

1-2023

To Be Blunt: Weed Appreciate You Not Flying with Marijuana, but Current Conflicting Cannabis Law Leaves Things Hazy

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Emily O'Brien, To Be Blunt: Weed Appreciate You Not Flying with Marijuana, but Current Conflicting Cannabis Law Leaves Things Hazy, 11 Ind. J. L. & Soc. Equal. 125 (2023).

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To Be Blunt: Weed Appreciate You Not Flying with Marijuana, but Current Conflicting Cannabis Law Leaves Things Hazy

Emily R. O'Brien*

The Controlled Substances Act of 1970 categorized marijuana as a Schedule I drug, making all forms of possession illegal at the federal level. However, in the last ten years alone, the majority of America has gained access to a form of marijuana, whether it be for recreational or medicinal purposes, in accordance with rapidly changing state laws. As of November 2022, twenty-one states, Washington, D.C., and Guam have legalized recreational marijuana, and thirty-seven states, Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands have legalized medical marijuana. With this conflict between federal and state law regarding cannabis possession, air travel while possessing marijuana has become a grey area filled with discrepancies and varying approaches. This Article offers specific recommendations for Congress to employ to best address the current issues airports across the United States are facing upon the discovery of a passenger attempting to fly while possessing a personal use amount of marijuana. This framework includes, at the broad level: (1) the removal of marijuana from the Controlled Substances Act of 1970, in accordance with current proposed legislation; and (2) editing current proposed legislation to include mention of what applicable federal agencies' roles will be as related to marijuana in response to this. This Article provides narrow recommendations regarding how the Department of Homeland Security should be directed to respond, including: (1) the implementation of specific guidelines regarding what TSA officials should do upon the discovery of marijuana in a passenger's possession, (2) the implementation of amnesty boxes at airports, (3) the educational efforts that should be employed as a response, and (4) the implementation of an oversight chair or committee.

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INTRODUCTION

It seems contradictory when a state allows something that is illegal at the federal level.¹ It becomes even more contradictory when this “something” is explicitly stated by an agency of the federal government to be of low to no priority.² It’s even worse when this “something” could carry no consequences in one state,³ but a felony charge in another.⁴ Seems confusing, right? Welcome to the realm of current conflicting cannabis law as it pertains to air travel.

Marijuana⁵ law was seemingly straightforward from approximately 1970 to the late 1990s. It became common knowledge that marijuana was illegal at both the federal and state level, with no exceptions.⁶ However, this area of the law quickly became complicated as potential medicinal uses of marijuana were discovered,⁷ as well as the various ways in which marijuana can be broken into other potentially less regulated substances, such as CBD.⁸ Upon these discoveries, states began to disagree with federal law and legalize—or decriminalize—marijuana.⁹ This shift at the state level towards legalization of marijuana rapidly developed in the last ten years, with the majority of states now considering at least some form(s) of marijuana and its uses to be legal.¹⁰

Despite this shift at the state level, marijuana remains illegal at the federal level, complicating the law in areas in which there are competing federal and state interests: airports and air travel. Though airports are controlled at the federal level, when it comes to cannabis being discovered on a passenger at an airport, state law tends to control.¹¹ This has led to a wide array of differing state approaches,

¹ See Lauren Zumbach, *Marijuana at the Airport: That Part of Your Packing List Might Not Fly*, CHI. TRIB. (Sept. 13, 2019, 10:53 AM), <https://www.chicagotribune.com/business/ct-biz-legal-marijuana-airport-travel-20190913-vmadafzkbzhavi5eetixye7ug4-story.html> [<https://perma.cc/7UGV-GVYC>].

² See TSA (@tsa), INSTAGRAM (Apr. 20, 2019), <https://www.instagram.com/p/BwfOvvnHWOr> [<https://perma.cc/B26S-UJHG>].

³ See *infra* note 192.

⁴ See *infra* note 195–96.

⁵ This Article will refer to “marijuana” and “cannabis” interchangeably, in accordance with the common understanding and definition of the two terms.

⁶ See generally Sarah Trumble & Nathan Kasai, *America’s Marijuana Revolution*, THIRD WAY (Aug. 24, 2017), <https://www.thirdway.org/report/americas-marijuana-evolution> [<https://perma.cc/PR8K-ZCBB>] (discussing the evolution of marijuana law in the United States, including the Controlled Substances Act in 1970 and “California [being] the first state to legalize marijuana for medical purposes in 1996” (footnote omitted)).

⁷ See generally Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 PHARMACY & THERAPEUTICS 180, 180–88 (2017).

⁸ See generally Eloise Theisen & Danielle Dresden, *What Is the Difference Between Hemp CBD and Cannabis CBD?*, MED. NEWS TODAY (July 23, 2020), <https://www.medicalnewstoday.com/articles/hemp-cbd-vs-cannabis-cbd> [<https://perma.cc/8SBY-4SDG>].

⁹ Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (Apr. 19, 2017), <https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> [<https://perma.cc/N8AY-Y59Y>].

¹⁰ Jeremy Berke, Shayanne Gal & Yuji Lee, *Marijuana Legalization Is Sweeping the US. See Every State Where Cannabis Is Legal*, BUS. INSIDER (May 27, 2022, 2:34 PM), <https://www.businessinsider.com/legal-marijuana-states-2018-1> [<https://perma.cc/SM6N-BDML>].

¹¹ See generally discussion *infra* Section II.C.

resulting in discrepancies, confusion, and room for prejudice and bias to play a role.¹²

This Article argues that Congress should pass legislation providing guidelines to federal entities—with recommendations to the states—addressing how to handle the discovery of personal use marijuana in a passenger’s possession at an airport. This guidance would ensure compliance with both federal and state law without leaving room for any grey areas. Part I of this Article provides an overview of current federal and state marijuana law and how this has changed or remained the same over time. Part II outlines how the conflicting federal and state marijuana laws have resulted in discrepancies and variances in application and potential punishment. It further addresses how these conflicting laws have created the opportunity for discrimination of air travelers possessing personal use amounts of marijuana. Finally, Part III proposes specific recommendations Congress should employ to eradicate these issues, while complying with both federal and state law in accordance with the U.S. Constitution.

I. A MONTAGE OF MARIJUANA LAWS: AN EVOLUTION OF CANNABIS LAW IN THE UNITED STATES

Marijuana has a relatively short history within the United States, as it was not “widely used for recreational purposes until the early 1900s.”¹³ Due to social unrest and high levels of unemployment during the Great Depression, coupled with the Prohibition era, twenty-nine states determined marijuana use to be illegal by 1931.¹⁴ The Marijuana Tax Act of 1937 became the first federal law to criminalize marijuana.¹⁵ Approximately thirty years later, the “War on Drugs”¹⁶ led to the emergence of the Controlled Substances Act.¹⁷ However, states have increasingly changed their perspective regarding marijuana’s status in recent years, with variations of marijuana becoming legal across the United States.¹⁸

This Part is divided into two sections. First, it will provide a brief history of current federal marijuana law established by the Controlled Substances Act. It will discuss how the Controlled Substances Act is divided into different schedules, what these schedules mean, and where marijuana fits into the Controlled Substances Act both historically and currently. Next, the discussion will turn to how marijuana law has evolved at the state level in the last twenty-five years and how this compares to the changes (or lack thereof) in marijuana law at the federal level.

¹² See discussion *infra* Part II.

¹³ *Marijuana*, HISTORY.COM, (Oct. 10, 2019), <https://www.history.com/topics/crime/history-of-marijuana> [<https://perma.cc/VUS6-3AWH>].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *War on Drugs*, HISTORY.COM, (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/986A-26N8>].

¹⁷ *Marijuana*, *supra* note 13.

¹⁸ See Berke et al., *supra* note 10.

A. *Current Federal Law Surrounding Marijuana: The Controlled Substances Act*

Current federal law regarding marijuana possession and use is dictated by the Controlled Substances Act. In 1970, President Richard Nixon signed the Comprehensive Drug Abuse Prevention and Control Act,¹⁹ which allowed for the combination of “all prior existing federal drug laws into one single statute.”²⁰ This Act is divided into three titles.²¹ Title II, which “addresses the registration and distribution of controlled substances,”²² has become known as the Controlled Substances Act (“CSA”).²³ The CSA went into effect on May 1, 1971.²⁴

The CSA is not limited to the regulation of drugs;²⁵ it also includes substances, such as plants or chemicals, that may not typically be classified as a drug.²⁶ It regulates both medical and recreational drugs that are either “legally or illicitly distributed.”²⁷

In the passage of the CSA, Congress recognized two competing interests relating to the regulation and distribution of controlled substances.²⁸ Congress found that many of the drugs included in the CSA “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.”²⁹ On the other hand, Congress found that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”³⁰ The intended purpose of the CSA is “to protect public health from the dangers of controlled substances while also ensuring access to controlled substances for legitimate purposes.”³¹ To accomplish this

¹⁹ See JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS 2 (2021).

²⁰ *The Controlled Substances Act: Overview*, FINDLAW, <https://www.findlaw.com/criminal/criminal-charges/controlled-substances-act-csa-overview.html> [<https://perma.cc/2V32-U5VA>] (emphasis omitted).

²¹ Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, 48 HOSP. PHARMACY 473, 473 (2013).

²² *Id.*

²³ LAMPE, *supra* note 19, at 2.

²⁴ Gabay, *supra* note 21, at 473.

²⁵ However, for purposes of this Article, “drugs” may be used for simplification purposes, as is commonly done. See LAMPE, *supra* note 19, at 2 n.21.

²⁶ *Id.* (“Substances subject to the CSA may include plants, such as marijuana or peyote, or chemicals not generally recognized as drugs.”).

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ 21 U.S.C. § 801(1).

³⁰ *Id.* § 801(2).

³¹ LAMPE, *supra* note 19, at 2.

purpose, the CSA categorizes drugs into five “schedules”³² based on a variety of factors.³³

i. The Five Schedules Under the CSA and Where Marijuana Fits in

Marijuana is currently categorized as a Schedule I drug under the CSA, meaning it is considered among the substances with the highest potential for abuse.³⁴ Discussion of the five schedules assists in understanding the current federal and state conflict regarding marijuana’s classification as a Schedule I drug. The five schedules of controlled substances established by the CSA are commonly known as Schedules I through V.³⁵ The Drug Enforcement Administration (“DEA”), the Department of Health and Human Services (“HHS”), Congress,³⁶ or a petitioning interested party may initiate “[p]roceedings to add, delete, or change the schedule of a drug or other substance.”³⁷ The factors the Attorney General³⁸ must consider in deciding whether a drug should be controlled or removed from one of the five schedules are:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration, and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or physiological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.³⁹

The controlled substances included in Schedule I are “the most strictly regulated, because they are deemed to have *no* medical value.”⁴⁰ Schedules II through V contain substances that have a “currently accepted” medical use.⁴¹ Further distinguishing factors between the Schedules are that Schedules I and II have “a high potential for abuse,” whereas Schedules III–V have “less (relative to

³² See *id.* at 5 (“Drugs become subject to the CSA by being placed in one of five lists, referred to as ‘schedules.’”).

³³ See *id.* at 6.

³⁴ See *id.* at 7 (“[S]ubstances in Schedules I and II may have a . . . high potential for abuse.”).

³⁵ *Id.* at 5.

³⁶ *Id.* at 8–9.

³⁷ *The Controlled Substances Act*, DEA, <https://www.dea.gov/drug-information/csa> [<https://perma.cc/QE97-TZ6F>] (last visited Nov. 22, 2022).

³⁸ See 21 U.S.C. § 811(a).

³⁹ *Id.* § 811(c).

⁴⁰ *The Controlled Substances Act: Overview*, *supra* note 20 (emphasis added).

⁴¹ See LAMPE, *supra* note 19, at 6.

each preceding schedule) abuse potential.”⁴² Accordingly, the drugs included in Schedule V are the least regulated controlled substances within the CSA.

To provide context, working from the least regulated to most regulated drugs under the CSA, Schedule V drugs include cough medicines that contain codeine,⁴³ stimulants,⁴⁴ depressants,⁴⁵ and FDA-approved drugs containing CBD.⁴⁶ Schedule IV drugs include Xanax, Valium, and Ambien.⁴⁷ Schedule III drugs include anabolic steroids,⁴⁸ testosterone, and Tylenol with codeine.⁴⁹ Opium and most opioids, including fentanyl,⁵⁰ coca leaves and cocaine,⁵¹ methamphetamine,⁵² and oxycodone⁵³ are among the substances categorized as Schedule II drugs.⁵⁴ Finally, substances that are considered to have the highest risk of abuse and are given the strictest regulation as Schedule I drugs include heroin,⁵⁵ 3,4-methylenedioxymethamphetamine (“MDMA”),⁵⁶ lysergic acid diethylamide (“LSD”),⁵⁷ peyote,⁵⁸ and marijuana.⁵⁹

ii. Marijuana as a Schedule I Substance

Since “marijuana remains a Schedule I controlled substance under federal law,” the increasing number of states decriminalizing marijuana has no effect on its

⁴² Alice Mead, *Legal and Regulatory Issues Governing Cannabis and Cannabis-Derived Products in the United States*, FRONTIERS IN PLANT SCI., June 2019, at 1, 2.

