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We[ed] The People: How a Broader Interpretation of the Rohrabacher-Farr Amendment Effectuates the Changing Social Policy Surrounding Medical Marijuana

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WE[ED] THE PEOPLE: HOW A BROADER INTERPRETATION OF THE ROHRABACHER-FARR AMENDMENT EFFECTUATES THE CHANGING SOCIAL POLICY SURROUNDING MEDICAL MARIJUANA

Tess A. Chaffee

I. INTRODUCTION

Over the past hundred years, the status of marijuana has shifted from legal to illegal and back again. Although marijuana remains federally illegal under the Controlled Substances Act of 1970,[1] as of 2022, seventy-four percent of states have measures in place allowing medical marijuana use, and an additional twenty percent of states allow for "low THC, high cannabidiol"[2] products.[3] Moreover, recent studies have found that nearly ninety percent of adults in the United States support medical marijuana legalization.[4] Yet, despite its growing acceptance, marijuana remains federally classified as an illegal substance with no formally recognized medicinal value.[5]

Nevertheless, in the states that have authorized marijuana—medically, recreationally, or both—the industry is robust. Today, the cannabis[6] industry supports nearly half a million full-time jobs, an increase of thirty-three percent from the preceding year, outpacing the

1. 21 U.S.C. §§ 801-971.

2. Tetrahydrocannabinol ("THC") is the compound that gives marijuana its psychoactive effects. Cannabidiol ("CBD"), another compound in the cannabis plant, does not produce psychoactive effects; however, it has been reported to provide a variety of health benefits. *See* Lauren Silva, *CBD Oil: 9 Science-Backed Benefits*, FORBES (Jan. 4, 2023, 5:30 AM), https://www.forbes.com/health/body/cbd-oil-benefits/ [https://perma.cc/398V-UUH9].

3. *State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 9, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/FW69-EFWF].

4. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Nov. 22, 2022), https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/ [https://perma.cc/PB9B-3P89].

5. 21 U.S.C. § 812 sched. I(c)(10).

6. This Comment refers to hemp and marijuana plants collectively as "cannabis." The distinguishing factor between hemp and marijuana is the plant's THC concentration. Hemp is classified as cannabis with a less than 0.3% THC content. Trey Malone & Brandon R. McFadden, *CBD, Marijuana and Hemp: What Is the Difference Among These Cannabis Products, and Which are Legal?*, THE CONVERSATION (Apr. 1, 2021, 1:44 PM), https://theconversation.com/cbd-marijuana-and-hemp-what-is-the-difference-among-these-cannabis-products-and-which-are-legal-154256 [https://perma.cc/K29S-VTUT]. Although hemp was formerly outlawed under the Controlled Substances Act alongside marijuana, section 12619(b) of the Agriculture Improvement Act of 2018 effectively removed hemp from the list of Schedule I controlled substances by qualifying "tetrahydrocannabinols" with the phrase, "except for tetrahydrocannabinols in hemp." Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

growth of the entire American financial sector.[7] By 2025, the industry is expected to generate $45 billion annually.[8] Furthermore, in August 2022, the First Circuit Court of Appeals formally acknowledged the national market for medical marijuana in striking down a Maine law for violating the dormant Commerce Clause of the Constitution,[9] which bars state-protectionist commercial legislation, even though medical marijuana activity is still a federal crime.[10]

Since 2015, however, Congress has included a provision in their annual Consolidated Appropriations Acts providing that "[n]one of the funds made available under this Act to the Department of Justice may be used" to prevent any state who has legalized medical marijuana "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[11] The provision, commonly referred to as the Rohrabacher-Farr Amendment because of its sponsors,[12] has listed a growing number of states each year as states continue to legalize medical marijuana. The most recently enacted version of the amendment includes all but three states.[13] Courts are split on whether "strict compliance" or "substantial compliance" with state law provisions is necessary to trigger the amendment's ban on the use of federal funds to prosecute.

The current federal-state dichotomy in medical marijuana legislation and the conflicting interpretations of the Rohrabacher-Farr Amendment create an increasingly uncertain legal minefield for businesses and individuals operating within state-legal medical marijuana industries. Although efforts have been made to reconsider marijuana's status under the Controlled Substances Act, none have yet been successful.[14]

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7. A.J. Herrington, *New Cannabis Jobs Report Reveals Marijuana Industry's Explosive Employment Growth*, FORBES (Feb. 23, 2022, 11:00 AM), https://www.forbes.com/sites/ajherrington/2022/02/23/new-cannabis-jobs-report-reveals-marijuana-industrys-explosive-employment-growth/?sh=749c08d123f2 [https://perma.cc/L6FG-KDJL]. The statistics within the article do not distinguish between the medical and recreational marijuana industries.

8. *Id.*

9. U.S. CONST. art. I, § 8, cl. 3. The dormant Commerce Clause is implicit in the Commerce Clause, which grants Congress the power to "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Id.*

10. Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me., 45 F.4th 542 (1st Cir. 2022).

11. Consolidated Appropriations Act, Pub. L. No. 117-328, § 531, 136 Stat 4459 (2022).

12. The amendment was sponsored by Representatives Dana Rohrabacher (R-CA) and Sam Farr (D-CA). The amendment is also sometimes referred to as the Rohrabacher-Blumenauer Amendment because of another sponsor, Representative Earl Blumenauer (D-OR).

13. Consolidated Appropriations Act § 531. Idaho, Kansas, and Nebraska are not listed.

14. Most recently, a bipartisan group of lawmakers called on Congress to decriminalize cannabis at the federal level following elections in Maryland and Missouri that legalized marijuana for adult recreational use. Piper Hudspeth Blackburn, *Lawmakers Urge House Committee to Act on Pot Reform*,

This Comment examines medical marijuana's legislative history in the United States and the problems inherent to its conflicting treatment at the state and federal level, as well as suggests the approach courts should take when confronted with interpreting the scope of the Rohrabacher-Farr Amendment. Section II of this Comment traces the historical backdrop behind the twentieth-century push for national narcotics control and the enactment of the Controlled Substances Act, and the ensuing state legalization of medical marijuana. Further, Section II details the varying approaches taken by the Department of Justice regarding federal enforcement of the Controlled Substances Act, the continued adoption of the Rohrabacher-Farr Amendment in appropriations, and the circuit split surrounding its application. Finally, Section II briefly discusses the concept of statutory interpretation, particularly in the appropriations context.

Section III of this Comment argues that courts faced with interpreting the Rohrabacher-Farr Amendment should adopt the substantial compliance approach as a matter of both law and policy. First, Section III argues that the substantial compliance approach, backed by principles of statutory interpretation, appropriately returns this experimental social policy issue to the states, and properly allows states to police and enforce their own medical marijuana laws. Second, Section III argues that the substantial compliance approach helps create a stable environment for state medical marijuana market participants, giving actual effect to state laws and regulations in accordance with Congress's expressed intent regarding expenditure of public funds.

II. BACKGROUND

Marijuana use and regulation has had a turbulent history in the United States, culminating in competing legislation. Part A of this Section sketches marijuana's historical use as both a medicine and an industrial resource, and the shift in public policy that led to its federal regulation under the Marihuana Tax Act and later the Controlled Substances Act, which remains in force today. Part B addresses states' subsequent legalization of marijuana despite its continued federal illegality and the current federal-state dichotomy in marijuana law and policy. Part C then discusses the Rohrabacher-Farr Amendment and the opposing interpretations taken by the First and Ninth Circuits in determining the scope of its application. Finally, Part D introduces the

LAW 360 (Nov. 15, 2022, 10:20 PM), https://www.law360.com/lifesciences/articles/1548640/lawmakers-urge-house-committee-to-act-on-pot-reform [https://perma.cc/5CXL-55ZL].

different canons of construction courts invoke when interpreting statutes and appropriations.

A. Historical Context & the Controlled Substances Act

For hundreds of years, people have derived health benefits from cannabis. Ancient Chinese literature documents the use of various parts of the plant to treat a vast range of ailments, including nausea, constipation, menstrual disorders, nervous disorders, poisoning, dry throat, ulcers, wounds, and hair loss.[15] Similarly, early Arabic literature notes the use of cannabis to cure earaches, epilepsy, abscesses, tumors, and neurological pains.[16] Cannabis was first introduced to Western medicine in the 1800s by the Irish physician, William Brook O'Shaughnessy, who learned of the plant's medicinal properties from Native Indians.[17]

In addition to its use in early medicine, cannabis has historically served as a versatile and sustainable resource. For example, in the early days of American colonization, cannabis was grown prolifically. Jamestown settlers cultivated the plant and exported it to England at the command of the Crown for the creation of maritime ropes, sails, and other industrial products.[18] In fact, George Washington and Thomas Jefferson themselves grew large quantities of cannabis for commercial use, although debate exists as to whether they consumed the crop for medical or recreational purposes.[19] Still, cannabis was widely available in the United States as an over-the-counter medicine during the nineteenth and early twentieth centuries, and was added to the U.S. Pharmacopeia in 1850.[20]

Prior to the early twentieth century, cannabis enjoyed a generally positive, if quiet, reputation. As synthetic pharmaceuticals rose in

15. F. PORTER SMITH & G. A. STUART, CHINESE MATERIA MEDICA: VEGETABLE KINGDOM 90-91 (1911).

16. Indalecio Lozano, *The Therapeutic Use of* Cannabis sativa *(L.) in Arabic Medicine*, 1 J. CANNABIS THERAPEUTICS 63, 65-69 (2001).

17. DAVID E. NEWTON, MARIJUANA: A REFERENCE HANDBOOK 35-36 (2d ed. 2017).

18. *High Times Greats: Flying Founding Fathers*, HIGH TIMES (Feb. 15, 2021), https://hightimes.com/culture/flying-founding-fathers [https://perma.cc/4TXS-EF37].

19. Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 288 (2019) (noting that "the minimalists seem to have the better of the argument").

20. Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 J. PHARMACY & THERAPEUTICS 180, 180 (2017). The U.S. Pharmacopeia is a compendium of drug information published annually by the U.S. Pharmacopeial Convention, "an independent, scientific nonprofit organization focused on building trust in the supply of safe, quality medicines," formed in 1820. *About the U.S. Pharmacopeia (USP)*, USP, https://www.usp.org/about [https://perma.cc/V7B3-MJ4G] (last visited Jan. 21, 2023).

popularity, however, demand for medicinal cannabis waned.[21] Further, the increase in immigration following the Mexican Revolution caused racist fearmongering to attach to the consumption of cannabis in the United States.[22] And the media caught on.[23] Concurrently, lawmakers began to lobby against marijuana in large part due to the drug's growing recreational use.[24] Marijuana was further demonized by widespread anti-cannabis propaganda, most notably the 1936 film *Reefer Madness*, in which the cannabis-consuming characters devolve into homicidal tendencies.[25]

Harry Anslinger, former commissioner of the now-defunct Federal Bureau of Narcotics,[26] is lauded as a driving force behind the transformative narcotics legislation of the twentieth century. Seeking to garner support for national narcotics control, Anslinger pushed for the drafting and adoption of model legislation.[27] Consequently, in 1932, the American Bar Association approved the fifth draft of the Uniform State Narcotics Act, which included cannabis,[28] and was submitted to states for their voluntary adoption the following year.[29] Eventually, the Uniform Act was adopted by most states, some with modifications.[30] Notably, some states did not include cannabis in their

21. Grossman, *supra* note 19, at 289.

22. *See* Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970). Anti-Mexican sentiment is classically regarded as one of the prevailing influences that prompted a nationwide prohibition on cannabis. Recent scholarship, however, suggests a more nuanced relationship between immigration and marijuana, due in large part to the misconception that there was widespread, casual use of the drug in Mexico during the late nineteenth and early twentieth centuries. *See generally* Isaac Campos, *Mexicans and the Origins of Marijuana Prohibition in the United States: A Reassessment*, 32 SOC. HIST. ALCOHOL & DRUGS 6 (2018).

23. For instance, a 1915 issue of The Ogden Standard claimed that, when a Mexican is under the influence of "loco-weed," "he often goes on a rampage that brings death to whoever crosses his path." *Is the Mexican Nation "Locoed" By a Peculiar Weed?*, THE OGDEN STANDARD (Sept. 25, 1915), https://chroniclingamerica.loc.gov/data/batches/uuml_indurain_ver01/data/sn85058396/print/1915092501/0844.pdf [https://perma.cc/2BRG-58MC].

24. Grossman, *supra* note 19, at 289.

25. *See* Kristin Hunt, *Marijuana Panic Won't Die, but Reefer Madness Will Live Forever*, JSTOR DAILY (Apr. 23, 2020), https://daily.jstor.org/marijuana-panic-wont-die-but-reefer-madness-will-live-forever [https://perma.cc/VL6W-EMPH].

26. The Federal Bureau of Narcotics was a predecessor agency of the Drug Enforcement Administration. *See* U.S. DRUG ENF'T ADMIN., DEA HISTORY—THE EARLY YEARS 29, https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf [https://perma.cc/BH4C-8B94] (last visited Jan. 21, 2023).

27. *Id.* at 17.

28. Unif. Narcotic Drug Act (1932), *reprinted in* WILLIAM BUTLER ELDRIDGE, NARCOTICS AND THE LAW: A CRITIQUE OF THE AMERICAN EXPERIMENT IN NARCOTIC DRUG CONTROL app. A (Am. Bar Found. 1962).

29. Robert L. Swain, *The Status of Exempt Narcotics Under the Uniform State Narcotic Act*, 26 J. AM. PHARM. ASS'N 835, 835 (1937).

30. U.S. DRUG ENF'T ADMIN., *supra* note 26, at 17.

enumeration of regulated substances under their laws.[31]

Although Anslinger's primary focus was on opiates,[32] "[h]e shared the concern of the medical and scientific community of the day that marijuana was a serious threat to the nation, particularly its youth."[33] In 1937, at Anslinger's urging[34] and pursuant to its authority to "lay and collect taxes,"[35] Congress passed the Marihuana Tax Act of 1937,[36] the first federal regulation on cannabis. Subsequently, cannabis was removed from the U.S. Pharmacopeia,[37] reflecting the evolving social sentiment against the drug.[38]

The Marihuana Tax Act of 1937 placed a prohibitive tax on the sale of cannabis and required registration with the Internal Revenue Service.[39] Physicians, dentists, and other practitioners engaged in "professional" transfers of cannabis were subject to a lower yearly tax than those engaged in "nonprofessional" transfers, and patients receiving the drug for medical purposes were largely exempt from the written order form and transfer tax requirements.[40] While the Marihuana Tax Act did not declare the drug illegal *per se*, the "onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade."[41]

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31. Swain, *supra* note 29.

32. U.S. DRUG ENF'T ADMIN., *supra* note 26, at 17.

33. *Narcotics Enforcement in the 1930s*, U.S. DRUG ENF'T ADMIN. MUSEUM, https://museum.dea.gov/exhibits/online-exhibits/anslinger/narcotics-enforcement-1930s [https://perma.cc/XY3Z-FMCE] (last visited Jan. 21, 2023). In an essay published in 1937 entitled *Marihuana, Assassin of Youth*, Anslinger wrote that, "[n]o one knows, when he places a marijuana cigarette to his lips, whether he will become a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer." Nathan Greenslit, *How Neuroscience Reinforces Racist Drug Policy*, THE ATLANTIC (June 12, 2014), https://www.theatlantic.com/health/archive/2014/06/how-bad-neuroscience-reinforces-racist-drug-policy/371378/ [https://perma.cc/8X6D-G8E3].

34. *See Taxation of Marihuana: Hearings on H.R. 6906 Before the Subcomm. of the S. Comm. on Fin.* (recording Anslinger's remarks concerning the Marihuana Tax Act of 1937); Cydney Adams, *The Man Behind the Marijuana Ban for All the Wrong Reasons*, CBS NEWS (Nov. 17, 2016, 5:45 PM), https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/ [https://perma.cc/FVR4-PA7R] (detailing Anslinger's role in federal narcotics legislation).

35. U.S. CONST. art. I, § 8, cl. 1.

36. Pub. L. No. 75-238, 50 Stat. 551 (1937).

37. Bridgeman & Abazia, *supra* note 20.

38. *See* Bonnie & Whitebread, *supra* note 22, at 975-76 (writing that the restrictive public policy surrounding marijuana has been heavily tied to other social and cultural issues, like the earlier anti-narcotics and prohibition experiences).

39. Pub. L. No. 75-238, 50 Stat. 551 (1937).

40. *Id.* "In principle, the Marihuana Tax Act of 1937 stopped only the use of the plant as a recreational drug." *Did You Know... Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about/history/did-you-know/marijuana [https://perma.cc/3G2M-SM7X] (last visited Jan. 21, 2023).

41. Gonzales v. Raich, 545 U.S. 1, 11 (2005).

The Marihuana Tax Act was in force for over thirty years until challenged by Timothy Leary, when a search of his vehicle upon return to the United States from Mexico revealed marijuana, seeds, and three partially smoked marijuana cigarettes.[42] Leary was convicted for having "knowingly transported, concealed, and facilitated the transportation and concealment of marihuana, without having paid the transfer tax" under the Act.[43] On appeal to the United States Supreme Court, Leary argued that his conviction violated his Fifth Amendment right against self-incrimination.[44] The Supreme Court agreed, finding the Act unconstitutional as it mandated Leary to identify himself "not only as a transferee of marijuana, but as a transferee who had not registered and paid the occupational tax."[45] Further, a subsection of the Act required that this fact "be conveyed by the Internal Revenue Service to state and local law enforcement officials on request… 'a significant link in a chain of evidence tending to establish his guilt' under the state marihuana laws then in effect."[46] As such, Leary's conviction under the Act was overturned.[47]

The following year, the precipice of the national War on Drugs, Congress enacted the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the Controlled Substances Act ("CSA")[48]—a uniform, comprehensive legal framework that regulates all aspects of certain drugs, including marijuana, and imposes a variety of penalties for noncompliance, ranging from warning letters and suspension of an entity's registration to "large fines and lengthy prison sentences" for violations of its trafficking provisions.[49] The CSA was passed pursuant to Congress's power to regulate commerce "among the several states."[50] Section 801 of the

42. Leary v. United States, 395 U.S. 6, 10 (1969).

43. *Id.* at 11.

44. *Id.* at 12.

45. *Id.* at 16.

46. *Id.* (quoting Marchetti v. United States, 390 U.S. 39, 48 (1968)).

47. *Id.* at 53.

48. 21 U.S.C §§ 801-971.

49. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS summary, 17 (2023).

