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The Wellness Approach: Weeding Out Unfair Labor Practices in the Cannabis Industry

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THE WELLNESS APPROACH: WEEDING OUT UNFAIR LABOR PRACTICES IN THE CANNABIS INDUSTRY

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I. INTRODUCTION

California was at the forefront of medicinal cannabis legalization in 1996.¹ That was twenty years ago. Today, twenty-three states, Puerto Rico, Guam, and the District of Columbia have all passed laws legalizing the use of cannabis for medical purposes.² Three of these states plus the District of Columbia have also legalized the recreational use of cannabis.³ However, despite the aggregate of state protections and changing public opinion, both medical and recreational use of cannabis remains illegal under federal law.⁴ This underlying conflict between state and federal law creates significant uncertainty for cannabis businesses and their employees.

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1. 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Feb. 27, 2016).

2. *Id.*; *Puerto Rico Governor Signs Order to Legalize Medical Marijuana*, HUFFINGTON POST (May 4, 2015, 9:15 AM), http://www.huffingtonpost.com/2015/05/04/puerto-rico-medical-marijuana_n_7203916.html; *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated Jan. 25, 2016).

3. *State Medical Marijuana Laws*, *supra* note 2.

4. *See* Controlled Substances Act, 21 U.S.C. §§ 812(b)-(c), 829 (2012). Under the Controlled Substances Act, cannabis is classified as a Schedule I controlled substance. § 812(c). This is the most restrictive category and signifies Congress's conclusion that cannabis has no medicinal value and cannot be legally prescribed. *See id.* § 812(b); *see also* Racketeer Influenced & Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (2012).

Since the advent of state-authorized medicinal cannabis, scholars have thoroughly explored the employment law issues raised by legalization.⁵ This discussion concerns various topics, ranging from drug-free workplace policies to mandatory drug screening and employment discrimination. Additionally, employer practices and resulting lawsuits have prompted consideration of the legal ramifications of employees using cannabis.⁶ However, current literature does not adequately address how state and federal law may regulate employment within the industry itself given the prevailing federal criminal prohibitions still governing cannabis.⁷ This unique situation has left one federal agency to regulate an industry that another is tasked with eliminating.

Recently, due to the expanding nature of the cannabis industry, the National Labor Relations Board (“NLRB” or “the Board”) has agreed to hear multiple labor cases involving claims that cannabis employers engaged in unfair labor practices. The federal Office of General Counsel of the NLRB released an Advice Memorandum (“Memo”) recommending what this Note terms the “Wellness Approach”⁸—reasoning that the NLRB should exercise jurisdiction to investigate unfair labor practice claims against cannabis enterprises.⁹ This Note offers the first meaningful analysis of the NLRB’s proposed approach, evaluating whether extending the protections of the National Labor Relations Act (“NLRA” or “the Act”) to cover the cannabis industry is feasible as a matter of statutory interpretation or policy.

5. See generally Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, N.J. LAW., Dec. 2014, at 66; Matthew D. Macy, *Employment Law and Medical Marijuana—An Uncertain Relationship*, COLO. LAW., Jan. 2012, at 57; Michael D. Moberly & Charitie L. Hartsig, *Smoke – and Mirrors? Employers and the Arizona Medical Marijuana Act*, ARIZ. ATT’Y, July/Aug. 2011, at 30.

6. See *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008) (upholding the right of the employer to terminate its employee, a qualified medical cannabis patient, after he failed a drug screening); see also Len Iwanski, *Medical Marijuana Law Doesn’t Protect Workers*, MISSOULIAN (Apr. 4, 2009), http://www.missoulain.com/news/state-and-regional/article_2f5ef0f7-fab3-50fe-8f48-914c716fd23a.html (“In July 2006, Mike Johnson tested positive for marijuana in a random drug test. The company said the 25-year employee could return to work if he submitted to additional drug tests and passed them. He refused and was fired.”).

7. See Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. REV. 1759 (2014).

8. This Note’s argument that the Board should exert jurisdiction will be referred to as the “Wellness Approach” because the NLRB Memo is not law, nor is it binding on the Board.

9. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, NLRB, to Jonathan B. Kreisberg, Reg’l Dir. Region 1 (Oct. 25, 2013) [hereinafter NLRB Memorandum], http://www.managementmemo.com/files/2014/08/01_CA_104979_10_25_13_.pdf.

Ultimately, this Note argues that the NLRB should exercise jurisdiction because cannabis legalization will continue to expand at the state level,¹⁰ allowing more citizens to be employed in an industry where workers' rights remain unclear. While Congress continues to leave major questions facing the cannabis industry unanswered, the Board will serve as a vehicle to address interstitial labor issues. The Board's decision will not only validate the nascent cannabis industry, but it will also help expose dormant labor conflicts. Cannabis industry employees deserve the same labor rights guaranteed to all other workers in the American economy under the NLRA.¹¹

This Note proceeds in four parts: Part II discusses the background of the cannabis industry as well as the gap in state and federal law protecting employees in the industry. Part III examines the mechanics of the NLRA, the jurisdictional bounds of the Board, and the recent NLRB Memo, which suggested jurisdiction. Part IV explores the Wellness Approach, applying it in the context of the law on unfair labor practices under the NLRA. Additionally, Part IV argues that the NLRB should apply the Wellness Approach and bring employees of the cannabis industry under the protection of federal labor law. Part V addresses the core challenges that will likely arise in applying labor law to the cannabis industry. This Note will conclude by proposing various ways the NLRB can improve labor law jurisprudence in the fledging American cannabis industry.

II. AN INDUSTRY CLOUDED UNDER SMOKE

Ian Brodie quit his job at Wellness Connection, a company that operates multiple marijuana-growing facilities and dispensaries, due to his frustration with company management and their failure to address widespread employee grievances.¹² Brodie, along with other co-workers, also suffered illnesses stemming from working in a facility with pesticides and mold.¹³ When employees expressed their grievances through legally protected organizing, they were issued disciplinary warnings, unlawfully interrogated, and made to believe that any union activities were under surveillance.¹⁴ The employer's

10. Cannabis sales are estimated to hit \$3.1–3.6 billion in total revenue by 2016. See Chris Walsh, *US Medical Marijuana Sales to Hit \$1.5B in 2013, Cannabis Revenues Could Quadruple by 2018*, MARIJUANA BUS. DAILY (Mar. 21, 2013), <https://mmjbusinessdaily.com/us-medical-marijuana-sales-estimated-at-1-5b-in-2013-cannabis-industry-could-quadruple-by-2018>.

11. See generally National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

12. Dave Jamieson, *Medical Marijuana Workers Have the Same Labor Rights As Everyone Else, Feds Say*, HUFFINGTON POST (Feb. 27, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/02/27/medical-marijuana-unions_n_4860793.html.

13. See *id.*

14. *Id.*

retaliatory actions were in direct violation of federal labor laws.¹⁵ Employees in any other industry would be protected and could seek relief under multiple federal laws; but, since this company produces, cultivates, and dispenses cannabis, it is stuck in a gray area as to whether it should be considered within the scope of federal jurisdiction. If it is, this would mean that federal laws administered by the U.S. Department of Labor (“DOL”), such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the NLRA, among many others, have not been adequately enforced within the cannabis industry.¹⁶

The issues raised by Mr. Brodie’s case and others like it have received little attention from the courts, scholars, or policymakers. With some states providing legal access to medical marijuana, commentators have debated the protections that should be available to workers prescribed to use cannabis. As the Brodie situation makes clear, however, current discussion has mostly missed an equally important issue—the rights of workers in the cannabis industry itself. The Brodie example follows a pattern seen in a troubling number of cases—cannabis workers being taken advantage of due to the lack of federal oversight.¹⁷ Brodie’s case highlights the implications of the inconsistency between state and federal cannabis laws—an inconsistency causing increasing uncertainty regarding the rights of employees who work for state-sanctioned dispensing organizations. Although states have passed marijuana legislation to protect the health, safety, and welfare of its citizens, the lack of federal oversight may lead to serious abuse of employees.¹⁸ Section II.A explores the nature of the emerging cannabis industry, illuminating how and why it leaves employees open to exploitation.