⁴³ LAMPE, *supra* note 19, at 6.

⁴⁴ 21 C.F.R. § 1308.15(d) (2022).

⁴⁵ *Id.* § 1308.15(e).

⁴⁶ LAMPE, *supra* note 19, at 6. “CBD, or cannabidiol, is the second most prevalent active ingredient in cannabis (marijuana). While CBD is an essential component of medical marijuana, it is derived directly from the hemp plant, a cousin of marijuana, or manufactured in a laboratory. . . . CBD does not cause a ‘high’ by itself.” Peter Grinspoon, *Cannabidiol (CBD): What We Know and What We Don’t*, HARV. HEALTH PUBL’G (Sept. 4, 2021), <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476> [<https://perma.cc/LB4B-GGX7>].

⁴⁷ LAMPE, *supra* note 19, at 6.

⁴⁸ 21 C.F.R. § 1308.13(f).

⁴⁹ *See* LAMPE, *supra* note 19, at 6 (listing Tylenol with codeine as an example of a Schedule III drug); *see also* 21 C.F.R. § 1308.13(f) (contains the full list of Schedule III substances).

⁵⁰ 21 C.F.R. § 1308.12(c).

⁵¹ *Id.* § 1308.12(b)(4).

⁵² *Id.* § 1308.12(d)(2).

⁵³ *Id.* § 1308.12(b)(1)(xiv).

⁵⁴ *See id.* § 1308.12 (listing all Schedule II drugs).

⁵⁵ *Id.* § 1308.11(c)(11).

⁵⁶ *Id.* § 1308.11(d)(11). MDMA is also commonly known as both “ecstasy” or “Molly.” *Ecstasy or MDMA (Also Known as Molly)*, DEA <https://www.dea.gov/factsheets/ecstasy-or-mdma-also-known-molly> [<https://perma.cc/6Z5H-TWL5>] (last visited Sept. 26, 2021).

⁵⁷ 21 C.F.R. § 1308.11(d)(22).

⁵⁸ *Id.* § 1308.11(d)(26).

⁵⁹ *Id.* § 1308.11(d)(23); LAMPE, *supra* note 19, at 6 n.2 (“The CSA generally uses the word ‘marihuana’ to refer to the cannabis plant and its derivatives. This report uses the more widely accepted ‘marijuana,’ unless quoting other sources.”). This Article will similarly use the commonly accepted spelling “marijuana.”

federal status.⁶⁰ The CSA defines marijuana as including its seeds, resins, leaves, compounds, and derivatives, “as well as synthetic versions thereof.”⁶¹ “The most commonly known [chemical] compounds are delta-9-tetrahydrocannabinol (“THC”) and cannabidiol (“CBD”).”⁶² Despite this, CBD is not classified as a Schedule I drug.⁶³ It was removed from the CSA in 2020 following notification from DEA to GW Pharmaceuticals announcing the FDA-approved drug Epidiolex: “[T]he only CBD medicine approved by FDA, is no longer a controlled substance under the federal Controlled Substances Act.”⁶⁴

Additionally, hemp is excluded from the definition of marijuana and is no longer a controlled substance either.⁶⁵ The Agricultural Improvement Act of 2018 (or “Farm Bill”)⁶⁶ was signed by President Donald Trump on December 20, 2018.⁶⁷ Among the provisions implemented was legislation legalizing hemp “as a regular agriculture ‘crop.’”⁶⁸ This simultaneously amended the CSA, legalizing hemp farming.⁶⁹ One catch to this new law is that sellable hemp “cannot contain more than 0.3 percent of [THC].”⁷⁰ Arguably, it was the passage of the Farm Bill that led to the legalization of CBD products, such as Epidiolex.⁷¹ The irony in this is that both hemp and Epidiolex contain THC,⁷²—albeit small amounts—and are not considered drugs under the CSA, while THC remains a Schedule I drug under this Act.⁷³

⁶⁰ LAMPE, *supra* note 19, at 26.

⁶¹ Mead, *supra* note 42, at 2, 3.

⁶² *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA (Jan. 22, 2021) <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [<https://perma.cc/27HU-KZUU>].

⁶³ See 21 C.F.R. § 1308.11.

⁶⁴ GW Pharms. PLC, *GW Pharmaceuticals PLC and Its U.S. Subsidiary Greenwich Biosciences, Inc. Announce That EPIDIOLEX (Cannabidiol) Oral Solution Has Been Descheduled and Is No Longer a Controlled Substance*, GLOBENEWSWIRE (Apr. 6, 2020, 9:00 AM), <https://www.globenewswire.com/news-release/2020/04/06/2012160/0/en/GW-Pharmaceuticals-plc-and-Its-U-S-Subsidiary-Greenwich-Biosciences-Inc-Announce-That-EPIDIOLEX-cannabidiol-Oral-Solution-Has-Been-Descheduled-And-Is-No-Longer-A-Controlled-Substan.html> [<https://perma.cc/AVB4-XHFD>] (“Epidiolex] (cannabidiol) oral solution, a pharmaceutical formulation of highly purified cannabidiol (CBD), is the first in a new class of anti-epileptic medications . . . and the first prescription, plant-derived cannabis-based medicine approved by the U.S. Food and Drug Administration . . .”).

⁶⁵ 21 U.S.C. § 802(16)(B)(i) (2022).

⁶⁶ For an in-depth explanation of what the Farm Bill entails and why it is important, see *generally infra* note 68.

⁶⁷ See *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, *supra* note 62.

⁶⁸ Thomas J. McClure, *What’s the Buzz? 2018 Farm Bill*, 92 WIS. LAW. 30, 33 (2019).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *id.*

⁷³ Leigh Ann Anderson, *List of Schedule 1 Drugs*, DRUGS (Feb. 7, 2022), [https://www.drugs.com/article/csa-schedule-1.html#:~:text=NOTE%3A%20Tetrahydrocannabinol%20\(THC%2C%20marijuana,use%20or%20for%20medicinal%20use](https://www.drugs.com/article/csa-schedule-1.html#:~:text=NOTE%3A%20Tetrahydrocannabinol%20(THC%2C%20marijuana,use%20or%20for%20medicinal%20use) [<https://perma.cc/5UM7-9KCS>] (“NOTE: Tetrahydrocannabinol (THC, marijuana) is still

B. *The (Quick) Evolution of Marijuana Legalization Across the States*

Marijuana laws have changed drastically across the states in a significantly short period of time. California became the first state in the United States to legalize medical marijuana in 1996.⁷⁴ It was not until 2012 that Colorado and Washington voted to legalize recreational marijuana in a historic and ground-breaking move.⁷⁵ Each state's respective measures legalized marijuana for individuals aged twenty-one and older.⁷⁶ Just six years later, Vermont became "the first state to legalize marijuana through [the] legislature."⁷⁷ Up until that point, the states that had legalized recreational marijuana had done so through ballot initiatives.⁷⁸ Approximately one year after this landmark passage, Illinois followed in Vermont's footsteps and "took things one step further, becoming the first state legislature to pass a bill legalizing the sale and possession of [marijuana]."⁷⁹

As of November 2022, twenty-one states, Washington, D.C., and Guam have legalized recreational marijuana.⁸⁰ Additionally, thirty-seven states, Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands have legalized medical marijuana.⁸¹ This means that in the last ten years alone, the majority of America has gained access to a form of marijuana, whether it be for recreational or medicinal purposes.

considered a Schedule 1 drug by the DEA, even though some U.S. states have legalized marijuana for personal, recreational use or for medical use.”).

⁷⁴ Trumble, *supra* note 9.

⁷⁵ Christina Ng, Abby Phillips & Clayton Sandell, *Colorado, Washington Become First States to Legalize Recreational Marijuana*, ABC NEWS (Nov. 6, 2012, 11:49 AM), <https://abcnews.go.com/Politics/OTUS/colorado-washington-states-legalize-recreational-marijuana/story?id=17652774> [<https://perma.cc/MM5S-EFKY>].

⁷⁶ *Id.*

⁷⁷ Katie Zezima, *Vermont Is the First State to Legalize Marijuana Through Legislature*, WASH. POST (Jan. 24, 2018, 5:20 PM), <https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/vermont-is-the-first-state-to-legalize-marijuana-through-legislature> [<https://perma.cc/R6M7-RMT4>].

⁷⁸ *Id.*

⁷⁹ Amber Phillips, *How Illinois Became the First State Legislature to Legalize Marijuana Sales*, WASH. POST (June 4, 2019, 10:09 AM), <https://www.washingtonpost.com/politics/2019/06/04/how-illinois-became-first-state-legislature-legalize-marijuana-sales> [<https://perma.cc/9PQ2-QERV>].

⁸⁰ Berke et al., *supra* note 10; Claire Hansen, Horus Alas & Elliott Davis Jr., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (July 27, 2022, 2:51 PM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization#SD> [<https://perma.cc/J4DW-RW5W>]; see also *State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 12, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/VL27-3FF4>] (“As of May 27, 2022, 19 states, two territories and the District of Columbia have enacted [legislation] to regulate cannabis for adult [nonmedical] use.”).

⁸¹ NAT'L CONF. OF STATE LEGISLATURES, *supra* note 80 (“As of February 3, 2022, 37 states, three territories and the District of Columbia allow the medical use of cannabis products.”).

C. *The (Lack of) Evolution of Federal Cannabis Law*

Despite this quick development of state legalization, both recreational and medical marijuana remain categorized as Schedule I substances under the CSA.⁸² As of January 21, 2021, FDA has approved only “one cannabis-derived and three cannabis-related drug products . . . [that] are only available with a prescription from a licensed healthcare provider.”⁸³ FDA has expressed its concern regarding “the proliferation of products asserting to contain CBD that are marketed for therapeutic or medical uses although they have not been approved by FDA.”⁸⁴ However, FDA has also stated that it does not object to research regarding cannabis’s potential medical uses.⁸⁵ Therefore, at the federal level, medical and recreational marijuana remain equals under the law; this remains mostly true in its application to U.S. airports and airlines as well.

II. FLYING HIGH: THE LACK OF CLEAR GUIDELINES AND POLICIES RELATING TO TRAVELING WITH MARIJUANA DUE TO CONFLICTING FEDERAL AND STATE CANNABIS LAW

Though it may be clearly established at the federal level that marijuana remains a Schedule I drug and is therefore illegal, the quick evolution of legalization across the states has complicated the law surrounding air travel and marijuana possession. This Part begins by identifying and exploring the legal doctrines and case law that impact the conflict between federal and state law regarding this legalization as related to air travel.⁸⁶ Then, this Part addresses how this conflict impacts current regulations—or lack thereof—regarding marijuana possession, including an analysis of how this conflict is being treated across U.S. airports and by federal agencies.⁸⁷ Next, this Part examines how the regulations that have been put forth, coupled with the federal versus state law conflict, have resulted in substantial variations regarding penalties for passengers who attempt to board a plane with marijuana in their possession.⁸⁸ This leads to an analysis of how the culminating inconsistencies within the conflicting laws and regulations allow for potential racial bias, prejudice, and discrimination.⁸⁹ Finally, this Part

⁸² See 21 C.F.R. § 1308.11(d)(31) (2022).

⁸³ *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, *supra* note 62 (“FDA has approved Epidiolex . . . which contains a purified form of the drug substance CBD for the treatment of seizures . . . [and] has approved Marinol and Syndros for therapeutic uses” These drugs “include the active ingredient dronabinol, a synthetic delta-9-tetrahydrocannabinol (THC) which is considered the psychoactive component of cannabis.”).

⁸⁴ *Id.*

⁸⁵ *Id.* “The FDA believes that scientifically valid research conducted under an IND application is the best way to determine what patients could benefit from the use of drugs derived from cannabis.” *Id.* The FDA then goes on to list specific ways in which the FDA supports that research. *See id.*

⁸⁶ See *infra* Section II.A.

⁸⁷ See *infra* Section II.B.

⁸⁸ See *infra* Section II.C.

⁸⁹ See *infra* Section II.D.

explores various legislative proposals that have been presented in recent years to potentially resolve conflicts in or, at the very least, substantially impact current marijuana law and how some of these proposals conflict with one another.⁹⁰

A. Conflict Between Federal and State Law

Despite a majority of states having “enacted medical marijuana laws that permit the growth, use, and distribution of marijuana for medical purposes, as well as licensing patients to buy and use marijuana,” these state laws directly conflict with federal law.⁹¹ Similarly, so does any state law permitting the use of recreational marijuana or any other type that is in violation of the CSA.⁹² The Supremacy Clause of the U.S. Constitution establishes that federal law generally trumps state law.⁹³ However, the “question of federal preemption is a question of Congressional intent.”⁹⁴ The CSA conveys congressional intent by making it clear that this federal law will only trump state law under “*very limited circumstances*.”⁹⁵ Typically, as related to the conflict between federal and state law regarding marijuana legalization, the federal government does not get involved so as to reserve resources, unless the marijuana possession is related to one of eight specifically designated prioritizations.⁹⁶ Another reason the federal government tends to defer to state law for small, personal use amounts of marijuana is largely due to the Tenth Amendment.

i. The Tenth Amendment’s Application to Federal Versus State Conflict

Under the Tenth Amendment, while the federal government has the right to create and enforce its own laws regarding marijuana, it is unconstitutional to compel state officers to enforce these federal laws, as it would be an “unconstitutional commandeering of a state’s resources.”⁹⁷ The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁹⁸ This recognizes every individual state as its own “political entity . . . with

⁹⁰ See *infra* Section II.E.