50. U.S. CONST. art. I, § 8, cl. 3. Although the Supreme Court historically took a rather narrow view of Congress's Commerce Clause authority, *see, e.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918) (overruled by United States v. Darby, 312 U.S. 100 (1941)), the twentieth century saw the Court shift toward a much broader interpretation of Congress's power under the Clause. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"); United States v. Lopez, 514 U.S. 549 (1995) (identifying three broad categories of activity Congress may regulate under the Commerce Clause and adopting a malleable four-part test to determine whether

CSA lays out Congress's findings that the "manufacture, local distribution, and possession" of drugs, although "not an integral part of the interstate or foreign flow . . . nonetheless have a substantial and direct effect upon interstate commerce,"[51] effectively allowing Congress to outlaw even those substances that remain within the borders of a single state. Although the decision whether to outlaw marijuana was previously left to the states, by the time the CSA was adopted, every state had enacted legislation criminalizing the drug.[52] Just three years later, though, Oregon became the first state to decriminalize cannabis with five other states soon following suit.[53]

The CSA does not differentiate between drugs used for medical or recreational purposes, or between those distributed legally or illegally.[54] Further, the CSA divides the regulated drugs and the chemical components thereof into different schedules based on their potential for abuse and accepted medical use. "Marihuana," and its constituent psychoactive component, tetrahydrocannabinol ("THC"), are classified as Schedule I substances.[55] Schedule I substances are defined as those with "a high potential for abuse," with "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug . . . under medical supervision."[56]

Today, marijuana remains classified as a Schedule I drug despite research and numerous studies indicating that marijuana holds significant pain- and symptom-relieving properties. For example, marijuana has been found to serve as an effective antiemetic in treating chemotherapy-induced nausea in cancer patients[57] and as a safer alternative to opioids.[58] Although marijuana's strict Schedule I

Congress can regulate activity that otherwise "substantially affects interstate commerce" in conjunction with the Necessary and Proper Clause).

51. 21 U.S.C. § 801(3).

52. Leary v. United States, 395 U.S. 6, 16 n.15 (1969).

53. PATRICK ANDERSON, HIGH IN AMERICA: THE TRUE STORY BEHIND NORML AND THE POLITICS OF MARIJUANA introduction (1981). Alaska, California, Maine, Colorado, and Ohio decriminalized marijuana during the summer of 1975. *Id.*

54. LISA N. SACCO, CONG. RSCH. SERV., R44782, THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP summary (2022).

55. 21 U.S.C. § 812 sched. I(c)(10), (c)(17).

56. § 812(b)(1)(A)-(C).

57. NAT'L ACADS. OF SCIS., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 91-94 (2017).

58. A study from 2016 found that, after three months of medical marijuana use, "patients reported a notable decrease in their use of conventional pharmaceutical agents from baseline, with opiate use declining more than 42%." Staci A. Gruber et al., *Splendor in the Grass? A Pilot Study Assessing the Impact of Medical Marijuana on Executive Function*, 7 FRONTIERS IN PHARMACOLOGY 1, 1 (2016); *see also* Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, 174 J. AM. MED. ASS'N 1668, 1668 (2014) (finding that "[s]tates with medical cannabis laws had a 24.8% lower mean annual opioid overdose mortality rate . . . compared with

classification has historically frustrated efforts to obtain and conduct further research on the drug,[59] a bill to facilitate marijuana research for medical purposes was signed into law by President Joe Biden in December 2022.[60]

Accordingly, there have been repeated efforts to reschedule marijuana under the CSA. Most recently, the Marijuana Opportunity Reinvestment and Expungement Act, which was passed by the House of Representatives in April 2022, would remove marijuana from the list of scheduled substances under the CSA and eliminate federal criminal penalties for those engaged in the manufacture, distribution, or possession of marijuana.[61] Similarly, the Cannabis Administration and Opportunity Act, introduced in the Senate in July 2022, would "decriminalize and deschedule cannabis . . . provide for reinvestment in certain persons adversely impacted by the War on Drugs, and . . . provide for expungement of certain cannabis offenses."[62]

Lawmakers and lobbyists are not the only ones pushing for reform. A former Drug Enforcement Administration ("DEA") agent, Robert Stutman, had a change of heart regarding the legal status of the drug after finding opioids ineffective to treat his back pain.[63] "[A]fter taking a marijuana extract, the pain disappeared. I got my normal life back," Stutman wrote in a 2020 article for *The Hill* urging his colleagues to reschedule the drug.[64] "How long will the DEA continue this absurdity—one that flies in the face of public opinion, growing scientific research and human experience?"[65] In 2021, the Ninth Circuit dismissed a petition seeking to order the DEA to reschedule marijuana under the CSA for failing to exhaust administrative remedies before filing suit.[66] In a concurring opinion, however, Judge Watford wrote that,

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states without medical cannabis laws" and that "such [medical cannabis] laws were associated with a lower rate of overdose mortality that generally strengthened over time"). See *Medical Cannabis Provides an Alternative to Opiates*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/how-access-to-medical-marijuana-helps-fight-the-opioid-epidemic [https://perma.cc/5NNW-JJAH] (last visited Jan. 21, 2023), for more statistics on medical marijuana's effect on opioid use.

59. *See* SACCO, *supra* note 54, at 16-19 (detailing the administrative hurdles involving the Drug Enforcement Administration, the Food and Drug Administration, and the National Institute on Drug Abuse that must be satisfied for an entity to conduct research under federal law).

60. Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215, 136 Stat. 2257 (2022).

61. Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022).

62. Cannabis Administration and Opportunity Act, S. 4591, 117th Cong. (2022).

63. Robert Stutman, *A Retired DEA Agent's Plea: Time to Reschedule Marijuana*, THE HILL (Dec. 28, 2020, 5:30 PM), https://thehill.com/opinion/criminal-justice/531841-a-retired-dea-agents-plea-time-to-reschedule-marijuana [https://perma.cc/C7CE-4XUK].

64. *Id.*

65. *Id.*

66. Sisley v. United States Drug Enf't Admin., 11 F.4th 1029, 1036 (9th Cir. 2021).

> in an appropriate case, the Drug Enforcement Administration may well be obliged to initiate a reclassification proceeding for marijuana, given the strength of petitioners' arguments that the agency has misinterpreted the controlling statute by concluding that marijuana "has no currently accepted medical use in treatment in the United States,"[67]

further signaling the changing tides.

B. State Legalization

As of 2022, thirty-seven states and Washington D.C. have passed laws allowing the medical use of cannabis.[68] Twenty-one states and Washington D.C. also passed legislation regulating adult, non-medical use of cannabis,[69] and ten states have measures in place allowing "low THC, high cannabidiol" products for limited medical purposes or as a legal defense,[70] leaving only three states that still prohibit cannabis entirely.[71]

In 1996, California became the first state to legalize medical marijuana with the passage of Proposition 215, known as the Compassionate Use Act.[72] The Compassionate Use Act authorized the use of medical marijuana recommended by physicians to treat "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief," and provided protections for physicians, patients, and caregivers against criminal penalties.[73] The 2005 Supreme Court case *Gonzales v. Raich* challenged—and upheld—enforcement of the CSA against conduct authorized by the California law. [74]

1. *Gonzales v. Raich*

In 2002, federal DEA agents came to Diane Monson's home in California and seized and destroyed all six of her cannabis plants despite the fact that county deputies found Monson's cultivation and

67. *Id.* (Watford, J., concurring) (quoting 21 U.S.C. § 812(b)(1)(B)).

68. *State Medical Cannabis Laws*, *supra* note 3.

69. *Id.*

70. *Id.*

71. *Id.* Idaho, Kansas, and Nebraska are the only states with no public cannabis access program.

72. California was also the first state to outlaw marijuana in 1913 by way of an addition to the state's Poison Act. Jessica Roy, *California's Been Rejecting Legalized Marijuana for More Than a Century. Here's Why This Time Is Different*, L.A. TIMES (Sept. 13, 2016, 12:05 AM), https://www.latimes.com/politics/la-pol-ca-timeline-california-recreational-marijuana-history-20160708-snap-story.html [https://perma.cc/3CYD-3AGF].

73. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A)-(B), (c), (d).

74. 545 U.S. 1 (2005).

use entirely within the confines of California law.[75] Monson suffered from a serious medical condition and relied on the marijuana she cultivated herself, pursuant to her doctor's recommendation, to alleviate her symptoms.[76] Angel Raich, another seriously ill California resident, also relied on prescribed marijuana as the only effective treatment for her condition.[77] Raich received locally grown marijuana from her caregivers at no charge, some of which she processed into "oils, balms, and foods for consumption."[78]

Together, Monson, Raich, and her caregivers, litigating as "John Does," challenged the CSA as applied to their personal medical use of marijuana, seeking declaratory and injunctive relief.[79] Specifically, they alleged that enforcement of the Act against them violated the Commerce Clause,[80] the Due Process Clause of the Fifth Amendment,[81] the Ninth Amendment,[82] the Tenth Amendment,[83] and the doctrine of medical necessity.[84] Although the district court denied their motion for a preliminary injunction, the Ninth Circuit reversed, finding that they "had demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority."[85] The Ninth Circuit distinguished the case from prior Commerce Clause jurisprudence on the grounds that the activity fell within its own class as a non-commercial, medical endeavor conducted intrastate and pursuant to state law, distinct from the "broader illicit drug market" that the CSA was targeted toward eradicating.[86]

The Supreme Court disagreed. Relying substantially on the Court's decision in *Wickard v. Filburn*,[87] which sanctioned Congress's author-

75. *Id.* at 7.

76. *Id.* at 6-7.

77. *Id.*

78. *Id.* at 7.

79. *Id.*

80. U.S. CONST. art. I, § 8, cl. 3.

81. U.S. CONST. amend. V. The Fifth Amendment protects against the government's deprivation of "life, liberty, or property" without due process of law.

82. U.S. CONST. amend. IX. The Ninth Amendment provides that "the enumeration… of certain rights, shall not be construed to deny or disparage others retained by the people."

83. U.S. CONST. amend. X. The Tenth Amendment reserves those powers that are not delegated to the federal government to the states or to the people.

84. *Gonzales*, 545 U.S. at 8. The doctrine of medical necessity is a common law legal defense to the crime of drug possession that balances "the defendant's interest in health against the state's interest in enforcing drug laws that protect the public." *See* Andrew J. LeVay, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 716 (2000).

85. *Gonzales*, 545 U.S. at 8.

86. *Id.* at 8-9.

