RISKING A CONTACT HIGH: THE TENTH CIRCUIT'S FAILURE TO DEFER TO COLORADO'S MARIJUANA LAWS

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ABSTRACT

Current federal supremacy regarding resolution of contradicting state and federal law on the regulation of marijuana fails to solve the diverse inefficiencies created by the disparate treatment and affects broad industries. The proposed "solutions" considered by Congress, such as the SAFE Act, do not resolve all the issues. This Article, therefore, proposes either (a) under the Controlled Substances Act (CSA), marijuana be re-scheduled; or (b) a judicial challenge to *Gonzales v. Raich* is mounted. Due to the already problematic foundations of that decision and the changed composition of the court, a carefully crafted challenge may succeed.

The federal circuit courts, as illustrated through the Tenth Circuit Court of Appeals in this Article, are unwilling and unable to resolve the broad implications of the current state of federal law. The Tenth Circuit's recent decision in *Standing Akimbo, LLC v. United States* warrants a renewed investigation of marijuana-adjacent risks and obligations based on the inconsistent state and local statutory and regulatory schemes. *Standing Akimbo* addresses the obligation of the state and individuals to provide the Internal Revenue Service (IRS)—a federal investigative agency—with certain information about marijuana businesses, even when doing so risks incriminating the business. Specifically, the IRS refused to provide immunity to the marijuana business despite the fact that the IRS could not request any information, let alone the plant reports and licensing information it actually sought, for an investigation of drug offenses. While the case's holdings for marijuana businesses and the state are unambiguous, how the Tenth Circuit is trying to handle the disparate nature of state and federal law, consistent with other precedent investigated herein, greatly impacts those marijuana-adjacent businesses seeking to be compliant with all laws.

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The interpretation of Colorado law, at Section II.E. in the *Standing Akimbo* opinion, also demonstrates the Tenth Circuit's reticence to currently offer any protection under state law. Again, as an example, the data at issue in *Standing Akimbo* had only tangential relevance to the tax issue and unequivocally enjoyed some level of confidentiality under state law. In two short paragraphs that do not analyze the state law's purpose, nor review the statutes in place at any other relevant time periods, the Tenth Circuit avoids giving deference to the state's interest in protecting businesses complying with state law. Again, this stance by the Tenth Circuit provides insight into the protections (or lack thereof) marijuana and marijuana-adjacent businesses can expect to gain by compliance with state law. This Article proposes rescheduling marijuana through congressional action or revisiting *Raich* and providing greater deference to state regulation as methods to address this ongoing issue.

TABLE OF CONTENTS

INTRODUCTION

Federal courts continue to demonstrate antipathy towards the marijuana industry and the states' ability to regulate the same, adding uncertainty and risk into a variety of adjacent businesses. This Article briefly investigates the federalism issue as determined in *Gonzales v. Raich*[1] before investigating the implications on Colorado and Tenth Circuit case law. The Article then investigates the broad industries and persons affected by the disparate treatment under state and federal law. The diverse implications highlight that the proposed, narrowly tailored fixes currently before Congress, themselves stalled, will not resolve all issues. The Article then proposes two solutions to actually provide the states with governing authority, including a public policy analysis indicating why such a result is desirable.

Despite the expansion of various marijuana economies across the country, current jurisprudence does not allow the states to regulate the implications of the marijuana industry on the overall state regulatory and economic environment. By way of example, a recent Tenth Circuit Court of Appeals decision, *Standing Akimbo, LLC v. United States*,[2] finds that despite state laws confirming confidentiality and minimal relevance of certain information collected by the state on marijuana operations to federal tax investigations, disclosure of sensitive business information to the IRS may still be required.[3] The IRS is a part of the Department of Treas-

1. 545 U.S. 1 (2005).
2. 955 F.3d 1146 (10th Cir. 2020).
3. *Id.* at 1159–60.

ury, whose mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."[4] The IRS describes their role as "help[ing] the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share."[5] Broadly, the purpose of the IRS is to collect taxes. While protections exist to protect the use of information disclosed in IRS proceedings from being used in criminal proceedings, the IRS required the State of Colorado to disclose potentially incriminating information about its regulated marijuana businesses.[6] As explained in Section I.B.1 below, the information the IRS stated that they needed seems to be beyond their mission. Additionally, the IRS refused to grant any immunity for actions discovered from the marijuana information obtained from the State of Colorado.[7] While this ruling was supported by language in the statute, the grounds considered by the Tenth Circuit, and the court's antipathy towards protections under Colorado law, demonstrate an unwillingness to allow the states to regulate their own businesses.[8]