⁹¹ Florence Shu-Acuaye, *Rohrabacher-Blumenauer Amendment, Case Law, and the Department of Justice: Who Prevails in the Medical Marijuana Legalization Debate?*, 54 GONZ. L. REV. 127, 128 (2019).

⁹² See 21 U.S.C. §§ 801–971.

⁹³ U.S. CONST. Art. VI, cl. 2.

⁹⁴ *State Marijuana Regulation Laws Are Not Preempted by Federal Law*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/issues/legalization/state-marijuana-regulation-laws-are-not-preempted-by-federal-law> [<https://perma.cc/K6FU-H2AP>] (last visited Nov. 6, 2021).

⁹⁵ *Id.* (emphasis added); see also 21 U.S.C. § 903 (1970).

⁹⁶ See U.S. DEPT OF JUST., *Guidance Regarding Marijuana Enforcement* 1–2 (2013) (“Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”).

⁹⁷ *State Marijuana Regulation Laws Are Not Preempted by Federal Law*, *supra* note 94.

⁹⁸ U.S. CONST. amend. X.

its own powers and purposes.”⁹⁹ This application of the Tenth Amendment contributes to a deeper understanding of the conflict between federal and state law as it relates to marijuana.

The Department of Justice (“DOJ”) is prohibited from preventing states’ authorization of medical marijuana, as dictated by Congress and the Tenth Amendment to the U.S. Constitution. The Rohrabacher-Farr Amendment was first introduced in the U.S. House of Representatives in 2001,¹⁰⁰ but this appropriations rider was not passed by Congress until 2014.¹⁰¹ It was included again in the “Fiscal Year 2020 spending legislation,” which the president . . . signed into law.”¹⁰² This rider prohibits DOJ “from using congressionally allocated funds to prosecute state-legal medical cannabis operators for noncompliance with federal law.”¹⁰³ In other words, this “omnibus spending bill . . . prohibit[s] the Justice Department from expending funds to prevent states from implementing laws that authorize medical marijuana.”¹⁰⁴ The Ninth Circuit was the first federal appellate court to consider the potential scope and effect of this provision.¹⁰⁵ *United States v. Pisarski* re-emphasized the Ninth Circuit’s landmark *United States v. McIntosh* holding by reinforcing that “[i]n *McIntosh*, we held that defendants may seek to enjoin the expenditure of DOJ funds only if they ‘strictly comply with all *state-law conditions* regarding the use, distribution, possession, and cultivation of medical marijuana.”¹⁰⁶ While this Ninth Circuit decision exists, it remains unclear how other courts will interpret the law in relation to this act and other potential acts that may arise relating to marijuana.¹⁰⁷

⁹⁹ Margaret Mary J. Mangan, *The Tenth Amendment*, 48 WOMEN LAWS. J. 20, 20 (1962).

¹⁰⁰ Michael Schroeder, *Medical Cannabis Protection: The Rohrabacher-Farr Amendment*, CANNACON (Jan. 26, 2018), <https://cannacon.org/medical-cannabis-protection-rohrabacher-farr-amendment> [<https://perma.cc/LW2B-Y6GJ>]; Rohrabacher-Farr Amendment, H.R. 4660, 113th Cong., § 558 (2014).

¹⁰¹ Robert Becher & William Weinreb, *Ninth Circuit Clarifies Restrictions on Prosecutions Related to Medical Marijuana*, JD SUPRA (July 17, 2020), <https://www.jdsupra.com/legalnews/ninth-circuit-clarifies-restrictions-on-87879> [<https://perma.cc/8A43-HVL7>].

¹⁰² Zachary S. Roman, *Tenth Circuit Decision Clears the Way for Further Judicial Consideration of Application of Recently Re-Enacted Rohrabacher-Farr Amendment*, REED SMITH (Dec. 27, 2019), <https://www.reedsmith.com/en/perspectives/2019/12/tenth-circuit-decision-clears-the-way-for-further-judicial-consideration> [<https://perma.cc/4BB4-J55M>].

¹⁰³ Becher & Weinreb, *supra* note 101.

¹⁰⁴ Jennifer L. Petrusis, *Sky High? The Federal-State Marijuana Law Conflict and Air Travelers*, 34 AIR & SPACE LAW. 11, 13 n.8 (2021). It is important to note that the “omnibus spending bill” only applies to medical marijuana— not recreational. See Mike Sager, *Legally Smoking Pot Just Got a Little Easier*, ESQUIRE (Dec. 19, 2014), <https://www.esquire.com/news-politics/news/a32247/obama-marijuana> [<https://perma.cc/ZZ7P-ETAD>].

¹⁰⁵ Roman, *supra* note 102.

¹⁰⁶ *United States v. Pisarski*, 965 F.3d 738, 741 (9th Cir. 2020) (quoting *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016)) (emphasis added).

¹⁰⁷ However, it is worth noting that the rule of lenity may affect how some states determine this issue. For example, the Supreme Court of the State of Hawaii addressed how the rule of lenity applies to a conflict between federal and state law regarding marijuana in its 2013 *State v. Woodhall* decision. The majority answered in the affirmative the question of whether, under the rule of lenity, “the conflict between a statute that allows medical use of marijuana, including transportation of such marijuana, and another statute that prohibits transportation of medical marijuana through any place open to the public, creates an

Based on the passage of this appropriations act and the *McIntosh* decision, it would initially appear the federal government is leaning toward allowing the states to implement regulations and conditions as it relates to marijuana without interference on the part of the federal government. However, it is important to emphasize that this appropriations rider, along with the *McIntosh* decision, only applies to *medical* marijuana.¹⁰⁸ The decriminalization or legalization of *recreational* marijuana at the state level and whether prosecution relating to marijuana may be federally funded has not been settled. Additionally, while it seems to be relatively clear how the Ninth Circuit will apply this rider going forward, it remains unclear how the states that have legalized medical marijuana will do so. Even “the U.S. federal government’s stance on cannabis enforcement remains unclear.”¹⁰⁹

While Congress provided state protections regarding the medical marijuana industry through the passage of the Rohrabacher-Farr Amendment, both recreational and medical marijuana remain Schedule I substances, leading to confusion among the states regarding federal interference. This becomes significantly more unclear when considering current guidelines regarding traveling with marijuana.

B. Leading Guidelines for United States Airports: Or, More Accurately, What Guidelines?

While the federal government has established various entities to oversee air travel, these entities have failed to establish clear guidelines pertaining to their relevant departments and how these departments can and should address marijuana. The federal entities that oversee air travel and its related elements (such as pilots, passengers, airports, and airlines) are the U.S. Department of Transportation, the Federal Aviation Administration, the U.S. Department of Homeland Security, and the Transportation Security Administration.¹¹⁰ In the following sub-parts, this Article will address the applicable corresponding relationships between these entities. Furthermore, the policies each of these entities

irreconcilable conflict that must be resolved in favor of the defendant.” *State v. Woodhall*, 301 P.3d 607, 609 (Haw. 2013).

¹⁰⁸ Schroeder, *supra* note 100 (“[T]he Rohrabacher-Farr Amendment is legislation intended to prohibit the U.S. Justice Department from spending any funds on actions designed to interfere with implementation of state level *medical* cannabis laws.”) (emphasis added).

¹⁰⁹ Bererbian, et al., *Interpreting the Renewed Rohrabacher-Farr Amendment: A Loophole for Enforcement?*, THOMPSON COBURN LLP (May 31, 2017), <https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2017-05-31/interpreting-the-renewed-rohrabacher-farr-amendment-a-loophole-for-enforcement> [https://perma.cc/C6EQ-45JU].

¹¹⁰ *See Federal Aviation Missions*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/policy-regulations/policy/aviation-management-policy/interagency-committee-for-aviation-policy-icap/federal-aviation-missions> <https://www.gsa.gov/policy-regulations/policy/aviation-management-policy/interagency-committee-for-aviation-policy-icap/federal-aviation-missions> [https://perma.cc/K4EW-T6WU] (last visited Sept. 26, 2021).

have put forth regarding personal use amounts of either recreational or medical marijuana, as pertinent to air travel, will be explored.

i. The U.S. Department of Transportation and Federal Aviation Administration's Marijuana Policies

To better understand the policies set forth regarding personal use amounts of marijuana as it pertains to air travel, it is imperative to look at the regulations established by both the parent department, the Department of Transportation (“DOT”), and the agency of this department, the Federal Aviation Administration (“FAA”). FAA “is the agency of the United States Department of Transportation responsible for the regulation and oversight of civil aviation within the [United States] . . . [with] [i]ts primary mission [being] to ensure safety of civil aviation.”¹¹¹

DOT issued an Office of Drugs and Alcohol Policy and Compliance notice for employees in 2019 relating to medical marijuana.¹¹² This notice was issued in response to a 2009 guideline issued by DOJ “for [f]ederal prosecutors in states that have enacted laws authorizing the use of ‘medical marijuana.’”¹¹³ DOT’s Drug and Alcohol Testing Regulation¹¹⁴ does not recognize “‘medical marijuana’ under a state law to be a valid medical explanation for a transportation employee’s positive drug test.”¹¹⁵ This applies to safety-sensitive employees, including pilots.¹¹⁶ The notice reminds employees that “marijuana remains a drug listed in Schedule I of the Controlled Substances Act,” and, as such, “Medical Review Officers will *not* verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana.’”¹¹⁷

The policy was additionally stated in a 2012 DOT Office of Drug and Alcohol Policy and Compliance Notice released regarding the use of recreational marijuana.¹¹⁸ The same sentiments were applicable to DOT employees, including pilots.¹¹⁹ Further, this notice emphasized that DOT “want[s] to make it perfectly clear that the state initiatives [regarding the legalization of recreational marijuana]

¹¹¹ *Federal Aviation Administration (FAA)*, SKYBRARY, [https://www.skybrary.aero/index.php/Federal_Aviation_Administration_\(FAA\)](https://www.skybrary.aero/index.php/Federal_Aviation_Administration_(FAA)) [<https://perma.cc/8WTR-7KXE>].

¹¹² *DOT “Medical Marijuana” Notice*, U.S. DEP’T OF TRANSP., (Nov. 19, 2019), <https://www.transportation.gov/odapc/medical-marijuana-notice> <https://www.transportation.gov/odapc/medical-marijuana-notice> [<https://perma.cc/F39J-JMQ8>].

¹¹³ *Id.* (referencing Memorandum from the U.S. Department of Justice Office of the Attorney General to Selected United States Attorneys (Oct. 19, 2009) (available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/E56A-BLML>])).

¹¹⁴ 49 C.F.R. § 40.151(e) (2010).

¹¹⁵ *DOT “Medical Marijuana” Notice*, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ *DOT “Recreational Marijuana” Notice*, U.S. Dep’t of Transp. (Feb. 1, 2017), <https://www.transportation.gov/odapc/dot-recreational-marijuana-notice> [<https://perma.cc/4ZHK-4HNG>].

¹¹⁸ *Id.*

¹¹⁹ *Id.* (“The Department of Transportation’s Drug and Alcohol Testing Regulation—49 CFR Part 40—does not authorize the use of Schedule I drugs, including marijuana, for any reason.”).

will have no bearing on the Department of Transportation’s regulated drug testing program.”¹²⁰

Just as DOT released guidelines strictly relating to *pilots* using marijuana, FAA did so as well.¹²¹ Their discussion of marijuana remains limited to the “knowing transportation of marijuana on aircraft” by pilots.¹²² FAA indicates that this applies to all pilots, both private and commercial.¹²³ Their rules include heavy penalties for pilots, including “authoriz[ing] the agency to revoke the certificates of [pilots] who knowingly transport aboard aircraft even small quantities of marijuana that amount to simple possession.”¹²⁴ It is emphasized that this is because “[e]ven if marijuana possession or cultivation is legal in a state, it is illegal under federal law to use an aircraft to transport marijuana to, from, or within that state.”¹²⁵ Additionally, the guidelines explicitly state that “FAA regulations pertaining to carrying prohibited substances aboard aircraft *do not apply to passengers*.”¹²⁶ The only exception to this is that FAA regulations do apply to passengers who are “people with airman certificates . . . knowingly transporting aboard aircraft controlled substances.”¹²⁷

ii. The Department of Homeland Security and Transportation Security Administration’s Marijuana Policies

The Department of Homeland Security’s (“DHS”) mission remains “to secure the nation from the many threats we face.”¹²⁸ Accordingly, the Transportation Security Administration (“TSA”), was created after 9/11 “to oversee security in all modes of transportation.”¹²⁹ “TSA became part of the Department of Homeland Security in March 2003, making up a quarter of the DHS workforce.”¹³⁰ TSA oversees commercial and general aviation, screening “more than 2 million passengers each day at nearly 440 airports nationwide.”¹³¹

Both DHS and TSA have addressed marijuana as it pertains to air travel in some regard,¹³² albeit minimally and with contradictory statements. In 2017, DHS

¹²⁰ See *Marijuana Can’t Fly*, FED. AVIATION ADMIN., https://www.faa.gov/pilots/transporting_marijuana (Aug. 5, 2022) [<https://perma.cc/VAE7-KDJ6>].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Id.*

¹²⁸ *About DHS*, DEP’T. OF HOMELAND SEC. (July 13, 2021), <https://www.dhs.gov/about-dhs> [<https://perma.cc/EM7E-BADS>].