87. 317 U.S. 111 (1942).

ity under the Commerce Clause to regulate excess wheat grown for home consumption, the *Gonzales* Court concluded that Congress was "well within" its authority to "'make all Laws which shall be necessary and proper'" to regulate interstate commerce when it determined that failure to regulate the entirely intrastate, personal cultivation and use of marijuana would leave a "gaping hole" in the CSA.[88] By the time the case reached the Supreme Court, nine states had enacted laws authorizing the use of medical marijuana.[89]

In a strong dissent, Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist and Justice Clarence Thomas,[90] began by acknowledging,

> One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[91]

The dissent recognized that California had done just that; the state, through its representative legislative process, had exercised its core police powers that "have always included authority to define criminal law and to protect the health, safety, and welfare of . . . citizens," and came to its own conclusion on whether marijuana should be available for medical use.[92] The dissent criticized the majority's endorsement of sweeping legislation based on broad generalizations and "bare declarations" and emphasized the lack of evidence indicating that local consumption of cannabis would actually have an effect on the illegal interstate market.[93] Indeed, in the Supreme Court's 1995 decision in *United States v. Lopez*,[94] the Court refused to "pile inference upon inference . . . to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[95]

88. *Gonzales*, 545 U.S. at 22 (quoting U.S. CONST. art. I, § 8, cl. 18). While the Court in Wickard v. Filburn, 317 U.S. 111, 125-28 (1942), engaged in a discussion of the broader market effects on the price of wheat when it is grown in surplus, the Court in *Gonzales* failed to detail just how the personal use and consumption of medical marijuana that was never set to reach a stream of commerce would have a substantial and direct effect on interstate commerce, for which, unlike wheat, there existed no legal interstate market.

89. *Gonzales*, 545 U.S. at 5.

90. Justice Thomas joined all but part III of the opinion.

91. *Gonzales*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

92. *Id.* at 42-43.

93. *Id.* at 45-56.

94. 514 U.S. 549 (1995).

95. *Id.* at 567.

2. Problems Inherent to the Federal-State Dichotomy

Illustrated by *Gonzales v. Raich*,[96] the Supremacy Clause of the United States Constitution mandates that the federal constitution and any law made pursuant to its authority take priority over any state law to the contrary.[97] As a result, the continued federal illegality of marijuana creates issues for both individuals and businesses as the majority of states now allow for its medical use.

Primarily, federal law impedes state-legal marijuana businesses' efforts to obtain financial services. First, providing financial services to these businesses exposes lending institutions to criminal liability for aiding and abetting or conspiracy to violate the CSA, which exposes them to the same punishment as those acting directly in violation of the law.[98] Federal anti-money laundering laws also act as a powerful deterrent by criminalizing the handling of proceeds knowingly secured through activity that contravenes federal law.[99] Further, federal asset-forfeiture laws authorizing the seizure of property acquired through revenue from unlawful marijuana sales, even if state law sanctioned the sale,[100] leave banks vulnerable.[101]

Additionally, federal banking regulators maintain "strong, flexible administrative enforcement powers" to ensure financial institutions are operating within the bounds of both state and federal law.[102] Regulators are empowered to "issue cease-and-desist orders, impose civil money penalties, and issue removal and prohibition orders" as well as "revoke an institution's federal deposit insurance and to take control of and liquidate a depository institution."[103] Prohibitory

96. 545 U.S. 1 (2005).

97. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

98. 18 U.S.C § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter [the CSA] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

99. 18 U.S.C. § 1956 (laundering of monetary instruments); 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from specified unlawful activity).

100. *See* United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) ("Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. CONST. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.").

101. 18 U.S.C. § 981(a)(1)(C) ("The following property is subject to forfeiture to the United States: . . . Any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting 'specified unlawful activity'. . . or a conspiracy to commit such offense.").

102. SACCO, *supra* note 54, at 32.

103. *Id.* The SAFE Banking Act, which passed the House of Representatives in April 2021, would remedy many of these obstacles by prohibiting "a federal banking regulator from penalizing a depository

regulatory requirements—for instance, the mandatory filing of suspicious activity reports ("SARs") for every transaction with a marijuana business—further increase the cost and liability for banks choosing to associate with these businesses.[104]

The constant threat of federal penalties and prosecution leaves much of the marijuana industry conducted in cash transactions, evoking concerns surrounding tax compliance.[105] In addition to these financial barriers, the federal-state dichotomy in marijuana legislation raises issues involving individuals' eligibility to receive federal student financial aid,[106] housing assistance,[107] gun ownership,[108] and visas.[109]

In a statement accompanying the Supreme Court's denial of certiorari for a cannabis case in 2021, Justice Clarence Thomas observed that,

> Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.[110]

Concluding, Justice Thomas opined that "[a] prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper to support the Federal Government's piecemeal approach"[111]—further foreshadowing a transition in marijuana law and policy in the United States.

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institution for providing banking services to a legitimate cannabis-related business" and establishing that "proceeds from a transaction involving activities of a legitimate cannabis-related business are not considered proceeds from unlawful activity," as well as vitiating liability for asset forfeiture "for providing a loan or other financial services to a legitimate cannabis-related business." Secure and Fair Enforcement Banking Act, H.R. 1996, 117th Cong. (2021).

104. SACCO, *supra* note 54, at 33; *see also* Aaron Klein, *Legal Marijuana Businesses Deserve Better Than to Be Treated as Potentially Criminal Enterprises*, NBC NEWS (Apr. 20, 2018, 1:35 PM), https://www.nbcnews.com/think/opinion/legal-marijuana-businesses-deserve-better-be-treated-potentially-criminal-enterprises-ncna867816 [https://perma.cc/NJ78-9G62].

105. SACCO, *supra* note 54, at 32; *see also* Kevin Murphy, *Legal Marijuana: The $9 Billion Industry That Most Banks Won't Touch*, FORBES (Sept. 6, 2018, 10:07 AM), https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/?sh=4e55d5d03c68 [https://perma.cc/NJ9E-TSRN].

106. SACCO, *supra* note 54, at 49-50.

107. MAGGIE MCCARTY ET AL., CONG. RSCH. SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 23-26 (2016).

108. 18 U.S.C. § 922(g)(3), (h)(1) (making it unlawful to ship, transport, possess, or receive a firearm or ammunition "in or affecting commerce" for anyone who "is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))").

109. 18 U.S.C. § 1182(a)(2) (making aliens ineligible to receive visas who have *inter alia* committed acts constituting the essential elements of a controlled substance offense).

110. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236-37 (2021) (Thomas, J., concurring).

111. *Id.* at 2238.

3. Department of Justice Approaches

Presidential administrations have taken varying approaches to the enforcement of the CSA as states have increasingly legalized medical marijuana. In 2013, Deputy Attorney General James Cole of the Obama Administration issued a memorandum setting forth Department of Justice ("DOJ") guidelines directing federal prosecutors to focus CSA enforcement priorities on certain areas deemed "particularly important to the federal government," such as preventing marijuana distribution to minors, "[p]reventing the diversion of marijuana from states where it is legal under state law . . . to other states," and "[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity."[112] Cole acknowledged that, in states that have implemented effective regulatory and enforcement systems, "conduct in compliance . . . is less likely to threaten" the identified federal priorities.[113]

In 2018, Attorney General Jefferson Sessions of the Trump Administration rescinded these prior guidelines.[114] Sessions declared in a memorandum that, instead, investigative and prosecutorial discretion should be exercised "in accordance with all applicable laws, regulations, and appropriations."[115]

Although current Attorney General Merrick Garland of the Biden Administration has not formally reinstated the Cole memorandum or issued equivalent guidance, he has told Congress that enforcement of federal marijuana legislation is a low priority.[116] In response to questions concerning DOJ policy during a Senate Appropriations Subcommittee hearing in April 2022, Garland stated that prosecuting marijuana offenses is "not an efficient use of resources, given the opioid and methamphetamine epidemic that we have."[117] Moreover, in

112. The Cole memorandum updated the guidelines written by Deputy Attorney General David Ogden in 2009 "in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale." Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys, at 1 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/8VQT-VYR6].

113. *Id.* at 3.

114. Memorandum from Jefferson B. Sessions, III, Deputy Att'y Gen., to All United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/ARB2-VGE8].

115. *Id.*

116. Sam Reisman, *Garland Tells Lawmakers DOJ's Approach to Pot Unchanged*, LAW 360 (Apr. 26, 2022, 4:01 PM), https://www.law360.com/articles/1487552/garland-tells-lawmakers-doj-s-approach-to-pot-unchanged [https://perma.cc/QFA2-5JNF].

117. *Id.*

early October 2022, President Joe Biden issued an executive order pardoning all United States citizens' simple marijuana possession convictions under the CSA.[118] President Biden further instructed Garland and the Secretary of Health and Human Services to initiate the administrative process[119] to consider altering the Schedule I status of cannabis.[120]

C. The Rohrabacher-Farr Amendment

The Constitution demands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[121] Thus, Congress, through its power to enact legislation, has the ultimate authority to decide how federal funds are spent.[122] Each year, Congress passes a Consolidated Appropriations Act delegating funds to carry out government programs for the following fiscal year.[123] The appropriations often include conditions called "riders" that serve as limitations or requirements dictating how the money may, or may not, be spent in effectuating government programs.[124] "[T]he [Appropriations] Clause has a . . . fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents . . . ."[125]

The Rohrabacher-Farr Amendment prohibits the DOJ from using any allocated funds to "prevent" the states that have legalized medical marijuana "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[126] This

118. Proclamation No. 10467, 87 Fed. Reg. 61441 (Oct. 6, 2022).

119. 21 U.S.C. § 811 empowers the Attorney General to initiate proceedings to reschedule or remove a drug from the Act through a notice-and-comment rulemaking process. The Attorney General has delegated that authority to the Administrator of the Drug Enforcement Administration. 28 C.F.R. § 0.100(b). See LAMPE, *supra* note 49, at 9-12, for more information on scheduling procedures.