A. *The American Cannabis Industry*

The cannabis sativa plant and its derivative products are classified as a Schedule I narcotic under the Controlled Substances Act of

15. See 29 U.S.C. §§ 157-159 (2012).

16. See generally Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

17. See 29 U.S.C. §§ 157-159 (providing federal oversight mechanisms for employees covered under the Act); Jamieson, *supra* note 12; see also Hilary Bricken, *Marijuana Workers and Unions: The 4-1-1*, CANNA LAW BLOG (Feb. 5, 2015), <http://www.cannalawblog.com/marijuana-workers-and-unions-the-4-1-1/>; Jan Hefler, *Growing Pains: Labor Strife at N.J.’s First Medical Marijuana Dispensary*, PHILLY.COM (Jan. 30, 2015), http://articles.philly.com/2015-01-30/news/58591595_1_marijuana-dispensary-marijuana-industry-marijuana-regulations.

18. See Michael Hiltzik, *How We Know Marijuana Industry Is Maturing: Unfair Labor Practice Complaints*, L.A. TIMES (Mar. 17, 2015), <http://www.latimes.com/business/hiltzik/la-fi-mh-marijuana-industry-unfair-labor-complaints-20150317-column.html>.

1970 (“CSA”).¹⁹ Although the CSA prohibits the possession, cultivation, and distribution of cannabis,²⁰ twenty-three states, Puerto Rico, Guam, and the District of Columbia have all established rules, regulations, constitutional provisions, or legislative enactments that legalize some variation of its use.²¹ The states that allow the production, sale, and use of cannabis have created a budding industry, estimated to be worth \$1.5 billion in revenue.²² By 2018, industry revenue is predicted to grow to \$6 billion.²³ Due to federal laws banning medical cannabis, the regulation of the industry is left primarily to each respective state.²⁴

As the use of medical cannabis gains public approval, the rights of workers in the industry will remain cloudy and complicated by regulatory inconsistencies and ambiguities.²⁵ The legal responsibilities of cannabis enterprises differ from companies that are regulated by federal law. Yet, on the state level, each state that has legalized cannabis has established its own regulations.²⁶ States with legalized cannabis enforce comprehensive regulations to ensure safety, privacy, and accountability within the industry. For example, among many other requirements, California requires all medical cannabis dispensaries that apply pesticides to their harvest to obtain an operator identification number from the County Agricultural Commissioner.²⁷ These dispensaries must continue to send the pesticide use reports on a monthly basis to the Commissioner’s office.²⁸ Maine also imposes significant regulations after the state passed the Maine Medical Use

19. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1249 (codified as amended in scattered sections of 21 U.S.C.). The CSA constitutes Title II of the Comprehensive Drug Abuse and Prevention and Control Act., § 100, 84 Stat. at 1242. The CSA provides a statutory framework for the federal government to regulate the lawful production, possession, and distribution of controlled substances. See §§ 100-709, 84 Stat. at 1242-84.

20. See §§ 100-709, 84 Stat. at 1242-84.

21. *23 Legal Medical Marijuana States and DC*, supra note 1; *Puerto Rico Governor Signs Order to Legalize Medical Marijuana*, supra note 2.

22. Walsh, supra note 10.

23. Jon C. Ogg, *Estimated \$10 Billion Marijuana Sales in 2015 Far Too Low*, 24/7 WALL ST. (May 23, 2015, 9:20 AM), <http://247wallst.com/consumer-products/2015/05/23/estimated-10-billion-marijuana-business-sales-in-2015-far-too-low/>.

24. See Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 5 n.1 (2013) (citing state statutes governing marijuana).

25. See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 787 (2004).

26. See, e.g., NEV. ADMIN. CODE § 453A.502 (2014) (showing that Nevada state law requires cannabis cultivation facilities to strictly label each of its products).

27. *Pesticide Use on Marijuana*, DEPT OF PESTICIDE REG., http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/cannabis_enfrmnt/pesticide_use_on_marijuana.pdf (last visited Feb. 27, 2016).

28. *Id.*

of Marijuana Act in 2009.²⁹ The Act delegated authority to Maine's Department of Health and Human Services ("DHHS") as the principle agency to regulate the state's new medical marijuana industry.³⁰ The DHHS published a comprehensive set of rules, including, among other requirements, that all medical cannabis employees secure a registry identification card from DHHS before affiliating or working at any state dispensary.³¹ During the mandated application process, each medical cannabis employee must also pass a background check conducted by DHHS.³² Moreover, cannabis dispensaries are required to have written employment contract policies, procedures, and job descriptions; to contract with approved employee assistance programs; and, to maintain an alcohol and drug-free workplace policy.³³

Furthermore, as public opinion and laws have evolved nationwide, the federal government has, in rare cases, recognized aspects of the industry by enforcing a limited but growing number of federal regulations. For instance, financial institutions working with state-sanctioned cannabis businesses are now required to file a Marijuana Limited Suspicious Activity Report ("SAR") with federal authorities.³⁴ The SAR discloses whether the business is following the government's guidelines with regard to revenue derived exclusively from legal sales.³⁵ Additionally, in May 2014, the U.S. House of Representatives passed a bill to protect states with medical cannabis laws from federal interference.³⁶ Congress emphasized its commitment to such policy by passing the Consolidated and Further Continuing Appropriations Act of 2015 ("Cromnibus Act"). Under this spending bill, Congress prevented the use of federal funds to prosecute individuals acting under state-approved medicinal marijuana laws.³⁷

29. ME. STAT. tit. 22, §§ 2421-2430 (2014).

30. See 10-144-122 ME. CODE R. §§ 1-11 (LexisNexis 2016).

31. *Id.* § 8.

32. *Id.*

33. *Id.* § 6.

34. DEPT OF THE TREASURY FIN. CRIMES ENFT NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 3 (2014), www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

35. See *id.*

36. H.R. 4660, 113th Cong. (2014). Representative Rohrabacher (R-CA) offered House Amendment 748 to the Commerce, Justice, Science, and Related Agencies Appropriations Bill to prohibit the use of funds to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. H. Amdt. 748, 113th Cong. (2014). The GOP-controlled House produced a 219-189 vote. *Final Vote Results for Roll Call 258*, OFF. OF THE CLERK: U.S. HOUSE OF REPRESENTATIVES (May 30, 2014), <http://clerk.house.gov/evs/2014/roll258.xml>; see also Ryan J. Reilly & Matt Ferner, *House Blocks DEA from Targeting Medical Marijuana*, HUFFINGTON POST (May 30, 2014, 12:24 AM), http://www.huffingtonpost.com/2014/05/30/dea-medical-marijuana-house-vote_n_5414679.html.

37. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014); see Matt Ferner, *Congress Passes Historic Medical Marijuana Protections*

Nonetheless, as long as cannabis remains illegal under the CSA, state protections for industry workers will be dangerously incomplete. States have no obligation to extend protections to industry workers and may offer varying levels of protection. As the cannabis industry expands throughout the states, it will employ a growing, significant workforce to harvest, process, and sell cannabis and its derivative products. Therefore, it will become imperative for federal labor laws to be applied and enforced to protect the industry and its participants. Part III begins by examining how the National Labor Relations Act may apply to the cannabis industry. First, Part III develops an account of the purposes of the NLRA and the authority conventionally exercised by the National Labor Relations Board. Next, Part III studies the NLRB's recent analysis of its jurisdiction in cannabis cases.

III. AMERICAN LABOR LAW

A. *The National Labor Relations Act*

As state legalization spreads across the United States, an increased demand for cannabis has triggered the creation of larger, more sophisticated cannabis dispensaries and enterprises.³⁸ One such enterprise is the California Harborside Health Center, which earned approximately \$20 million in gross revenues in 2008.³⁹ Yet, despite employing more than seventy-five full-time workers, the Oakland-based dispensary and its employees are uncertain whether federal labor laws, such as the NLRA, govern and protect their rights.⁴⁰

The NLRA is the foundational federal labor law aimed at protecting workers' rights and balancing employer needs.⁴¹ The NLRA guarantees basic rights for private sector employees, including the right to organize into trade unions and engage in collective bargaining for better wages.⁴² The NLRA is designed to "curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."⁴³ To implement the policies of the NLRA, sections 153–156 of the Act estab-

in Spending Bill, HUFFINGTON POST (Dec. 14, 2014, 9:24 AM), http://www.huffingtonpost.com/2014/12/14/congress-medicalmarijuana_n_6317866.html?utm_hp_ref=tw.

38. See RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* 61-75 (2004).

39. Angela Woodall, *Marijuana Laws Spur Small Businesses in Oakland, Elsewhere*, INSIDE BAY AREA (Nov. 1, 2009), http://www.insidebayarea.com/ci_13679216.

