CULTIVATING DEVIANCE IN THE MARIJUANA INDUSTRY

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The marijuana industry is trapped inside Schrödinger's cat's box.[1]

I. INTRODUCTION

Two-thirds of Americans support legalizing marijuana.[2] Nineteen states have legalized recreational use of marijuana, while thirty-seven states and four territories have legalized medical marijuana use.[3] As a result, sales of state-legal marijuana reached $17.5 billion in 2020.[4] Meanwhile, the cultivation, possession, and distribution of marijuana remain illegal under the federal Controlled Substances Act ("CSA").[5]

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1 Mont. Cannabis Indus. Ass'n v. Montana, 286 P.3d 1161, 1170 (Mont. 2012) (Nelson, J., dissenting) ("I disagree with the premise . . . that it is appropriate for state legislatures to enact laws which purport to make *lawful* conduct which federal law has already dictated is *unlawful*. . . . [M]arijuana possession and distribution cannot simultaneously be both lawful and unlawful—except, perhaps, inside Schrödinger's cat's box."). Schrödinger's cat is a thought experiment propounded by Erwin Schrödinger that "a hypothetical cat [inside a closed box] may be considered simultaneously both alive and dead as a result of its fate being linked to a random subatomic event that may or may not occur." *Schrödinger's Cat*, WIKIPEDIA, https://en.wikipedia.org/wiki/Schr%C3%B6dinger's_cat (last visited Apr. 10, 2022).

2 *See Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx (noting "solid majorities of U.S. adults in all major subgroups by gender, age, income and education support legalizing marijuana.").

3 *See State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGIS. (May 27, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

4 Will Yakowicz, *U.S. Cannabis Sales Hit Record $17.5 Billion As Americans Consume More Marijuana Than Ever Before*, FORBES (Mar. 3, 2021, 3:43 PM), https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=275ad2a12bcf (noting this was a forty-six percent increase over 2019). One source estimates that the legal recreational marijuana industry will reach $25 billion by 2025. *See* Jan Conway, *U.S. Sales of Legal Recreational Cannabis 2019-2025*, STATISTA (Jan. 21, 2022), https://www.statista.com/statistics/933384/legal-cannabis-sales-forecast-us/.

5 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–971).

Due to these recent changes in marijuana legislation at the state level, more than half of the U.S. population now resides in states where buyers and sellers are engaging in activities that, while legal in their respective states, are in direct violation of federal law.[6] Businesses engaged in the marijuana industry[7] face unique challenges, ranging from lack of access to traditional banking services, federal tax restrictions, limited intellectual property protection, and a general lack of legal protection afforded to other legitimate businesses.[8]

Marijuana-based businesses operating in states that have legalized marijuana (recreationally and/or medically) most often engage in illicit and/or illegal activities just to maintain standard business operations.[9] Conflicting policy and regulatory structures have transitioned the marijuana industry into a legitimate economy and market, yet force individuals to participate in "involuntary deviance" to survive. This article utilizes "structural strain theory," a theory that explores the relationship between deviant behavior and social structural characteristics, to investigate "involuntary deviance" in the marijuana industry.[10] In addition, we explore the possible market(ing) and policy solutions to this interesting social conflict that is affecting markets, marketing,

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[6] *See* Chris Nichols, *Do a Majority of Americans Live in States with Legal Marijuana?*, POLITIFACT (Apr. 19, 2018), https://www.politifact.com/factchecks/2018/apr/20/john-chiang/do-majority-americans-live-states-legal-marijuana/ (verifying the claim made by California Treasurer John Chiang that a majority of Americans now live in states where they have decided to legalize cannabis).

[7] Marijuana is derived from the dried leaves and flowers of the cannabis plant. *See* MARTIN BOOTH, CANNABIS: A HISTORY 154 (2003). Cannabis is a genus of flowering plants in the family Cannabaceae, of which *Cannabis sativa* is the most widespread. *Id.* at 2. Cannabis is a source of the psychoactive agent, tetrahydrocannabinol (THC). *Id.* at 7. Cannabis also contains cannabidiol (CBD), which has no psychoactive capability. *Id.* at 7. The focus of this article is on the state legalization, and continued federal prohibition, of marijuana, though some sources may refer to the cannabis industry generally, which may or may not include non-psychoactive CBD products.

[8] The authors previously examined the effect of the conflict between state and federal marijuana laws on consumer adoption of cannabis-based products in states where marijuana consumption is legal. *See* Stephanie Geiger-Oneto & Robert Sprague, *Cannabis Regulatory Confusion and Its Impact on Consumer Adoption*, 57 AM. BUS. L .J. 735 (2020).

[9] *See infra* Part III.

[10] Tomas J. Bernard, *Testing Structural Strain Theories*, 24 J. RSCH. CRIME & DELINQ. 262, 262 (1987).

society, and marketing systems.

Part II of this article reviews the legal conflict arising from the Supremacy Clause in light of the fact that a majority of the states have legalized marijuana use in some form while marijuana retains its Schedule I status under the federal CSA. Part III introduces the marketing theories underpinning the occurrence of involuntary deviance in the marijuana industry due to the numerous obstacles driven by conflict between state and federal law. The specific obstacles examined are: (1) lack of access to banking services; (2) treatment of state-legal marijuana businesses as criminal enterprises by the IRS; (3) lack of intellectual property protection (specifically trademark registration); (4) lack of access to legal services; and (5) lack of or contradictory pesticide regulations. Part III explains that while the legalization of marijuana at the state level may have reduced criminal behavior at an individual (consumer) level, the continued federal prohibition creates or fosters criminal/deviant behavior at an organizational level. Part IV examines potential policy and marketing solutions to reduce or minimize the involuntary deviant behavior within the marijuana industry.

II. FEDERAL MARIJUANA PROHIBITION REIGNS SUPREME

Marijuana is a Schedule I drug under the CSA.[11] As a result, cultivation, possession, or distribution of marijuana can lead to prison sentences from five years to life.[12] This leaves the owners of businesses operating within states that have legalized marijuana for medical or recreational use in a precarious situation. The fact that an individual may not be prosecuted under state law does not provide that person with immunity under federal law.[13] The

[11] 21 U.S.C. § 812(c), sched. I, (c)(10). Schedule I controlled substances are considered to have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use of the drug or other substance under medical supervision. *See* 21 U.S.C. § 812(b)(1).

[12] *See* 21 U.S.C. § 841(b)(1).

[13] *Cf.* United States v. Stacy, 734 F. Supp. 2d 1074, 1079 n.1 (S.D. Cal. 2010); *see also* United States v. Landa, 281 F. Supp. 2d 1139, 1143 (N.D. Cal. 2003) (holding that California's medical marijuana law limits immunity from state prosecution to possession and use by qualified patients and their qualified primary caregivers, not to large-scale marijuana processing and distribution entities—even for eventual medical marijuana uses).

conflict between absolute federal marijuana prohibition and state legalization represents what is arguably "one of the most important federalism disputes in a generation."[14]

A. *The Supremacy of Federal Marijuana Law*

The Supremacy Clause of the U.S. Constitution provides that federal law is controlling whenever there is a conflict between state and federal laws.[15] Generally speaking, "all preemption cases are about contradiction between state and federal law[.]"[16] In other words, when state law authorizes something federal law forbids, the Supremacy Clause requires courts to apply the federal rule.[17] In particular, "[s]tates are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance."[18]

Federal preemption is, however, more nuanced. Specifically, addressing interstate commerce—a federal domain—the Supreme Court has counseled that courts must examine congressional purpose in each case.[19] The Court starts with the assumption that the historic police powers of the states were not to be superseded by federal law unless that was the clear and manifest purpose of Congress.[20] For example:

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[14] Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, CATO INST. POLICY ANALYSIS No. 714 (Dec. 12, 2012), http://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf.

[15] U.S. CONST. art. VI; *see also* Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

[16] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 262 (2000).

[17] *Id.* at 261.

[18] Arizona v. United States, 567 U.S. 387, 399 (2012).

[19] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone.").

[20] *See Rice*, 331 U.S. at 230; *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1174 (1998) (analyzing the *Gade* holding and concluding that: "A state law can therefore be preempted as frustrating federal law if the effect of the state law hinders either the primary substantive purpose underlying the federal law or the secondary purpose of avoiding duplicative regulation.").

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[21]

In her *Berkley Journal of Criminal Law* article, Michelle Patton describes four situations when federal law can preempt state law: (1) "express preemption[, which] occurs when Congress explicitly defines the extent to which a federal law preempts state law; [(2) f]ield preemption[, which] occurs when Congress enacts a legislative scheme with the implied intent of preempting all state laws on the issue:" (i.e., is there an "inference that Congress 'left no room' for supplementary [legislation]");[22] (3) "obstacle preemption[, which] occurs when enforcement of the state law would hinder the achievement of the full purposes and objectives of Congress;" and "(4) conflict preemption," similar to obstacle preemption, occurs when "state and federal laws conflict in a manner that prevents simultaneous compliance with both laws."[23]

Congress can withdraw specified powers from the states by enacting a statute containing an express preemption provision.[24] But the CSA does not expressly exclude state marijuana enforcement.[25] Indeed, "[t]he CSA explicitly contemplates a role

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[21] *Rice*, 331 U.S. at 230 (citations omitted).

[22] *See* Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency*, 15 BERKELEY J. CRIM. L. 163, 180 (2010) (citing Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 476 (2008), *cert. denied* 556 U.S. 1235 (2009)); *San Diego NORML*, 81 Cal. Rptr. 3d at 476.

[23] *See* Patton, *supra* note 22, at 180 (citing *San Diego NORML*, 81 Cal. Rptr. 3d at 475–76); *see also* Patton, *supra* note 22, at 181 (noting obstacle and conflict preemption analyses are merged by many courts); Reed-Kaliher v. Hoggatt, 347 P.3d 136, 141 (Ariz. 2015) (concluding Arizona's medical marijuana statute is not preempted by the CSA under any of the four categories: express, field, obstacle, or conflict). *But see* Nelson, *supra* note 16, at 262 (questioning the usefulness of dividing preemption analysis into separate analytical categories).