¹²⁹ *TSA at a Glance*, TRANSP. SEC. ADMIN., (May 19, 2021), <https://www.tsa.gov/news/press/factsheets/tsa-glance#:~:text=TSA%20became%20part%20of%20the,%3B%20highways%2C%20pipelines%20and%20ports> [<https://perma.cc/5F8K-ZYWA>].

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See discussion *infra* Section II.B.ii.

Secretary John F. Kelly addressed the drug trade and DHS's role in protecting against this as it relates to marijuana.¹³³ Specifically, he stated that “[w]hen marijuana is found at aviation checkpoints and baggage screening, TSA personnel will . . . take appropriate action.”¹³⁴ It was never clarified what “appropriate action” should be.

However, DHS has published an extensive list detailing what can be brought on a plane by passengers.¹³⁵ This list does not differentiate between medical marijuana, recreational marijuana, CBD, or other forms of marijuana. Rather, it lumps all marijuana-related items into the “Medical Marijuana” category.¹³⁶ It explicitly categorizes this item as “Medical” and indicates that it may be allowed in checked *and* carry-on bags with special instructions.¹³⁷

Despite this characterization within the list, in the official item description, it reads:

Marijuana and certain cannabis infused products, including some Cannabidiol (CBD) oil, remain illegal under federal law except for products that contain no more than 0.3 percent THC on a dry weight basis or that are approved by FDA. TSA officers are required to report any suspected violations of law to local, state[,] or federal authorities.¹³⁸

TSA has the same policy published as well.¹³⁹ Additionally, both policies specify that “TSA security officers do not search for marijuana or other illegal drugs, but if any illegal substance is discovered during security screening, TSA will refer the matter to a law enforcement officer.”¹⁴⁰ It does not specify whether this is a local or federal law enforcement officer.¹⁴¹

With the continuous increase in legalization of marijuana across the United States, TSA released an Instagram post in 2019 addressing the confusion regarding flying with marijuana and clarified their position by stating:

Are we cool? We like to think we're cool. We want you to have a pleasant experience at the airport and arrive safely at your

¹³³ See Home and Away: DHS and the Threats to America, Remarks delivered by Secretary Kelly at George Washington University Center for Cyber and Homeland Security, Dep't of Homeland Sec. (Apr. 18, 2017), <https://www.dhs.gov/news/2017/04/18/home-and-away-dhs-and-threats-america> [<https://perma.cc/6FS3-RN2T>].

¹³⁴ *Id.*

¹³⁵ See *Learn What I Can Bring on the Plane*, DEP'T OF HOMELAND SEC. (last visited Nov. 22, 2022), <https://www.dhs.gov/learn-what-i-can-bring-on-the-plane> [<https://perma.cc/E2U2-CBHH>] (interactive tool that allows for the searching of items that can/cannot be brought on planes).

¹³⁶ *Medical Marijuana*, TRANS. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/whaticanbring/items/medical-marijuana> [<https://perma.cc/2FXT-SDXM>] (last visited Nov. 22, 2022).

¹³⁷ *Id.*

¹³⁸ *Id.* (citation omitted).

¹³⁹ *Medical Marijuana*, *supra* note 136.

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

destination. But getting caught while trying to fly with marijuana or cannabis-infused products can really harsh your mellow. Let us be blunt: TSA officers DO NOT search for marijuana or other illegal drugs. Our screening procedures are focused on security and detecting potential threats. But in the event a substance appears to be marijuana or a cannabis infused product, we're required by federal law to notify law enforcement. This includes items that are used for medicinal purposes.¹⁴²

Therefore, when comparing the various information released by TSA, it remains unclear whether medical marijuana is allowed, as its two statements conflict. However, it remains clear that marijuana is not considered a threat to security and, if found, is passed off to a law enforcement officer to address.¹⁴³

iii. How Marijuana Is Being Addressed by Various Airports and Airlines

Airports located within states where recreational or medicinal marijuana is legal have taken different approaches in their interpretation of the various “guidelines” set forth at the federal level. In fact, U.S. “airports have a bewildering range of cannabis policies in their efforts to find a path through the drug’s conflicting legal status.”¹⁴⁴ Los Angeles International Airport permits passengers to carry up to 28.5 grams of cannabis, as this is the general law in California.¹⁴⁵ John Wayne Airport (located in Orange County, California), Seattle-Tacoma Airport, and Portland International Airport have similar policies.¹⁴⁶

Despite marijuana being legal in Nevada and Colorado,¹⁴⁷ Denver International Airport and Las Vegas’s McCarran International Airport have “banned possession of marijuana on its property.”¹⁴⁸ Boston Logan International Airport has established a similar policy, stating that “[a]lthough Massachusetts has legalized some uses of marijuana in the Commonwealth, it is prohibited under federal law to carry marijuana through the TSA checkpoints.”¹⁴⁹ Though the approaches taken by airports differ, an option that is increasing in popularity at airports that do not allow for the possession of marijuana is amnesty boxes.

Amnesty boxes “serve as a safe spot where travelers can get rid of marijuana and other drugs before getting on a plane, since traveling with marijuana remains

¹⁴² TSA (@tsa), *supra* note 2.

¹⁴³ See TSA at a Glance, *supra* note 129.

¹⁴⁴ Chris Lo, *High Flyers: Legal Cannabis Creates Grey Area for US Airports*, AIRPORT TECH. (Nov. 7, 2019), <https://www.airport-technology.com/features/flying-weed> [<https://perma.cc/T9KP-KKYT>].

¹⁴⁵ See *id.*

¹⁴⁶ *Id.* (“Portland International Airport allows passengers to carry marijuana with them if they’re flying within the state of Oregon.”).

¹⁴⁷ See Berke et al., *supra* note 10.

¹⁴⁸ Petrusis, *supra* note 104, at 3 (Denver International Airport has “set a maximum fine of \$999 for violators”).

¹⁴⁹ *Safety and Security are Top Priorities at Logan*, BOS. LOGAN AIRPORT, <https://www.massport.com/logan-airport/at-the-airport/security-information> (last visited Sept. 26, 2021).

illegal [at the federal level].”¹⁵⁰ These receptacles tend to be brightly colored,¹⁵¹ are placed at every TSA checkpoint,¹⁵² and usually “have a secure mailbox-like compartment, are made of metal, and are bolted to the floor.”¹⁵³ They may also be installed “outside of the buildings” as opposed to at checkpoints, as is the case at Las Vegas’s McCarran International Airport.¹⁵⁴ At these boxes, there is a clear sign that reads: “Disposal for Prescription and Recreational Drugs.”¹⁵⁵

Amnesty boxes were installed at every TSA checkpoint in Illinois’ Chicago O’Hare International Airport and Chicago Midway International Airport in early 2020, following the legalization of marijuana in the state.¹⁵⁶ Other airports—such as Colorado Springs Airport, Aspen/Pitkin County Airport Sandy Field, and Las Vegas’s McCarran International Airport—set an example regarding these boxes for these two Illinois airports.¹⁵⁷ The contents of amnesty boxes are not typically tracked, but they are usually disposed of on a weekly basis by an individual who has been hired to safely dispose of controlled substances, while accompanied by a member of law enforcement to oversee the process.¹⁵⁸

Similarly, as various airports have taken different approaches to handling marijuana, so have different airlines. American Airlines¹⁵⁹ and Delta Airlines¹⁶⁰ have similar policies, each stating that “TSA has stated that possession of marijuana, even medical marijuana, is illegal under federal law” and that the airlines therefore do not allow passengers to transport marijuana on their planes.¹⁶¹ Alaska Airlines simply prohibits marijuana from either carry-on or checked baggage

¹⁵⁰ Kelly Bauer, *Cannabis Amnesty Boxes are Now in Chicago Airports To Dump Your Weed Before Flights*, BLOCK CLUB CHI. (Jan. 6, 2020), <https://blockclubchicago.org/2020/01/06/cannabis-amnesty-boxes-are-now-in-chicago-airports-to-dump-your-weed-before-flights> [https://perma.cc/8MYG-9CCH].

¹⁵¹ *See id.*

¹⁵² Jayme Deerwater & Morgan Hines, *Now That Marijuana is Legal in Illinois, There are Pot Amnesty Boxes at Chicago’s Airports*, USA TODAY (Jan. 10, 2020, 11:47 AM), <https://www.usatoday.com/story/travel/airline-news/2020/01/10/leaving-chicago-put-your-weed-amnesty-box-airport/4429547002> [https://perma.cc/S84G-YG73].

¹⁵³ Petrusis, *supra* note 104, at 12.

¹⁵⁴ Harriet Baskas, *Can You Fly With Marijuana Within Legalized States?*, KSDK-TV (Feb. 6, 2018, 1:22 PM), <https://www.ksdk.com/article/news/nation-now/can-you-fly-with-marijuana-within-legalized-states/465-483558fd-49b0-4b02-9d2f-2562a54d9545> [https://perma.cc/T9CB-XWL4].

¹⁵⁵ Zumbach, *supra* note 1.

¹⁵⁶ Deerwater & Hines, *supra* note 152.

¹⁵⁷ *See* Petrusis, *supra* note 104, at 12; *see also* *How to Dispose of Cannabis on Your Way Out of Colorado*, COLORADO (May 20, 2021), <https://www.colorado.com/articles/how-dispose-cannabis-your-way-out-colorado> [https://perma.cc/3Z3G-NJU7].

¹⁵⁸ Zumbach, *supra* note 1.

¹⁵⁹ *Restricted Items*, AM. AIRLINES, <https://www.aa.com/i18n/travel-info/baggage/restricted-items.jsp> [https://perma.cc/49WL-FGTB] (last visited Sept. 26, 2021).

¹⁶⁰ *Tobacco, E-Cigarettes or Marijuana*, DELTA, <https://www.delta.com/us/en/baggage/prohibited-or-restricted-items/tobacco-ecig-marijuana> [https://perma.cc/3UCS-4BSV] (last visited Sept. 26, 2021).

¹⁶¹ AM. AIRLINES, *supra* note 159; DELTA, *supra* note 160.

without an explanation.¹⁶² United Airlines,¹⁶³ Southwest Airlines,¹⁶⁴ and Spirit Airlines¹⁶⁵ do not explicitly address whether marijuana is allowed on their flights, but rather, direct inquiring individuals to the TSA list of prohibited items¹⁶⁶ and the FAA PackSafe guide.¹⁶⁷ The TSA list references medical marijuana,¹⁶⁸ whereas the FAA PackSafe guide does not reference any form of marijuana, including CBD.¹⁶⁹

C. Substantial Variance in Penalties for Traveling with Marijuana

It is not surprising that the differing approaches of various airports, airlines, federal administrative agencies, and employees have resulted in a substantial variation in penalties individuals receive for traveling with marijuana. Penalties have ranged from TSA officials allowing the transport of marijuana, both personal use amounts and larger distribution amounts, to pass through security checkpoints,¹⁷⁰ to asking an individual to discard their marijuana in an available amnesty box,¹⁷¹ to arresting individuals for carrying CBD.¹⁷²

Despite TSA expressly stating they “DO NOT search for marijuana,” they have been instructed by DHS to “take appropriate action” and “notify law enforcement” if it is found.¹⁷³ This “appropriate action” requirement is in dispute, as

¹⁶² *Prohibited and Restricted Items*, ALASKA AIRLINES, <https://www.alaskaair.com/content/travel-info/baggage/prohibited-items> [<https://perma.cc/3RMB-QX3X>] (last visited Sept. 26, 2021).

¹⁶³ *Dangerous Items*, UNITED AIRLINES, <https://www.united.com/ual/en/us/fly/travel/baggage/dangerous.html> <https://www.united.com/ual/en/us/fly/travel/baggage/dangerous.html> [<https://perma.cc/8RTV-6AZT>] (last visited Sept. 26, 2021).

¹⁶⁴ *Baggage*, SOUTHWEST, <https://www.southwest.com/html/customer-service/baggage> [<https://perma.cc/2N45-MYDH>] (last visited Sept. 26, 2021).