40. See *id.*

41. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

42. *Id.* § 157.

43. *National Labor Relations Act*, NLRB, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Feb. 27, 2016).

lished the NLRB to oversee investigations and to remedy unfair labor practices.⁴⁴ Congress designed the NLRA to rectify the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”⁴⁵

As the principal enforcer of the NLRA, the NLRB was created to oversee the process by which employees decide whether they want to be represented by a labor organization and prosecute labor violations.⁴⁶ The NLRB is authorized to prevent unfair labor practices and to adjudicate hearings, all of which may be appealed through the court system.⁴⁷ To ensure compliance with the Act, the NLRB has been delegated broad investigatory powers and has the authority to issue subpoenas, examine evidence, and conduct investigations.⁴⁸

In many cases, the NLRB clearly has jurisdiction over employers and employees; however, the Act specifically restricts the Board’s authority over agricultural laborers; supervisors; federal, state, or local government workers; independent contractors; and workers covered under the Railway Labor Act.⁴⁹ In the case of the cannabis industry, however, the answer is far less obvious. Would affording employees’ rights under the NLRA impermissibly conflict with federal drug policy? Should labor law more broadly apply to an industry considered illegal as a matter of federal law as well as the laws of many states? Section III.B follows and considers how the NLRB traditionally exerts jurisdiction and how it may enforce it in the cannabis realm.

B. The National Labor Relations Board

The Supreme Court has “consistently declared that in passing the [NLRA], Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.”⁵⁰ Section 2(2) of the NLRA contains language that “vests jurisdiction in the Board over ‘any’ employer doing business in this country save those Congress excepted with careful particularity.”⁵¹ However, if a labor dispute’s effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction, section

44. 29 U.S.C. §§ 153-156.

45. *Id.* § 151.

46. *Id.* §§ 153, 155.

47. *Id.* § 160.

48. *Id.* § 161.

49. *Id.* § 152; *see also* Railway Labor Act, Pub. L. No. 74-487, 49 Stat. 1189 (1936) (codified as amended at 45 U.S.C. §§ 181-188 (2012)).

50. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

51. *India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986); *see* 29 U.S.C. § 152(2).

14(c)(1) of the NLRA provides the Board discretionary authority to decline jurisdiction.⁵² Although section 14(c)(1) of the NLRA makes it clear when the Board cannot decline jurisdiction over a particular labor dispute,⁵³ there are still many categories that the Board has traditionally decided not to control.

Throughout its history, the Board has declined to exert jurisdiction over various groups of employers, including charitable organizations, non-profits, small intrastate firms, as well as the horseracing and dogracing industries.⁵⁴ The Board would not exercise jurisdiction because the employers were either “small, local, and did not significantly affect commerce”⁵⁵ or because the employers were already heavily regulated by a sovereign state or international entity.⁵⁶ The effects of a labor dispute are not the sole reason the Board may unilaterally decide not to exercise jurisdiction. If the employer is based in an industry characterized by “temporary and sporadic employment,” then the Board has historically not exerted control because of the significant difficulties in administering the Act in that context.⁵⁷

Today, many of the Board’s historical exclusions are limited or reversed.⁵⁸ For instance, the Board no longer declines jurisdiction

52. See 29 U.S.C. § 164(c)(1) (2012). *But see* Hirsch v. McCulloch, 303 F.2d 208, 213 (D.C. Cir. 1962) (concluding that the Board’s discretion was not without limit and that the Board could not, on the basis of advisory opinions, refuse jurisdiction over labor issues involving categories or groups of employers without first promulgating a rule or holding a hearing).

53. See 29 U.S.C. § 164(c)(1); Leedom v. Fitch Sanitarium, Inc., 294 F.2d 251, 255-56 (D.C. Cir. 1961) (stating Board standards for jurisdiction existing on August 1, 1959).

54. NLRB Memorandum, *supra* note 9, at 7.

55. *Id.*

56. *Id.*; see, e.g., Evans & Kunz, Ltd., 194 N.L.R.B. 1216 (1972) (declining jurisdiction over a law firm consisting of four to six attorneys where the firm limited the majority of its practice in Arizona); Horseracing and Dogracing Industries, 38 Fed. Reg. 9537 (Nat’l Labor Relations Bd. Apr. 16, 1973) (codified at 29 C.F.R. § 103.3) (declining jurisdiction over horseracing and dogracing industries, in part, because local and state laws decide dates for tracks’ racing and set a percentage share of the gross wages that would go to the state; the states licensed employees and retained the right to effect termination to employees whose activities put at risk the integrity of the industry; and a “unique and special relationship” existed between these industries and the states because the industries made up a large source of revenue).

57. NLRB Memorandum, *supra* note 9, at 7; see Horseracing and Dogracing Industries, 38 Fed. Reg. at 9537; see also Chi. Mathematics & Sci. Acad. Charter Sch., 359 N.L.R.B. No. 41, at 11 (Dec. 14, 2012).

58. NLRB Memorandum, *supra* note 9, at 7; see, e.g., Kansas AFL-CIO, 341 N.L.R.B. 1015, 1018-19 (2004) (adopting the ALJ’s decision to reject respondent’s position that because it was engaged mostly in state lobbying conduct, the Board should not exercise jurisdiction); Lighthouse for the Blind of Hous., 244 N.L.R.B. 1144, 1145 (1979) (showing that the Board, moving forward, will not differentiate between nonprofit and for-profit organizations for jurisdictional analysis); Foley, Hoag & Eliot, 229 N.L.R.B. 456, 456-57 (1977) (overruling the Board’s past determination that it should refuse jurisdiction over particular law firms); R.I. Catholic Orphan Asylum, 224 N.L.R.B. 1344, 1345 (1976) (“[T]he only basis for declining jurisdiction over a charitable organization is a finding that its activities do not

simply because a state or foreign entity already exerts significant control over the employer.⁵⁹ Additionally, the Board now refuses to exclude intrastate companies that are already heavily regulated by a state.⁶⁰

The Board has authority over retail enterprises that produce an annual gross business volume of at least \$500,000 and fall within the Board's statutory jurisdiction.⁶¹ Based on these standards, the Board concluded in its advisory Memo that a cannabis enterprise is within the Board's jurisdiction so long as it meets the Board's monetary jurisdictional thresholds.⁶² The Board came to this conclusion for several reasons. First, Congress had already delegated this authority to the Board; second, a labor dispute in the cannabis industry could have substantial effects on interstate commerce; and finally, public policy considerations necessitate the Board to act.⁶³ However, the Board's recommendation to exercise jurisdiction raises important questions about how to resolve an obvious conflict between the CSA and federal labor law. This Part turns next to a detailed examination of the NLRB Memo.

have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction.”).

59. NLRB Memorandum, *supra* note 9, at 7-8; *see, e.g.*, Chi. Mathematics & Sci. Acad. Charter Sch., 359 N.L.R.B. No. 41, at 10-11 (Dec. 14, 2012) (rejecting the argument that the Board should discretionarily refuse authority over charter schools because of the significant state involvement where respondent received eighty percent public funding, where educators were required to be certified under the state school code and participate in the same assessments mandated of public school educators, and where respondent was subject to various other state regulations); *see also* Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975) (rejecting the argument that the Board should use its discretion to decline jurisdiction over the Jai Alai industry where the state mandated that all workers be licensed and that eighty-five percent be citizens of the state, retained authority to accept managerial workers, and employed residents directly to maintain the integrity of the sport and the gambling polices).

60. NLRB Memorandum, *supra* note 9, at 8; *see, e.g.*, Mgmt. Training Corp., 317 N.L.R.B. 1355, 1357-58 (1995) (showing that when deciding if the NLRB should exercise jurisdiction over an employer that has ties to a foreign government, the Board should only determine if the employer fits under the definition of “employer” under section 2(2) of the NLRA, and if that employer hits the monetary standards); State Bank of India, 229 N.L.R.B. 838, 842 (1977) (concluding that there is no public policy that justifies the Board to continue to decline jurisdiction on the basis that the employer is an “agency” or “instrumentality” of an international state); *cf.* Temple Univ. of the Commonwealth Sys. of Higher Educ., 194 N.L.R.B. 1160, 1161 (1972) (declining to assert jurisdiction where a state directly controlled a nonprofit university to the extent that the university was deemed to be a quasi-public institution).