120. Sam Reisman, *Biden to Pardon Federal Marijuana Possession Convictions*, LAW 360 (Oct. 6, 2022, 3:41 PM), https://www.law360.com/articles/1537963/biden-to-pardon-federal-marijuana-possession-convictions [https://perma.cc/TYC3-VFAJ].

121. U.S. CONST. art. I, § 9, cl. 7.

122. Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'").

123. See SANDY STREETER ET AL., CONG. RSCH. SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2016), for an overview of the appropriations process.

124. SEAN M. STIFF, CONG. RSCH. SERV., R46417, CONGRESS'S POWER OVER APPROPRIATIONS: CONSTITUTIONAL AND STATUTORY PROVISIONS 57 (2020).

125. *Richmond*, 496 U.S. at 427-28.

126. Consolidated Appropriations Act, Pub. L. No. 117-328, § 531, 136 Stat 4459, (2022). Although the text of the amendment has varied slightly over the years, its operative language has remained the same.

language was first introduced in Congress in 2001 but was withdrawn before reaching a vote.[127] After several subsequent failed attempts, the amendment passed both chambers of Congress and was signed into law on December 16, 2014, as part of the consolidated appropriations for fiscal year 2015.[128] The amendment had six Democrat and six Republican co-sponsors and passed with bipartisan support.[129] The rider has remained a component of Congress's Consolidated Appropriations Acts every year since. As introduced, the proposed appropriations to the DOJ for fiscal year 2023 included the traditional Rohrabacher-Farr Amendment as applied to forty-seven states, Washington D.C., and several territories as well as additional amendments that would prohibit the use of funds to prevent any Indian tribe, state, territory, or Washington D.C. from "implementing a law authorizing" marijuana, which would apply to laws authorizing use of the drug for any reason, including recreation.[130] The additional amendments, however, were not included in the final version of the 2023 Consolidated Appropriations Act.

Shortly after the Rohrabacher-Farr Amendment took effect, DOJ spokesperson Patrick Rodenbush announced the department's position that the amendment did not apply to prosecutions of private individuals or entities,[131] consistent with a DOJ memorandum issued to all federal prosecutors in February 2015.[132] Although the DOJ had argued prior to its enactment that the amendment would "severely disrupt" CSA enforcement efforts, it later maintained that the amendment only barred prosecutions against states or state officials.[133]

127. The amendment was first introduced by Representative Maurice Hinchey (D-NY). At the time, only eight states had legalized medical marijuana. Tom Angell, *Federal Medical Marijuana Amendment Author Dies at 79*, MARIJUANA MOMENT (Nov. 24, 2017), https://www.marijuanamoment.net/federal-medical-marijuana-amendment-author-dies-79/ [https://perma.cc/DQ7S-8T4G].

128. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). The amendment listed thirty-two states and Washington D.C. At the time of its passage, twenty-three states had legalized medical marijuana (although New York was not listed), and ten states had legalized cannabidiol.

129. *Feds Back Off Medical Marijuana Enforcement in 32 States and DC*, AMS. FOR SAFE ACCESS (Dec. 29, 2014), https://www.safeaccessnow.org/feds_back_off_medical_marijuana_enforcement_in_32_states_and_dc [https://perma.cc/7UZU-HZDH].

130. Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 8256, 117th Cong. §§ 531, 538-39 (2022) (as introduced).

131. Timothy M. Phelps, *Justice Department Says It Can Still Prosecute Medical Marijuana Cases*, L.A. TIMES (Apr. 2, 2015, 3:00 AM) https://www.latimes.com/nation/nationnow/la-na-nn-medical-marijuana-abusers-20150401-story.html [https://perma.cc/J9VD-E8M7].

132. Memorandum from Patty Merkamp Stemler, Chief, App. Section, U.S. Dep't. of Just. Crim. Div., to All Federal Prosecutors, at 2 (Feb. 27, 2015).

133. Christopher Ingraham, *How the Justice Department Seems to Have Misled Congress on Medical Marijuana*, WASH. POST (Aug. 6, 2015, 8:58 AM), https://www.washingtonpost.com/news/wonk/wp/2015/08/06/the-justice-department-says-it-misled-congress-on-medical-marijuana [https://perma.c

Following this announcement, Representatives Rohrabacher and Farr wrote a letter to then-Attorney General Eric Holder stating that the DOJ's interpretation of the amendment was "emphatically wrong."[134] Rohrabacher and Farr wrote that criminal prosecutions, such as asset forfeiture actions against dispensaries, are what motivated the passage of the amendment, pointing to the Congressional Record that "clearly illustrates" this intent.[135] Moreover, the representatives suggested that "state law enforcement agencies are best-suited to investigate" whether any specific case presents a violation of state law, given that the "states are responsible for implementing and enforcing laws and regulations relating to medical marijuana."[136]

In *United States v. Marin Alliance for Medical Marijuana*,[137] a California district court rejected the government's interpretation as "tortur[ing] the plain meaning of the statute."[138] Rather, the court wrote, the amendment "takes as a given that States implement their medical marijuana laws in the ways they see fit," such as, in this case, "allowing private dispensaries to operate under strict state and local regulation."[139] In sum, the court held that it was not in the position to "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited" by accepting the government's interpretation, which defies both "language and logic."[140] Although the *Marin Alliance* court's opinion is not binding federal precedent, consistently, subsequent cases hold that the Rohrabacher-Farr Amendment applies to prosecutions of private individuals and entities.[141] Some district courts have further held that the rider "protect[s]

c/PW87-BV4X].

134. Letter from Dana Rohrabacher & Sam Farr, Reps., to Eric Holder, Att'y Gen. at 1 (Apr. 8, 2015).

135. *Id.*

136. *Id.* at 2.

137. 139 F. Supp. 3d 1039 (N.D. Cal. 2015).

138. *Id.* at 1044. Although the Court accepted the plain meaning of the statute, which ends the inquiry into its interpretation, the Court went on to quote statements from the congressional floor debates as well as the letter to Attorney General Eric Holder from Representatives Rohrabacher and Farr that further bolstered the adopted interpretation.

139. *Id.* at 1045.

140. *Id.* at 1044-45 (citation omitted) (quoting United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 497 (2001)).

141. *See, e.g.*, United States v. McIntosh, 833 F.3d 1163, 1176-77 (9th Cir. 2016) ("DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.").

individuals from federal prosecutions that indirectly attempt to punish them for state law-compliant actions."[142] A circuit split exists, however, regarding the level of state-law compliance required to trigger the amendment's ban on the DOJ's use of funds to prosecute.

1. The Ninth Circuit's "Strict Compliance" Approach

The Ninth Circuit's principal case interpreting the Rohrabacher-Farr Amendment is its 2016 decision in *United States v. McIntosh*.[143] *McIntosh* involved ten consolidated interlocutory appeals seeking to dismiss indictments or enjoin prosecutions against individuals charged with violations of various provisions under the CSA in medically legal states on the grounds that the Rohrabacher-Farr Amendment prohibits the DOJ from spending funds to prosecute.[144]

To interpret the amendment, the Ninth Circuit began with the statutory text, noting that, "[u]nfortunately, the rider is not a model of clarity."[145] Observing the dictionary definition of "implement," the Ninth Circuit concluded that the rider "prohibits [the] DOJ from spending money on actions that prevent the Medical Marijuana States' *giving practical effect* to their state laws," and "at a minimum" prohibits the spending of funds to prosecute individuals engaged in conduct permitted by the state's laws "and who fully complied with such laws."[146]

The Ninth Circuit then addressed appellants' argument that "implementation of laws necessarily involves all aspects of putting the law into practical effect, including interpretation of the law, means of application and enforcement, and procedures and processes for determining the outcome of individual cases."[147] First, the Ninth Circuit dealt with this contention by analyzing the phrase, "laws that authorize," determining that the rider prohibits the DOJ from

142. United States v. Jackson, 388 F. Supp. 3d 505, 512-13 (E.D. Pa. 2019) (reasoning that "[r]evoking a defendant's supervised release for his state law-compliant medical marijuana use would 'accomplish[] materially the same effect' as directly prosecuting him for his marijuana use and would prevent Pennsylvania from 'giving practical effect' to its law," and distinguishing the present case from other cases concluding that the rider did not apply to violations of supervised release); *see also* United States v. Samp, No. 16-cr-20263, 2017 U.S. Dist. LEXIS 46291, at *4 (E.D. Mich. Mar. 29, 2017) ("Although the Government is not attempting to directly prosecute [defendant] for his medical marijuana business, which would be in direct violation of [the Rohrabacher-Farr Amendment], Count Four [charging defendant with possession of firearms in connection with his medical marijuana business] accomplishes materially the same effect.").

143. 833 F.3d 1163 (9th Cir. 2016).

144. *Id.* at 1168-69.

145. *Id.* at 1175.

146. *Id.* at 1176-77 (emphasis added).

