred from the predominant shares of the market.").

132. *E.I. du Pont*, 351 U.S. at 392.

133. *Id.* at 392-93.

134. *Id.* at 393.

135. *Id.* at 391.

136. Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (2010) (citing LePage's Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003) (en banc)).

137. *Id.* (citing Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 890-91 (1993)).

138. *Spectrum Sports, Inc.*, 113 S. Ct. at 891 (referencing Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1431-32 (6th Cir. 1990); Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 693 (10th Cir. 1989); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413-16 (7th Cir. 1989); Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987).

market for commodities depends on how different from one another are the offered commodities in character or in use, how far buyers will go to substitute one commodity for another."[139] The more different the commodity is, the less likely the commodity is to fall within the Sherman Antitrust Act.[140] The definition the Court arrived at in defining the relevant market is "commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce."[141]

The relevant market in this case includes "[b]usinesses serving Medical Use patients . . . [to] include companies that directly handle legal marijuana, such as producers, processors, and distributors,"[142] with only one dispensing center per region in Florida. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power."[143]

The next step in analyzing whether or not Section two of the Sherman Antitrust Act has been violated is to see if there was "willful" or "attempted" monopolization. According to the Court, "[a] monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits."[144] The only relevant competition in this case is being one of the first five applicants to obtain permission from the Department of Health to become a dispensing organization. Once that process is complete, no other growers of marijuana may enter the market, except in the rare situation where a grower loses his/her license. The growers will not have to compete based on the merits of their business. Patients may either go to the grower in their region to legally purchase marijuana or turn to the black market as an alternative source.

Florida legislation, in essence, forces a medical marijuana end-user to purchase marijuana from only one supplier. Other competitors, with potentially superior financial, business, and technical backgrounds are excluded from entering the market to compete for the end-user's business. However, courts have recognized that exclusive deal-

139. *E.I. du Pont*, 351 U.S. at 393.

140. *Id.* ("For example, one can think of building material as in commodity competition, but one could hardly say that brick competed with steel or wood or cement or stone in the meaning to Sherman litigation.").

141. *Id.* at 395.

142. ARCVIEW GROUP, THE STATE OF LEGAL MARIJUANA MARKETS EXECUTIVE SUMMARY 5 (2d ed. 2014), *available at* http://investir.ch/devfinale/wp-content/uploads/2014/02/Executive-Summary-The-State-of-Legal-Marijuana-Markets-2nd-Edition.pdf.

143. *E.I. du Pont*, 351 U.S. at 394.

144. *Race Tires Am., Inc.*, 614 F.3d at 75.

ings "generally pose little threat to competition."[145] They concluded that "[exclusive dealing arrangements] may be highly efficient to assure supply, price, stability, outlets, investment, best efforts or the like."[146]

While the Florida legislation at hand does not deal with exclusive dealing arrangements, the same principles may be applied. As previously noted, marijuana is classified as a Schedule I drug, which means that it may be highly addictive.[147] According to the Foundation for a Drug-Free World, "[t]he vast majority of cocaine users (99.9%) began by first using a "gateway drug" like marijuana, cigarettes or alcohol."[148] By limiting the amount of individuals capable of cultivating the plant, the state may better police the industry and limit abuse. This will save the state money it would have otherwise spent on enforcement and monitoring. The savings the state incurs may be passed on to the dispensing centers in the form of reduced application renewal fees. The dispensing centers may then use the saved money to enhance their facilities for better and more efficient production of the plant, resulting in a higher yield and reduced cost to the consumer. In an ideal world, this would be the case,[149] however, throughout history there have been many instances where businesses have reduced production or withheld goods to be sold in order to limit the supply and drive up the cost of goods.[150]

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145. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012).

146. *On the Road to Drug Abuse*, FOUNDATION FOR A DRUG-FREE WORLD, http://www.drugfreeworld.org/drugfacts/marijuana/on-the-road-to-drug-abuses.html (last visited June 14, 2015).

147. The Controlled Substances Act, 21 U.S.C. § 812(b)(c)(1) (1970).

148. *Id.*

149. When federal policymakers decide that they want to raise interest rates, they sell government bonds. This sale reduces the price of bonds and raises the interest rate on these bonds. (We can also think of this as the Fed reducing the money supply. This makes money less plentiful and drives up the price of borrowing.). When policymakers decide they want to lower interest rates, the Fed buys back government bonds. This purchase increases the price of bonds and lowers the interest rate on these bonds. (We can think of this as the Fed increasing the money supply, which makes money more plentiful and drives down the price of borrowing.). *See* Alejandro Reuss, *Why is the Government Buying Long-Term Bonds?*, DOLLARS & SENSE (2011), http://www.dollarsandsense.org/archives/2011/0111reuss1.html; *see also* Jerry Taylor & Peter Van Doren, *Economic Amnesia: The Case Against Oil Price Controls and Windfall Profit Taxes*, CATO INSTITUTE (Jan. 12, 2006), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/pa561.pdf ("Empirical studies conclude that in the short run, a 10 percent increase in gasoline prices will lead to a 0.6-1.0 percent decrease in demand. In the long term, however, a 10 percent increase in gasoline prices will lead to a 10 percent decrease in demand.") (internal citation omitted).