The Tenth Circuit's antipathy is worth examining for three reasons. First, the marijuana industry represents billions of dollars of business and state tax revenue.[9] The amount of money and state tax revenue generated directly by marijuana sales only represents the tip of the iceberg of the overall economic impact, as diverse industries operate adjacent to the marijuana industry.[10] Second, based on the U.S. Supreme Court's decision in *Raich*, which held that state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting its use and possession, lower courts appear to accept the federal government's ability to so regulate.[11] Finally, the antipathy of the federal system deprives citizens and businesses of the right to rely on state law.[12] Absent congressional action, marijuana-adjacent businesses—those that do not directly sell or participate in the marijuana industry but may come across it as part of the supply chain or dealing with its cash flow—continue to risk criminal and civil liability under federal law and possibly risk a legal obligation to betray the confidence of their marijuana clients.

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4. *The Agency, its Mission and Statutory Authority*, INTERNAL REVENUE SERV., https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last updated Sept. 28, 2020).

5. *Id.*

6. *Standing Akimbo*, 955 F.3d at 1167–69.

7. *Id.* at 1161–62.

8. *Id.* at 1166–68.

9. *See* OFF. OF RSCH. AND ANALYSIS, COLO. DEP'T OF REVENUE, COLORADO DEPARTMENT OF REVENUE MARIJUANA SALES HISTORY REPORT JANUARY 2014 TO DATE 1–2 (2020) [hereinafter COLORADO MARIJUANA REVENUE]; *see also* Carina Julig, *Colorado Surpasses $1 Billion in Marijuana Tax Revenue*, DENV. POST (June 12, 2019, 11:06 PM), https://www.denverpost.com/2019/06/12/colorado-marijuana-revenue-one-billion/.

10. *See* discussion *infra* Section II.B.

11. Gonzales v. Raich, 545 U.S. 1, 9, 39–42 (2005).

12. *See* Young v. Larimer Cnty. Sheriff's Off., 356 P.3d 939, 942–43 (Colo. App. 2014).

This Article surveys the impact that the uncertainty around federal marijuana law has on a variety of businesses and proceeds in the following manner. First, this Article will discuss the CSA and its impact on marijuana-adjacent businesses through an analysis of the Supreme Court decision in *Raich*, along with recent precedent and its relation to marijuana-adjacent businesses. Then, this Article will review the relevance of the marijuana industry, including a detailed history and background of banking regulations and the marijuana industry. This Article concludes with proposals and the public policy arguments for a need for action in order to create a path forward for marijuana-adjacent businesses.

I. CURRENT STATE OF THE LAW

A. Gonzales v. Raich*: Supreme Court Determines Federal Law Appropriate Through Intrastate Commerce, and Therefore Supreme*

Despite the fact that the regulation of marijuana and other drugs is not an enumerated power of the federal government, the federal government has implemented a comprehensive drug regulation scheme.[13] The CSA places all substances that are regulated by the federal government into one of five schedules.[14] Marijuana is considered a Schedule I drug, which means it has "no currently accepted medical use and a high potential for abuse."[15] Once a drug is scheduled, it is considered a controlled substance.[16] The CSA prohibits a variety of acts with controlled substances, including the manufacturing, distributing, and dispensing of marijuana, or aiding and abetting the same.[17]

The right of the federal government to regulate a completely intrastate scheme on marijuana rests on a 2005 decision of the U.S. Supreme Court in *Raich*.[18] In a split decision, four justices (generally thought to make up the liberal wing of the Court at that time) were joined by Justice Kennedy in announcing the rule that the federal government, through the Commerce Clause of the Constitution, could regulate purely *intra*state marijuana regulatory schemes through *inter*state commerce jurisprudence, and that the CSA was a valid exercise of that power.[19] *Raich* arose from California's medical marijuana regulatory scheme.[20] Respondents in the case cultivated and consumed the marijuana completely within the bounds of California.[21] Still, the majority found that the legislative pur-

13. *See* Controlled Substances Act, 21 U.S.C. §§ 801–904 (2018).
14. *Id.* § 812.
15. *Drug Scheduling*, U.S. DRUG ENF'T AGENCY, https://www.dea.gov/drug-scheduling (last visited Dec. 21, 2020); *see also* 21 U.S.C. § 812(b)(1).
16. *See* 21 U.S.C. § 802(6).
17. *Id.* §§ 841–844; *see also* discussion *infra* Section I.B.
18. Gonzales v. Raich, 545 U.S. 1, 33 (2005).
19. *Id.* at 9, 17–18. While Justice Scalia concurred in judgment, he wrote separately to note that his view of the Commerce Clause was more nuanced. *Id.* at 33–42 (Scalia, J., concurring).
20. *Id.* at 5–7 (majority opinion).
21. *Id.* at 6–7, 9.