147. *Id.* at 1177.

preventing the implementation of "only those rules that *authorize* medical marijuana use."[148] Second, the Ninth Circuit considered the varied nature and constant evolution of medical marijuana legislation as new laws are enacted and new administrative and judicial opinions are issued.[149] "Given this context and the restriction of the relevant laws to those that authorize conduct," the Ninth Circuit held that "[i]ndividuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the Rohrabacher-Farr Amendment]," therefore remanding the cases for evidentiary hearings to determine whether appellants' conduct had "strictly complied with all relevant conditions imposed by state law."[150] Separately, the Ninth Circuit held that "[t]he appropriations rider does not, however, bar the government from spending funds to determine whether the rider applies to the prosecution in the first place," as "[t]o hold otherwise would render a district court's *McIntosh* finding unreviewable."[151]

2. The First Circuit's "Substantial Compliance" Approach

United States v. Bilodeau[152] presented the First Circuit with the task of interpreting the Rohrabacher-Farr Amendment. Until then, the Ninth Circuit was the only federal appellate court to have interpreted its scope.[153]

The defendants in *Bilodeau* operated three marijuana grow sites in Maine.[154] Although the defendants maintained the requisite paperwork to "appear facially compliant" with Maine law, federal law enforcement began investigating the defendants' association with a drug organization that operated "under the cover" of the state's program.[155] After executing search warrants on the properties, the officers seized substantial quantities of marijuana and a notebook that recorded cash payments and "used what appeared to be abbreviations for states such as 'MD,' 'NY,' and 'GA'" and indicted the defendants under the CSA.[156] The defendants moved to enjoin their prosecutions

148. *Id.* at 1177-78 (emphasis added).
149. *Id.* at 1178.
150. *Id*. at 1178-79.
151. United States v. Pisarski, 965 F.3d 738, 742 (9th Cir. 2020).
152. 24 F.4th 705 (1st Cir. 2022).
153. *Id.* at 712.
154. *Id.* at 710.
155. *Id.*
156. *Id.* at 710-11.

pursuant to the Rohrabacher-Farr Amendment.[157]

Rejecting the government's proposed "strict compliance" test, the First Circuit reasoned that, because Congress failed to provide a bright-line rule and instead used more general language, "Congress likely had in mind a more nuanced scope of prohibition—one that would consider the practical effect of a federal prosecution on the state's ability to implement its laws."[158] Next, the First Circuit focused on the potential for "technical noncompliance" despite good faith efforts given the highly regulated nature of the marijuana industry.[159] "The predictable result," the First Circuit wrote, "would be fewer market entrants and higher costs flowing from the expansive efforts required to avoid even tiny, unintentional violations," which, in turn, would pressure states to "water down" their regulatory requirements.[160]

The First Circuit then acknowledged the inconsistency between state and federal law penalties, as Maine's regulations "were not drafted to mark the line between lawful activity and cause for imprisonment."[161] Rather, since Maine had "declined to mandate severe punishments" for every violation, the First Circuit reasoned that turning "each and every infraction into a basis for federal criminal prosecution" would further deter participation in Maine's market.[162]

Opting instead for a middle-ground "substantial compliance" approach, but declining to "fully define its precise boundaries," the First Circuit held that, in this case, "the record is clear" that the defendants' conduct was a "façade[] for selling marijuana to unauthorized users."[163] Therefore, their prosecutions were not barred by the rider.[164] Although Judge Barron opined in a concurring opinion that the First Circuit's substantial compliance approach in practice "is not materially different" from the Ninth Circuit's strict compliance approach,[165] the majority made clear that "the point is not that caregivers acting in good faith *will* be prosecuted for even tiny infractions of state law [under the strict compliance test] but that they

157. *Id.* at 711.

158. *Id.* at 713.

159. *Id.* (listing examples such as one marijuana plant exceeding the twelve-inch height and diameter requirements under Maine's law, or a curing that "happened to yield more than 2 ½ ounces of marijuana per qualifying patient," which, under the strict compliance approach, would expose a caregiver to criminal penalties under the CSA).

160. *Id.* at 713-14.

161. *Id.* at 714.

162. *Id.*

163. *Id.* at 715.

164. *Id.*

165. *Id.* at 718 (Barron, J., concurring).

can be."[166]

D. Statutory Interpretation & the Canons of Construction

When interpreting legislation, courts look first to the plain meaning of the language in the statute.[167] If the language is unambiguous, the inquiry into its meaning is over.[168] If, however, there is ambiguity, courts must resort to outside considerations to determine the scope of the statute's application. In fact, even when a statute's language seems clear on its face, there are often multiple reasonable interpretations of the text, and "a court's job then becomes choosing the best interpretation among them."[169]

Canons of construction are guides "designed to help judges determine the Legislature's intent as embodied in particular statutory language."[170] The canons "range from broad principles that apply in virtually every case . . . to narrow rules that apply in limited

166. *Id.* at 714.

167. *See* Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 412 (2012) ("We [the Supreme Court] begin 'where all such inquiries must begin: with the language of the statute itself.'").

168. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citations omitted)).

169. Matthew Foerster, *Canons of Construction: What Is Their Role, if Any, in Modern Jurisprudence?*, AM. BAR ASS'N (Feb. 4, 2022), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2022/winter/canons-of-construction/ [https://perma.cc/JS4L-7K5Q]; *see also* Steven Wisotsky, *How to Interpret Statutes - Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 343 (2009) (arguing that, in the hard cases, "'plain meaning' is a misnomer and is better called 'situational meaning'"). One famous example of two competing interpretations of the same statute is the hypothetical, "no vehicles in the park." *See* WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 6 (2016). Staunch textualists Justice Antonin Scalia and Bryan Garner examine a variety of dictionary definitions of the word "vehicle," and conclude that "[t]he proper colloquial meaning . . . is simply a *sizeable* wheeled conveyance," and therefore the statute should be applied to "automobiles, golfcarts, and mopeds," but not to "airplanes, bicycles, roller skates and toy automobiles." *Id.* at 7-8. By contrast, Justice Stephen Breyer "worries that 'an overemphasis on text can lead courts astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help.'" *Id.* at 8-9. Therefore, "[a]lthough Justice Breyer does not challenge the primacy of statutory text, he insists that a 'fair reading' of statutory text consider the underlying legislative expectations and problem-solving purposes." *Id.* at 9-10. Accordingly, if Congress enacted the statute to enhance public safety, and "[e]specially if bicycle accidents were a specific occasion for the public demand for the statute," Justice Breyer would interpret the statutory text to cover bicycles. *Id.* at 10.

170. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

contexts,"[171] and no one canon is dispositive.[172] Some examples of semantic canons are the purposive construction canon, which provides that ambiguous statutes should be interpreted "so as best to carry out their statutory purposes,"[173] and the whole text canon, which counsels against reading statutory phrases in isolation.[174] Examples of substantive canons include the federalism canon, which declares that courts "generally require a clear statement before finding that a federal statute 'alter[s] the federal-state balance,'"[175] and the presumption against implied repeals, which disfavors the repeal of a previously enacted statute absent an express statement of intent to do so.[176] While semantic canons focus on the particular language choice in the statute, substantive canons tilt interpretation toward a preferred policy outcome.[177]

1. Statutory Interpretation in the Appropriations Context

When interpreting appropriations measures, courts typically do not look beyond the text of the provision.[178] In 1978, the Supreme Court

171. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 36 (2016).

172. Further, a judge's personal theory of statutory interpretation—the predominating theories being strict textualism and purposivism—may influence the canons they invoke.

173. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 55 (2022) (citation omitted).

174. *Id.* at 57. Other examples of semantic canons include the harmonious reading canon ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."), the ordinary meaning canon ("Words should be given 'their ordinary, everyday meanings,' unless 'Congress has provided a specific definition' or 'the context indicates that they bear a technical sense.'"), and the presumption of validity ("'An interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*).' Stated another way, courts should construe statutes to have effect."). *Id.* at 52, 54-55 (citations omitted).

175. *Id.* at 57 (citation omitted); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 607 (1992) ("When a state's exercise of its police power is challenged under the supremacy clause, the Court 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'").

176. *See* BRANNON, *supra* note 173, at 59. Other examples of substantive canons include the canon of constitutional avoidance ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."), the presumption against retroactive legislation ("[C]ourts read laws as prospective in application unless Congress has unambiguously instructed retroactivity."), and the rule of lenity ("Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor."). *Id.* at 57, 59, 61-62 (citations omitted).

177. *See* BRANNON, *supra* note 173, at 28-34.

178. *See, e.g.*, United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016) ("It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history. 'An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history.'" (citations omitted)).

established that "the policy [disfavoring repeals by implication] applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act."[179] These principles are due in large part to the perceived nondeliberative nature of the appropriations process[180] as well as chamber rules "that encourage the separation of money and policy decisions."[181] Yet, "Congress regularly alters substantive law in appropriations acts,"[182] and courts have held that "Congress has the power to amend substantive legislation through appropriations riders if it does so very clearly."[183] In addition, appropriations riders "affect policy by stipulating for what purposes federal funds cannot be

179. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978).

180. SEAN M. STIFF, CONG. RSCH. SERV., R46899, REGULAR APPROPRIATIONS ACTS: SELECTED STATUTORY INTERPRETATION ISSUES 25 (2021) ("When the question is whether matter in an appropriations act affects provisions of [a] statute establishing substantive law, courts employ presumptions that are born of courts' understanding of the purpose and procedure behind regular appropriations acts."); *see, e.g.*, *Tenn. Valley Auth.*, 437 U.S. at 191-92 (rejecting corporation's argument that Congress's continued appropriation of funds for a development project that included the construction of a dam rendered the Endangered Species Act of 1973 inapplicable to the dam, reasoning that: "First, the Appropriations Committees had no jurisdiction over the subject of endangered species, much less did they conduct the type of extensive hearings which preceded passage of the earlier Endangered Species Acts, especially the 1973 Act. . . . Second, there is no indication that Congress as a whole was aware of [the corporation's] position, although the Appropriations Committees apparently agreed with [the corporation's] views.").