¹⁶⁵ *What Items Am I Not Allowed to Bring With Me?*, SPIRIT, <https://customersupport.spirit.com/en-us/category/article/KA-01146> [<https://perma.cc/S748-JSCJ>] (last visited Sept. 26, 2021).

¹⁶⁶ *What Can I Bring?*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening/whatcanibring/all> <https://www.tsa.gov/travel/security-screening/whatcanibring/all> [<https://perma.cc/7TUW-PHBQ>].

¹⁶⁷ *PackSafe for Passengers*, FED. AVIATION ADMIN., <https://www.faa.gov/hazmat/packsafe> <https://www.faa.gov/hazmat/packsafe> [<https://perma.cc/3NQE-WRVG>].

¹⁶⁸ *Medical Marijuana*, *supra* note 136.

¹⁶⁹ *See generally PackSafe for Passengers*, *supra* note 167.

¹⁷⁰ Press Release, Dep’t of Just., Former TSA Officer Indicted for Allegedly Allowing Marijuana-Laden Baggage to Pass Through Security Screening at LAX (Oct. 16, 2015) (on file with author) (“The indictment alleges that Smith accepted payments of at least \$500 to ensure that baggage containing marijuana would be allowed to pass through security checkpoints at LAX so that the bags would be loaded on to commercial aircraft.”).

¹⁷¹ Baskas, *supra* note 154; Bauer, *supra* note 150 (The amnesty boxes will “serve as a safe spot where travelers can get rid of marijuana and other drugs before getting on a plane.”).

¹⁷² *See* Scott Friedman & Jack Douglas, Jr., *CBD Arrests Flying High at Dallas-Fort Worth International Airport*, NBC 5 (Apr. 25, 2019, 4:09 PM), <https://www.nbcdfw.com/investigations/traveling-with-cbd-could-land-you-in-jail/248342> [<https://perma.cc/U82R-3LCX>] (“NBC 5 Investigates obtained police reports at the airport detailing some of the cases in which travelers were caught with CBD,” some resulting in felony drug possession charges).

¹⁷³ TSA (@tsa), *supra* note 2; Jeremy Berke, *DHS Head John Kelly Gave a Clear Signal That the Trump Administration is Heading for a Marijuana Crackdown*, BUS. INSIDER (Apr. 18, 2017, 1:46 PM), <https://www.businessinsider.com/secretary-john-kelly-says-dhs-will-enforce-weed-calls-it-gateway-drug-2017-4> [<https://perma.cc/T2PK-97BW>]; *Medical Marijuana*, *supra* note 136.

it remains unclear what governing law enforcement should be contacted. In 2018, TSA spokesperson Lorie Dankers stated that “[t]he passenger’s originating and destination airports are not taken into account . . . TSA’s response to the discovery of marijuana is the same in every state and at every airport—regardless of whether marijuana has been or is going to be legalized.”¹⁷⁴ In some cases, “TSA won’t bother notifying local authorities unless you possess large amounts [of marijuana] or are not of legal age” and are attempting to fly with marijuana.¹⁷⁵ With the definition of “appropriate action” lacking guidance from the federal government, airport employees across the United States are left with the decision of whether or not to turn to state agents—such as local police—which frequently seems to be the case.

Local law enforcement officials tend to take the approach that is generally accepted within their state. In states where personal-use amounts of either recreational or medical marijuana are legal, typically nothing will happen once local police are involved.¹⁷⁶ For example, in California, Los Angeles Airport Police have stated that if an individual is found carrying marijuana, “not much” will happen to them in terms of consequences.¹⁷⁷ Furthermore, Lieutenant Mark Gonzales of the Orange County Sheriff’s Department has explained, “If the TSA calls us about finding marijuana, we’d go up and make sure it is within the legal quantity. If it is, we’d just stand by while the passenger decides what to do with it.”¹⁷⁸ California Airport Police have also expressed that they would not charge an individual attempting to bring marijuana onto a plane “[b]ecause it is not a crime.”¹⁷⁹

Similarly, Fort Lauderdale-Hollywood International Airport representatives have expressed that medical marijuana is allowed, as long as proper documentation is provided.¹⁸⁰ Marcho Marchena—an Orlando airport lawyer—has stated that Orlando International Airport does not itself have law enforcement, making it unclear “[w]ho would make an arrest, if anybody,” were a passenger to bring any type of marijuana brought into the airport.¹⁸¹ At airports that do not have clear airport-wide marijuana bans, local law enforcement officials typically convey the following options to the passenger attempting to travel with marijuana: “disposing of the product in a trash bin or locked amnesty box, giving it to a friend in the terminal, or putting it in their car.”¹⁸² In states like California, the most severe

¹⁷⁴ Baskas, *supra* note 154.

¹⁷⁵ *What If I Get Caught With Weed While Flying?*, WILLIAM KROGER, <https://www.laattorney.com/what-if-i-get-caught-with-weed-while-flying.html> [<https://perma.cc/B3F6-JXHQ>].

¹⁷⁶ *Id.*

¹⁷⁷ Jessica Walters, *Can I Fly with Medical Marijuana?*, CANNAMD, <https://www.cannamd.com/can-i-fly-with-medical-marijuana> [<https://perma.cc/9AHC-VCBD>] (Dec. 2, 2021).

¹⁷⁸ *Id.*; *see also* Lo, *supra* note 144 (“Los Angeles International Airport (LAX) allows passengers to carry up to 28.5 [grams] of cannabis, as they are permitted to do in California generally.”).

¹⁷⁹ Baskas, *supra* note 154.

¹⁸⁰ Walters, *supra* note 177.

¹⁸¹ *Id.*

¹⁸² Baskas, *supra* note 154.

consequence tends to be officials simply confiscating the marijuana.¹⁸³ However, these instances are no longer tracked.¹⁸⁴

Some states take a different approach: They actively allow passengers to bring marijuana into airports and aboard airplanes—or at the very least—they do not discourage individuals from doing so. TSA agents at Seattle-Tacoma International Airport, for example, will not confiscate marijuana at their airport, since marijuana is legal within the state of Washington.¹⁸⁵ However, they will warn passengers that even though marijuana is legal in Washington, this does not mean it is legal at their destination.¹⁸⁶ Similarly, New York has recently announced that police at major New York airports “are no longer making arrests, writing tickets, or conducting product seizures in the case of [a personal-use amount of] cannabis possession by travelers.”¹⁸⁷ The current Federal Security Director for fifteen New York airports, Bart R. Johnson, stated TSA officers only look for “threats” such as “explosives, knives, [and] guns,” but they will “notify law enforcement” if marijuana is found.¹⁸⁸ Albany County Sheriff Craig Apple said, “If a passenger is discovered to be carrying cannabis, deputies will no longer take action unless the amount of cannabis appears to surpass the state’s three-ounce possession limit.”¹⁸⁹

However, other states have taken an approach at the opposite end of the spectrum. Just two months before CBD became legal in Texas, passengers attempting to board flights there were being “jailed on felony drug possession charges for a single bottle of CBD.”¹⁹⁰ Similarly, a seventy-one-year-old woman was charged with a felony and sent to jail after voluntarily telling authorities at a Texas airport that a vial within her bag contained “CBD oil which she used as medicinal pain relief.”¹⁹¹ Further, despite the 2018 Farm Bill having been passed at the federal level at this point,¹⁹² “a 22-year-old college student . . . was caught after . . . a random bag check [revealed] a brown bottle labeled ‘hemp CBD’” in his possession.¹⁹³ While most states tend to favor the approach of simply discarding marijuana, the substantial difference in potential penalties and responses is indicative of the need for a more uniform approach.

¹⁸³ *What If I Get Caught With Weed While Flying?*, *supra* note 175.

¹⁸⁴ Baskas, *supra* note 154.

¹⁸⁵ Zumbach, *supra* note 1.

¹⁸⁶ *Id.*

¹⁸⁷ Graham Abbott, *New York Police No Longer Seizing Cannabis in Airports*, GANJAPRENEUR, (July 21, 2021), <https://www.ganjapreneur.com/new-york-police-no-longer-seizing-cannabis-in-airports> [<https://perma.cc/DP9K-PF4H>].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Friedman & Douglas, *supra* note 172.

¹⁹¹ *Id.*

¹⁹² See *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, *supra* note 63; Friedman & Douglas, *supra* note 172 (“Attorney Jonathan Miller . . . said the federal farm bill signed into law [in 2018] makes it legal for people to transport CBD products made from hemp. ‘Federal law is very clear.’”).

¹⁹³ Friedman & Douglas, *supra* note 172.

D. Inconsistencies Lead to More than Just Confusion: They Also Allow Room for Racial Bias, Prejudice, and Discrimination Under the Current State of Law

Due to the lack of clear guidelines and policies, inconsistencies in marijuana law as applied to air travel have created a space for racial bias, prejudice, and discrimination to occur. TSA and airport law enforcement do not have a system in place for tracking the number of individuals who have been stopped at airports with marijuana.¹⁹⁴ Further, tracking is not available regarding the demographics of the individuals who have been stopped, searched, penalized for, or asked to discard marijuana once discovered at an airport.¹⁹⁵ Since it is not possible to definitively determine whether racial bias or discrimination is taking place within these “stops,” one could assume the nationwide correlation between marijuana stops and racial makeup applies similarly to the airport setting.

Black individuals and White individuals report marijuana usage at very similar rates.¹⁹⁶ However, Black individuals are approximately 3.64 times more likely to be arrested for possession of marijuana than White people.¹⁹⁷ This stark difference between arrests based on racial profiling has not been found to decrease since seeing an increase in the number of states either legalizing or decriminalizing marijuana.¹⁹⁸ In some states, this disparate enforcement has increased.¹⁹⁹

A 2021 study of New York City found that, in 2020, “people of color comprised 94[%] of those arrested” for marijuana possession.²⁰⁰ Similarly, Black individuals in Wisconsin are 4.3 times more likely than White individuals to be convicted for possession of marijuana.²⁰¹ Despite the trend toward legalization and decriminalization of marijuana, “[i]n [thirty-one] states, racial disparities were larger in 2018 than in 2010 . . . [and] in [twenty] states, racial disparities in marijuana possession arrests increased by [twenty-five percent] or more.”²⁰² Falling arrest rates as more states legalize or decriminalize marijuana have not amounted to a “reduction in racial disparities.”²⁰³ In some states, it has led to the opposite. In 2020, “[i]n every single state, Black people were more likely to be arrested for

¹⁹⁴ See Baskas, *supra* note 154.

¹⁹⁵ See *id.* It is important to note that this is in reference to personal use amounts of marijuana being found on a person that is not being tracked accordingly. This is not referring to large distribution quantities discovered and the tracking (or lack thereof) that goes with these crimes.

¹⁹⁶ ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 21 (2013).

¹⁹⁷ Tom Angell, *On 4/20, ACLU Highlights Racist Marijuana Enforcement in New Report*, FORBES (Apr. 20, 2020, 8:59 AM), <https://www.forbes.com/sites/tomangell/2020/04/20/on-420-aclu-highlights-racist-marijuana-enforcement-in-new-report/?sh=95a7c9a74876> [<https://perma.cc/FFB9-FC5A>].

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Racial Disparity in Marijuana Arrests*, NORML, <https://norml.org/marijuana/fact-sheets/racial-disparity-in-marijuana-arrests> [<https://perma.cc/Q3QY-Y7K5>].

²⁰¹ *Id.*

²⁰² ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 31 (2020).

²⁰³ *Id.* at 33.

marijuana possession, and in some states, Black people were up to six, eight, or almost ten times more likely to be arrested.”²⁰⁴

Just as local law enforcement on the streets arrest people of color at substantially higher rates than White individuals for possession of marijuana,²⁰⁵ this too is likely the case at airports, where officers are given a high level of discretion with no specific guidelines or laws to adhere to. This is difficult to address due to the lack of sufficient tracking²⁰⁶ and “shortcomings in police data.”²⁰⁷

This potential for abuse of discretion does not apply solely to local law enforcement. While TSA officials may be advised to contact local law enforcement upon the finding of marijuana in a person’s possession at an airport, they may not always do so.²⁰⁸ They similarly have the power to exercise—or abuse—a wide level of discretion. Since TSA has made it clear they “DO NOT search for marijuana,”²⁰⁹ it is possible that an agent may not “discover” one person’s marijuana but may prejudicially “find” a person of color’s marijuana. This may be especially true in the case of immigrants. “Marijuana is not ‘legal’ for noncitizens,”²¹⁰ even when it may be legal within that state for U.S. citizens.²¹¹ The consequences for immigrants found to be in possession of marijuana are very high.²¹² TSA officials may be subconsciously more likely to thoroughly search a noncitizen’s luggage and “discover” marijuana than they would a White U.S. citizen.

E. Congress Cannot Reach a Cannabis Consensus

One of the more hotly debated items on Congress’s recent agenda has been whether to decriminalize marijuana at the federal level by removing it from the CSA as a Schedule I drug. In 2019, the “Marijuana Opportunity Reinvestment and Expungement Act” (“MORE Act”) was first introduced in the Senate.²¹³ Rather than

²⁰⁴ *Racial Disparity in Marijuana Arrests*, *supra* note 200.