[24] *Arizona*, 567 U.S. at 399.

[25] 21 U.S.C. § 903

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion

for the States in regulating controlled substances."[26] This language arguably demonstrates that Congress intended to reject express and field preemption of state laws concerning controlled substances.[27] While the Supreme Court has stated that conflict preemption occurs when compliance with state and federal law is impossible, the California Court of Appeals has concluded that conflict preemption occurs only when the state law affirmatively requires acts violating the federal proscription.[28]

The Court held obstacle preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[29] But courts must determine obstacle preemption on a case-by-case basis.[30] For example, the Colorado Supreme Court has concluded that the

> of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

[26] Gonzales v. Oregon, 546 U.S. 243, 251 (2006).

[27] *See San Diego NORML*, 81 Cal. Rptr. 3d at 476; *see also* Ledcke v. State, 296 N.E.2d 412, 419–20 (Ind. 1973) (rejecting field preemption; "the states are not without authority to regulate in the field of drugs and narcotics."); *see also* State v. McHorse, 517 P.2d 75, 79 (N.M. 1973) (rejecting field preemption).

[28] *See* United States v. Locke, 529 U.S. 89, 109 (2000); *San Diego NORML*, 81 Cal. Rptr. 3d at 477; *see also* Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 159 (2012) (arguing that "state medical marijuana laws are not in positive conflict with the CSA; a positive conflict between state and federal law would exist only if the states forced some individuals to manufacture or distribute marijuana while the federal ban remained in place"); *see also* Stacey L. Worthy & Shruti R. Kulkarni, *Dazed and Confused: Making Sense of Employers' Risks from Mandated Coverage of Non-FDA-Approved Cannabis Products*, 45 SETON HALL LEGIS. J. 379, 399 (2021) (noting that "[s]tate laws mandating that health plans or workers' compensation plans cover non-FDA-approved cannabis products will likely be preempted by federal laws, such as the CSA.").

[29] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

[30] *See id.* ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); *see also* Savage v. Jones, 225 U.S. 501, 533 (1912)

> [W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished-if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect-the state law must yield to the regulation of Congress within the sphere of its delegated power.

CSA preempted the Colorado Constitutional provision[31] requiring law enforcement officers to return seized marijuana and marijuana products to medical marijuana patients after an acquittal.[32] In areas the state has traditionally regulated, it is less likely that state laws will thwart the objectives of federal legislation.[33]

In 2002, two medical marijuana users in California brought a lawsuit requesting a declaration that enforcement of the CSA, *inter alia*, was an impermissible expansion of Congress's Commerce Clause power.[34] The district court concluded that medical marijuana arguably cultivated wholly intrastate and not circulated in interstate commerce still fell within the ambit of the Commerce Clause because: "(1) controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate; and (2) 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."[35] The Ninth Circuit Court of Appeals reversed, holding that the plaintiffs' use of medical marijuana was personal and any substantial effect on interstate commerce was attenuated.[36]

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[31] COLO. CONST. art. XVIII, § 14(2)(e).

[32] *See* People v. Crouse, 388 P.3d 39, 42 (Colo. 2017)

> An officer returning marijuana to an acquitted medical marijuana patient will be delivering and transferring a controlled substance. Therefore, based on the CSA definition, when law enforcement officers return marijuana in compliance with section 14(2)(e), they distribute marijuana in violation of the CSA. Because compliance with one law necessarily requires noncompliance with the other, there is a 'positive conflict' between section 14(2)(e) and the CSA such that the two cannot consistently stand together.

[33] *See* Boyle v. United Techs., Corp., 487 U.S. 500, 507–08 (1988); *see also San Diego NORML*, 81 Cal. Rptr. 3d at 482 ("*Boyle* implicitly recognized that when Congress has legislated in a field that the states have traditionally occupied, rather than in an area of unique federal concern, obstacle preemption requires an even sharper conflict with federal policy before the state statute will be invalidated.").

[34] U.S. CONST. art. I, § 8 ("The Congress shall have power to . . . regulate commerce . . . among the several states"); *See* Raich v. Ashcroft, 248 F. Supp. 2d 918, 921 (N.D. Calif. 2003) (Federal agents had seized and destroyed one of the plaintiff's six marijuana plants).

[35] *Ashcroft*, 248 F. Supp. 2d at 926.

[36] Raich v. Ashcroft, 352 F.3d 1222, 1231, 1233 (9th Cir. 2003).

The U.S. Supreme Court vacated the Ninth Circuit's decision, stating that "Congress can regulate purely intrastate activity that is not itself 'commercial' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[37] The federal power over commerce, the Court noted, is superior to that of the states.[38] The Court has recognized that "[i]t is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide."[39]

Despite *Raich*, many states have effectively legalized medical marijuana use—not only are qualified medical marijuana users exempt from arrest and prosecution for using, possessing, and cultivating marijuana, but they are also exempt from additional civil sanctions (such as asset forfeiture) that usually apply under state drug laws.[40] In states that have legalized medical marijuana, prospective vendors must obtain a license to exempt them from state sanctions that would typically apply to marijuana distribution.[41] Legalized "recreational" use of marijuana goes one step further in defying federal law, essentially attributing marijuana to the same status as tobacco and alcohol.[42] However, some state legalization statutes protect users more than the

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[37] Gonzales v. Raich, 545 U.S. 1, 18 (2005); *see also id.* at 22

> Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere . . . and concerns about diversion into illicit channels, the Court has no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

(citations omitted).

[38] *Gonzales*, 545 U.S. 1 at 29.

[39] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947).

[40] *See* Mikos, *supra* note 14, at 5; *see also* Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 242 (2020), (summarizing state court cases finding their respective medical marijuana laws were not preempted by the CSA).

[41] *See* Mikos, *supra* note 14, at 5.

[42] *See* Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How*, 50 U.C. DAVIS L. REV. 617, 623 (2016) (asserting that state recreational marijuana laws are "nothing less than a thumb in the eye of the federal marijuana prohibition. . . . short-circuit[ing] the entire rubric of the CSA framework.").

businesses that legitimately supply those users. For example, a California Court of Appeal has ruled that the state's Compassionate Use Act allows a user to possess a "reasonable amount" of marijuana for medical purposes, but it does not protect marijuana growers.[43]

B. *Inter- and Intrastate Commerce*

At present, legal cannabis distribution and sale occur entirely intrastate.[44] Every state that has legalized marijuana prohibits its interstate sale—marijuana can be sold in the state only if it has been produced in the state, meaning importation of marijuana produced elsewhere is banned.[45] These same states also limit the ability of nonresidents to operate local marijuana-based businesses, making state residency a requirement for obtaining necessary licenses.[46] States reportedly restrict distribution and sale to intrastate-only out of fear that interstate transportation of marijuana, particularly through a state that has not legalized marijuana, could trigger federal CSA enforcement.[47]

Raich, however, effectively transforms purely intrastate marijuana activities into interstate commerce that the federal government can regulate. A case in point is *Safe Streets Alliance v. Hickenlooper*,[48] in which Colorado landowners brought an action against a marijuana cultivation facility, also located in Colorado (and adjacent to their property), claiming the facility had interfered with their present use and enjoyment of the land and caused a diminution in its market value.[49] The landowners claimed the marijuana operation constituted an illegal enterprise in

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43 *See* Littlefield v. Cnty. of Humboldt, 159 Cal. Rptr. 3d 731 (Cal. Ct. App. 2013).

44 *See* Gideon Mark & Laurie A. Lucas, *Symposium, Cannabis—Legal, Ethical, and Compliance Issues: Introduction*, 57 AM. BUS. L. J. 651, 652–53 (2020) ("[T]he cannabis market . . . presents a unique variation of an emerging market given the complexity caused by these discrete intrastate markets operating in the absence of a legal interstate market.").

45 *See* Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 862 (2021).

46 *Id.* at 864 (arguing that these state-imposed intrastate restrictions are probably unconstitutional barriers to interstate commerce.)

47 *See id.* at 867.

48 859 F.3d 865, 880 (10th Cir. 2017).

49 *Id.*

violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO")[50] because the growers' operation violated the CSA.[51] The Tenth Circuit Court of Appeals reversed the district court's dismissal of the landowners' RICO claims, reasoning that growers in states that have legalized marijuana may still be subject to federal racketeering charges and damages.[52]

C. *U.S. Department of Justice Enforcement Memos*

In October 2009, the U.S. Department of Justice issued formal guidelines in what has become known as the "Ogden Memo," for federal prosecutors in states that have enacted laws that authorize the use of marijuana for medical purposes.[53] While noting that "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority[,]" the Ogden Memo also specified that federal resources should not be focused on individuals "whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[54] Conversely, "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit" would continue to be an enforcement priority of the Department of Justice.[55] State law compliance would not thwart the Department's priorities.[56] While the Department of Justice prosecution priorities would shift away from individuals in full compliance with state-based medical marijuana laws, the Ogden Memo warned that its guidance regarding resource allocation did not "legalize" marijuana or provide a legal defense to a violation

50 *See id.*; *see also* 18 U.S.C. §§ 1962(c); 18 U.S.C. § 1964.

51 *Safe Streets Alliance*, 859 F.3d at 891.

52 *Id.*

53 Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1 (Oct. 19, 2009) [hereinafter "Ogden Memo"], https://www.justice.gov/opa/documents/medical-marijuana.pdf.

54 *Id.* at 1–2.

55 *Id.* at 2.