pose of regulating the *inter*state market for marijuana gave authority for the CSA and made it the supreme law on the subject.[22]

While the decision was nominally 6–3, the dissents, and even the concurrence, indicate that the Court viewed the precedent as difficult to reconcile with contemporary Commerce Clause jurisprudence. Writing for a block of conservative dissenters, Justice O'Connor stated, "[i]n my view, the case before us is materially indistinguishable from [cases failing to find federal authority to regulate *intra*state activity] when the same considerations are taken into account."[23] Relevant to the originalist/textualists on both sides of the political spectrum who have joined the Court since 2005, Justice Thomas's concurrence stated, "[r]espondents' local cultivation and consumption of marijuana is not 'Commerce . . . among the several States.'"[24] Deciding conservative votes, specifically Justices Kennedy and Scalia, have been replaced on the bench.[25] Justice Kagan has also confirmed the need to deal with the original text of the Constitution.[26] A modern presentation of the fact pattern in *Raich* may yield a different outcome.

B. Recent Precedent in Colorado Courts, Federal Court, and Bankruptcy Courts Demonstrates the Inability of States to Provide Unique Regulation and Protection to Marijuana-Adjacent Businesses

As discussed below, recent Colorado precedents demonstrate that the federal judiciary is unwilling to defer to the state regulatory scheme and is committed to the proposition that marijuana's illegality implicates the adjacent businesses.[27]

1. *Standing Akimbo, LLC v. United States*: Federal Court Recently Continues to Demonstrate Disregard for State Regulatory Interests

In a case recently before the Tenth Circuit Court of Appeals, the court continued to advance its position that the federal illegality of marijuana required interpreting state law in such a manner as to not deprive federal authorities of investigative power within the industry.[28] The IRS conducted an investigation of Standing Akimbo, LLC, a marijuana dis-

22. *Id.* at 18–22.
23. *Id.* at 45 (O'Connor, J., dissenting).
24. *Id.* at 58 (Thomas, J., dissenting).
25. *See, e.g.*, Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 2:47 PM), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court; *see also* Sheryl Gay Stolberg, *Kavanaugh is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.
26. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Nominee to be Solicitor General, Department of Justice).
27. *See* Standing Akimbo, LLC v. United States, 955 F.3d 1146, 1166–68 (10th Cir. 2020).
28. *See id.*

pensary operating legally under state law, to enforce federal tax code.[29] The IRS conducted a civil audit of the business's owners to verify their tax liabilities.[30] "[C]laiming to fear criminal prosecution, the [business owners] declined to provide the audit information to the IRS."[31] The IRS sought "information elsewhere [and] . . . issued four summonses for plant reports, gross-sales reports and license information to the Colorado Department of Revenue's Marijuana Enforcement Division (the "Enforcement Division"), which is the state entity responsible for regulating licensed marijuana sales."[32] After motions practice, the district court granted the motion to dismiss and ordered the summonses enforced; the Tenth Circuit affirmed.[33]

Standing Akimbo, therefore, addresses the obligation of the state and individuals to provide the IRS with certain information about marijuana businesses, even where that risks incriminating the business.[34] Specifically, the IRS refused to provide immunity to the marijuana business despite the fact it could not request the information for an investigation of drug offenses.[35] The case stands for the proposition that the state must provide the requested documents to the IRS.[36] In reaching this conclusion (and despite its assertion that it was not necessary to reach the conclusion), the court expressly rejected the marijuana entity's contentions that the marijuana entity was not violating the CSA.[37] The federal judiciary continues to create opportunities to demonstrate its view on the illegality of marijuana and marijuana-adjacent businesses in Colorado.