150. *See generally Price Elasticity of Demand*, INVESTOPEDIA, http://www.investopedia.com/terms/p/priceelasticity.asp (last visited June 14, 2015).

Traditionally, economists believed that competition is greatest when there are a large number of sellers of the same or similar products; however, the modern view is to look at the ability to freely enter a market.[151] The freer market entry is, the less likely monopolistic behavior occurs, regardless of how large the business in an area gets.[152] By restricting the ability to enter the market, Florida has basically left it in the hands of five individuals to dictate the market. This hits at the heart of the Sherman Antitrust Act. The consumer's ability to choose the product, and where to purchase the product, rests not on the consumer, but on the Department of Health's licensing decisions, leaving "the consumer no input whatever."[153] It virtually eliminates competition, hurting a fragile subset of our community who has nowhere else to turn for help, only to have the government create such a system to further their injury.[154]

IV. Legal Remedies for Florida's Compassionate Medical Cannabis Act's Hazy Future

A. Congress May Create a McCarran-Ferguson-Like Exemption

Logistically, a very simple solution to marijuana's legal woes would be legalization at the federal level. A simple way to accomplish this is for Congress to create an exception to the Controlled Substance Act. Congress has passed legislation which allows for exceptions in the past, such as in the passage of the McCarran-Ferguson Act.[155] The Act created an exception allowing for state regulation of health insurance. The U.S. Supreme Court ruled in *U.S. v. South-Eastern Underwriters Association* that Congress has the authority to regulate the health insurance industry under the authority given to it by the Commerce

151. N. Gregory Mankiw, Essentials of Economics 256 (7th ed. 2012).

152. *See generally* Nicholas Oxedine & Michael Ward, Price Effects from Retail Gasoline Mergers (Apr. 2005) (unpublished manuscript) (on file with author). For a critique of SCP modeling, see Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & Econ. 1 (1973).

153. Santana Prods. Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 133 (3d Cir. 2005).

154. Economic Department of Revenue, Financial Impact Estimating Conference, *Use of Marijuana for Certain Medical Conditions*, Fla. Dep't of Health (Oct. 13, 2013), *available at* http://edr.state.fl.us/Content/constitutional-amendments/2014Ballot/UseofMarijuanaforCertainMedicalConditions/NotebookUpdates_11-4-13.pdf (according to the Potential Range of Sales Tax Revenues from Medical Marijuana End-Users chart created by the Department of Health, a cancer patient could potentially spend in the upwards of $13,000 or more in purchasing a year supply of medical marijuana. Most of these patients will not have insurance to help cover any of the costs.).

155. 15 U.S.C. §§ 1011-15 (2012).

Clause of the U.S. Constitution.[156] One year following the Court's ruling in *South-Eastern Underwriters Association* Congress passed the McCarran-Ferguson Act (MFA) of 1945, which provided the insurance industry with a "limited exemption from federal antitrust laws.[157] Specifically, the MFA exempts conduct that constitutes the business of insurance to the extent that such conduct is regulated by state laws, provided that it does not amount to an agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[158] This legislation essentially allows states to regulate the insurance industry within their own borders in spite of the Commerce Clause.

The U.S. Supreme Court in *Gonzalez v. Raich* concluded that Congress has the authority under the Commerce Clause to regulate the production, manufacturing, and distribution of marijuana.[159] The Court further concluded that states are preempted in regulating medical marijuana. The Court in *Oakland Cannabis Buyers' Coop.* specifically states that there is no medical necessity exemption under the CSA and therefore, the state's medical marijuana legislation is preempted. Logically, using the McCarran-Ferguson Act as a model, Congress can simply enact legislation allowing states to regulate the production, manufacturing, and distribution of medical marijuana, thereby negating preemption. The "Respect States' and Citizens' Rights Act of 2013,[160] proposed by Diana DeGette of Colorado, has a similar intent and effect, as its stated goal is to "provide that Federal law shall not preempt State law."