56 *Id.* ("To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.").

of federal law.[57]

In June 2011, Deputy Attorney General James M. Cole issued a memorandum in response to the growing number of states that were authorizing, or considering authorizing, "multiple large-scale, privately-operated industrial marijuana cultivation centers."[58] This 2011 memorandum expressly states:

> The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. *Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.*[59]

The memorandum warned further that: "[t]hose who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."[60]

The impact of the 2011 memorandum was evident when, later that same year, prosecutorial "discretion" was shown in full effect in California, as the four United States Attorneys in California said that they would move against landlords who rent space to storefront operators of medical marijuana dispensaries, whom prosecutors suspect of using the law to cover large-scale for profit drug sales.[61] In a follow-up memorandum in 2013, Deputy

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[57] *Id.*

[58] Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

[59] *Id.* (emphasis added).

[60] *Id.*

[61] *See* Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES (Oct. 7, 2011), https://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html; Michael Cooper, *Safe Streets Alliance & the Tenth Amendment: Intrastate Cannabis Markets, Interstate Authority & Political Consequences*, 18 U.C. DAVIS BUS. L. J. 195, 203–04 (2017) (noting the limited scope of California's medical marijuana regulation); *see also* Keith Coffman,

Attorney General Cole elaborated on prosecutorial discretion.[62] The memorandum suggested that the cultivation, distribution, sale, and possession of marijuana in jurisdictions that have implemented strong and effective regulatory and enforcement systems are less likely to threaten federal priorities—i.e., be the target of CSA enforcement.[63] But such conduct, even if in state regulatory compliance, would not necessarily be immune from federal prosecution.[64] In addition, the 2013 memorandum expanded prosecutorial discretion beyond just medical marijuana use to state laws that have legalized marijuana "in some form."[65]

Following the change of President in 2017, Attorney General Jefferson B. Sessions, III, rescinded all previous marijuana enforcement guidelines.[66] The Department of Justice under the Biden Administration has yet to issue any marijuana enforcement guidance, but Attorney General Merrick Garland has "committed to diverting Justice Department resources away from non-violent cannabis enforcement."[67]

One takeaway from the current Justice Department's stance is that the more control each state exercises over its marijuana-based businesses, the less likely there will be Justice Department enforcement of the CSA. But tighter controls could make it more difficult to maintain a viable business. If legitimate growers' costs are higher than illegal growers', then a black market will remain

Feds Crack Down on CO Medical Pot Dispensaries, REUTERS (Jan. 13, 2012), https://www.reuters.com/article/us-pot-dispensaries/feds-crack-down-on-co-medical-pot-dispensaries-idUSTRE80C1MX20120113 (reporting U.S. prosecutors in Colorado started a crackdown against nearly two dozen medical marijuana dispensaries located within 1,000 feet of schools).

62 Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys: Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

63 *Id.*

64 *Id.* ("[B]oth the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, *may* allay the threat that an operation's size poses to federal enforcement interests.") (emphasis added).

65 *Id.*

66 Memorandum from Jefferson B. Sessions, III, Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys: Marijuana Enforcement 1 (Jan. 4, 2018), https://www.justice.gov/opa/press-elease/file/1022196/download.

67 John Hudak, *Merrick Garland, Cannabis Policy, and Restorative Justice*, BROOKINGS INST. (Feb. 24, 2021), https://www.brookings.edu/blog/fixgov/2021/02/24/merrick-garland-cannabis-policy-and-restorative-justice/.

to compete with the legitimate growers.[68] One interviewee discusses the challenges associated with complying with the conflicting regulations:

> The medical marijuana industry is] a train wreck. You get the government involved and the State involved, and things get screwed up real quick. . . . They put so many regulations on it, as they do for most big business or corporations. The states have big dollar signs in their eyes, and then they're regulating it to the point where nobody even wants to join. They just want to stay in the black market. . . . They're [the government] just going to make it to a point where it's going to cost thousands and thousands of dollars, even to become compliant to their regulations. Which means that a lot of people will quit, or a lot of people go to black market, and others just won't participate in the programs.[69]

While marijuana growers in California report excessive costs and regulations related to compliance, growers in other states, such as Oklahoma experience fewer state level restrictions on their operations. Fewer state regulations are "[f]ueled by low barriers for entry and a fairly hands-off approach by state officials."[70] However, if Oklahoma's "hands-off approach" is seen in conflict with the Justice Department's suggestion of "strong and effective regulatory and enforcement systems," marijuana-based businesses

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[68] *See, e.g.,* Natalie Fertig, *'Talk About Clusterf---': Why Legal Weed Didn't Kill Oregon's Black Market*, POLITICO (Jan. 14, 2022), https://www.politico.com/news/magazine/2022/01/14/oregon-marijuana-legalization-black-market-enforcement-527012 (Last Updated Jan. 21, 2022) ("'It all comes down to economics. . . . If you reduce the price, then there's no, or little, or less, incentive [for consumers] to participate in [the] illicit market because you're getting the price that you want . . . that's the tipping point.'") (quoting Economist Beau Whitney).

[69] Interview with Bruce, Owner-grower and retailer (2017) (interview transcript on file with authors).

[70] Simon Romero, *How Oklahoma Became a Marijuana Boom State*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/us/oklahoma-marijuana-boom.html (noting also that Oklahoma "has no cap on how many dispensaries can sell marijuana, the number of cannabis farms or even how much each farm can produce").

in the state may find themselves as targets of federal CSA enforcement.

D. *Congressional Legislative Action/Inaction*

To date, Congress has been unwilling to remove marijuana from Schedule I under the CSA, though it is trying. Five bills introduced in the current legislative session would declassify marijuana as a Schedule I drug under the CSA: the Marijuana 1-to-3 Act of 2021, introduced by Rep. Steube (R-FL);[71] the Homegrown Act of 2021, introduced by Rep. Evans (D-PA);[72] the Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act, introduced by Rep. Joyce (D-OH);[73] the MORE Act of 2021, introduced by Rep. Nadler (D-JY);[74] and the States Reform Act, introduced by Rep. Mace (R-SC).[75]

Other bills address isolated impediments to operating a marijuana-based business while marijuana remains a Schedule I drug under the CSA. For example, the Clarifying Law Around Insurance of Marijuana Act would provide a safe harbor from penalties or other adverse agency action for insurance companies that provide services to legitimate marijuana-based businesses in states that have legalized marijuana use.[76] The MORE Act would authorize the Small Business Administration to provide loans and technical assistance to small marijuana-related businesses owned and controlled by socially and economically disadvantaged individuals that operate in states or localities that have legalized marijuana use.[77] In addition, the Secure And Fair Enforcement (SAFE) Banking Act of 2021 would alleviate some of the banking constraints for marijuana-based businesses.[78]

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[71] H.R. 365, 117th Cong. § 2 (1st Sess. 2021) (rescheduling marijuana from Schedule I to Schedule III of the CSA).

[72] H.R. 2649, 117th Cong. § 2(a) (1st Sess. 2021).

[73] H.R. 3105, 117th Cong. § 3 (1st Sess. 2021).

[74] H.R. 3617, 117th Cong. § 3(a) (1st Sess. 2021).

[75] H.R. 5977, 117th Cong. § 101(a) (1st Sess. 2021).

[76] S. 862, 117th Cong. (1st Sess. 2021); *see also* H.R. 2068, 117th Cong. (1st Sess. 2021).

[77] H.R. 3617, 117th Cong. § 3054(b) (1st Sess. 2021).

[78] H.R. 1996, 117th Cong. (1st Sess. 2021); *see infra* text accompanying notes 111–117 for a discussion of the demise of the proposed legislation in 2021.

III. PREDICTING INVOLUNTARY DEVIANCE: A STRUCTURAL STRAIN THEORY PERSPECTIVE TO EXAMINE CONFLICT WITHIN THE MARIJUANA INDUSTRY

Arguably, state marijuana laws flout the federal punitive scheme for marijuana.[79] Regardless, owners of state-compliant marijuana-based businesses may not face many risks of imprisonment since most drug enforcement is carried out at the state level.[80] However, the continued federal marijuana ban directly interferes with state-compliant business operations in a variety of ways. We now look at how this interference propagates deviant behavior by marijuana-based businesses that are otherwise trying to carry out normal business operations.

An appropriate lens through which to examine involuntary deviance is structural strain theory.[81] According to this theory, structural strain occurs when an individual or institution experiences conflict arising from the blocking of legitimate methods of achieving desired goals.[82] Institutional norms lose their "legitimacy and regulatory power" when people have difficulty achieving their goals legally.[83] Strain is not an individual or psychological phenomenon, but rather, it is a structural reality produced by differential access to legitimate opportunities across society.[84] This theory proposes a number of adaptations that can occur in response to social systems that have anomie and/or blocked opportunities.[85] Conformity is "the most common and

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79 *Cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1282 (2009).

80 *See id.* at 1283–84; *see also* Conant v. Walters, 309 F.3d 629, 645 n.10 (9th Cir. 2002) (Kozinski, J., concurring) (noting that "federal drug policies rely heavily on the states' enforcement of their own drug laws to achieve federal objectives"); Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST (Mar. 26, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge (reporting that arrests in Colorado for possession, cultivation, and distribution of marijuana fell by ninety-five percent after voters in that state legalized recreational use of marijuana in 2012).

81 *See generally* ROBERT K. MERTON, SOCIAL THEORY & STRUCTURE 20, 403-413 (1957).

82 *See id.*

83 Francis T. Cullen & Steven F. Messner, *The Making of Criminology Revisited: An Oral History of Merton's Anomie Paradigm*, 11 THEORETICAL CRIMINOLOGY 5, 11 (2007).

84 *See id.*

85 *See id.*

widely diffused adaptation and refers to acceptance of both cultural goals, and institutional means to achieve them."[86] In contrast, innovation or deviant behavior describes the individual who has assimilated the cultural emphasis upon the superordinate goal without internalizing the institutional norms governing ways and means for its attainment.[87] In other words, "innovators" are those who break the rules (and often the laws) to achieve the success goals promoted in society. In this context, the legalizing of marijuana may have reduced criminal behavior at an individual (consumer) level but created or fostered criminal/deviant behavior at an organizational level.