This contrasts dramatically with the court's willful avoidance of nuances in Colorado law and case facts which would protect such businesses. While the case's holding for marijuana businesses and the state are unambiguous, two aspects of the opinion give insight into how the Tenth Circuit attempted to handle the disparate nature of state and federal law and impacts those marijuana-adjacent businesses seeking to be compliant with all laws. The Tenth Circuit continues to avoid directly ruling on the tension created by voluntarily reporting to the state activities done under the color of state law, which are illegal under federal law, and for which the federal courts recognize no protection.[38] Specifically, the court avoided a precedential ruling on the value of the data sought.[39] The IRS was seeking, in relevant part, the Enforcement Division's Marijuana En-

29. *Id.* at 1151.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 1151, 1153.
34. *See id.* at 1151–53.
35. *See id.* at 1161.
36. *Id.* at 1168–69.
37. *Id.* at 1158.
38. *See id.* at 1158–60.
39. *See id.* at 1160.

forcement Tracking Reporting Compliance (METRC) system.[40] At least before review by the district court judge, the marijuana entity raised the issue that such data was not relevant.[41] Still, the Tenth Circuit's primary holding was that this argument had not been preserved because it was not raised below.[42] While the Tenth Circuit continued with dicta that such a showing would not have changed the ultimate result, it avoided reliance on the statutory language enacted by the state through this choice in crafting its opinion.[43] In the end, even the dicta showed hostility towards the state's right to regulate the industry, as the Tenth Circuit found the data inherently relevant simply because it showed involvement in marijuana trafficking.[44] Finally, and to clarify the intentional nature with which the Tenth Circuit utilized procedural inconsistencies to avoid a precedential ruling on the state's ability to protect the industry information, the Tenth Circuit found that the district court had improperly considered the pleading as a motion to dismiss when it should have been considered a motion for summary judgment.[45] While the Tenth Circuit claimed the ability to still rule regardless of this error,[46] common sense suggests the evidence the parties felt appropriate for briefing at the trial court level was affected, as was the preservation of arguments. The court avoided precedential rulings on the state's regulatory scheme.

The court was explicit about its use of procedural measures to avoid ruling on the legitimacy of the state's purpose in regulating the marijuana industry.[47] In a footnote, the court deemed the appellant to have waived the argument that the IRS was intentionally trying to disrupt the state's marijuana scheme.[48] It claimed these arguments were waived because they were first raised in a procedural letter.[49] This was a "punt" as the Tenth Circuit had an ample record to rule on the merits of the case if it so desired, as such considerations permeated the decision on appeal.[50] The court avoided the opportunity to both investigate whether the federal government was so interfering with the state regulatory scheme and if such interference was appropriate.

The court similarly avoided ruling on the state's legitimacy in protecting certain information and obtaining disclosure of information from

40. *Id.* at 1152.
41. *Id.* at 1159.
42. *Id.*
43. *See id.* at 1159–60.
44. *See id.* at 1160 (emphasis added).
45. *Id.* at 1155.
46. *Id.* at 1155–56.
47. *See id.* at 1155–61.
48. *Id.* at 1158 n.9.
49. *Id.*
50. *See* Standing Akimbo, LLC v. United States, No. 17-mc-00169-WJM-KLM, 2018 WL 6791104, at *4 (D. Colo. Aug. 6, 2018); Order Adopting Aug. 6, 2018 Recommendation Denying Petitioners' Petition to Quash Summons and Granting Respondent's Motion to Dismiss Petition and Enforce Summonses, No. 17-mc-00169-WJM-KLM, 2018 WL 6791071, at *1 (D. Colo. Dec. 10, 2018).

marijuana-adjacent businesses. While pejoratively dismissing the argument as a "last attempt to assert a defense to enforcement," the Tenth Circuit could not avoid the marijuana entity's argument that disclosure of the sought information constituted a state misdemeanor.[51] In two short paragraphs that do not analyze the state law's purpose, nor review the statutes in place at any other relevant time periods, the Tenth Circuit avoided giving deference to the state's interest in protecting businesses complying with state law.[52] In fact, the court relied on the current version of the law restricting disclosure allowing for certain exceptions.[53] However, the statute in place at the time the documents were sought stated, "[a]ny person who discloses confidential records or information in violation of the provisions of this article commits a class 1 misdemeanor."[54] The court completely ignored this historical regulation.[55] Again, the choices in how to craft such a decision by the Tenth Circuit provides insight into the protections (or lack thereof) marijuana-adjacent businesses can expect to gain by compliance with state law.

2. Bankruptcy Court's Treatment of Marijuana-Related Matters

Much of the Tenth Circuit's treatment of marijuana cases has been borne out through bankruptcy cases. As Colorado's Chief U.S. Bankruptcy Judge Michael Romero explained, "[i]f the uncertainty of outcomes in marijuana-related bankruptcy cases were an opera, Congress, not the judiciary, would be the fat lady."[56] Courts consistently hold that marijuana is still illegal.[57] However, the various remedies and how the court sidesteps illegality of marijuana in its interpretation of various other aspects of the law continue to muddy the waters, and will continue to do so, until Congress acts.