B. The Federal Government May Reclassify or Declassify Marijuana Under the Controlled Substances Act

Short of a complete, national embrace, the federal government can simply reclassify marijuana as a Schedule II drug, or declassify marijuana altogether. There are three ways to reclassify a drug under the Controlled Substances Act. The first method is set out under 21 U.S.C. § 811(a), where the Attorney General, on his own motion, at the

156. 322 U.S. 533 (1944).

157. *See generally State Insurance Regulation*, NAT'L ASS'N OF INS. COMMISSIONERS, http://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf (last visited June 14, 2015).

158. Section for Antitrust Law, *Comments to the Antitrust Modernization Commission Regarding the McCarran-Ferguson Act,* A.B.A. (Apr. 2006), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_amc-mccarranferguson.authcheckdam.pdf.

159. *See generally* 545 U.S. 1 (2005).

160. H.R. 964, 113th Cong. (2013).

request of the Secretary of Health and Human Services, or upon the petition of an interested party, may initiate proceedings for a hearing to reclassify any drug on the Controlled Substance Act.[161] If an interested party is a party to the petition, it must first petition the DEA.[162] According to the court in *NORML v. DEA*, the DEA Administrator must refer the petition to the Secretary of Health and Human Services for scientific and medical evaluation.[163] The DEA is required to hold a public hearing where "all interested parties" are given an opportunity to submit additional information for consideration by the agency.[164] If the Attorney General is initiating the proceedings, he must request from the Secretary of Health and Human Services "a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be controlled or removed as a controlled substance," prior to initiating proceedings.[165]

There are eight factors that the Secretary has to consider in making his recommendations, which are then "binding on the Attorney General."[166] The Secretary of Health and Human Services can also unilaterally make findings, based on medical and scientific evaluations, to reclassify marijuana under the Controlled Substance Act.[167] As of this writing, the Secretary has refused, based on medical and scientific evaluations, to reclassify marijuana. There is hope on the horizon for proponents of marijuana reclassification, however. In testimony made to the House Committee on Oversight and Government Reform, FDA Deputy Director Doug Throckmorton stated that the FDA is currently conducting scientific and medical research on marijuana, as ordered by the DEA, in order to determine the appropriate classification of marijuana.[168]

The second way to reclassify marijuana is for Congress to take action. Congress has, in the past, changed the classification of controlled substances. For example, in 2000, Congress passed the "Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of

161. 21 U.S.C. § 811(a) (2014); 28 C.F.R. § 0.100 (2003) (delegating Attorney General's authority to the Administrator of the DEA).

162. § 811(a).

163. 559 F.2d 735, 738 (D.C. Cir. 1977).

164. 5 U.S.C. § 554 (2014).

165. 21 U.S.C § 811(b) (2014).

166. *Id.*

167. *See generally* § 811.

168. Matt Ferner, *FDA to Evaluate Marijuana for Potential Reclassification as Less Dangerous Drug*, HUFFINGTON POST (June 24, 2014), http://www.huffingtonpost.com/2014/06/24/fda-marijuana_n_5526634.html.

2000."[169] This Act amended the Controlled Substance Act to add "gamma hydroxybutyric acid" to Schedule I.[170] On June 23, 2011, Senator Barney Frank of Massachusetts, along with several other Senators, introduced a bill known as "Ending Federal Marijuana Prohibition Act of 2011."[171] This bill was to completely remove marijuana from the schedule under the Controlled Substance Act.[172] The bill did not get enough votes to pass both the House and Senate.[173]

Finally, the President may, by Executive Order, reclassify marijuana. President Obama may order the Attorney General to use the power granted to the Attorney General under the Controlled Substance Act.[174] In an interview with David Remnick, President Obama stated that he did not think that marijuana was "more dangerous than alcohol."[175] President Obama went on to say that he did not think it was right that we are "locking up kids or individual users for long stretches of jail time when some of the folks who are writing those laws have probably done the same thing."[176] President Obama feels that the legalization of marijuana in Colorado and Washington should go forward because "it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."[177] On February 12, 2014, in response to President Obama's comments made during the interview, eighteen members of congress wrote to the President requesting that he "instruct Attorney General Holder to delist or classify marijuana in a more appropriate way . . . ."[178] The members of congress reasoned that "[l]ives and resources are wasted enforcing harsh, unrealistic, and unfair marijuana laws . . . [and that] [c]lassifying marijuana as Schedule I at the federal level perpetuates an unjust and irrational system."[179] President Obama has yet to act on Congress' recommendations; how-

169. Pub. L. No. 106-172.

170. *Id.* at § 2(4), 5(a), 114 Stat. 7, 7, 10.

171. H.R. 2306, 112th Cong. (2015).

172. *Id.*

173. *Id.*

174. *See* 21 U.S.C. § 811.