To better understand this phenomenon, Stephanie Geiger-Oneto conducted several in-depth interviews using an ethnographic approach with individuals involved in the marijuana industry in Colorado and California. Those interviews reveal that deviant behavior is a result of conflicting federal and state laws. In addition, as detailed in Part III.A below, organizations within this industry are vulnerable to violence and criminal behavior by outsiders because of their inability to engage in normal banking activities. Her data suggest that the policy implications and unintended consequences of legalizing marijuana are more complex than originally thought.

A. *Banking and Finance*

Marijuana-based businesses face formidable obstacles in obtaining banking services.[88] Fundamentally, if banks provide services to marijuana-based businesses—despite their being fully compliant with state law—the banks still "plainly" violate the CSA.[89] The CSA, as federal law, "applies to state banks and businesses regardless of a state's law on cannabis use."[90] This

86 MERTON, *supra* note 81, at 141.

87 *See* MERTON, *supra* note 81.

88 *See, e.g.*, Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 47 (2014) ("One of the most universally acknowledged problems with the current state of affairs . . . is the difficulty that marijuana businesses have in obtaining basic banking services.").

89 *See, e.g.*, Fourth Corner Credit Union v. FRB, 861 F.3d 1052, 1055 (10th Cir. 2017).

90 Colleen M. Baker, *Entrepreneurial Regulatory Legal Strategy: The Case of Cannabis*, 57 AM. BUS. L. J. 913, 922 (2020).

threat was emphasized in Deputy Attorney General James M. Cole's 2011 memorandum, which explicitly warned that financial institutions servicing state-legal marijuana-based businesses could still be subject to federal money laundering statutes.[91] In a 2014 guidance, the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") warned financial institutions:

> The obligation to file a SAR [suspicious activity report] is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, 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 [Bank Secrecy Act], or (iii) lacks a business or apparent lawful purpose. *Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity*.[92]

These mandates mean that "banks must have extensive, costly, anti-money laundering compliance programs, including filing,

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[91] *See* Memorandum from James M. Cole, Deputy Attorney Gen., *supra* note 58, at 2.

[92] FIN. CRIMES ENFORCEMENT NETWORK, *BSA Expectations Regarding Marijuana-Related Businesses*, DEP'T OF THE TREASURY, FIN-2014-G001 (2014), https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses (emphasis added). Although Attorney General Jefferson B. Sessions, III, rescinded all previous marijuana enforcement guidelines in 2017 (*see supra* note 66 and accompanying text), FinCEN and the banking agencies have informally said that notwithstanding these evolving Department of Justice policy shifts, the FinCEN Guidance (including any references to the Cole Memo) remains applicable; *See* John Geiringer, *Clearing the Air for Banking Marijuana-Related Businesses*, BARACK FERRAZZANO, https://www.bfkn.com/newsroom-publications-359 (last visited Dec. 28, 2021).

investigation, and continuing staff education capabilities."[93] Understandably, many banks have severed any ties they had with marijuana-based businesses, though some banks reportedly are providing limited banking services to these businesses.[94] But even these limited services come at a high cost. One interviewee discusses the high service fees associated with a legitimate bank account for a marijuana-based business:

> [Y]ou know here's the deal that people aren't talking about when it comes to banking is, so yeah, banking is available. People don't understand, it's costing anywhere from $1500 to $2000 a month fee, the bank. Okay, so now I'm a small guy, I'm trying to make it, right? Okay, do I have 1500 dollars a month? So if I've got to feed my kids or pay a bill, which one am I going to do, right?[95]

The high service fees banks impose on marijuana-based business owners are due, in part, to the level of risk they assume when servicing these types of accounts as explained by another interviewee:

> Secondly I think there has to be federal legislation dealing with the banking industry. We got to give banks safe harbors, because currently I can tell you, it's arm and a leg for a bank account. If you saw the fees that we charge people for this, it's . . . we're talking about . . . just in basic fees alone, for one account, we'll run you eighteen thousand dollars a year. That's your monthly fee. It's not the other fees that come with it.[96]

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93 Baker, *supra* note 90, at 924.

94 *See* Kamin, *supra* note 88, at 47. *See* Baker, *supra* note 90, at 925 ("Banks that do extend services are likely to only provide accounts, debit-related functions, and wire transfers, but not checking, credit card, or other services that would intersect with federal payment systems.").

95 Interview with Sharon, Consulting-Compliance Professional (2017) (interview transcript on file with authors).

96 Interview with Matthew, Consultant-Accountant (2018) (interview transcript on file with authors).

Many marijuana-based businesses resort to keeping multiple bank accounts at different institutions because of the threat that their accounts will be shut down every six to eight weeks.[97] One interviewee revealed that her marijuana-based business went through four or five bank accounts over a nine-month period while one of her clients had gone through twenty-two bank accounts in five years.[98]

It is estimated that seventy percent of marijuana-based businesses have "no relationship with a financial institution and thus use cash for all transactions, including salaries for employees."[99] This "[l]ack of banking services stands as a formidable barrier to growth of the state-legal marijuana industry."[100] It effectively makes the industry a cash-only business, with substantial amounts of cash being collected and hoarded with no place to put it. [101] One consultant to marijuana businesses provided some context on the situation, sharing:

> I went to visit a client, we went to his home and we went down to his basement and there was a vault door. He opened the vault door and there was a concrete hallway about four feet long. He had buried a shipping container in his backyard and reinforced it with bar and concrete and had a bank vault in the middle of it. He opened it and there was approximately $15 million in cash because he can't spend it. My god, that's about the most insane thing about it. Imagine having $15 million of cash and not being able to [spend it]. I can buy a used

[97] Interview with Sharon, Consulting-Compliance Professional (2017) (interview transcript on file with authors).

[98] Interview with Sharon, Consulting-Compliance Professional (2017) (interview transcript on file with authors).

[99] *See* Stuart Leavenworth, *When Does Too Much Cash Become a Health Risk? When You Own a Marijuana Shop*, MCCLATCHY (Feb. 7, 2018, 5:36 PM), https://www.mcclatchydc.com/news/nation-world/national/article198941964.html.

[100] Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015).

[101] *See id.* at 600–01 ("Without access to banking services, marijuana businesses must conduct transactions in cash and spend an inordinate amount of time and resources on cash management.").

> car but I can't buy a house, can't put it into an investment account. That's where we looked at it and the bank and I still look at it from a personal standpoint, this is a public good that we're doing, we're getting this money off the streets and offering people an alternative way of doing business.[102]

The lack of banking services has led marijuana-based businesses to adopt deviant, if not illegal, practices. For example, some marijuana-based business owners have utilized both cash and cashless ATMs to transform their "tainted" cash into clean electronic transactions.[103]

The business owner will purchase their own cash ATMs and stock the machines with the "tainted" cash earned during normal marijuana sales transactions.[104] Some marijuana-based businesses use cashless ATMs to disguise purchases as cash withdrawals by miscoding purchases as ATM withdrawals.[105] This strategy was also expressed by Bruce, an independent marijuana grower and distributor interviewee: "One of the ideas I sold to the industry was ATM machines. Let me show you how this works. We use the cash to order, we replenish it, kind of electronic version and guess what, now we got electronic money going to the bank account."[106]

The cash-only nature of marijuana-based businesses has implications for payroll and employees as well. Employers within the marijuana industry must pay their employees, but without access to basic banking services, many companies must distribute payroll in cash.[107] Their employees must either deposit it into their

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[102] Interview with Matthew, Consult-Accountant (2018) (interview transcript on file with authors).

[103] *See* Jose Pagliery, *Legal Marijuana's All-Cash Business and Secret Banking*, CNN (Apr. 29, 2013, 3:56 PM), https://money.cnn.com/2013/04/29/smallbusiness/marijuana-cash/index.html.

[104] *See id.*

[105] *See* Amiah Taylor, *Cashless ATMs at Cannabis Dispensaries Are the Industry's Latest Disguise Against Banks*, FORTUNE (April 1, 2022, 1:26 PM), https://fortune.com/2022/04/01/cashless-atms-at-cannabis-dispensaries/.

[106] Interview with Bruce, Owner-grower and retailer (2017) (interview transcript on file with authors).

[107] *See* Rachel Cheasty Sanders, Comment, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN. ST. L. REV. 281, 301–02

own banks (and risk having their assets seized if the bank knows where the money is coming from) or continue to walk around with large sums of cash, thereby becoming targets for thieves.[108] As expressed by the interviewees, owners of marijuana-based businesses must go to great lengths on paydays to ensure the safety of both themselves and their employees, one business owner described the situation by stating:

> I'm adamant I'm not going to break the law but I also see the need for this [illegal behavior] because when we're going back to where do you see some of these things as a dispensary[.] On [the] Wednesday and Thursday before payday I [send] three people out to the [7-11], [Safeway] and King Supers [local grocery stores], all over the city to buy money order[s] so I could give people their paycheck. Because if we gave it to them in check form, even though we had a bank account, [the banks have the ability,] if you got something that says cannabis or marijuana on it they can kick you out [of] your personal bank account.[109]

One interviewee explains the risk to their employees when being paid in cash:

> So, if you're paying your employees by cash, you know that they're about to walk out with, you know [a] few thousand whatever it might be in their pocket [in] cash, you want them protected. So I know a company that does that. They pay cash in different locations and they tell them where the next location will be for their paycheck. They have security or some kind of service.[110]

(2015).

[108] *See id.*

[109] Interview with Matthew, Consult-Accountant in Laramie, Wyo. (June 4, 2016) (interview transcript on file with authors).

[110] Interview with Sharon, Consulting-Compliance Professional in Denver, Colo. (June 17, 2016) (interview transcript on file with authors).