In re Malul,[58] one of the most recent cases on bankruptcy and marijuana, provides an overview of bankruptcy protections, or lack thereof, for marijuana and marijuana-adjacent businesses.[59] In *Malul*, a debtor and other investors sued on a subscription agreement for a marijuana company, set up to cultivate and sell medical marijuana to dispensaries in Colorado.[60] In addition to marijuana plants, the money was used for "growing equipment . . . and related business services."[61] When the bankruptcy court reviewed the debtor's motion to reopen the case, the court had concerns that the "case would require [the court to order] ad-

51. *See Standing Akimbo*, 955 F.3d at 1166–67.
52. *See id.* at 1166–68.
53. *Id.*
54. COLO. REV. STAT. § 12-43.3-201 (2017) (repealed 2018).
55. *See Standing Akimbo*, 955 F.3d at 1166–67.
56. *In re* Malul, 614 B.R. 699, 701 (Bankr. D. Colo. 2020).
57. *Id.* at 706–07.
58. 614 B.R. 699 (Bankr. D. Colo. 2020).
59. *See id.* at 706–14.
60. *Id.* at 701–02.
61. *Id.* at 702.

ministration of marijuana assets, which [are] illegal under Federal Law."[62] "However, in the Reopen Supplement, Malul expressly represented, on the Petition Date, 'there existed no tangible assets or claims against third parties related to the marijuana industry.'"[63] The court then entered an order to conditionally reopen the bankruptcy case based on the debtor's representations.[64]

This illustrates how, even though the bankruptcy court had full knowledge that the matter underlying the subscription agreement was marijuana related, the court was still willing to engage and evaluate the claims. "[T]he assets at issue '[were] unvested rights to proceeds derived from the sale of marijuana[.]'"[65] The court-appointed trustee maintained that this still constituted illegal activity.[66]

The court reasoned that this case was not easily dismissed under the CSA because a subscription agreement does not require the active producing, distributing, or selling of marijuana, as it is instead a "roundabout connection to the marijuana industry, arising indirectly through [Debtor's] ownership interest."[67]

Malul cites *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*,[68] which presented a similar issue of a court ruling on the validity of an insurance contract that insured marijuana plants.[69] In *Green Earth Wellness*, a store owner sued an insurance company to pay out its policy for marijuana plants damaged in a fire.[70] The court ruled on the insurance policy itself and failure to honor a contractual agreement, not on the underlying fact that the items insured were marijuana plants.[71] This was a departure from prior case law because the court did not declare the insurance contract void on public policy grounds, stating that the party "entered into the Policy of its own will, knowingly and intelligently, [and] is [therefore] obligated to comply with its terms or pay damages for having breached it."[72] The court's reasoning in *Green Earth Wellness* created a "distinction between ordering [an] insurer to pay for damages to specific items [like] marijuana plants[, which are illegal,] and merely ordering compliance with the contract," which did not reference the existence of a marijuana asset and thus is legal.[73]

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62. *Id.* at 703.
63. *Id.*
64. *Id.* at 703–04.
65. *Id.* at 704.
66. *Id.* at 705.
67. *Id.* at 706.
68. 163 F. Supp. 3d 821 (D. Colo. 2016).
69. *Malul*, 614 B.R. at 707–08 (citing *Green Earth Wellness*, 163 F. Supp. 3d at 823, 834–35).
70. *Id.* at 707.
71. *Id.*
72. *Id.* (quoting *Green Earth Wellness*, 163 F. Supp. 3d at 835).
73. *Id.* at 708.

In *Malul*, the court also relied on a case from the U.S. District Court for the Northern District of Texas where a company "solicited fund[s] for their medical marijuana business."[74] When the deal fell through, the investor sued.[75] In that case, the court noted that repayment of the promissory notes would not require the company to "manufacture, distribute, dispense, or possess marijuana. In other words, even if the promissory notes concern an illegal object (i.e., a violation of the CSA), it is possible for the Court to enforce the Notes in a way that does not require any party to engage in illegal conduct."[76]

The Texas case and *Green Earth Wellness*:

> [S]tand for the proposition [that] contracts that can be performed without violating the CSA are likely enforceable even if the transaction's subject matter involves CSA violations. In both cases, the underlying contracts would require no more than the payment of money, which is not *per se* illegal under federal law.[77]