²⁰⁵ Tiney Ricciardi, *Despite Legalization, People of Color Still Disproportionately Targeted for Marijuana*, *New Studies Say*, DENVER POST (June 9, 2020, 6:00 AM), <https://www.denverpost.com/2020/06/09/marijuana-colorado-racial-profiling> [<https://perma.cc/DP96-PNNL>].

²⁰⁶ *See* Baskas, *supra* note 154 (“[W]e don’t track these contacts [between police and passengers possessing marijuana] anymore.”).

²⁰⁷ Angell, *supra* note 197 (“ACLU . . . reported that shortcomings in police data make it hard to get a full understanding of the unfair impact marijuana enforcement has across racial lines.”).

²⁰⁸ *See* Press Release, Dep’t of Just., *supra* note 170.

²⁰⁹ TSA (@tsa), *supra* note 2.

²¹⁰ W. Scott Railton, *Marijuana and Immigration*, 32 CRIM. JUST. 14, 15. (2017).

²¹¹ *Id.* at 14; *see also id.* at 15–16 (“Noncitizens’ can fall into many different categories. They include ‘lawful permanent residents’—those noncitizen immigrants who hold ‘green cards.’ Noncitizens also include nonimmigrants—those who are in the United States for shorter durations, such as tourists, students, and professionals. Persons without documentation, and those who have overstayed their period of authorized stay are also noncitizens.”).

²¹² Kathy Brady, Zachary Nightingale, & Matt Adams, *Immigrants and Marijuana*, IMMIGRANT LEGAL RES. CTR., May 2021, at 1, 5–6 (May 2021) (“A conviction relating to marijuana can cause deportability[,] . . . inadmissibility[,] . . . a temporary . . . bar to establishing [good moral character,] . . . [and being classified as] an aggravated felon[.]”).

²¹³ MORE Act of 2019, S. 2227, 116th Cong. (2019).

advancing further, the MORE Act was “read twice and referred to the Committee on Finance.”²¹⁴ In 2020, the U.S. House of Representatives “revisited the classification of cannabis as a federally controlled and prohibited substance” for the first time in approximately fifty years, since the passage of the CSA in 1970.²¹⁵ In a historic vote, the House voted to pass the MORE Act of 2020.²¹⁶ Despite passing the House with a 228–164 vote,²¹⁷ the bill did not advance in the Senate.²¹⁸ However, after revisions were made to the bill, the MORE Act of 2021 was reintroduced in the House on May 28, 2021,²¹⁹ and passed in the House on April 1, 2022.²²⁰

The MORE Act would officially “end the federal prohibition of cannabis by removing it from the CSA and ending criminal penalties under federal law.”²²¹ Additionally, the MORE Act would make it a requirement for federal courts to expunge cannabis-related convictions, implement resentencing, and provide funding to communities that have been disproportionately impacted by “the war on cannabis.”²²² Further, it would create an Office of Cannabis Justice,²²³ establish a five percent tax on cannabis retail sales,²²⁴ and allow Veterans Affairs medical professionals to recommend the use of medical cannabis to veterans.²²⁵

The MORE Act’s “whole intention and vision . . . is that it would repair past harms of drug prohibition.”²²⁶ It would “set federal policy on a path toward correcting an unfair system by addressing many of the harms caused by prohibition using an equity and justice-centered framework,” including protecting immigrants from being denied citizenship status over cannabis, lifting current barriers in the cannabis industry, and by “block[ing] federal agencies from denying public benefits or security clearances due to cannabis use,”²²⁷ in addition to the measures already

²¹⁴ *Id.*

²¹⁵ Kristine Blackwood, David J.M. Skillman, & Mickayla A. Stogsdill, *House Takes Historic Vote to Remove Cannabis from the Controlled Substances Act*, ARNOLD & PORTER (Dec. 8, 2020), <https://www.arnoldporter.com/en/perspectives/publications/2020/12/house-takes-vote-to-remove-cannabis-from-csa> [<https://perma.cc/GC7T-8WDG>].

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Alicia Victoria Lozano, *House Reintroduces Bill to Decriminalize Cannabis, Create Social Equity Programs*, NBC NEWS (May 28, 2021, 5:44 PM), <https://www.nbcnews.com/politics/congress/house-reintroduces-bill-decriminalize-cannabis-create-social-equity-programs-n1269017> [<https://perma.cc/375A-XAJV>].

²¹⁹ MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

²²⁰ *Id.*

²²¹ *Sens. Booker, Wyden, and Schumer Introduce Preliminary Draft of Bill to End Cannabis Prohibition*, MARIJUANA POLY PROJECT (July 14, 2021), <https://www.mpp.org/policy/federal> [<https://perma.cc/2ZXF-VBNX>].

²²² *Id.*

²²³ Lozano, *supra* note 218.

²²⁴ *Id.* This amount is proposed to later increase to 8% over a period of three years. *Id.*

²²⁵ *Sens. Booker, Wyden, and Schumer Introduce Preliminary Draft of Bill to End Cannabis Prohibition*, *supra* note 221.

²²⁶ Lozano, *supra* note 218.

²²⁷ *Sens. Booker, Wyden, and Schumer Introduce Preliminary Draft of Bill to End Cannabis Prohibition*, *supra* note 221.

discussed.²²⁸ Due to the back-and-forth on the MORE Act since 2019, it is unclear whether it is likely to pass in the Senate in the near future, despite the current Senate Majority Leader's affirmative support.²²⁹

Though the MORE Act is considered “the most likely vehicle for wide ranging cannabis reform in the [117th] Congress,”²³⁰ other measures are being considered. On July 14, 2021, Senate Majority Leader Chuck Schumer and Senators Cory Booker and Ron Wyden “released draft legislation titled the Cannabis Administration and Opportunity Act.”²³¹ This sweeping legislation was introduced on July 21, 2022, and was “[r]ead twice and referred to the Committee on Finance.”²³² Consistent with the goals of the MORE Act, the Cannabis Administration and Opportunity Act draft contains “proposed legislation that would help put an end to the unfair targeting and treatment of communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.”²³³ Additionally, it “establishes grant programs for small business owners entering the industry who are from communities disproportionately hurt by past drug laws, requires the Department of Transportation to research and develop a nationwide standard for marijuana-impaired driving, and restricts the marketing of cannabis to minors.”²³⁴

Both the MORE Act and the Cannabis Administration and Opportunity Act would be substantial steps toward resolving the current discrepancies regarding marijuana possession at airports and while traveling, but neither would go far enough in its guidance to definitively resolve the issue. As the MORE Act is currently written, it “would leave in place the patchwork of state laws governing cannabis, including prohibitions as strict as those currently in place under the CSA, in some ways inverting the current ‘marijuana policy gap’ between state and federal law.”²³⁵ Additionally, the MORE Act fails to “address other existing federal regulatory regimes applicable to cannabis.”²³⁶ The same sentiments are largely true regarding the Cannabis Administration and Opportunity Act. While the Cannabis

²²⁸ *Id.*

²²⁹ See Natalie Fertig, *Schumer: Senate Will Act on Marijuana Legalization with or Without Biden*, POLITICO (Apr. 3, 2021, 7:00 AM), <https://www.politico.com/news/2021/04/03/schumer-senate-marijuana-legalization-478963> [<https://perma.cc/5K7J-Q7KY>].

²³⁰ Kris Krane, *Democrats Win the Senate: The Impact on Marijuana Policy*, FORBES (Jan. 6, 2021, 4:40 PM), <https://www.forbes.com/sites/kriskrane/2021/01/06/democrats-win-the-senate-the-impact-on-marijuana-policy/?sh=69bc23db351c> [<https://perma.cc/8ZDZ-ZC24>].

²³¹ Ryan Bernstein & Scott Binkley, *Update on Cannabis Administration and Opportunity Act*, JD SUPRA (July 22, 2021), <https://www.jdsupra.com/legalnews/update-on-cannabis-administration-and-9800642> [<https://perma.cc/74U3-KTQ9>].

²³² Cannabis Administration and Opportunity Act, S. 4591, 117th Congress (2022).

²³³ Press Release, U.S. Senate on Committee Fin., Majority Leader Schumer, Senate Finance Committee Chair Wyden and Senator Booker Release Discussion Draft of Cannabis Administration and Opportunity Act, Legislation to End the Federal Cannabis Prohibition and Unfair Targeting of Communities of Color (July 14, 2021) (on file with author).

²³⁴ Natalie Fertig, *Schumer's Legal Weed Bill is Finally Here*, POLITICO (July 21, 2022, 2:58 PM), <https://www.politico.com/news/2022/07/21/schumer-legal-weed-bill-00047058> [<https://perma.cc/6YM7-36UB>].

²³⁵ Blackwood et al., *supra* note 215.

²³⁶ *Id.*

Administration and Opportunity Act calls for involvement by DOT regarding a nationwide standard for marijuana-impaired driving, it too is entirely silent regarding air travel.²³⁷ By leaving the state laws governing cannabis in place and failing to address how the Cannabis Administration and Opportunity Act would impact federal agencies, such as DHS, TSA, and DOT, the MORE Act as it is currently written would allow for the same legal discrepancies and issues currently facing travelers carrying marijuana via air travel. While the MORE Act would effectively seek to achieve “[j]ustice for victims of [the] War on Drugs,”²³⁸ it, along with the Cannabis Administration and Opportunity Act, would likely fail to protect future potential victims in this narrow context. The same is true of the other proposals that have been put forth by Congress so far.

The Marijuana 1-to-3 Act of 2021 was introduced in the House on January 19, 2021.²³⁹ This Act would remove marijuana from the CSA as a Schedule I drug and change its classification to that of a Schedule III drug.²⁴⁰ The latest action taken on this Act was its transfer to the Subcommittee on Crime, Terrorism, and Homeland Security on March 5, 2021.²⁴¹ Not much would change in terms of the current conflict between state and federal law regarding traveling with marijuana via air by simply changing marijuana’s status as a Schedule I drug to a Schedule III drug. Though a Schedule III drug calls for less regulation,²⁴² it does not legalize marijuana, meaning the same confusion would apply.²⁴³

Similarly, on May 11, 2021, Republican Representatives David Joyce and Don Young introduced the Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act to the House of Representatives.²⁴⁴ This bill was referred to the Subcommittee on Health one day later.²⁴⁵ If passed, this bill would “legalize marijuana at the federal level, . . . protect banks that service state-legal cannabis businesses and ensure that military veterans treated by the Veterans’ Administration (“VA”) are allowed to be treated with medical marijuana .

²³⁷ See Cannabis Administration and Opportunity Act, S. 4591, 117th Congress (2022).

²³⁸ Nick Kovacevich, *Cannabis Reform? It’s the Right Time for Full Federal Legalization to Help Economy and People*, USA TODAY (July 1, 2021, 5:30 AM), <https://www.usatoday.com/story/opinion/2021/07/01/social-economic-justice-decriminalize-marijuana/7773894002> [<https://perma.cc/DE37-5FNH>].

²³⁹ Marijuana 1-to-3 Act, H.R. 365, 117th Cong. (2021).

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² See LAMPE, *supra* note 19, at 6.

²⁴³ See Michelle Simakis, *Biden’s Order to Review Cannabis “Truly Historic,” But What’s at Stake?*, CANNABIS BUS. TIMES (Oct. 26, 2022), <https://www.cannabisbusinesstimes.com/article/biden-cannabis-policy-scheduling-controlled-substances> [<https://perma.cc/XF47-S746>] (“If marijuana were to be removed from Schedule I and placed in some other schedule in the Controlled Substances Act, the majority of states right now that are out of compliance with federal law would be just as out of compliance with federal law going forward.” (internal quotation omitted)).

²⁴⁴ Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act, H.R. 3105, 117th Cong. (2021) [hereinafter Common Sense Cannabis Reform Act].

²⁴⁵ *Id.* On November 9, 2021, the Common Sense Cannabis Reform Act was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. *Id.*

. . .”²⁴⁶ However, as currently written, the Common Sense Cannabis Reform Act would “*not* nationally legalize cannabis by preempting state law.”²⁴⁷ Additionally, it would remain “illegal to transport [any amount of] marijuana into states where it remains unlawful.”²⁴⁸ Further, this Act does not contain “any provisions promoting social equity or otherwise reinvesting in communities most impacted by cannabis criminalization.”²⁴⁹ With these stipulations in place, the Common Sense Cannabis Reform Act would fail to address the current conflicting state and federal law regarding flying with marijuana. Discrepancies and potential for bias would continue to exist and there would likely be little to no change to the current dilemma.