Pending legislation may help resolve some of the abovementioned challenges associated with operating a cash-only business. For example, the U.S. House of Representatives passed the SAFE Banking Act of 2021, most recently in February 2022.[111] The legislation would alleviate some of the banking constraints for marijuana-based businesses, including prohibiting banking regulators from: (1) taking any adverse action against a depository institution solely because the depository institution provides or has provided financial services to a cannabis-related legitimate business or service provider;[112] (2) penalizing depository institutions for providing financial services to a cannabis-related legitimate business or service provider;[113] or (3) prohibiting a depository institution from or penalizing a depository institution for engaging in a financial service for a cannabis-related legitimate business or service provider.[114] The House included the SAFE Banking Act in an amendment to the National Defense Authorization Act ("NDAA"),[115] but the Senate removed the bill from its consideration of the NDAA, which became law on December 27, 2021.[116] One commentator argues that the failure of the SAFE Banking Act may be for the best because if it became law it would provide only "modestly useful" changes rather than more comprehensive needed changes.[117]

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[111] Secure and Fair Enforcement (SAFE) Banking Act of 2021, H.R. 1996, 117th Cong. (2021); *see also Safe Banking Act*, REP. ED PERMUTTER, https://perlmutter.house.gov/safe-banking-act/ (last visited June 6, 2022).

[112] H.R. 1996, § 2(a)(1).

[113] *Id.* § 2(a)(2).

[114] *Id.* § 2(a)(5).

[115] National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. (2021).

[116] S. Res. 1605, 117th Cong. (2021) (enacted); Pub. L. No. 117-81, 135 Stat. 1541 (2021). *See*, Marc Hauser, *Once Again, SAFE Banking Isn't Going to Become Law Anytime Soon*, REED SMITH (Dec. 8, 2021), https://viewpoints.reedsmith.com/post/102hdy1/once-again-safe-banking-isnt-going-to-become-law-any-time-soon; Kyle Jaeger, *Congressman Slams Senate After Marijuana Banking Excluded from Defense Bill*, MARIJUANA MOMENT (Dec. 7, 2021), https://www.marijuanamoment.net/marijuana-banking-not-included-in-congressional-defense-bill-following-bicameral-negotiations/.

[117] *See* Hauser, *supra* note 116. *See also* Marc Hauser, *What Would the SAFE Banking Act Actually Do for the Cannabis Industry?*, REEDSMITH (June 16, 2021), https://viewpoints.reedsmith.com/post/102h0jj/what-would-the-safe-banking-act-actually-do-for-the-cannabis-industry (noting that the SAFE Banking Act does not

Raising capital in the financial markets is possible despite the federal ban on marijuana. The Securities and Exchange Commission ("SEC") recognizes that marijuana-related businesses can offer both registered and unregistered investment securities.[118] The SEC, however, adds this caveat: "[i]f you are considering investing in a company that is connected to the marijuana industry, be aware that marijuana-related companies may be at risk of federal, and perhaps state, criminal prosecution."[119]

Some marijuana-based businesses seeking to use the public securities markets still face obstacles in pursuit of that goal.[120] Importantly, some states that have legalized marijuana ban nonresidents from investing in local cannabis businesses.[121] Businesses must also make full disclosures, including risk factors, which can include: "the federal government may raid us, seize all of our equipment and inventory, and arrest all of our employees, officers, and investors, *including you*."[122] Despite these obstacles,

apply to non-bank lenders, equity investors, stock exchanges, or credit card merchants, and does not eliminate I.R.C. § 280E). The SAFE Banking Act is not dead, yet. Representative Ed Perlmutter (D-CO) reportedly plans to attach the SAFE Banking Act to the America Creating Opportunities to Meaningfully Promote Excellence in Technology (COMPETES) Act of 2022 (H.R. 4521). *See* Tony Lange, *UPDATE: Rep. Perlmutter Makes Final Push on SAFE Banking*, CANNABIS BUS. TIMES (Feb. 7, 2022), https://www.cannabisbusinesstimes.com/article/rep-perlmutters-final-push-on-safe-banking/.

118 *See Investor Alert: Marijuana-Related Investments*, SEC (May 16, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_marijuana.html.

119 *Id.*

120 *See* Luke Scheuer, *The Green Rush: The Public Marijuana Securities Market*, 26 WIDENER L. REV. 53, 58 (2020).

121 *See* Troutman Pepper, *Residency Rules in Cannabis Industry May Not Withstand Constitutional Scrutiny*, JDSUPRA (Nov. 18, 2021), https://www.jdsupra.com/legalnews/residency-rules-in-cannabis-industry-5476243/. *Cf.* Mikos, *supra* note 45, at 865–66, 894 (arguing against this intrastate restriction):

> The federal ban on all marijuana commerce simply does not give legalization states license to discriminate against outside cannabis firms and investors. In addition, states lack a credible legitimate rationale for quashing interstate commerce in cannabis when they permit intrastate commerce in the same. In short, to the extent that states allow any commerce in cannabis, they likely must put outside firms and investors on an equal footing with locals.

122 *Marijuana Investments: Securities Law 101*, HARRIS BRICKEN: CANNA L. BLOG (Dec. 10, 2014), https://harrisbricken.com/cannalawblog/marijuana-investments-securities-law-101/.

marijuana-based businesses are finding funding opportunities.[123] Marijuana-based businesses in the U.S. raised approximately $12.7 billion in 2021.[124] Individual states also offer funding opportunities to marijuana-based firms located in their states.[125]

B. *Federal Taxation*

As long as marijuana remains a Schedule I drug under the CSA, I.R.C. § 280E prohibits marijuana-based businesses from deducting their business expenses,[126] except for costs of goods sold.[127] Regardless of whether it is legal at the state level, according to the U.S. Tax Court, selling marijuana constitutes the illegal sale of drugs, triggering § 280E.[128] The inability to deduct standard business expenses can result in a marijuana-based business owing more in federal income taxes than it earned in profits.[129] It has even been suggested that § 280E "is the biggest impediment to the development of a legitimate marijuana industry, and could drive all legitimate sellers out of business."[130]

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123 *See, e.g.*, Gideon Mark, *Cannabis Securities Litigation*, 46 SETON HALL LEGIS. J. (forthcoming 2022) (noting a number of cannabis-related businesses have begun listing their shares on the NYSE and NASDAQ stock exchanges, though most listings have transpired solely on Canadian exchanges).

124 *See* Lawrence Carrel, *Cannabis Sales Fell In 2021, But Debt Capital Raises Grew 806%*, FORBES (Dec. 30, 2021), https://www.forbes.com/sites/lcarrel/2021/12/30/cannabis-sales-fell-in-2021-but-debt-capital-raises-grew-806/?sh=63c989731d9f (reporting $1.4 billion lower than in 2018).

125 *See, e.g.*, Kyle Jaeger, *New York Governor Announces $200 Million Marijuana Fund to Promote Industry Equity*, MARIJUANA MOMENT (Jan. 5, 2022), https://www.marijuanamoment.net/new-york-governor-announces-200-million-marijuana-fund-to-promote-industry-equity/; *Social Equity Cannabis Loan Program*, ILL. DEP'T COM. & ECON. OPPORTUNITY, https://www2.illinois.gov/dceo/CannabisEquity/Pages/LoanInfo.aspx (last visited May 26, 2022).

126 I.R.C. § 280E ("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 . . . consists of trafficking in controlled substances").

127 *See* Olive v. Comm'r, 139 T.C. 19, 29 (2012). However, depreciation deductions do fall within § 280E. *See* Wellness v. Comm'r, 156 T.C. 62, 71–72, 72 n.11 (2021).

128 *See* Californians Helping to Alleviate Med. Problems, Inc. (CHAMP) v. Comm'r, 128 T.C. 173, 181 (2007); Olive v. Comm'r, 792 F.3d 1146, 1148 (9th Cir. 2015).

129 Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 533 (2014).

130 *Id.* at 532.

The Tax Court has held, however, that § 280E applies only to expenses related to the activity of selling marijuana, rather than to all expenses of any business that sells marijuana.[131] As a result, some marijuana retailers have created independent retail spaces within their stores selling merchandise. One interviewee said:

> So Congress wrote a quick rule called 280E which is, you sell a Schedule I drug, there are no ordinary business expenses [you can deduct]. . . But that's a big thing. . . . So, you're going to learn that you're going to put a gift store in your shop, and it's going to take up the majority of the square footage because that is going to be a separate corporate entity, and you're going to end up being able to, well guess what[?] Ninety percent of my store is actually a gift shop. So I get to write off under normal taxes 90% [of those expenses].
>
> I'm not a CPA, so I will not say that I'm a tax expert. That is my understanding from my descriptions over the last two years. People are finding innovative ways to be able to do this. Shrink your space, shrink your footprint in what you do. Finding those ways to get around 280E. Forming consulting companies and you're consulting for yourself basically. But once again, trying to get those revenue streams that aren't just [marijuana].[132]

Despite this challenge, the Tax Court has declined, however, to recognize a separate business enterprise where a retailer derived almost all of its revenue from marijuana merchandise, and the types of non-marijuana products that it sold (pipes and other marijuana paraphernalia) complemented its efforts to sell marijuana.[133] Similarly, the Tax Court has also ruled that § 280E

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131 *See CHAMP*, 128 T.C. at 183–84 (holding that medical marijuana dispenser's separate caregiving services were "a trade or business that is separate from its trade or business of providing medical marijuana" and therefore not subject to § 280E).

132 Interview with Matthew, Consultant-Accountant in Laramie, Wyo. (June 4, 2016) (interview transcript on file with authors).

133 Alterman v. Comm'r, No. 13666–14, 2018 WL 2980049, at *9 (T.C. June 13, 2008). The court also concluded that expenses associated with merchandise

applies to nonmarijuana-related activities where they are merely ancillary to the marijuana-related business.[134]

The lack of banking services discussed above also means that marijuana-based businesses face the dilemma of paying federal income taxes in cash—and the IRS is authorized to assess a penalty of up to ten percent of the tax due if the payment is not deposited in a government depository (*e.g.,* a bank).[135] IRS regulations specify that business-related tax payments must be made via electronic funds transfer ("EFT").[136] The I.R.C. does state, however, that the penalty can be waived if the failure to use EFT "is due to reasonable cause and not due to willful neglect."[137]

In 2014, a Denver, Colorado-based marijuana dispensary, Allgreens, LLC, challenged the IRS non-cash payment penalty.[138] The IRS sought penalties of over $20,000 for taxes that Allgreens claimed it could not make through the EFT system "because it has no bank account as a result of federal laws that make banks leery of doing business with the marijuana industry."[139] Initially, the IRS argued the fact that Allgreens "cannot secure a bank account due to current banking laws is not considered reasonable cause to abate the penalty."[140] Allgreens' attorney argued that the cash payment

consisting of hats and T-shirts with the company's logo could not be deducted because such items helped advertise the sale of marijuana. *See id.* at *9, n.18.