61. Carolina Supplies & Cement Co., 122 N.L.R.B. 88, 89 (1958); *see* NLRB Memorandum, *supra* note 9, at 8.

62. NLRB Memorandum, *supra* note 9, at 8.

63. *Id.*

C. *The NLRB Memorandum*

In 2013, employees of the Wellness Connection of Maine claimed that the cannabis-dispensing organization engaged in unfair labor practices and conducted union-busting activities.⁶⁴ The United Food and Commercial Workers International Union (“UFCW”), which maintains a Medical Cannabis and Hemp Division,⁶⁵ petitioned the Board to hear the case, and for the first time in U.S. history, the Board accepted the petition.⁶⁶ Yet, because the CSA renders all cannabis businesses illegal under federal law, it was unclear whether employees of an illegal enterprise could seek redress under federal labor laws that technically do not apply. Ultimately, the parties agreed to a settlement, and the charges were dismissed,⁶⁷ but the Board’s Associate General Counsel Barry J. Kearney nonetheless released an Advice Memorandum detailing how the Board should regulate labor disputes in the cannabis industry.⁶⁸ It is important to note that a formal decision by the agency or a court has never been issued, and although the Memo is persuasive authority, it does not have force of law, nor is it binding on the Board.

The Memo addressed two concerns: (1) whether the Board would exercise jurisdiction over an enterprise that commercially grows, processes, and sells medical cannabis; and (2) whether the workers, who process cannabis that has already been cultivated and harvested by other workers, should be classified as agricultural laborers and thus not considered “employees” under section 2(3) of the NLRA.⁶⁹ The Memo first discusses the medical cannabis industry and the difficulties employees face due to the federal prohibition of

64. *Id.* at 1-2.

65. See *Cannabis Workers Rising*, UFCW, <http://cannabisworkers.org/> (last visited Feb. 27, 2016) (showing that the UFCW maintains “Cannabis Workers Rising,” a campaign that gives a voice to employees in the medical marijuana retail industry); see also Samuel P. Jacobs & Alex Dobuzinskis, *Marijuana Industry Provides Hope for Shrinking Labor Unions*, HUFFINGTON POST (Feb. 6, 2013, 12:59 AM), http://www.huffingtonpost.com/2013/02/06/marijuana-industry_n_2627699.html; Stu Woo, *Teamsters Organize Medical Marijuana Growers*, WALL ST. J., <http://online.wsj.com/news/articles/SB10001424052748703305004575504370924866534> (last updated Sept. 21, 2010, 12:01 AM).

66. See NLRB Memorandum, *supra* note 9, at 1; see also Candice Zee, *NLRB Announces Intent to Become Involved in the Commercial Marijuana Business*, EMPLOYER LAB. REL. BLOG (Aug. 8, 2014), <http://www.employerlaborrelations.com/2014/08/08/nlrb-announces-intent-to-become-involved-in-the-commercial-marijuana-business/>.

67. Joshua Rhett Miller, *Union Gripe Brings Federal Labor Agency into Marijuana Debate for First Time*, FOX NEWS (Mar. 5, 2014), <http://www.foxnews.com/us/2014/03/05/federal-labor-agency-enters-medical-marijuana-debate-for-first-time.html>.

68. NLRB Memorandum, *supra* note 9.

69. *Id.* at 1; see National Labor Relations Act, 29 U.S.C. § 152 (2012).

cannabis.⁷⁰ The Memo also explains, in particular, the medical cannabis industry in Maine, as well as the business procedures of the charged party, The Wellness Connection.⁷¹

In 2009, Maine officially legalized the use of medical cannabis for qualified patients by passing the Maine Medical Use of Marijuana Act.⁷² By 2015, cannabis had become the highest valued cash crop industry in Maine, with an approximate value of \$78 million.⁷³ Maine's Department of Health and Human Services ("DHHS") was tasked with issuing a detailed set of rules to regulate the new industry.⁷⁴ The DHHS rules require individuals interested in joining or working for a cannabis dispensary to pass a background screening and obtain a registry identification card.⁷⁵ In addition, DHHS rules instruct all dispensaries to establish personnel policies, procedures, and job descriptions and to maintain a drug-free workplace policy and employment contract policies.⁷⁶

Wellness Connection of Maine, the largest medical cannabis enterprise in the state, operates four large dispensaries.⁷⁷ In 2013, several Wellness Connection employees complained to management about health and safety hazards within the dispensaries, specifically their exposure to illegal pesticides.⁷⁸ Management refused to acknowledge the complaints.⁷⁹ In response, the employees staged a walk-out from one of Wellness Connection's growing facilities.⁸⁰ The workers then tried to organize, alleging that Wellness Connection retaliated against the workers because of the protest and conducted several intrusive interrogations.⁸¹ The employees also claimed that the Wellness Connection facilities often lacked sterility and contained a high presence of mold.⁸² The UFCW agreed to represent the Wellness Connection employees and filed a claim with the Board

70. See NLRB Memorandum, *supra* note 9, at 3-5.

71. *Id.* at 1-5.

72. ME. STAT. tit. 22, §§ 2421-2430 (2014).

73. NLRB Memorandum, *supra* note 9, at 4; Seth Koenig, *Federal Prohibition of Medical Marijuana Continues to Handcuff Now-Legal Industry in Maine*, BANGOR DAILY NEWS (Sept. 6, 2013, 12:35 PM), <https://bangordailynews.com/2013/09/06/health/federal-prohibition-of-medical-marijuana-continues-to-handcuff-now-legal-industry-in-maine/> (stating that the signature wild blueberry industry of Maine is being surpassed by cannabis harvest).

74. See 10-144-122 ME. CODE R. §§ 1-11 (LexisNexis 2014).

75. *Id.* § 8.

76. *Id.* § 6.

77. NLRB Memorandum, *supra* note 9, at 1.

78. See Koenig, *supra* note 73.

79. See Jamieson, *supra* note 12.

80. *Id.*

81. See NLRB Memorandum, *supra* note 9, at 1-2; Koenig, *supra* note 73.

82. See Jamieson, *supra* note 12.

alleging that Wellness Connection engaged in unlawful surveillance, interrogation, and retaliatory discipline and discharge, violating sections 8(a)(1) and 8(a)(3) of the NLRA.⁸³

Although the parties reached a settlement, the Board still made the decision that an enterprise involved in the cannabis industry is within the Board's jurisdiction because (1) the Board has clear authority to assert jurisdiction, (2) a labor dispute involving the industry could have a substantial effect on interstate commerce, and (3) policy considerations do not compel the Board to decline.⁸⁴ Finally, the Board concluded that the Wellness Connection's processing assistants should be classified as covered "employees" as defined under the Act.⁸⁵

The first jurisdictional hurdle addressed in the Memo is the fact that cannabis producers and distributors may intend to keep their business operations wholly intrastate.⁸⁶ However, similar to the authority granted to Congress by the Commerce Clause,⁸⁷ the Memo suggests that any potential intrastate issue should not limit the Board's reach.⁸⁸ The Memo explained that Wellness Connection is a substantial enterprise, which employs over fifteen production and processing assistants and services over 3000 of Maine's 4500 registered cannabis customers.⁸⁹ Wellness Connection purchases enough out-of-state supplies to reach the Board's non-retail monetary standard and "has gross revenue sufficient to meet the Board's retail standard."⁹⁰ The Memo went on to explain that the cannabis industry as a whole has evolved into a large-scale economy, no longer bound by state lines.⁹¹ The industry employs thousands of Americans, some of whom are represented by unions and covered by collective bargaining agreements.⁹² Based on these facts, the Memo concluded that a

83. NLRB Memorandum, *supra* note 9, at 1-2; see National Labor Relations Act § 8, 29 U.S.C. § 158 (2012).

84. NLRB Memorandum, *supra* note 9, at 8.

85. *Id.* at 15; see National Labor Relations Act § 2, 29 U.S.C. § 152 (2012).

86. See NLRB Memorandum, *supra* note 9, at 9.

87. U.S. CONST. art. I, § 8, cl. 3.

88. See NLRB Memorandum, *supra* note 9, at 6-9; see also *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (concluding that the CSA is clearly within Congress's commerce power because "production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity").

89. NLRB Memorandum, *supra* note 9, at 2.

90. *Id.* at 9.