175. David Remnick, *Going the Distance: On and off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), http://www.newyorker.com/magazine/2014/01/27/going-the-distance-2.

176. *Id.*

177. *Id.*

178. Letter from Earl Blumenauer et al., Congressmen, to Barack Obama, President (Feb. 12, 2014), *available at* http://blumenauer.house.gov/images/stories/2014/02-12-14%20Blumenauer%20Rescheduling%20Letter.pdf.

179. *Id.*

ever, these actions seem to indicate a national trend in favor of changing current marijuana laws.

Until marijuana becomes legalized nationally, either by re-Scheduling or de-Scheduling the drug, states cannot truly create meaningful marijuana legislation. This is the real crux of state marijuana laws. If federal legalization were to occur however, Florida's legislation will still be pre-empted by the Sherman Antitrust Act. For a state's legislation to be fully valid, and provide complete protection for its citizens, it must pass legal muster on all fronts.

C. States Must Allow for Competition in the Medical Marijuana Industry to Avoid Violating the Sherman Antitrust Act

The Sherman Antitrust Act was created to protect businesses and consumers from legislation that would create a culture in which businesses are allowed to create monopolies.

> Monopoly is the extreme case in capitalism. It is characterized by a lack of competition, which can mean higher prices and inferior products. Competition is a regulating force, along with the self-interest of the consumer[180] in the U.S. economy. They work together to keep prices low and bring new products to the market place; they also foster innovations that help bring down the cost of doing business."[181]

The early history of the U.S. railroad industry is a resounding historical example of the economic perils inherent in a monopoly.

In the Nineteenth Century, there was a great Westward expansion as entrepreneurs flocked to the West in hopes of making their fortunes.[182] Railroads were the main mode of transporting materials to the West.[183] As the railroad business boomed, large corporations "attempted to stabilize their situations by pooling markets and centralizing management" of other big businesses that relied on the railroad industry such as "iron, steel, copper, glass, machine tools, and oil."[184] As a result of the consolidation of these big businesses, they were able to eliminate competitors, drive down prices paid for labor

180. Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA, http://www.investopedia.com/articles/economics/08/hammer-antitrust.asp (last visited June 14, 2015).

181. *History of Monopolies in the United States*, ECONEDLINK, http://www.econedlink.org/lessons/index.php?lid=628&type=educator (last visited June 14, 2015).

182. *Rise of Monopolies: Development of the Railroad Monopoly*, STANFORD COMPUTER SCI. (June 10, 1996), http://cs.stanford.edu/people/eroberts/cs201/projects/corporate-monopolies/development_rrmon.html.

183. *Id.*

184. *Id.*

and raw materials, charge customers more, and obtain special favors from the government.[185] "The actions of the railroad companies dictated how nearly every citizen in the West (and a majority in the East) performed their businesses and lived their lives. They were powerless to avoid this conglomeration (or conspiracy) of individual companies."[186]

Florida legislation, allowing only five dispensaries in the entire state, threatens a repeat of the railroad monopoly. To prevent the creation of monopolies in what will potentially be a multi-billion dollar business, Florida legislation must not impose measures that prohibit businesses from entering the Florida marijuana market. As seen in the railroad business, monopolies lead to higher costs to the consumer, less efficiency, and potential for political corruption.

CONCLUSION

The Compassionate Medical Cannabis Act of 2014 is invalid under the Sherman Act. By licensing five, and only five, marijuana dispensaries, the state of Florida has created a monopoly. The intent of this section of the Act is to create barriers to abuse. Having recently emerged from its reputation as a pill mill state, the Florida legislature has placed controls on the industry that, while formulated with good intentions, place a choke-hold on free trade and gives five individual businesses a ready-made market with no price ceiling. In this scenario, being named a dispensary is akin to winning the lottery. Profits are all but assured, with competition vanquished in advance. Price projections have ranged from $225 to $450 dollars per ounce but are utterly meaningless, as dispensaries will serve a hungry clientele that is without choice. By eliminating competition and choice, Florida has left the compassion out of The Compassionate Medical Cannabis Act, and is irrefutably in violation of the Sherman Antitrust act.

It is high time the federal government moved on marijuana. Florida has become the twenty-third state to enact some form of marijuana legislation,[187] highlighting the national trend. However, the substance is still *illegal*. It is unconscionable that a law-abiding, state-sanctioned business can be subject to prosecution by the federal government. Washington needs to officially recognize states' rights as being preeminent in this regard, or make a move to either legalize or decriminalize marijuana at the national level.

185. *Id.*
186. *Id.*
187. FLA. MARIJUANA INFO., *supra* note 45.