134 *See* Alt. Health Care Advocs. v. Comm'r, 151 T.C. 225, 239–40 (2018) (noting the allocation of floor space and employee activities both showed that the receipt and sale of marijuana was the dominant activity and that the sale of non-marijuana products had a close and inseparable organizational and economic relationship with, and was incident to the petitioner's primary business of selling marijuana); *see also* Canna Care, Inc. v. Comm'r, No. 5678–12, 2015 WL 6389130, at *5 (T.C. Oct. 22, 2015) (applying § 280E to all of petitioner's business because "the sale of medical marijuana was petitioner's primary source of income and that the sale of any other item was an activity incident to its business of distributing medical marijuana").

135 *See* I.R.C. §§ 6656(a), (b).

136 *See* Deposit rules for taxes under the Federal Insurance Contributions Act and withheld income taxes, 26 C.F.R. § 31.6302–1(h)(3).

137 I.R.C. § 6656(a).

138 *See* David Migoya, *IRS Fines Unbanked Pot Shops for Paying Federal Payroll Tax in Cash*, DEN. POST (Oct. 2, 2016), https://www.denverpost.com/2014/07/02/irs-fines-unbanked-pot-shops-for-paying-federal-payroll-tax-in-cash/.

139 *Id.*

140 David Migoya, *IRS Deal Will Refund Fines to Denver Pot Shop that Pays Taxes in Cash*, DEN. POST (Oct. 2, 2016, 3:35 PM) https://www.denverpost.com/2015/03/19/irs-deal-will-refund-fines-to-denver-pot-shop-that-pays-taxes-in-cash/ (internal quotation marks omitted).

penalty "was intended for businesses that refused to be compliant, not as punishment for those that paid on time, yet were forced to bring a briefcase full of cash to the one Denver IRS office that would accept in-person payments."[141] The IRS agreed and settled with Allgreens, agreeing to refund approximately $25,000 in penalties and abate future penalties.[142] In 2015, the IRS also updated its guidance concerning "unbanked" taxpayers:

> For unbanked taxpayers who are timely in meeting their tax deposit obligations, the Service will not impose or will abate the failure to deposit penalty if a taxpayer can show they made reasonable efforts but were unable to get a bank account during the period at issue. To request penalty relief under this guidance, the unbanked taxpayer must include a signed statement that explains the taxpayer's attempt to get a bank account and must include any corroborating documentation (denied account applications, correspondence from banks, etc.).[143]

As Benjamin Leff pointed out, "[w]hen the cost of running a legitimate business is raised, the financial benefit of running an illegal or quasi-legal business is increased. At a certain point, the costs of legitimacy get too high, and black-market providers thrive."[144] One interviewee explains why some of those in the marijuana industry chose to remain in the illegal black market once marijuana was legalized at the state level:

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141 *Id.*

142 *See id.*

143 *See* Memorandum from Maria S. Hwang, Dir., Servicewide Operations, to Comm'r, Small Business/Self-Employed, Comm'r, Wage & Investment, and Chief Appeals 2 (June 9, 2015), https://www.irs.gov/pub/foia/ig/spder/SBSE-04-0615-0045[1].pdf (noting also that "[t]his guidance does not apply to situations in which the taxpayer can obtain a bank account, but chooses not to maintain a bank account. Such cases will continue to be handled on a case by case basis."). This approach appears to comport with Colleen Baker's argument that a permissive regulatory strategy can be beneficial for marijuana-based businesses. *See generally* Baker, *supra* note 90 (permissive regulatory strategy applied to the banking sector).

144 Leff, *supra* note 129, at 534; *see also* Fertig, *supra* note 68 ("[Twenty-five] years into the legalization movement, as 36 states have adopted some form of legalized marijuana, the black market is booming across the country.").

> Well, like most of the people who wanted it, they left, they have to regulate their job or disability or social security, they don't even pay taxes. That's been around for years. Just as long as they take care of property taxes things like that, and pay their other taxes but I personal never done that . . . because I want to be up and up and clean. Whatever I'm selling, whatever I'm making, because the last thing a lot of us wanted is the IRS to be involved. If you don't get greedy and you file your taxes as if you have your whole lives working, then they'll just leave you alone. But it's one of those things where there's this can of worms that the IRS ever does decide to try research us or look into it, of all these people, all over in the State of California, it would be a nightmare. There again, they wouldn't have enough people to even do it.[145]

Regardless of the possible abatement of the cash payment penalty, paying taxes in cash still poses significant obstacles. Cash payments must be made in-person at an IRS Taxpayer Assistance Center ("TAC"); not all TACs accept cash payments over $10,000 and the locations of those that do are not publicly disclosed and are "often changing"; and appointments must be made 30 to 60 days in advance.[146]

In another example of deviant behavior, some marijuana-based businesses have resorted to strategically overpaying their taxes in order to receive refunds issued by the U.S. government that can then be legitimately deposited into bank accounts without fear of prosecution.[147] In essence, by using the IRS or state level

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[145] Interview with Bruce, Owner-grower and retailer (2017) (interview transcript on file with authors).

[146] *See Cash Payments to the IRS Over $10,000: Frequently Asked Questions*, IRS (July 2, 2021), https://www.irs.gov/payments/cash-payments-to-the-irs-over-10000-frequently-asked-questions.

[147] *See* Kyle Jaeger, *Lawmakers Press Treasury Official On Marijuana Business Banking Access*, MARIJUANA MOMENT (Mar. 12, 2019), https://www.marijuanamoment.net/lawmakers-press-treasury-official-on-marijuana-business-banking-access/ ("[S]ome of them are overpaying them and getting Treasury

tax agency, marijuana-based businesses are able to legally transform their "tainted" revenue into clean revenue. In effect, using the IRS to launder money.[148] An owner, grower, and retailer contemplated the impact of taxes on his marijuana business saying:

> Taxes, yeah, well that's a tricky one. I mean, do you know how many trips a year I have to make there? It's ridiculous . . . and they know where the money comes from. I just show up and hand it over and let them do their thing. Then I wait for the deposit to come through for the refund. I tell you, it makes me smile every time.[149]

Another grower and retailer also discussed the impact of taxes on his business saying:

> Some guys have figured it out . . . You see, you just make the appointment and show up with the cash. The maximum amount every time. It's not like they are going to turn your tax money away. You let them count it, and you've paid your taxes like a good soldier and then, guess what? At the end of the year you get a refund check because you overpaid . . . That's right. Uncle Sam sends you a refund check that I can deposit anywhere, and I stick that in my Wells Fargo [account]. . . . Once again, you come up with these clever ideas.[150]

As the IRS continues to grapple with marijuana legalization, growers and retailers will continue to find innovative strategies to ensure their business is profitable while operating within the

checks back, so we've essentially laundered the money for them.") (quoting Rep. Mark Amodei (R-NV)).

148 *See id.*

149 Interview with Bill, Owner-grower and retailer (medical only) (Nov. 2, 2017) (interview transcript on file with authors).

150 Interview with Vance, CEO, Grower and Retailer (Oct. 5, 2017) (interview transcript on file with authors).

confines of the law. Until a more comprehensive and cohesive system of taxation for marijuana-based businesses is created, deviant behavior such as that mentioned above is likely to continue.

C. *Intellectual Property Protection*

Brand equity has been defined as "the benefits a product achieves through the power of its brand name."[151] From a company standpoint, branding is an integral part of its overall positioning strategy both in the marketplace and in the minds of consumers.[152] It has been linked to customer retention, acquisition, and overall profitability.[153] But, the value of brand equity depends on the ability of a company to create a unique brand name distinguishing its product offerings from others in the marketplace. To do this, companies rely on trademark protection for their products, which prevents competitors from unlawfully using their brand name. Importantly, a certificate of registration is prima facie evidence "of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate."[154]

However, the U.S. Patent and Trademark Office ("PTO"), which reviews and approves trademarks under the federal Lanham Act, requires that trademark owners comply with other laws when selling their trademarked goods.[155] This means that selling a CSA Schedule I drug (i.e., marijuana) constitutes grounds for refusing or even canceling the registration of a trademark.[156]

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[151] Florian Stahl et al., *The Impact of Brand Equity on Customer Acquisition, Retention, and Profit Margin*, 76 J. MKTG. 44, 45 (2012).

[152] *See generally* David A. Aaker, *The Value of Brand Equity*, 13 No. 4 J. BUS. STRATEGY 27, 27–28 (1992); *see also* George S. Day & Prakash Nedungadi, *Managerial Representations of Competitive Advantage*, 58 No. 2 J. MKTG 31, 32 (1994).

[153] Stahl et al., *supra* note 151, at 59.

[154] 15 U.S.C. § 1057(b).

[155] Act of July 6, 1946, Pub. L. No. 79–489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n); *see also* Matal v. Tam, 137 S. Ct. 1744, 1752 (2017) (noting the "foundation of current federal trademark law is the Lanham Act").