181. KEVIN P. MCNELLIS, CONG. RSCH. SERV., R44124, APPROPRIATIONS REPORT LANGUAGE: OVERVIEW OF COMPONENTS AND DEVELOPMENT 1, 16 (2021) (also noting that the rules restricting the inclusion of legislative provisions in appropriations measures do not apply to limitation provisions: "Because they affect only how an agency uses appropriated funds, limitation provisions are distinct from other forms of legislative provisions and are allowed under House and Senate rules."). Recent scholarship suggests that the justifications underlying the marginalization of appropriations interpretation is misguided. *See, e.g.*, Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1075 (2021) (arguing that "in public law doctrine, appropriations are ignored, pulled out for special legal treatment, or subjected to legal frameworks ill-suited for appropriations realities"); Daniel B. Rodriguez & Mathew D. McCubbins, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 671 (2005) (arguing that the canon of construction disfavoring legislative changes through the appropriations process "rests on an impoverished analysis of the appropriations process and is, therefore, unjustified as a matter of positive political theory").

182. STIFF, *supra* note 180 (citing Demby v. Schweiker, 671 F.2d 507, 512 (D.C. Cir. 1981)) (stating that, while such repeals "are infrequent," they occur in "every session by Congress"); *see, e.g.*, City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 423 F.3d 777, 780-81 (7th Cir. 2005) (holding that an appropriations rider prohibiting the use of appropriated funds to disclose trace and multiple sales data and providing that "all such data shall be immune from legal process" amounted to a "change in substantive FOIA law in that it exempts from disclosure data previously available to the public under FOIA").

183. Last Best Beef, LLC v. Dudas, 506 F.3d 333, 335 (4th Cir. 2007); *see also* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) ("Although repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly." (citations omitted)); United States v. Dickerson, 310 U.S. 554, 555 (1940) ("There can be no doubt that Congress could suspend or repeal [an] authorization . . . and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." (citations omitted)).

used."[184]

When appropriations measures conflict with existing law, courts must determine whether Congress's decision to appropriate (or prohibit) funds for a specified purpose amounts to a change in the law. This determination depends chiefly "on the language of the appropriation and its relation to preexisting substantive law."[185] When the appropriation and the preexisting statute are irreconcilable such that the only reasonable interpretation is that the appropriation modifies substantive law, "a court will likely find that the appropriations act's text overcomes the 'very strong presumption'" against repeals by implication.[186]

III. DISCUSSION

In an increasingly divergent federal-state medical marijuana regime, the circuit split concerning the scope of the Rohrabacher-Farr Amendment is of mounting import. Although the Ninth Circuit's strict compliance approach is not implausible as a matter of statutory interpretation, the First Circuit's substantial compliance approach gives practical effect to the language in the amendment and better serves the evolving social policy surrounding medical marijuana legislation.

Part A of this Section argues that courts faced with interpreting the Rohrabacher-Farr Amendment should adopt the substantial compliance approach because it is a legitimate interpretation of the amendment as a matter of law, backed by several canons of construction and federalism principles. Next, Part B of this Section argues that the substantial compliance approach should be adopted because it helps effectuate the changing social policy around medical marijuana, which the strict compliance approach fails to achieve.

A. The Substantial Compliance Approach is Most Faithful to the Text and Purpose of the Rohrabacher-Farr Amendment and Restores Fundamental Principles of Federalism.

An interpretation of the Rohrabacher-Farr Amendment must begin with the plain meaning of its text.[187] The Rohrabacher-Farr Amendment states: "None of the funds made available under this Act

184. JAMES V. SATURNO, CONG. RSCH. SERV., R41634, LIMITATIONS IN APPROPRIATIONS MEASURES: AN OVERVIEW OF PROCEDURAL ISSUES 6 (2016).

185. STIFF, *supra* note 180, at 26.

186. *Id.* at 28.

187. *See* discussion *supra* Part II.D.

to the Department of Justice may be used" to prevent any state who has legalized medical marijuana "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[188] The operative verb is "implement[],"[189] and as the Ninth Circuit observed, to implement a law means to give it practical effect.[190] Therefore, by a plain reading of its text, the Rohrabacher-Farr Amendment prohibits the DOJ from using any allocated funds to prevent the states that permit medical marijuana from giving practical effect to their laws "authoriz[ing] the use, distribution, possession, or cultivation" of the drug.[191] While ordinarily this plain reading would end the inquiry into the amendment's meaning,[192] the circuit split reflects ambiguity in its application.

The Ninth Circuit placed emphasis on the word "authorize," concluding that any act that does not strictly comply with the letter of all state laws and regulations relating to medical marijuana is unauthorized and therefore, opens the door to CSA enforcement, regardless of what remedies the state deems appropriate for that particular violation.[193] While technically the language of the rider can be interpreted this way, this interpretation fails to consider the language as a whole and the purpose behind the rider's continued inclusion in appropriations acts. The First Circuit's substantial compliance approach, on the other hand, is not only justified by the whole text canon and the purposive construction canon, [194] but also restores the proper balance of state and federal power in the medical marijuana sphere, together making this approach the superior interpretation.

Courts should interpret the Rohrabacher-Farr Amendment as suspending the CSA's application to conduct in substantial compliance with state medical marijuana laws and regulations. For any minor or inadvertent violations, only state law penalties should be available at the discretion of state law enforcement. This should be the case not only for those directly engaged with state-legal medical marijuana businesses, but also for financial institutions and other entities that provide services and support to these businesses. Conversely, when there is reason to suspect that an individual is hiding under the cover

188. Consolidated Appropriations Act, Pub. L. No. 117-328, § 531, 136 Stat 4459 (2022).

189. *Id.*

190. United States v. McIntosh, 833 F.3d 1163, 1176 (9th Cir. 2016).

191. *Id.* (quoting Consolidated Appropriations Act § 531).

192. *See* discussion *supra* Part II.D.

193. *McIntosh*, 833 F.3d at 1178.

194. The whole text canon counsels against reading statutory phrases in isolation, and the purposive construction canon provides that statutes should be interpreted "so as best to carry out their statutory purposes." *See* discussion *supra* Part II.D.

of state law to distribute marijuana unlawfully, or there are articulable grounds to suspect illegal interstate activity, as in *United States v. Bilodeau*,[195] the DOJ should not be precluded from using funds to enforce the CSA against such conduct.

Although the presumption against implied repeals holds added weight in the appropriations context,[196] here, Congress has made its intent clear, obviating any need to fall back onto such presumptions. The language of the Rohrabacher-Farr Amendment is diametrically at odds with the command of the CSA. While not expressly overturning the CSA's application to medical marijuana—and given its temporal nature, the rider should not be read to do as much—Congress has imposed a policy, through duly enacted legislation, that federal funds should not be spent in a manner that interferes with state medical marijuana laws. Put differently, for every fiscal year that the rider is included in appropriations, Congress has replaced traditional DOJ discretion regarding medical marijuana prosecutions with the states' judgment.

When the text of the Rohrabacher-Farr Amendment is read as a whole in light of this purpose, the substantial compliance approach better and more clearly effectuates its language. When something is authorized, it necessarily comes with conditions—here, the accompanying regulatory requirements and penalties for noncompliance. A state's chosen penalties are an integral component of the state's regulatory regime, reflecting the state's judgement as to the severity of and appropriate remedy for certain violations. Imposing draconian CSA penalties on even trivial violations of state law would distort state laws into something they are not. As such, granting states the discretion to enforce their own penalties for violations of their own laws is crucial to the states' ability to implement those laws.

Notably, the word "compliance" appears nowhere within the amendment's text; Congress did not decide that strict compliance alone is necessary for a state to implement its laws. Rather, Congress simply expressed an intent through more generalized language that the DOJ not interfere with state-authorized medical marijuana activity. By listing "use, distribution, possession, *or* cultivation,"[197] Congress presumably sought to protect the entire range of state-authorized medical marijuana activity. Because states draft, enact, and enforce their own laws, logically, they should decide when and how those laws should be enforced in a given situation to give their laws the desired

195. 24 F.4th 705 (1st Cir. 2022).

196. *See* discussion *supra* Part II.D.1.

197. Consolidated Appropriations Act, Pub. L. No. 117-328, § 531, 136 Stat 4459 (2022) (emphasis added).

effect.[198] The substantial compliance approach achieves this purpose.

Moreover, as discussed more fully in Part B below, the substantial compliance approach remedies the CSA's strong deterrent effect on individuals who desire to engage in good faith, state-authorized medical marijuana conduct. The looming threat of federal prosecution under the strict compliance approach instead frustrates states' ability to implement their laws authorizing the drug. This is because, in effect, the strict compliance approach judicially sanctions the expenditure of federal funds to target and investigate any state-legal business and wait for a slight slip up, like a permit renewed a day late, so that the business can be prosecuted for federal crimes even if the state deemed that a modest fee would be the appropriate remedy. As the Ninth Circuit recognized, but failed to account for in its interpretation, medical marijuana is a constantly evolving, highly regulated industry.[199] Thus, maintaining strict compliance with every regulatory requirement on any given day is nearly impossible, and an unrealistic expectation at the least. The strict compliance approach therefore breeds a strong and undesirable chilling effect that discourages citizens from engaging in legitimate, state-legal markets.

Also relevant is the fact that, for most of history, marijuana legislation was left to the states.[200] Only when the CSA was promulgated pursuant to the Commerce Clause power—at a time when all fifty states had already adopted legislation outlawing the drug[201]—did the federal government declare marijuana illegal. Yet, as Justice O'Connor astutely observed in her dissent in *Gonzales v. Raich*,[202] the decision whether to permit medical marijuana falls squarely within the states' core police power as a matter of "health, safety, and welfare" to be decided by the people of the state.[203] Further, Justice Thomas recently criticized the federal government's "contradictory and unstable" approach toward marijuana as "strain[ing] basic principles of federalism and conceal[ing] traps for the unwary."[204]

Although the Court in *Gonzales* upheld application of the CSA to state-authorized conduct, importantly, Congress's expressed objectives regarding state-authorized medical marijuana activity have

198. This proposition is supported by the sentiments the amendment's primary sponsors, Representatives Rohrabacher and Farr, expressed in their letter to the former attorney general. *See supra* note 134.