Since bipartisan support is increasing and multiple measures are being implemented to decriminalize marijuana, it is unsurprising that other alternatives (as opposed to a sweeping reform bill) are being considered by lawmakers. In June 2022, it was noted that “the tone has changed on Capitol Hill” and “Senators previously opposed to anything but a major marijuana decriminalization bill are slowly warming to another option: adding provisions to a broadly supported bill that would allow financial institutions to offer banking services to the cannabis industry, called the SAFE Banking Act.”²⁵⁰ Though there is currently “no tangible legislative plan,”²⁵¹ several Democrats and Republicans alike are considering adding “one or more provisions from the” Cannabis Administration and Opportunity Act to the SAFE Banking Act.²⁵²

These pushes toward various forms of legalization or decriminalization reflect nationwide bipartisan support of marijuana reform.²⁵³ It is important to note that while the MORE Act and the Cannabis Administration and Opportunity Act were introduced and sponsored by members of the Democratic Party,²⁵⁴ the Marijuana 1-to-3 Act and the Common Sense Cannabis Reform Act were introduced by members of the Republican Party.²⁵⁵ However, the fact that the Marijuana 1-to-3 Act was

²⁴⁶ Travis McDermott, *Congress Keeps Taking Baby Steps on Marijuana Reform*, JD SUPRA (May 27, 2021), <https://www.jdsupra.com/legalnews/congress-keeps-taking-baby-steps-on-8779251> [<https://perma.cc/9F3W-WTP3>].

²⁴⁷ *Id.* (emphasis added).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Natalie Fertig, *Democrats are Looking for a Weed Deal*, POLITICO (June 24, 2022, 4:30 AM), <https://www.politico.com/news/2022/06/24/omnibus-weednibus-cannabis-marijuana-bill-00041506> [<https://perma.cc/5SK6-539V>].

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization> [<https://perma.cc/JVW9-VXAP>] (“Two-thirds of Americans say the use of marijuana should be legal, reflecting a steady increase over the past decade The share of U.S. adults who oppose legalization has fallen from [fifty-two percent in 2010 to [thirty-two percent] today.”).

²⁵⁴ See MORE Act of 2021, H.R. 3617, 117th Cong. (2021); Bernstein & Binkley, *supra* note 231.

²⁵⁵ Marijuana 1-to-3 Act, H.R. 365, 117th Cong. (2021); Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act, H.R. 3105, 117th Cong. (2021). Additionally, Congresswoman

introduced to the House shortly before the MORE Act was reintroduced—and the Cannabis Administration and Opportunity Act draft legislation was released—seems to indicate Congress’s mixed opinions. This demonstrates Congress’s indecision regarding whether they’d prefer to remove marijuana from the CSA, change its scheduling classification within the CSA, or leave marijuana classified as a Schedule I drug. This is further reflected in the fact that the MORE Act was reintroduced to the House just sixteen days after the Common Sense Cannabis Reform Act was introduced, with the two Acts differing substantially in terms of intent and approach when addressing marijuana law reform.²⁵⁶

III. THE MORE ACT NEEDS MORE: CURRENT PROPOSED LEGISLATION BY CONGRESS IS AN EXCELLENT START, BUT MUST BE WRITTEN TO EXTEND FURTHER

As this Article has demonstrated, current measures being considered by Congress²⁵⁷ to address marijuana’s legal status at the federal level are novel starting points, but do not extend far enough to adequately address the federal-state dilemma regarding personal-use amounts of marijuana in the air travel context. While it is imperative that states retain their independent sovereign rights in accordance with the Tenth Amendment,²⁵⁸ there are ways for the federal government to work alongside the states, protecting individual state rights, while simultaneously removing the current confusion, discrepancies, and possibility of discrimination that exists. This Part proposes that the best way to resolve this issue is through broad solutions that must begin with Congress, followed by narrow solutions adopted in accordance with Congress’s groundwork and implemented by specific agencies.

A. Broad Solution

A broad approach is the best initial starting point to resolve the federal-state dilemma regarding flying with personal-use amounts of marijuana. This broad approach must include the removal of marijuana from the CSA in accordance with currently proposed legislation. Additionally, legislation needs to be crafted that outlines the specific role of DHS in relation to marijuana in the air travel context.

Nancy Mace (R-SC) introduced the States Reform Act in the House on November 15, 2021. *See* States Reform Act, H.R. 5977, 117th Cong. (2021). Similar to the MORE Act and the Common Sense Cannabis Reform Act, this bill would remove marijuana from its classification as a Schedule I drug. Press Release, Rep. Nancy Mace, Rep. Nancy Mace Introduces the States Reform Act (Nov. 15, 2021) (on file with author). Ironically, the other leading feature of this bill is that it encourages “Washington . . . to provide a framework which allows states to make their own decisions on cannabis moving forward,” *id.*, which, arguably, is what has already been established across states through application of the Tenth Amendment, *see* discussion *supra* Section II.A.i.

²⁵⁶ Compare MORE Act of 2021, H.R. 3617, 117th Cong. (2021) *with* Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act, H.R. 3105, 117th Cong. (2021).

²⁵⁷ *See supra* Section II.E.

²⁵⁸ U.S. CONST. amend. X.

i. Complete Removal from the CSA

To best resolve this complex issue, marijuana must be removed entirely from the CSA, as proposed by the MORE Act²⁵⁹ and the Cannabis Administration and Opportunity Act.²⁶⁰ The MORE Act seems to be the strongest proposed measure to effectively remove marijuana from the CSA. The MORE Act is further along in the legislative process,²⁶¹ has already begun garnering bipartisan support,²⁶² and seems to be the strongest option when considering the current political makeup of the Executive²⁶³ and Legislative²⁶⁴ branches. Complete removal is necessary, as simply rescheduling marijuana as a lesser-controlled substance would result in the retention of the same discrepancies currently in play. This would only add to the confusion among the states. While states continue to rapidly pass laws either legalizing or decriminalizing marijuana,²⁶⁵ if Congress takes anything less than a firm stance regarding cannabis law, this will continue to leave us exactly where we sit today: stuck with an outdated, ignored federal cannabis law that conflicts with most states' laws.²⁶⁶

Congress must adequately reevaluate marijuana's classification as a drug that falls under the CSA and determine that it is either correctly currently categorized or it must be removed completely. As this Article has demonstrated, since states are reflecting American ideology by implementing laws that legalize or decriminalize marijuana at the state level,²⁶⁷ Congress should act according to this shift as well and move toward legalizing or decriminalizing marijuana at the federal level. Adoption of the MORE Act would be the best initial step in achieving this purpose as it would remove marijuana from the CSA.

²⁵⁹ MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

²⁶⁰ *Sens. Booker, Wyden, and Schumer Introduce Preliminary Draft of Bill to End Cannabis Prohibition*, *supra* note 221.

²⁶¹ *See* MORE Act of 2021, H.R. 3617, 117th Cong. (2021).

²⁶² *See* Blackwood et al., *supra* note 215. The MORE Act of 2020 was passed in the House by a vote of 228 to 164, with one Libertarian Representative and five Republic Representatives “cross[ing] party lines to support the bill.” *Id.*

²⁶³ President Joseph R. Biden, Jr. is the current President of the United States and identifies as a member of the Democratic Party. *Who is Joe Biden*, BUSINESS STANDARD, <https://www.business-standard.com/about/who-is-joe-biden> [<https://perma.cc/7TAU-AXUC>].

²⁶⁴ Katherine Gypson, *With Control of White House and Congress, Democrats Have 2 Year to Make Big Changes*, VOA NEWS (Jan. 22, 2021, 2:25 AM), https://www.voanews.com/a/usa_us-politics_control-white-house-and-congress-democrats-have-2-years-make-big-changes/6201047.html [<https://perma.cc/3HUN-6BN4>] (“Even with a narrow margin in the Senate and a diminished number of seats in the House, control of both chambers does clear a path for Biden [and the Democratic Party] to pass legislation . . .”).

²⁶⁵ *See* Berke et. al., *supra* note 10.

²⁶⁶ *See id.*

²⁶⁷ *See id.*

ii. Including the Role of Department of Homeland Security Within Applicable Legislation

Simply removing marijuana from the CSA does not extend far enough in providing a clear path forward as to the relation between federal and state law regarding air travel with personal-use amounts of marijuana. As currently written, the MORE Act fails to indicate how specific agencies, such as DHS, should operate in accordance with this proposal. The removal of marijuana from the Schedules under the CSA requires strict guidance, training, and support across agencies—in conjunction with local officials—to create a uniform approach that simultaneously adheres to states' laws. Rather than leaving this area unaddressed, as the MORE Act currently does, Congress should include a clause indicating that all applicable agencies, such as DHS and DOT, must adopt clear guidelines and policies that operate in accordance with state law for their respective departments, as related to personal-use amounts of marijuana. The next Part discusses how this can be addressed and implemented through a narrow approach.

B. Narrow Solution

While broadly removing marijuana from the CSA and outlining the role DHS must have regarding air passengers traveling with personal-use amounts of marijuana is an effective starting point, these steps need to be further ironed out into a more concrete and specific solution. This includes specific guidelines instructing DHS and TSA on what they should do upon the discovery of a passenger possessing marijuana based on three anticipated situations. Other necessary measures that should be implemented include installing amnesty boxes within all federal airports, incorporating education efforts, and including an oversight chair or committee within the currently proposed Office of Cannabis Justice.

i. Specific Guidelines Regarding What TSA Should Do Upon the Discovery of a Passenger with Marijuana

One of the most confusing areas within the current federal-state conflict regarding air travel with marijuana is the lack of clear federal guidelines. While it is true that TSA officials are told to turn to local state officials when marijuana is located, this Article has shown that this is not always the case.²⁶⁸ These guidelines would become even murkier if the federal government were to decide, in accordance with the MORE Act, that marijuana is no longer illegal at the federal level, but where it continues to be illegal at the state level. In this situation, a TSA official acting as a federal agent would likely be inclined to simply comply with federal law. This would effectively erase the sovereignty the states are granted through the Tenth Amendment.²⁶⁹ Should the removal of marijuana from the CSA pass at the

²⁶⁸ Press Release, Dep't of Just., *supra* note 170.

²⁶⁹ U.S. CONST. amend. X.

federal level, with states retaining the right to determine whether it is legal or not at the state level, specific guidelines instructing TSA officials exactly how to act are necessary. Therefore, with the recommendation of Congress, DHS should adopt guidelines and departmental policies that remove the grey areas in these scenarios, so agents know precisely how to act in any given situation.

There are three specific situations that DHS should address to limit discrepancies in how to act following the discovery of marijuana by a TSA employee: (1) when a passenger's possession of a particular type of marijuana²⁷⁰ is illegal within the state they are currently in; (2) when a passenger's possession of a particular type of marijuana²⁷¹ is legal within the state they are traveling from, but illegal in the state in which they are traveling to; and (3) when a passenger's particular type of marijuana²⁷² is legal in the state in which they are traveling from and is also legal in the state in which they are traveling to.

a. Situation I: Possession of Marijuana is Illegal in the State in Which the Passenger is Currently in and Traveling From

In a situation where the possession of a type of marijuana²⁷³ is illegal in the state in which the passenger is currently in and traveling from, TSA officials should be required by DHS policy to follow the current recommended policy: The TSA official should contact local law enforcement to determine how to address the situation in accordance with the state's laws.²⁷⁴ However, as this Article has demonstrated,²⁷⁵ once local law enforcement is contacted, the officer is afforded substantial discretion, which can lead to discrepancies and prejudice. Therefore, to best aid in preventing possible issues, and in accordance with the MORE Act's underlying goals,²⁷⁶ Congress and DHS (and subsequently TSA) should encourage the states to adopt specific courses of action for local law enforcement, while complying with their respective state's laws.

States should consider adopting a very clear approach to eliminate the current "grey area" along with the potential for abuse by law enforcement officers. As amnesty boxes are growing in popularity, a sound approach may be to have clear

²⁷⁰ When this Article refers to a "particular type of marijuana" in this way, it is in reference to the inclusion of various forms of marijuana, such as CBD, marijuana used for recreational purposes, and marijuana used for medicinal purposes.

²⁷¹ See Berke et al., *supra* note 10.

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ Baskas, *supra* note 154.

²⁷⁵ See discussion *supra* Part III.

²⁷⁶ See Sens. Booker, Wyden, and Schumer *Introduce Preliminary Draft of Bill to End Cannabis Prohibition*, *supra* note 221 ("In addition to federally decriminalizing and descheduling cannabis, the MORE Act would require federal courts to expunge prior cannabis-related convictions and provide for resentencing; provide grants and funding to communities most harmed by the war on cannabis; lift barriers to licensing and employment in the cannabis industry; block federal agencies from denying public benefits or security clearances due to cannabis use; protect immigrants from being denied citizenship over cannabis; and allow VA physicians to recommend medical cannabis to veterans.").

guidelines, such as: (1) if the possession is under a certain amount, the individual has the option to discard their marijuana in an amnesty box without any penalty; (2) if the individual is above the age of twenty-one²⁷⁷ and the possession is above X²⁷⁸ amount, then the individual *must* be penalized in accordance with state law;²⁷⁹ or (3) if the individual is under the age of twenty-one²⁸⁰ and the possession is above X²⁸¹ amount, then the individual *must* be penalized in accordance with state law.²⁸² A clear example of this can be seen in California’s applicable law.²⁸³

b. Situation II: Possession of Marijuana Is Legal in the State in Which the Passenger Is Traveling from, But Illegal in the State the Passenger is Traveling To

In a situation where the possession of that type of marijuana is legal in the state in which the passenger is traveling from but illegal in the state the passenger is traveling to, TSA officials should be required by DHS policy to follow what is currently being adhered to by states: options for disposal of the marijuana without penalty.²⁸⁴ Currently, “[i]n airports that don’t ban cannabis property-wide, local law enforcement called over by TSA officers will outline a passenger’s options, which may include disposing of the product in a trash bin or locked amnesty box, giving it to a friend in the terminal, or putting it in their car.”²⁸⁵ If the MORE Act officially becomes law, it will no longer be necessary for TSA officials to call local law enforcement. Rather, at DHS’s direction, in states in which marijuana is legal (and not banned at airports), TSA officers could simply require disposal of the marijuana through the options outlined. This would increase efficiency by saving time and resources, while abiding by both applicable states’ laws. Officers would be adhering to the law of the state where the passenger is flying *out* of by not imposing a penalty—as long as that type of marijuana is legal there—and would be adhering to

²⁷⁷ In states that have legalized marijuana, individuals must be twenty-one years or older to possess and use it. See *supra* Section II.D discussion.