[156] *See* Robert A. Mikos, *Unauthorized and Unwise: The Lawful Use Requirement in Trademark Law*, 75 VAND. L. REV. 161, 163 (forthcoming 2022); *see also In re* Morgan Brown, 119 U.S.P.Q.2d 1350, 1351 (T.T.A.B. 2016)

> [T]o qualify for a federal service mark registration, the use of a

While acquiring a trademark for a marijuana-related product is prohibited, some marijuana-based businesses have used creative strategies to protect their brands. For instance, some marijuana-based businesses create separate business entities as consulting firms. The newly formed consulting firms are then able to secure patents and/or trademarks for their intellectual property:

> From a standpoint there, a lot of, there are a lot of dispensary owners and grow owners that are creating holding companies for place in their intellectual property. . . . Anyway what they'll do is they'll create a holding company and there are people that have figured out that this is the recipe to make it grow as fast and potent as possible, or we figured out this is the correct settings for the lighting or the humidity levels or the water or a whole bundle of that and they'll say, okay when we say this is intellectual property when put it over here, now we are going to charge our dispensary for being able to use the intellectual property. So now our dispensary is sending money over here which at that point, that cash then has the ability to be written down as normal business [revenue]. I don't know if it helps get around it [lack of trademark] but from that standpoint, you can literally shift a lot of money this, let's put it that way. Particularly if you're really good at it, you can sell the thing to other companies. People will buy it. I know companies that work with companies all around the states, all around the states, the different states that are selling because what's happening is remember Colorado and California have had a long time to figure this stuff out.[157]

> mark in commerce must be 'lawful.' Thus, any goods or services for which the mark is used must not be illegal under federal law. Thus, the fact that the provision of a product or service may be lawful within a state is irrelevant to the question of federal registration when it is unlawful under federal law.

(citations and footnotes omitted).

157 Interview with Matthew, Consultant-Accountant (June 4, 2016) (interview

By creating holding companies, marijuana-based businesses are able to work around existing legislation thereby protecting their intellectual property despite being in violation of federal law.

D. *Access to Legal Services*

Unlike a typical state-based business, properly state-licensed marijuana-based businesses continually violate federal law by growing, distributing, and selling marijuana.[158] This raises the question of whether marijuana-based businesses can legitimately obtain legal services while their operations are illegal under federal law. Sam Kamin, Vicente Sederberg Professor of Marijuana Law and Policy, and Eli Wald, Charles W. Delaney Jr. Professor of Law, both at the University of Denver Law School, argue that any potential prosecution would have to be by federal prosecutors, who would have to prove the attorneys aided and abetted violations of the CSA.[159] But, legal counsel still face the possibility of professional discipline. Rule 1.2(d) of the American Bar Association Rules of Professional Conduct states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.[160]

It is generally presumed that lawyers can discuss the state of the law with clients, but becoming actively involved in a client's

transcript on file with authors).

158 *See* Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 871 (2013) ("Even in those states decriminalizing marijuana, every sale of marijuana, every plant that is grown, is a serious violation of federal law").

159 *See Id.* at 886; *but see* Andrew Dixon, *Marijuana Business Attorneys and the Professional Deference Standard*, 71 ARK. L. REV. 789, 800 (2019) (arguing that providing any legal services beyond informing clients about the legal consequences of their proposed courses of action could constitute aiding and abetting violation of the CSA).

160 MODEL RULES OF PRO. CONDUCT r. 1.2(d) (A.B.A. 1980).

marijuana-based business, such as drafting formation documents or contracts, submitting dispensary permit applications, preparing or enforcing lease agreements, or creating employee agreements, could be seen as violating professional standards by assisting the client in violating federal law.[161] One California attorney states: "[s]o when you're advising your clients in your engagement letters, you need to say that very, very clearly that this is illegal and you cannot give them any advice how to comply with federal cannabis laws [because] there are none."[162]

Colorado provides a stark example of the continuing conflict between state and federal marijuana law. Following the 2012 decriminalization of recreational marijuana, the Colorado Bar Association issued Ethics Opinion 125 which, in part, permitted Colorado attorneys to advise a client about the consequences of marijuana use or commerce, but maintained that it was unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law.[163] On March 24, 2014, the Colorado Supreme Court added comment [14] to Colorado Rules of Professional Conduct Rule 1.2:

> A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado's recreational marijuana constitutional provisions], and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.[164]

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[161] *See* Kamin & Wald, *supra* note 158 at 922.

[162] Joyce E. Cutler, *Cannabis Practice Creates Ethical Traps, Conflicts for Lawyers*, BLOOMBERG L. (July 27, 2021, 10:01 AM), https://news.bloomberglaw.com/us-law-week/cannabis-practice-creates-ethical-traps-conflicts-for-lawyers.

[163] Colo. Bar Ass'n Ethics Comm., Formal Ethics Op. 125: The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities, 10/21/13; addendum issued 10/21/2013 [Withdrawn 5/17/14]; *see also* Peter A. Joy & Kevin C. McMunigal, *Lawyers, Marijuana, and Ethics*, 32 No. 4 CRIM. JUST. 72, 72 (2017).

[164] MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 14 (COLO. BAR ASS'N 2014); *see also* Joy & McMunigal, *supra* note 163, at 72; Lee Katherine Goldstein, *Colorado Lawyers Can Now Ethically Advise Clients Concerning Marijuana Use and Business Issues—Update on December Blog Post*, FAIRFIELD & WOODS (Apr. 10, 2014),

Shortly thereafter, however, the U.S. District Court for the District of Colorado explicitly excluded Comment 14 from its local practice rules of practice.[165] As a result, when Colorado lawyers practice in federal courts, they face conflicting guidance from state and federal authorities about how to ethically act in response to Colorado's marijuana laws.[166]

Ohio attorneys have fared better. Initially, the Ohio Supreme Court Board of Professional Conduct issued an opinion (2016-6) stating that under Professional Conduct Rule 1.2(d):

> [A] lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law. The types of legal services that cannot be provided under the rule include, but are not limited to, the completion and filing of marijuana license applications, negotiations with regulated individuals and businesses, representation of clients before state regulatory boards responsible for the regulation of medical marijuana, the drafting and negotiating of contracts with vendors for resources or supplies, the drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services.[167]

Fortunately for marijuana-based businesses and their attorneys, the Ohio Supreme Court later amended Ohio's ethics rules to effectively nullify Opinion 2016-6:

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https://www.fwlaw.com/insights/colorado-lawyers-can-now-ethically-advise-clients-concerning-marijuana-use-business (describing the new comment as at least giving "Colorado lawyers comfort that they will not run afoul of the Colorado ethics rules in providing legal advice to clients on marijuana related issues").

165 Colo. Loc. R. of Prac. 2(b) (D. COLO. 2016); *see also* Joy & McMunigal, *supra* note 163, at 72.

166 Joy & McMunigal, *supra* note 163, at 72.

167 Ohio R. Prof'l Conduct, Op. 2016-6 (2016); *see also* Joy & McMunigal, *supra* note 163, at 31.

> A lawyer may counsel or assist a client regarding conduct expressly permitted under [Ohio statutes] authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.[168]

As of 2019, only fifteen states (including Colorado and Ohio) had issued advisory opinions essentially providing that attorneys would not be disciplined for advising clients attempting to comply with state marijuana laws.[169]

E. *Pesticides and Other Chemicals*

Typically, pesticides, insecticides, and other chemicals used in agricultural commodities are heavily regulated under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), which governs the "registration, distribution, sale, and use of pesticides in the United States."[170] Because marijuana is currently listed as a Schedule I drug under the CSA, the Environmental Protection Agency ("EPA") has not issued any federal guidance on the use of pesticides on cannabis.[171] As a result, "[p]eople who consume marijuana medically or recreationally may be exposing themselves

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168 MODEL RULES OF PROF. CONDUCT r. 1.2(d)(2) (Ohio 2021); *see also* Joy & McMunigal, *supra* note 163, at 31.

169 Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over the Line?*," A.B.A (July 2, 2019), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/1/ethical-issues-representing-clients-the-cannabis-business-one-toke-over-line/.

170 Insecticide Act of 1910, Pub. L. No. 61-152, 36 Stat. 331 (1910) (codified as amended at 7 U.S.C.); *see also Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, EPA (Feb. 16, 2021), https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities.

171 *See* Jenna Hardisty Bishop, *Weeding the Garden of Pesticide Regulation: When The Marijuana Industry Goes Unchecked*, 65 DRAKE L. REV. 223, 226 (2017) (noting that because the EPA has not approved any pesticides for use on marijuana plants and FIFRA dictates that a pesticide may not be used inconsistently with its labeling).

to unknown health risks from toxic pesticides."[172] Therefore, states that have legalized marijuana are tasked with creating new regulators for the industry that are responsible for setting testing standards for pesticide and insecticide residue on cannabis plants.[173] Some state pesticide officials state that these standards are being determined by agencies that do not normally regulate pesticide levels, thereby creating a public health risk and exposing marijuana users to unsafe levels of the chemicals.[174] One interviewee elaborated on conflicts facing marijuana-based businesses with respect to pesticides:

> Okay, another nuance is this and I'm going to try and remain very calm about this because it really pisses me off. So the pesticide thing that's going on right now, here's what people don't know, okay, none of the marijuana certified labs in the State of Colorado have been certified to do pesticide testing, that's number one. [That] kind of raises your eyebrows, doesn't it? "Really?," Okay, so your next question is who's doing the testing? Right, okay, up until they had that huge [product] recall, okay and it affected the entire industry. I have two clients right now that have product on hold that shouldn't be on hold that amounts to $500,000, okay, so huge impact this had. Well, all of a sudden right after that happened and I know who owns this and so it

[172] Jael Holzman & Jacob Fischler, *As States Legalize Marijuana, Pesticides May Be a Blind Spot*, ROLL CALL (Sept. 16, 2019, 5:30 AM), https://www.rollcall.com/2019/09/16/as-states-legalize-marijuana-pesticides-may-be-a-blind-spot/.