91. *Id.*

92. *Id.*

labor dispute at Wellness Connection, or any other employer in the cannabis industry, could “adversely affect out-of-state suppliers or interstate channels of commerce.”⁹³

The Memo noted that this was not the first time the Board would be asserting jurisdiction in an industry already heavily regulated by the state.⁹⁴ The mere fact that the employer’s business is already strictly regulated by the state of Maine is immaterial because the Board’s assertion of jurisdiction can “function concurrently with state regulation.”⁹⁵ Further, just because an employer violated one federal law “does not give it license to violate another.”⁹⁶ Therefore, the Board should exercise jurisdiction over employers in the cannabis industry, notwithstanding the federal prohibitions.⁹⁷ The Memo compared this jurisdictional policy to that of the U.S. Occupational Safety and Health Administration, another federal agency that currently exerts authority over similar cannabis enterprises that directly violate the CSA.⁹⁸ Additionally, it was noted that the Board maintained jurisdiction over companies in direct violation of the Immigrant Reform and Control Act (“IRCA”) because the companies were employing illegal immigrants.⁹⁹

Finally, the Memo addressed whether Wellness Connection employees should be classified as processing assistants or as agricultural laborers.¹⁰⁰ This is an important distinction because “agricultural laborers” will not be considered “employees” under section 2(3) of the NLRA.¹⁰¹ For purposes of classification, the Memo stated that the Board should derive the meaning of the term “agricultural laborer” from the definition of “agriculture,” as defined under section 3(f) of the Fair Labor Standards Act of 1938 (“FLSA”).¹⁰² In determining whether the workers are agricultural laborers or processing assis-

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 11.

97. *Id.* at 10.

98. *Id.*; see also *Inspection No. 893552.015 – Wellness Connection of Maine*, OSHA, https://www.osha.gov/pls/imis/establishment.inspection_detail?id=893552.015 (last visited Feb. 27, 2016) (providing information about the Occupational Safety & Health Administration’s inspection of Wellness Connection).

99. NLRB Memorandum, *supra* note 9, at 10-11 (noting that in the immigration context, “[a]ny limitations on the Act’s applicability . . . have been strictly remedial in nature”); see, e.g., *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47, Case No. 29-CA-25476, at 2-4 (Aug. 9, 2011).

100. NLRB Memorandum, *supra* note 9, at 11.

101. 29 U.S.C. § 152(3) (2012).

102. NLRB Memorandum, *supra* note 9, at 11; see Fair Labor Standards Act of 1938 § 3, 29 U.S.C. § 203(f) (2012); see also *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 & n.6 (1977) (noting that Congress has “tied the definition of ‘agricultural laborer’ in § 2(3) of the NLRA to § 3 of the FLSA.”).

tants, the Memo analyzed the employer's processing operation.¹⁰³ The Memo noted that the employer's "processing operation transforms the cannabis plants from their raw and natural state and therefore is more akin to manufacturing than agriculture."¹⁰⁴ The Memo continued to discuss how the employer's processing functions are not subordinate to the employer's farming operations.¹⁰⁵ Ultimately, the Memo found that the Wellness Center's processing assistants are indeed statutory employees entitled to the full protection of the NLRA.¹⁰⁶ The Memo based this conclusion on the fact that the processing function of the company was not purely to prepare cannabis for the market; rather, it was "a valuable part of its operation that utilizes significant labor and equipment to transform cannabis plants from their natural state into retail medical marijuana products."¹⁰⁷

For the above reasons, the Memo concluded by making two important findings. First, it is within the Board's authority to assert jurisdiction over the Wellness Connection, and second, the Wellness Connection's workers are processing assistants and therefore covered by the Act.¹⁰⁸

IV. THE WELLNESS APPROACH

The Wellness Approach will likely not end the debate about how—and whether—labor laws should cover the cannabis industry. This Part explores whether the Board should adopt the Wellness Approach going forward. The NLRA was intended to be a broad, prophylactic law.¹⁰⁹ One of the principle rationales behind the Act was to limit obstructions to free commerce, checking unfair labor practices and restoring a fair balance of bargaining power in American indus-

103. See NLRB Memorandum, *supra* note 9, at 12-13.

104. *Id.* at 13. The Memo's finding does not rely on the fact that the employer made tincture or kief when most of the claimed unfair labor practices happened. *Id.* at 13 n.55. Even though tincture and kief production obviously changed the raw and natural cannabis product, the Memo's conclusion was based on the Wellness Center's operations at the time of the Board's decision, which did not include production of tincture or kief. *Id.*

105. *Id.* at 13-15; see also 29 C.F.R. §§ 780.145-147 (2014) (showing DOL regulations listing more factors to decide whether activities are incident to or in conjunction with farming operations).

106. NLRB Memorandum, *supra* note 9, at 15.

107. *Id.*; see *Camsco Produce Co., Inc.*, 297 N.L.R.B. 905, 908 n.18 (1990) (explaining that when a worker is engaged normally in both primary agricultural work and nonagricultural work, a limited size of nonexempt work will be "inadequate to tip the scales" to bring the work under the protection of the Act; thus, the Board rightfully imposes a substantiality requirement in those instances).

108. NLRB Memorandum, *supra* note 9, at 11, 15.

109. William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 46 (2006).

try.¹¹⁰ However, recent worker abuse in the cannabis industry clearly demonstrates the growing need for the Board's intervention.¹¹¹ Exercising jurisdiction over cannabis enterprises meets both objectives of the original law while ensuring cannabis employees are not abused by their employers. Additionally, exercising jurisdiction over cannabis enterprises is consistent with the scope of other federal agencies and brings clarity to an evolving industry.

This Part begins by establishing that extending the Board's jurisdiction over the cannabis industry naturally follows from a principled interpretation of the NLRA. There are at least three reasons why the Board should exert jurisdiction and enforce federal labor laws to protect employees of the American cannabis industry: (1) the terms "employer" and "employee" as defined in the NLRA have been interpreted broadly; (2) courts will give considerable deference to the Board's reasonable interpretations;¹¹² and (3) a decision to extend coverage of the Act to such workers is consistent with the Act's avowed purpose. Next, this Part argues that the policy benefits of extending jurisdiction outweigh the costs.

A. *The Board's Jurisdiction Is Consistent with the NLRA*

Extending NLRB jurisdiction over the cannabis industry naturally flows from a principled interpretation of the NLRA. The broad statutory interpretation of the term "employer," as used in section 2(2) of the NLRA, appears to include cannabis companies.¹¹³ Subject to limited enumerated exceptions, section 2(2) broadly defines "employer" as "*any person* acting as an agent of an employer."¹¹⁴ The breadth of section 2(2)'s definition is clear: the Act objectively applies to "*any person*."¹¹⁵ The only limitations are specific exemptions for federal, state, and local government agencies, labor organizations, and any person subject to the Railway Labor Act.¹¹⁶ Since cannabis enterprises are not among the few groups of employers expressly exempted by Congress, they plainly come within the broad statutory definition of

110. *See generally id.*

111. *See* Jamieson, *supra* note 12; Beth Quimby, *Pot Dispensary Workers Rally in Portland*, PORTLAND PRESS HERALD (Apr. 6, 2013), <http://www.pressherald.com/2013/04/06/medical-pot-workers-protest-in-portland/>.

112. Here, "reasonable" means that the Board's interpretation is supported by substantial evidence based upon the record as a whole, even if the court would have made a different choice when considering the matter under *de novo* review. *See* 29 U.S.C. § 160(e)-(f) (2012); *N.L.R.B. v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 258 F.3d 305 (4th Cir. 2001).

113. *See* 29 U.S.C. § 152(2) (2012).

114. *Id.* (emphasis added).

115. *Id.* (emphasis added).

116. *Id.*; *see also id.* §§ 201-219 (listing sections of the FLSA and its exceptions); 45 U.S.C. §§ 151-165 (2012) (defining the Railway Labor Act and its exceptions).