²⁷⁸ Claire Hansen, Horus Alas, & Elliott Davis Jr., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Oct. 2, 2022, 2:24pm), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [<https://perma.cc/P7WW-5HDV>]. “X” is the possession limit that is to be established by individual states’ laws.

²⁷⁹ The word “must” is emphasized so as to eliminate the current picking and choosing by law enforcement officers. If the individual meets these conditions, then they are punished, regardless of race, ethnicity, gender, etc. *Infra* Part III(C), (D).

²⁸⁰ Berke et al., *supra* note 10.

²⁸¹ See *id.*

²⁸² See Baskas, *supra* note 154.

²⁸³ See CAL. HEALTH & SAFETY CODE § 11357 (West 2017). Two things must be noted: (1) California law dictates that law enforcement “may” charge a violator, whereas I am advocating that they “must” (in these situations); (2) this is with the exception of the first recommendation, as marijuana is legal for individuals to possess in the state of California if the individual is over the age of twenty-one and within a certain amount of possession. *Id.* For an example of what this law looks like, see *infra* Appendix.

²⁸⁴ See Baskas, *supra* note 154.

²⁸⁵ *Id.*

the law of the state where the passenger is flying *into* by not allowing the passenger to bring a product with them that is illegal within that state.

c. Situation III: Possession of Marijuana Is Legal in the State in Which the Passenger Is Traveling from and is also Legal in the State They Are Traveling To

In a situation where the possession of a type of marijuana is legal in the state in which the passenger is traveling from and is also legal in the state in which the passenger is traveling to, TSA officials should be required by DHS policy to ensure the passenger complies with both states' laws regarding the legal personal-use amount of marijuana. States have defined different personal-use possession amounts of legal marijuana.²⁸⁶ Some states also distinguish between amounts allowed for recreational versus medical marijuana.²⁸⁷ TSA officials would need to have updated and accurate information readily available to them providing the legal amounts of marijuana an individual can possess in each of the respective points of destination (where the passenger is flying from and where they are flying to). Then, the TSA official would need to measure the amount of marijuana the passenger is attempting to fly with to ensure they are within the legal limit of possession for all destination points. For example, if a twenty-five-year-old passenger is attempting to fly from New York to Maine, where recreational and medicinal marijuana is legal in both states,²⁸⁸ with three ounces (or, approximately eighty-five grams) of recreational marijuana in a nonconcentrated format, the TSA official would need to ensure additional steps are taken. While possessing three ounces of marijuana is legal in New York,²⁸⁹ adults twenty-one and older can legally possess up to 2.5 ounces (seventy-one grams) of marijuana in Maine.²⁹⁰ Therefore, the TSA official would need to require the passenger to dispose of at least 0.5 ounces of marijuana, through one of the options available,²⁹¹ before being allowed to fly. This would always ensure compliance within both states, as well as the federal government.

²⁸⁶ *Marijuana Laws by State*, INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST. (Nov. 2021), <https://www.ihs.org/topics/alcohol-and-drugs/marijuana-laws-table> [https://perma.cc/69FU-WLHC].

²⁸⁷ *Id.*

²⁸⁸ *See Marihuana Regulation and Taxation Act*, N.Y. STATE OFF. CANNABIS MGMT., <https://cannabis.ny.gov/marihuana-regulation-and-taxation-act-mrta> [https://perma.cc/V7M3-JTVY] (last visited Nov. 22, 2022); *see also Rules and Statutes*, STATE OF ME.: OFF. CANNABIS POL'Y, <https://www.maine.gov/dafs/ocp/adult-use/rules-statutes#:~:text=The%20Marijuana%20Legalization%20Act%20includes,adult%20use%20cannabis%20in%20Maine> [https://perma.cc/37BB-8QW9] (last visited Nov. 22, 2022).

²⁸⁹ Luis Ferré-Sadurní & Troy Closson, *New York Has Legalized Marijuana. Here's What to Know*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/article/new-york-marijuana-legalization-facts.html> [https://perma.cc/F36K-PPPG].

²⁹⁰ *Cannabis in Maine*, MYSTIC MEDIA, INC. & VISIT NEW ENGLAND, <https://www.visit-maine.com/state/cannabis-marijuana-in-maine> [https://perma.cc/4T42-HSZ7] (last visited on Nov. 7, 2021).

²⁹¹ Baskas, *supra* note 154 (“[L]ocal law enforcement called over by TSA officers will outline a passenger’s options, which may include disposing of the product in a trash bin or locked amnesty box, giving it to a friend in the terminal, or putting it in their car.”).

ii. Other Necessary Implementations the Department of Homeland Security Should Oversee

To appropriately implement and carry out the specific guidelines and policies recommended above, other efforts are necessary. To provide the greatest sense of unity, efficiency, and to eliminate foreseeable issues, DHS should implement, at the recommendation of Congress, amnesty boxes, education efforts, and an oversight chair or committee.

a. Implementation of Amnesty Boxes at Every Federal Airport

As this Article has discussed, amnesty boxes are growing in popularity in the United States.²⁹² They provide a simple way for individuals to dispose of their marijuana in a quick and efficient manner. These amnesty boxes allow individuals to comply with the laws of the applicable state. As states that have implemented amnesty boxes are currently doing, the contents of the boxes should be disposed of by an official along with local law enforcement²⁹³ to ensure compliance with state law and federal guidelines.²⁹⁴ Finally, the implementation of these boxes will be a way to save time when TSA officials discover marijuana that needs to be disposed of in accordance with state law (and according to the proposed guidelines previously discussed).

b. Implementation of Education

To best ensure that all applicable entities are consistently and effectively applying the law and policies put forth by Congress, the states, and DHS, education will be one of the most crucial aspects to implement within this process. Education will ensure there are no longer any grey areas within the law, no room for discrimination in this regard, and that both the federal and state agents, as well as the public, are aware of precisely how to proceed in scenarios involving passengers traveling with marijuana via air.

1. Education and Training Provided to All Federal Agents Within Airports

First, DHS should ensure its departments are provided with sufficient education and training on the most current and accurate federal and state laws pertaining to air travel and marijuana. While this may initially be difficult due to

²⁹² See Chad Abraham, *No Slowdown for Airport's Amnesty Boxes*, ASPEN DAILY NEWS (Apr. 7, 2018), <https://www.aspendailynews.com/news/no-slowdown-for-airport-s-amnesty-boxes/article914836ca-3a10-11e8-97b7-4310e2eb30d1.html> [<https://perma.cc/RC46-MRS7>].

²⁹³ Zumbach, *supra* note 1.

²⁹⁴ See *id.*

the rapidly changing state laws regarding cannabis use and possession,²⁹⁵ education and training should be relatively easy to implement and maintain over time when utilizing today's technological advancements. "Sufficient education" may involve taking a required course to learn how marijuana laws vary state-to-state and how to properly address these variations to ensure proper compliance with state and federal law. These courses could take place either in classrooms or virtually. Further, these course should encompass a form of Diversity, Equity, and Inclusion training so officials can learn how to identify and address their implicit biases and ensure these biases do not impact decisions made while working in their official capacities. To prove that the education and training was completed, a test may be required of those seeking employment with DHS and/or TSA. TSA officials should have no question regarding what to do when they are faced with a situation involving a passenger attempting to fly with marijuana. Resources should be readily available in all situations, so they have access to all state laws regarding what type(s) of marijuana are permissible within that state, how much, what the potential repercussions are, and what their role as a TSA official is, and how their role works with local law enforcement.

2. Education Provided to the Public

Similarly, this same information needs to be available to the public. If marijuana is removed from the CSA, signage should be implemented at all federal airports along with the amnesty boxes. Airports could optionally designate select areas to this resource—areas in which there are signs, pamphlets, and an amnesty box all available for passengers to be fully aware of the law, the possible repercussions should they fail to comply with the law, and no-penalty options to ensure their compliance. Utilizing relevant technology, this could be made easier by having iPads, computers, or another electronic resource specifically dedicated to displaying the latest accurate information regarding current state cannabis laws. Potential passengers should have easy access to determine, before the screening process, whether marijuana is legal in the state in which they currently are (and up to what amount), and, if marijuana is legal, whether it is also legal in the state they are traveling to and what amount. They could then determine whether they are following both states' laws regarding the specific amount they are in possession of and dispose accordingly if not. It is also crucial that passengers know what the potential maximum noncompliance penalty is. By providing these clear, black-and-white guidelines and easily accessible information, passengers cannot later claim confusion as a defense.

3. Education Provided to All Major Airlines

Finally, education would also need to be provided to all major airlines, in addition to airports. As this Article has demonstrated, airlines and airports have

²⁹⁵ Berke et al., *supra* note 10.

adopted a wide range of policies regarding marijuana and air travel—some in accordance with federal law, some in accordance with state law, and some leaving the entire area full of ambiguities. If Congress, and subsequently DHS, implemented the approaches recommended above, this would provide very clear guidance for airlines and airports to simultaneously adopt and make available to the public while complying with both federal and state law. By encouraging airlines to publish this information on their websites, or, in the alternative, to point potential inquiring passengers to DHS's website, citizens would have more clarity as to the legality of their actions.

c. Implementation of Oversight Chair or Committee

One notable aspect of the MORE Act includes the novel creation of “the Office of Cannabis Justice to oversee the social equity provisions in the law.”²⁹⁶ To combat social inequities related to marijuana in the airport context, Congress should seek to create a chair or committee under this new Office of Cannabis Justice that is dedicated strictly to overseeing air travel with marijuana. This position or committee may not be long term but could certainly be useful in initially establishing the guidelines, education, and resources recommended within this Article. Further, it could identify potential unforeseen issues and how to best combat these issues to prevent another fifty years of confusing and conflicting law.

CONCLUSION

Marijuana law has come a long way since cannabis was first designated as a Schedule I drug in the CSA approximately fifty years ago. In recent years, there has been a rapid push towards the legalization of marijuana, as is evidenced by evolving state law. As state law is quickly changing to reflect the ideologies of society, federal law has refused to budge, resulting in federal-state conflicts regarding marijuana within federally controlled airports. To best eliminate the current grey areas, discrepancies, room for prejudice, and constant federal-state conflict as it pertains to air travel with personal-use amounts of marijuana, there must be substantial changes made, beginning at a broader level with Congress. The only way to truly defeat these inconsistencies is for Congress to pass legislation removing marijuana from the CSA and direct DHS to take clear steps addressing these issues while complying with state law. These steps—including establishing clear and concise guidelines and policies, the implementation of amnesty boxes, education and training, and designating a position or committee to oversee these changes—will allow the current conflicting cannabis law as it relates to air travel to be resolved, in compliance with federal and state law.

²⁹⁶ *The MORE Act*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/policy/federal/the-more-act> [<https://perma.cc/GB4U-ZXJ7>] (last visited Nov. 7, 2021).

APPENDIX

Under California law,

If you are caught in an airport with illegal amounts of marijuana, or are not of legal age to possess marijuana, local law enforcement may charge you with penalties pursuant to § 11357 of the California Health and Safety Code (HSC):

- **If you possess less than 28.5 grams of cannabis or 8 grams of concentrated cannabis (wax, oil, or resin) and you are:**
 - **Over 21** – possession is legal
 - **Over 18 but under 21** – punishable by a fine up to \$100
 - **Under 18** – punishable by four hours of drug counseling and up to 10 hours of community service
- **If you possess more than 28.5 grams of cannabis or 8 grams of concentrated cannabis and you are:**
 - **Over 21** – punishable by a misdemeanor and up to 6 months in county jail and/or a fine of up to \$500
 - **Over 18 but under 21** – punishable by up to six months in jail or a fine of up to \$500, or both
 - **Under 18** – punishable by up to 10 hours of drug counseling and up to 60 hours community service.²⁹⁷

²⁹⁷ See *What If I Get Caught With Weed While Flying?*, *supra* note 180; see also CAL. HEALTH & SAFETY Code § 11357 (West 2017).