[173] *See id.*; Chester Harper, *All Is for the Best in the Best of All Possible Worlds: The Unnecessary Environmental Costs of Federal Cannabis Prohibition*, 21 VT. J. ENV'T. L. 55, 57 (2019) (noting that where marijuana is legal, federal agencies cannot fulfill their normal regulatory roles because marijuana remains a Schedule I controlled substance under the CSA, resulting in states being left to their own devices for regulating the marijuana industry in a patchwork approach lacking the resources or expertise of federal agencies); Christopher D. Strunk & Mackenzie S. Schoonmaker, *How Green Is the "Green Rush"? Recognizing the Environmental Concerns Facing the Cannabis Industry*, 21 VT. J. ENV'T. L. 506, 519–22 (2020) (describing state level pesticide regulation efforts).

[174] *See* Holzman & Fischler, *supra* note 172, at 246; Dorina V. Pinkhasova et al., *Regulatory Status of Pesticide Residues in Cannabis: Implications to Medical Use in Neurological Diseases*, 2 CURRENT RSCH. TOXICOLOGY 140, 146 (2021).

doesn't surprise me because he's got a lot of money and he'll go in and fight it, okay, all of a sudden they came out a new bulletin about a week after that happened or two weeks after that said, "Oh well, we're changing the process now for pesticide testing." I read the bulletin and freaked out with one of the sentences. Boy, I got on the phone with MED [Marijuana Enforcement Division] and I was like, "Can you please help understand this?" Basically, what was happening prior I found out is that one of the labs, MED certified labs had a contract with the Colorado Department of Agriculture to do the pesticide testing, again what do you see wrong with this picture? They're not certified to do it, okay, however they had to go through somebody because the way that it works for transporting product. If that product leaves your door, it's not going to leave without what's called the transportation manifest, okay? That manifest is only generated through the metric system, State of Colorado system so you have to be a part of that, right? Okay, when they first came out and said, "Well, CDA is going to start testing for pesticides," all the owner operators went, "Really? How do we legally get the samples to the CDA?," Nobody can do that, right? Then everybody went, "Oh, how we test the product if we can't transport it?"

So they put out this bulletin and said, "Okay, here's the new protocol, the Department of Health will come in and do a visual assessment and if they determine that a sample product . . . sample of the product needs to be done then the CDA will make that happen." Okay, help me with this, how do you go in and do a visual in a cultivation facility and be able to determine? Well, there's one way, you can go to where all of their nutrients and pesticides are and if they're following regulations, they'll have them clearly separated, they'll have them marked and then you can go in and say, "Are they using a product that they're not supposed to be using?" I'm

> okay with that, but if they're not using something then what is your basis for saying, "You have to be tested?" It's completely subjective as far as we know because there's no other information given, right? Okay, so now CDA says, "They're going to come in and they're going to test it." "Okay so we just did something illegal," so when you talk about how as an owner operator, do you kind of deal with the things you have to do? That makes us very nervous. We have product that's going out the door that's not manifested, not tested and therefore over time it starts building up, right, so how do your account for it?
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> They're not telling us that we don't know what pesticides, I just heard from somebody, I wasn't able to validate but very credible person in the industry said to me, "Gosh, I just found out that the CDA is testing for more pesticides than what they're allowing." Well, if that's the case and you're allowing fifteen different pesticides and you're testing for twenty of them, that's not fair.[175]

As more states legalize marijuana, conflicts such as those mentioned above are likely to create challenges for marijuana-based business owners, policymakers, and consumers alike.

IV. POTENTIAL POLICY AND MARKETING SOLUTIONS

All of the obstacles faced by marijuana-based businesses—and consequent involuntary deviant behavior—identified in the article stem directly from marijuana's continued Schedule I status under the CSA. The simplest and most effective policy solution would be to remove marijuana from the list of scheduled drugs under the CSA. Even legislation that falls short of full rescheduling could provide some relief. For example, rescheduling marijuana to Schedule III would prevent the enforcement of I.R.C. § 280E.[176] In

[175] Interview with Sharon, Consulting-Compliance Professional (2017) (interview transcript on file with authors).

[176] *See* I.R.C. § 280E; H.R. 365, 117th Cong. § 2 (1st Sess. 2021) (rescheduling

addition, if marijuana were dropped to Schedule III, the proposed SAFE Banking Act of 2021would allow access to banking services for marijuana-based businesses just like other legitimate businesses.[177] But the passage of only one of these bills only provides relief in one area—not across the board.

Short of removal of marijuana from the CSA, Sam Kamin, Vicente Sederberg Professor of Marijuana Law and Policy at the University of Denver Law School, and Erwin Chemerinsky, Dean of the University of California Berkeley School of Law have recommended a "cooperative federalism" approach.[178] They argue that Congress should amend the CSA to allow for states to "opt-out" of CSA application by adopting and enforcing regulations along the lines of those outlined in the 2013 Cole Memo.[179]

At present, the only concrete movement toward marijuana legalization remains at the state level, which only perpetuates the marijuana industry's operational obstacles. One possible solution, particularly related to safety, is for the industry to engage in self-regulation. One scholar has argued that growers in states with comprehensive marijuana safety regulations could use an appellation—a certified designation of origin—that establishes that certain quality or stylistic standards are met.[180]

Marijuana-based businesses can look to other industries for self-regulation guidance. The diamond industry, for example, has created the Kimberley Process to prevent rough diamonds from conflict-ridden regions from entering the international market.[181] This certification process was created voluntarily around the globe

marijuana from Schedule I to Schedule III of the CSA); *supra* notes 126–134 and accompanying text (discussing the impact of § 280E).

177 Secure And Fair Enforcement (SAFE) Banking Act of 2021, H.R. 1996, 117th Cong. (2021).

178 *See* Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1120 (2014); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015).

179 *See* Kamin, *supra* note 178, at 1120; Cherminsky, *supra* note 178, at 116. *See supra* notes 62–65 and accompanying text (discussing the 2013 Cole Memo).

180 *See* Ryan B. Stoa, *Marijuana Appellations: The Case for Cannabicultural Designations of Origin*, 11 HARV. L. & POL'Y REV. 513, 514–15 (2017).

181 *See* Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 89 J. BUS. ETHICS 403, 404 (2010).

by legislation in member states.[182] Under this certification process, firms had to follow rules and regulations implemented by the private sector regarding ethical sourcing.[183] With respect to the marijuana industry, a certification process could be established that tracks the growing, production, and sale of marijuana to ensure that members follow guidelines regarding, for example, the use of pesticides, thus creating their own regulatory legitimacy within the industry. While this type of certification is likely to impose a price premium for consumers, much like those purchasing certified diamonds, safety or quality-conscious consumers may prefer certified products over non-certified marijuana products.[184]

V. CONCLUSION

This article has confirmed what one scholar has declared: "Marijuana . . . occupies a legal status unprecedented in American history; no substance or conduct has ever been treated quite so disparately in our federal system—being licensed and regulated at the state level while expressly prohibited at the federal level."[185]

This article has reviewed the current state of conflict between states that have legalized marijuana, for medical and/or recreational use, and the federal government's continued classification of marijuana as an illegal drug under the CSA. Despite the fact that legal marijuana production must remain entirely intrastate, the U.S. Supreme Court has ruled that marijuana production confined within state borders nonetheless impacts interstate commerce—leaving marijuana-based businesses subject to federal prosecution under the CSA.[186] As demonstrated

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182 *See id.*; David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 273 (2008); John Gerard Ruggie, *Reconstituting the Global Public Domain–Issues, Actors, and Practices*, 10 EUR. J. INT'L RELS. 499, 512–13 (2004).

183 *See* Virginia Haufler, *The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention*, 89 J. BUS. ETHICS 403, 404 (2010).

184 *See* Debora L. Spar, *Markets Continuity and Change in the International Diamond Market*, 20 J. ECON. PERSPS. 195, 204–06 (2006); G. Ariovich, *The Economics of Diamond Price Movements*, 6 MANAGERIAL & DECISION ECON. 234, 240 (1985).

185 Kamin, *supra* note 42, at 624.

186 *See* Gonzales v. Raich, 545 U.S. 1, 18, 22, 29 (2005).

in Part III of this article, the continued criminalization of marijuana at the federal level prevents marijuana-based businesses from using services that are standard for any other legitimate business—banking, tax deductions and payments, intellectual property, legal advice, and pesticide control. If marijuana remains illegal under the CSA, particularly as a Schedule I drug, owners of marijuana-based businesses will have to engage in the involuntary deviant behavior discussed in this article. This involuntary behavior leads to higher costs of business and thus higher costs of product—thwarting the legitimacy of state-legal marijuana and potentially perpetuating an unregulated black market for marijuana, even in states that have legalized its use.

APPENDIX

Methodology

To identify major obstacles in the marijuana industry, exploratory research was conducted using in-person interviews. Seven informants were interviewed for 1-2 hours over a period of two years about their experience in the marijuana industry. Specifically, informants were asked about specific challenges or obstacles that exist because of the conflicting legislation in the marijuana industry. From these interviews, obstacles were identified, and further research was conducted.

Informants were recruited using the snowball or referral sampling technique. An interview guide consisting of open-ended questions was created to ensure similar topics were discussed across all interviews. However, a vast amount of the data collected resulted from impromptu unscripted discussions occurring after the guided portion of the interview was completed. Informants were assured of confidentiality, and all names have been changed and locations disguised in the present study. No incentive was offered to informants for their participation. Table 1 lists the

> Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

(citations omitted); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947).

demographics of the sample. Five interviews were conducted in-person and two by telephone. Three interviews were conducted on-site, at their place of business.

Table 1:

Name	Age	Years of Experience in Marijuana Industry	Position	Location
Bill	50s	15	Owner-grow and retail (medical only)	CA
Michelle	30s	8	Director of Operations-grow and retail	CO
Sharon	40s	13	Consulting-Compliance Professional	CO
Matthew	50s	15	Consulting-Accounting	CO
James	40s	11	CMO-grow and retail (medical only)	CO
Vance	50s	10	CEO-grow and retail	CO
Bruce	50s	20	Owner-grow and retail	CA

Thomas J. Bernard, *Testing Structural Strain Theories*. 24 J. RSCH. CRIME DELINQ., 262-80 (Nov. 1987).