“employer.”¹¹⁷ Excluding cannabis employers from the Act’s protections would be inconsistent with basic tenets of statutory construction.¹¹⁸

In many cases, the Supreme Court has demonstrated how broadly “employer” may be defined.¹¹⁹ For instance, in *NLRB v. E. C. Atkins & Co.*, the Court reversed the U.S. Court of Appeals for the Seventh Circuit and upheld the Board’s determination that plant guards are “employees” within the meaning of section 2(3) of the NLRA and are therefore entitled to the full protection of the Act.¹²⁰ The Court noted that Congress did not attempt “to spell out a detailed or rigid definition of . . . an employer.”¹²¹ The Court recognized that the term “employer” is more inclusive than the technical and traditional common law definitions because the term draws “substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.”¹²²

In *NLRB v. Hearst Publications*, the Supreme Court again rejected conventional limitations behind the term “employer.”¹²³ In this case, Hearst Publications, the publisher of four daily Los Angeles newspapers, refused to bargain collectively with its newsboys.¹²⁴ The newsboys attempted to form a local union by filing a petition for certification from the Board.¹²⁵ The Board concluded that the newsboys should be considered full-time employees under the NLRA and ordered the publishers to bargain with the newsboys.¹²⁶ Upon Hearst Publication’s petition for review, the U.S. Court of Appeals for the Ninth Circuit refused to enforce the Board’s order, reasoning that the newsboys were independent contractors rather than employees.¹²⁷ The Supreme Court granted certiorari to review the Board’s determination that the newsboys are employees covered by the Act.¹²⁸ The Court concluded that the broad language of the Act’s definitions “leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifica-

117. See 29 U.S.C. § 152(2).

118. See *Solis v. Cindy’s Total Care, Inc.*, No. 10 Civ.7242 (PAE), 2011 WL 6013844, at *3 (S.D.N.Y. Dec. 2, 2011).

119. See, e.g., *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 401-03 (1947).

120. *Id.* at 415.

121. *Id.* at 403.

122. *Id.*

123. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 129 (1944).

124. *Id.* at 113.

125. *Id.* at 114.

126. *Id.*

127. See *id.* at 114-15.

128. *Id.* at 113.

tions.”¹²⁹ In reviewing the legislative history of the NLRA, the Court found that Congress did not limit the terms with definite meaning, but rather intended to derive its meaning from the context of the NLRA.¹³⁰ Thus, the Court held that the NLRA’s terms must be interpreted broadly enough as to correct the harms that the statute aimed to address.¹³¹

In administering the NLRA, the Board has accrued expertise and experience in employment relationships spanning numerous industries.¹³² The Supreme Court has recognized and acknowledged that this experience puts the Board in the best position to interpret the boundaries of the NLRA.¹³³ Congress created the Board to administer the NLRA and, in doing so, delegated the power to define the terms of the Act.¹³⁴ Courts should give considerable deference to the Board and its construction of NLRA terms.¹³⁵ Accordingly, the Supreme Court is likely to uphold any reasonably defensible interpretation of “employer” by the Board.¹³⁶ The U.S. Court of Appeals for the Tenth Circuit acknowledged this judicial deference in *Jefferson County v. NLRB*.¹³⁷ The court noted that the Board’s construction of its own statutory jurisdiction, like determining whether unfair labor practices have been committed, should be entitled to great respect.¹³⁸

Additionally, by extending the protections and coverage of the NLRA to workers in the cannabis industry, the Wellness Approach will be consistent with the Act’s declared purpose to:

[E]liminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment.¹³⁹

129. *Id.* at 129.

130. *Id.*

131. *Id.* at 129-30.

132. *See* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

133. *See id.*; Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 126 (2003).

134. *Hearst Publ’ns*, 322 U.S. at 130-31.

135. *See, e.g.*, *Ford Motor Co. (Chi. Stamping Plant) v. NLRB*, 441 U.S. 488, 496-97 (1979); *NLRB v. Local Union No. 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

136. *See Sure-Tan*, 467 U.S. at 891.

137. *Jefferson Cty. Cmty. Ctr. for Developmental Disabilities v. NLRB*, 732 F.2d 122 (10th Cir. 1984), *overruled by* *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999).

138. *Id.* at 124.

139. National Labor Relations Act, 29 U.S.C. § 151 (2012).

If cannabis companies are to be excluded from federal labor laws, then a subdivision of employers without the same legal incentives to practice safe workplace policies as other covered employers may place a substantial burden on commerce by “impairing the efficiency, safety, or operation of the instrumentalities of commerce.”¹⁴⁰ This potential employer subdivision is part of an industry that is fully integrated in local, state, and national economies, employing thousands of workers who are unable to safeguard their proper interests. Denying cannabis employees the same rights as other American workers may eventually lead to strikes and other forms of industrial unrest, which Congress planned to address under the NLRA.¹⁴¹ With the NLRA, Congress intended to protect collective bargaining rights by ensuring that there was no subclass of employers without a comparable interest in minimal workplace standards as other legal enterprises.¹⁴² The Wellness Approach will be consistent with these core NLRA goals.

B. The Board’s Jurisdiction Makes Sense as a Matter of Policy

Not only would the Wellness Approach carry out congressional intent, but it would also create good public policy. The Wellness Approach would provide federal oversight to check unfair labor practices, restore a fair balance of bargaining power in the industry, and promote consistency with existing federal policy.

Extending the coverage of the NLRA to workers in the cannabis industry is consistent with the Act’s objective of protecting the rights of employees and encouraging certain private sector management practices that benefit the overall welfare of workers, businesses, and the U.S. economy.¹⁴³ In enacting the NLRA, Congress was cognizant of how capitalism can create an inevitable struggle between two competing interests in the workplace.¹⁴⁴ An employer’s profit motive will drive them to seize as much from labor as possible, and workers often must endure these efforts to secure their own material compensa-

140. *Id.* (noting the Act’s declaration that it is the policy of the United States to eliminate the causes of obstruction to the free flow of commerce); *see also* NLRB. v. Jones Laughlin Steel Corp., 301 U.S. 1, 23 n.2 (1937) (quoting the language found in 29 U.S.C. § 51 to demonstrate the United States’ policy to eliminate causes of obstruction to the free flow of commerce).

141. *See* Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11, 23 (1997) (noting the importance protecting workers collective bargaining rights through the NLRA).

142. *Id.*; *see* James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 958 (1996).

143. *See* 29 U.S.C. §§ 151-169 (2012); NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111 (1944).

144. *See* RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 15 (1979).

tion.¹⁴⁵ This struggle manifests itself across every major industry in the United States and, if left unchecked, may significantly hamper the free flow of commerce.¹⁴⁶ However, the two competing interests are not irreconcilable. An industry should seek to balance the interests of employers with the rights of its workers. Unionism, supported by the power of strikes, can significantly improve the workers' position via collective bargaining agreements and shop-qualified floor representation, while also limiting employer abuse.¹⁴⁷

Allowing the Board to exercise jurisdiction will not only restrict unfair labor practices but will also reimpose a fair balance of bargaining power. The Wellness Approach would encourage employers to take steps to deter workplace policies that might generate evidence typical of unfair labor practices. Just as the NLRA successfully encouraged employers to set up fair procedures in legal industries,¹⁴⁸ the Wellness Approach is likely to reduce instances of unfair labor practices in the cannabis industry.

A recent conflict arising between the Compassionate Care Foundation of New Jersey and its employees manifests the inherent necessity for federal labor standards.¹⁴⁹ When the New Jersey-based cannabis dispensary faced financial difficulties, management told its employees to "voluntarily" take a temporary sixty-day pay cut and defer full payment for a later date.¹⁵⁰ Eventually, the employees asked management to restore their full salaries and hours.¹⁵¹ Management refused to acknowledge their pleas and announced that the employees would not receive their promised back pay.¹⁵² The workers organized and petitioned to join a labor union in hope that they could collectively apply enough pressure to bring management to the bar-

145. *See id.* at 12.

146. *Cf. id.* at 15-16.

147. *See id.* at 16.

148. Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y. CITY L. REV. 107, 120-22 (2009) (discussing how the subsequent limitations imposed on the NLRA diminished the motives of employers to engage in fair labor practices). *See generally* JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 166 (2007).

149. *See* Stipulation, Compassionate Care Foundation, No. 04-RC-140751 (N.L.R.B. Nov. 24, 2014) [hereinafter Compassionate Care Foundation] (on file with author); *see also* Hefler, *supra* note 17; Jan Hefler, *Marijuana Dispensary Workers Continue Union Effort*, PHILLY.COM (Apr. 22, 2015), http://articles.philly.com/2015-04-22/news/61383462_1_only-medical-marijuana-dispensary-employees-compassionate-care-foundation.