199. United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

200. *See* discussion *supra* Part II.A.

201. Leary v. United States, 395 U.S. 6, 16 n.15 (1969).

202. 545 U.S. 1 (2005).

203. *Id.* at 42 (O'Connor, J., dissenting).

204. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021) (Thomas, J., concurring).

since shifted. The federalism canon protects state authority even when Congress *could* invade that realm if it did so clearly, [205] as it did in 1970 with the enactment of the CSA. Since 2015, however, Congress has clearly elected to recognize and respect states' decisions in this rapidly shifting area of social policy through the inclusion of the Rohrabacher-Farr Amendment in appropriations. Accordingly, the Rohrabacher-Farr Amendment should be read to allow states to police their *own* laws. State law enforcement can alert the DOJ when conduct is not satisfactorily compliant such that federal prosecution is appropriate, and the DOJ can instead concentrate CSA enforcement efforts on true interstate activity. This interpretation rightfully restores this experimental social policy issue to state police power while restraining CSA enforcement efforts to actual interstate activity. Although use of the Commerce Clause power to regulate even intrastate activity is undisputed,[206] the federal policing of state laws in order to enforce a federal law with an entirely opposite objective undoubtedly interferes with the states' ability to implement their own laws authorizing medical marijuana.

In sum, the strict compliance approach gives the federal government the green light to essentially waste limited federal resources to uncover any minute violation of an unfamiliar state law—a perverse incentive at odds with fundamental federalism principles and Congress's expressed intent through the language and purpose of the Rohrabacher-Farr Amendment—while the substantial compliance approach allows states to effectively implement their laws in their entirety.

B. The Substantial Compliance Approach Gives Practical Effect to the Rohrabacher-Farr Amendment and Better Effectuates the Changing Social Policy Surrounding Medical Marijuana.

Within the past thirty years, marijuana cultivation and use has evolved from a dual-sovereignty criminal endeavor to a state-sanctioned medical practice in nearly three-quarters of the states.[207] While Congress has not quite reached the consensus necessary to formally reschedule or remove marijuana from the CSA, recent legislative efforts indicate this is where it is headed.[208] Although

205. *See* BRANNON, *supra* note 173, at 57. The federalism canon provides that courts "generally require a clear statement before finding that a federal statute 'alter[s] the federal-state balance.'" *Id.*

206. *See supra* note 50.

207. *See* discussion *supra* Part II.A-B.

208. *See, e.g.*, Blackburn, *supra* note 14; Reisman, *supra* note 120; Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022); Cannabis Administration and Opportunity Act, S. 4591, 117th Cong. (2022).

Congress could decline to include the amendment in subsequent appropriations or abandon efforts at re-scheduling the drug at any time, the Rohrabacher-Farr Amendment's inclusion in appropriations for the past nine years further indicates that Congress has no intention of interfering with states' decisions in this area.

Courts should adopt the substantial compliance approach to the Rohrabacher-Farr Amendment because it gives the appropriate practical effect to states' medical marijuana laws and helps actualize the changing social policy surrounding the drug. First, for states to implement their laws, it is essential that the prohibitively deterrent effect of the CSA be minimized to protect those who are engaged in good faith conduct from exposure to CSA penalties by allowing states to impose and enforce their own penalties in order to test the effectiveness of (and suitably modify) their experimental regulatory regimes. Second, the substantial compliance approach creates a more stable environment in which medical marijuana industries can operate, again allowing states to give full practical effect to their laws and further providing a foundation for the likely forthcoming national market.

The substantial compliance approach to the Rohrabacher-Farr Amendment allows patients to derive health benefits from medical marijuana without fear of federal prosecution for inadvertent non-compliance. Likewise, medical marijuana providers can invest in their own businesses and deal with other businesses safely and with assurance. Because the CSA was drafted at a time when marijuana was already illegal nationwide, its penalties are no longer proportionate considering the relaxed approach the DOJ has taken toward medical marijuana[209] and Congress's expressed intent in appropriations measures. Because businesses and providers are especially vulnerable to the CSA due to the heightened criminal penalties under its trafficking provisions,[210] the substantial compliance approach allows for a sufficiently flexible margin around state law such that the state can exercise its own discretion regarding the proper punishment for entities who fail to meet each and every regulatory requirement.

Further, the inability to obtain financing can act as an insur-mountable barrier for businesses who wish to operate in the medical marijuana industry. Construing the rider's applicability to prohibit the DOJ from spending funds to prosecute banks and other financial institutions that provide services to substantially compliant businesses allows those who wish to enter the industry to obtain the necessary

209. *See* discussion *supra* Part II.B.3.

210. *See* LAMPE, *supra* note 49.

financial support. The risk of federal prosecution for conspiracy, aiding and abetting, money laundering, and other financial crimes, as well as exposure to asset forfeiture, dissuades lending institutions from investing in these businesses with considerable magnitude.[211] Surely, a bank cannot be responsible for overseeing every aspect of a client's medical marijuana business. The substantial compliance approach protects financial institutions to the extent that they deal with legitimate, good faith businesses and allows states to give effect to their laws authorizing medical marijuana. Indeed, their laws cannot fully be implemented under the shadow of excessive and prohibitive federal penalties for even technical noncompliance. The inconsistencies in federal and state law and the accompanying penalties create the very "traps" Justice Thomas warned of as a result of the federal government's "half-in, half-out regime."[212] While the unduly and impractically narrow strict compliance approach only exacerbates this problem, the substantial compliance approach provides a more predictable environment in which medical marijuana industries can operate.

The common theme of stability underlies the concerns surrounding the federal-state dichotomy in marijuana law and policy. The Rohrabacher-Farr Amendment seeks to facilitate the shifting social policy by deferring to the states while marijuana's legal status remains in a transitionary period. One way in which the substantial compliance approach effectuates this purpose is by providing notice. In a jurisdiction that has adopted the substantial compliance approach, an individual engaged in state-authorized medical marijuana conduct is aware that, so long as they stay reasonably abreast of their state's regulatory requirements and maintain legitimate efforts to comply with such requirements, they will not be subject to prosecution under the CSA. Inversely, the strict compliance approach allows the federal government to substitute CSA penalties for state penalties at the discretion of any particular DOJ office.

Although it is not necessarily true that the DOJ will go after those in substantial compliance with state law under the strict compliance approach, as the First Circuit pointed out, the point is that they *can*.[213] For those attorneys general that disagree with a state's chosen policy, their prosecutorial discretion would make this a very real possibility, hinging vulnerability to federal prosecution on the political values of any individual prosecutor rather than on the culpability of the

211. *See* discussion *supra* Part II.B.2.

212. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021) (Thomas, J., concurring).

213. United States v. Bilodeau, 24 F.4th 705, 714 (1st Cir. 2022).

individual or whether the prosecution would interfere with the state's ability to implement its laws. Further, the Ninth Circuit has held that the Rohrabacher-Farr Amendment does not bar the DOJ from spending funds to determine whether the rider is applicable to a given prosecution.[214] The substantial compliance approach would deter prosecutors from pursuing criminal charges when the issue of compliance is a close call, properly allowing state law enforcement to determine how their laws should be enforced in such a situation.

The strict compliance approach poses concerns of instability not only for medical marijuana operators themselves, but also for their employees. The cannabis industry today supports nearly half a million jobs and continues to grow at an exponential rate.[215] As federal prosecution of business owners could shut down entire operations, the strict compliance approach puts hundreds of thousands of individuals at risk of losing their income and professional livelihood over something as small as a managerial or clerical error. As a result, the strict compliance approach effectively allows federal prosecutors to penalize employees merely for their employer's oversight. This prospect not only further deters those who wish to engage in the medical marijuana industry from participating in the state-sanctioned market, but it also punishes individuals who have not engaged in culpable conduct.

At its core, the Rohrabacher-Farr Amendment represents Congress's judgment that prosecuting state-authorized medical marijuana conduct is not only *not* a fiscal priority, but by prohibiting the use of funds outright, is not the DOJ's concern at all. Over the years, Congress has drawn from the taxing power,[216] the interstate commerce power,[217] and now the power of the purse[218] to regulate the production and use of medical marijuana. State laws authorizing medical marijuana simply do not pose an obstacle to Congress's most recently expressed objectives. While zealous enforcement of the CSA toward minor regulatory violations under the strict compliance approach would effectively abrogate states' experimental regimes, the broader substantial compliance approach is faithful to the text and spirit of the amendment—that the federal government take a hands-off approach in states that have legalized medical marijuana, allowing states to implement their own regulatory regimes.

214. United States v. Pisarski, 965 F.3d 738, 742 (9th Cir. 2020).

215. Herrington, *supra* note 7.

216. *See* discussion *supra* Part II.A.

217. *Id.*

218. *See* discussion *supra* Part II.C.

IV. CONCLUSION

Individuals acting in substantial compliance with their state's medical marijuana laws should be shielded from the federal government's punitive reach. For nearly a decade, Congress has allowed the states to take the reins on this important public health issue and execute their own carefully drafted medical marijuana legislation. Now a flourishing, billion-dollar industry, it appears that the marijuana market is here to stay.

The substantial compliance approach to the Rohrabacher-Farr Amendment better effectuates the text and purpose of the amendment, restores the proper balance of state and federal power in the medical marijuana sphere, and creates a predictable legal environment that is critical for states to adapt and uphold their medical marijuana laws to best serve the needs of their people. Enacted during a nationwide drug panic, the CSA's provisions flatly outlawing marijuana are antiquated and fail to pass muster under today's growing scientific understanding and evolving public opinion of the drug, making it inappropriate to expend federal funds to accord the CSA its full weight against those who engage in only minor violations of state laws implemented with Congress's consent.