150. Compassionate Care Foundation, *supra* note 149; Susan K. Livio, *N.J. Medical Marijuana Dispensary Workers Withdraw Petition to Unionize*, NJ.COM (Apr. 15, 2015, 2:20 PM), http://www.nj.com/politics/index.ssf/2015/04/nj_medical_marijuana_dispensary_workers_withdraw_p.html.

151. Compassionate Care Foundation, *supra* note 149; *see* Hefler, *supra* note 17.

152. Compassionate Care Foundation, *supra* note 149; *see* Hefler, *supra* note 17.

gaining table.¹⁵³ Nevertheless, the Compassionate Care Foundation blocked the workers from joining the union and retaliated against participating employees by cutting their hours and wages.¹⁵⁴ Management's response was in clear violation of multiple provisions of the NLRA.¹⁵⁵ To insulate itself from liability, the Compassionate Care Foundation reclassified its employees as agricultural laborers, one of the limited exemptions under the Act.¹⁵⁶ Cannabis employers have attempted to use the ambiguous legality of the industry to justify otherwise questionable practices, leaving their employees vulnerable. The potential for employee abuse is compounded because many workers in the cannabis industry are the kind of low-wage, low-skill workers most in need of labor law protections.¹⁵⁷

Far too many companies are inclined to participate in unfair employment practices when their workers are replaceable and have no avenue of recourse. For instance, a Seattle-based cannabis dispensary doing business as A List MMJ ("MMJ") characterized its employees as volunteers and refused to reimburse them for their work.¹⁵⁸ MMJ also established policies that not only prevented workers from communicating with one another about wages, but also prevented them from speaking to the news media about workplace conditions.¹⁵⁹ The employees were eventually terminated after they participated in organized activities to obtain their unpaid wages.¹⁶⁰ In an attempt to equalize this bargaining position, cannabis industry workers from across the country started to organize and seek representation by various trade groups, including the United Food and Commercial

153. Compassionate Care Foundation, *supra* note 149; see Hefler, *supra* note 17.

154. Hefler, *supra* note 17.

155. Compassionate Care Foundation, *supra* note 149; see 29 U.S.C. §§ 151-160 (2012); see also Hefler, *supra* note 17 (noting that Compassionate Care workers' claims include that their attempt to unionize was blocked, they were retaliated against when Compassionate Care lowered their hours and wages, and they were denied previously promised back-pay after taking a voluntary sixty-day pay cut).

156. Compassionate Care Foundation, *supra* note 149; see 29 U.S.C. § 152(3) (2012).

157. Cf. Luke Scheuer, *The Worst of Both Worlds: The Wild West of the "Legal" Marijuana Industry*, 35 N. ILL. L. REV. 557 (2015); Jeremy B. White, *California Pot Farmers Wrestle with New Medical Marijuana Rules*, SACRAMENTO BEE (Nov. 17, 2015, 10:10 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/article45255678.html>; *Cannabis Workers Rising*, UFCW, <http://cannabisworkers.org> (last visited Feb. 27, 2016).

158. See Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, NLRB, to Ronald K. Hooks, Reg'l Dir. Region 19, 1-2 (Dec. 16, 2013), <http://apps.NLRB.gov/link/document.aspx/09031d45815370c4> [hereinafter Kearney Advice Memorandum].

159. See *Pot Dispensary Failed to Meet Retail Business Volume Jurisdictional Standard; Successor Not Liable Under Golden State: NLRB General Counsel's Office*, PRAC. L. LAB. & EMP. (Jan. 2, 2014), <http://us.practicallaw.com/1-553-3525?q=&qp=&qo=&qe=#null>.

160. Kearney Advice Memorandum, *supra* note 158, at 1.

Workers (“UFCW”).¹⁶¹ The UFCW reported that the union’s newly formed Medical Cannabis and Hemp Division now represents “thousands of medical cannabis workers” throughout the United States.¹⁶² For example, employees at Otsego-based Minnesota Medical Solutions ratified a contract under the auspices of the UFCW, Local 1189, best known for representing supermarket employees and food processing workers.¹⁶³ The UFCW has also organized cannabis workers in other states, including California, Colorado, and Washington.¹⁶⁴ The union represents cannabis workers involved across the entire production chain, such as employees involved in basic horticulture, harvesting, extraction, distribution, and retail.

Granting cannabis workers the same federal statutory protections as other American workers creates a stronger incentive for management to review, investigate, and resolve employee grievances.¹⁶⁵ Using the Board as a vehicle to advance cannabis labor rights will not create more lawsuits; instead, it will foster a workplace in which lawsuits are limited. This is because labor disputes will be addressed, not by the courts, but between two equally positioned bargaining parties, such as an employer and the employees organized as a union.¹⁶⁶

If the Wellness Approach is enacted, it will promote coherency and consistency of federal agency regulation. For instance, the U.S. Department of Justice (“DOJ”) issued similar advisory memos in October 2009 and June 2011, which advised federal prosecutors that it was not an efficient use of federal resources to prosecute “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”¹⁶⁷ The most recent advisory memo, released by Deputy Attorney General James M. Cole (“Cole Memo”), outlined the enforcement priorities of the DOJ and how compliant cannabis enterprises might mitigate risks

161. See Jacobs & Dobuzinskis, *supra* note 65; see also Woo, *supra* note 65 (discussing how employees of various cannabis-growing companies have recently joined the Teamsters union).

162. Hefler, *supra* note 149.

163. Tom Webb, *Medical Marijuana Workers Organize in Minnesota*, TWINCITIES.COM (Feb. 20, 2015, 12:01 AM), http://www.twincities.com/localnews/ci_27566625/food-workers-union-organize-medical-marijuana-workers-minnesota.

164. Jacobs & Dobuzinskis, *supra* note 65.

165. EDWARDS, *supra* note 144, at 143.

166. *Id.* at 150.

167. Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Selected U.S. Att’y’s 1-2 (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>; see also Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to U.S. Att’y’s 1 (June 29, 2011), <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> (referring to the Ogden Memo’s stance that it is not an efficient use of federal resources to “focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers”).

adverse to these priorities.¹⁶⁸ The Cole Memo aims to limit federal enforcement in states with strong regulatory infrastructures.¹⁶⁹ The Cole Memo underscores the agencies' expectation that state governments will implement effective regulatory and enforcement systems that address the threat the cannabis industry might pose to law enforcement interests, such as public health and safety.¹⁷⁰ In February 2014, the U.S. Department of Treasury ("DOT") also issued a memorandum giving financial institutions more leeway in accommodating cannabis businesses.¹⁷¹ The stated purpose of the memo was to bring the economic activity out of the shadows and into auditable, tractable transactions.¹⁷²

The U.S. Occupational Safety and Health Administration ("OSHA") is yet another federal agency that has exercised jurisdiction and conducted investigations throughout the cannabis industry.¹⁷³ The OSHA investigations and the violations discovered indicate both the risks cannabis workers face and the need for stronger worker representation.¹⁷⁴ Additionally, federal confidentiality laws, such as the Health Insurance Portability and Accountability Act ("HIPAA"), are also constantly enforced within the industry.¹⁷⁵ Such enforcement emphasizes the federal government's desire to strike a balance between protecting the rights of cannabis employees and regulating an illegal industry. Thus, the Wellness Approach can bring American labor law into line and encourage consistency with the approach taken by many other federal actors when dealing with the cannabis industry.

168. See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys 1-2 (Aug. 29, 2013) [hereinafter Cole Memo], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (listing enforcement priorities as including, among other things, preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; and preventing state-authorized marijuana from being used as a cover for trafficking other drugs).

169. *Id.* at 2.

170. *Id.*; see also *Justice Department Announces Update to Marijuana Enforcement Policy*, U.S. DEP'T OF JUST. (Aug. 29, 2013), <http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

171. DEP'T OF THE TREASURY FIN. CRIMES ENF'T NETWORK, *supra* note 34.

172. See *id.*

173. See *Inspection No. 893552.015 – Wellness Connection of Maine*, *supra* note 98.

174. See *id.*

175. See Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996); see also Joshua B. Murphy, *Q&A: The Legal Implications of Medical Marijuana*, PRAC. PAIN MGMT. (June 30, 2011), <http://www.practicalpainmanagement.com/treatments/complementary/qa-legal-implications-medical-marijuana>.

V. CHALLENGES TO THE WELLNESS APPROACH

While the policy considerations for the Wellness Approach are strong, serious challenges stand in the way. Given that the cannabis industry runs afoul of multiple federal laws,¹⁷⁶ some critics may prefer to dedicate regulation of the industry to the states. There are several key objections that may be raised to counter the Wellness Approach. First, extending the Board's jurisdiction may create an unnecessary conflict with existing federal drug laws.¹⁷⁷ Second, given the Board's interpretation of the nature of work in the cannabis industry, the Board may treat a broader class of workers as not falling under the agricultural laborer exception of the NLRA. This may result in offering more protections than those given to employees in legal industries. Ultimately, however, none of these objections are persuasive.

The Wellness Approach may also face considerable impediments if new cannabis regulations compromise enforcement of the CSA. The Supreme Court has expressed concern with any agency order that potentially interferes with existing federal law or policy.¹⁷⁸ Since it may be impossible for an individual to obtain employment at a cannabis company without directly or indirectly contravening federal drug enforcement policies, the Wellness Approach may have to yield to the federal government's stance on Schedule I narcotics.

The main objective of the CSA, as articulated by the Supreme Court, was to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances" in addition to combating recreational drug abuse.¹⁷⁹ The text of the CSA itself reaffirms this purpose by stating, "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."¹⁸⁰ Critics may argue that enforcing the NLRA with respect to the illegal cannabis industry is not compatible with the CSA's purpose to control the traffic of controlled substances throughout the United States. By giving employees in the industry the protections available to those in legal industries, the Wellness Approach could arguably incentivize more workers to enter into a business clearly deemed illegal by the CSA. If the courts view the purpose of the CSA in broad terms—as deterring and prohibiting

176. See, e.g., 21 U.S.C. § 812(b)-(c) (2012); Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (2012).

177. See 21 U.S.C. § 812(b)-(c).

178. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

179. *Gonzales v. Oregon*, 546 U.S. 243, 269, 272 (2006) (quoting *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005)).

180. 21 U.S.C. § 801(6) (2012).

the use of controlled substances—then any step taken by the NLRB to legitimize the industry may well contravene the goals of the CSA.

The Board has thus far not treated many cannabis workers as agricultural laborers, reasoning that they more closely resemble manufacturers than farm laborers because they transform a product from its raw and natural state.¹⁸¹ This logic could equally apply to farm laborers who transform any plant or animal product by processing or butchering it.¹⁸² If the Board defines the class of agricultural workers in the marijuana industry more narrowly, it may create another incentive for employees to enter into an industry still treated as illegal under federal law as well as the law of a majority of states.

A. Challenges Rebuffed

The objections discussed above are not persuasive for many reasons. Fundamentally, employees should not lose basic labor protections simply because the industry runs afoul of federal law. After all, employers are also violating the law and should not reap an unfair bargaining advantage as a result. Moreover, any conflict between the CSA and the NLRA is implicit and minor. Even if there were a genuine conflict, the federal government remains free to enforce the CSA against industry participants. Enforcement is preferable to allowing unfair labor practices to continue to go unchecked. Doing so advances neither the purpose of the NLRA nor the purpose of the CSA. Finally, many employees in the cannabis industry do not neatly fit within the agricultural worker exception under the NLRA. The Board did not give cannabis industry participants protections other workers do not enjoy. Instead, the Board simply recognized the nature of the work performed by some employees in the industry.

The conflict between the Board's authority to enforce the NLRA and the potential conflict with the CSA is analogous to an issue the Supreme Court addressed in *Sure-Tan, Inc. v. NLRB*.¹⁸³ In *Sure-Tan*, the Court directly confronted potential conflicts between an NLRB order and federal immigration policy.¹⁸⁴ The Court concluded that the Board properly interpreted the NLRA to apply to undocumented workers because federal immigration statutes convey only a "peripheral concern" with the employment of illegal aliens.¹⁸⁵ The Court noted that Congress did not make it a separate criminal offense for employers to hire illegal aliens or for illegal aliens to seek employment, so there was "no reason to conclude that application of the NLRA to

181. NLRB Memorandum, *supra* note 9, at 13.

182. *See id.*

183. 467 U.S. at 883.

184. *See id.*

185. *Id.* at 892 (quoting *DeCanas v. Bica*, 424 U.S. 351, 360 (1976)).

employment practices affecting such aliens would necessarily conflict with the terms” of federal immigration policy.¹⁸⁶

The CSA states that an employer may not knowingly or intentionally manufacture, distribute, or dispense a controlled substance except as authorized by the Act.¹⁸⁷ The CSA provides specific penalties, both civil and criminal, for violations.¹⁸⁸ However, the Act’s language itself does not explicitly state how a violation is to affect the enforcement of other laws, such as the NLRA. What is to happen, for instance, when an individual is hired to work at a company whose business plan violates provisions in the CSA? Must the individual accept unfair wages? May the employer ignore federally mandated labor laws? Specifically, may the employer violate those labor laws with impunity, secure in the knowledge that the Board cannot exert jurisdiction over it? Additionally, the CSA does not make it a separate criminal offense when individuals seek employment in the cannabis industry. Thus, there is reason to conclude that application of the NLRA to employment practices would not necessarily conflict with the terms of the CSA.

The fact that an employer’s business violates certain provisions of the CSA should not shield it from violations of another statute involving significantly different considerations and legislative purposes. Whether a cannabis enterprise is participating in the illegal sale and distribution of Schedule I narcotics in interstate commerce is a question of defining the enterprise’s business in the framework of national drug enforcement policies. In contrast, whether a cannabis enterprise is withholding earned wages or engaging in unfair labor practices is a matter of federal policy governing labor relations. Thus, enforcing labor laws will not trivialize the CSA, nor condone or encourage future violations of the CSA.

The objection that the Board’s interpretation of the nature of work in the cannabis industry may ostensibly offer more protections to cannabis workers than employees in other legal industries is illusory. While it is true that many employees in the cannabis industry do not neatly fit within the agricultural laborer exception of the NLRA, by analyzing the duties of employees on a case-by-case basis, the Board will avoid extending protections not enjoyed by other workers.

VI. CONCLUSION

In states where cannabis is legal, employees in the industry are forced to make an impossible choice—risk abuse or abandon an em-

186. *Id.* at 893.

187. 21 U.S.C. § 841(a) (2012).

188. *Id.* § 841(b).

ployment opportunity. It is unlikely that voters and legislators intended to impose such a cruel predicament on cannabis workers when enacting these state laws. The Board should provide protection to cannabis employees who suffer from these adverse employment issues. Doing so would further one of the fundamental purposes of the NLRA: to promote the general welfare of employees.

At the judicial level, courts should dismiss employers' arguments that federal law precludes the Board's jurisdiction. Federally recognizing fair labor conditions is not the same as federally recognizing medical cannabis. Based on the many unsuccessful attempts to reschedule cannabis as a Schedule II drug under the CSA, it is unlikely that the federal government will legalize medical marijuana use in the near future;¹⁸⁹ therefore, the Board needs to take action to ensure that workers are afforded protection in this ever-developing industry.¹⁹⁰ Federal agencies evaluating employment issues should glean perspective from precedent and insights of the Board in order to ensure cannabis workers have the same protections as other working Americans.

All actors in the cannabis industry will benefit if legal protections for cannabis workers are enhanced. Moreover, these solutions will best balance the competing interests of employees and their employers. Workplace policies and conditions that are illegal should remain beyond the realm of marijuana politics. As it currently stands, all American workers are equal, but some are less equal than others.¹⁹¹

189. The National Organization for the Reform of Marijuana Laws made continuous petitions to reclassify cannabis, but the DEA consistently rejected each attempt. The most recent rejection was in 2001. *See* Notice of Denial of Petition, 66 Fed. Reg. 20,038 (Apr. 18, 2001).

190. *See* *All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 15 F.3d 1131, 1132-33 (D.C. Cir. 1994) (upholding the DEA administrator's classification that cannabis is a Schedule I narcotic); *see also* *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438 (D.C. Cir. 2013) (showing a second unsuccessful petition to reconsider marijuana was filed on Oct. 9, 2002, by the Coalition to Reschedule Cannabis), *cert. denied*, 134 S. Ct. 267 (2013) (mem.), and *cert. denied sub nom.* *Olsen v. Drug Enf't Admin.*, 134 S. Ct. 673 (2013) (mem.).

191. GEORGE ORWELL, *ANIMAL FARM* 112 (1945) (alluding to the single commandment displayed at the farm in Orwell's dystopian novel: "All animals are equal but some animals are more equal than others.").