This advancement in adjudication of marijuana claims indicates that the court and prosecutors have abandoned the position that the contracts are void on their face, as a matter of public policy, because marijuana is a controlled substance under the CSA. A reasonable person of ordinary intelligence can clearly decipher that these payments directly relate to the purchase, sale, and manufacturing of marijuana—a CSA violation. However, this is good news for the marijuana industry. While federal courts have made it clear they will not legalize marijuana outright, they have indicated an acceptance of the industry and willingness to enforce contracts as long as the court can have a "clean conscience" that they did not directly rule on marijuana or marijuana assets.[78]

As *Malul* noted:

> While *Green Earth Wellness* confirms the legality of a contract to replace destroyed marijuana plants with currency of equal value, *Green Earth Wellness* also stands for the inverse proposition that a contract promising to replace lost marijuana plants with substitute plants, rather than their value, would be illegal and unenforceable. *Burton*, then, stands for the proposition that a bankruptcy judge may exercise his discretion to terminate a bankruptcy case involving prosecution of legal claims of this type.[79]

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74. *Id.*
75. *Id.*
76. *Id.* (quoting Ginsburg v. ICC Holdings, LLC, No. 3:16-CV-2311-D, 2017 WL 5467688, at *8 (N.D. Tex. Nov. 13, 2017).
77. *Id.* at 709.
78. *See id.* at 703.
79. *Id.* at 711.

In re Burton,[80] another case *Malul* cited to, is a Ninth Circuit case where a plaintiff pursued claims on a security agreement, even though a business was no longer operational.[81]

The judge in *Malul* used his discretion to rule that the security interest in and of itself was per se illegal.[82] That being said, the case still stands for the notion that as long as one's connection to the marijuana industry is two or more steps removed, the contract is likely enforceable. As a matter of public policy, does this not simply encourage a creation of various shell companies that will preserve one's rights? Is a complex web of empty or relatively meaningless corporate entities what is truly desired?

As Judge Romero concluded, "[u]ltimately, participants in the marijuana industry will continue to experience difficulty and uncertainty in predicting the outcome of any particular marijuana-related bankruptcy case unless and until Congress provides a legislative solution to the divergent federal and state drug laws."[83]

3. State Court View of Federalism Issues

a. *Young v. Larimer County Sheriff's Office*: State Courts Concede Current State of the Law Requires Deference to Federal Law

Even state courts appear reticent to grant protection under the state regulatory scheme. In a leading state court precedent on the taking of marijuana-related property, the Colorado Court of Appeals found it an inescapable consequence of the federal illegality of marijuana that a party could not have a federal property interest in the marijuana, therefore depriving that party of protection under 42 U.S.C. § 1983 and the Constitution.[84] In *Young v. Larimer County Sheriff's Office*,[85] Kaleb Young, the subject of a search and seizure of marijuana plants, was authorized, by state law, to have marijuana plants to treat a debilitating medical condition.[86] "Young leased property where [, under color of state law,] he grew marijuana plants and distributed marijuana for medical use."[87] "After obtaining search warrants, sheriff's deputies entered Young's property and seized forty-two marijuana plants by cutting them off just above the roots[,] . . . kill[ing] the plants."[88] Mr. Young was acquitted of all charges and the verdict, based on the Medical Marijuana Amendment,

80. 610 B.R. 633 (B.A.P. 9th Cir. 2020).
81. *See id.* at 634–37.
82. *Malul*, 614 B.R. at 713.
83. *Id.* at 714.
84. Young v. Larimer Cnty. Sheriff's Off., 356 P.3d 939, 943 (Colo. App. 2014).
85. 356 P.3d 939 (Colo. App. 2014).
86. *Id.* at 940.
87. *Id.*
88. *Id.*

required the plants be returned.[89] Mr. Young brought suit for destruction of his plants under takings and civil rights claims.[90] The court found that because the plants were illegal under federal law, despite the state regulatory scheme, Mr. Young had no possessory interest in the plants and could not maintain his claims.[91]

b. *Coats v. Dish Network, LLC*

The *Young* decision was later implicitly endorsed by the Colorado Supreme Court.[92] In *Coats v. Dish Network, LLC*,[93] the Colorado Supreme Court faced the question of whether the petitioner, Brandon Coats, could be fired for consuming marijuana during his nonworking hours.[94] While the decision rested on definitions inherent in Colorado's own law, the Colorado Supreme Court endorsed the position that an activity which is illegal federally cannot be a "legal activity" under state law.[95] Colorado law "generally makes it an unfair and discriminatory labor practice to discharge an employee based on the employee's 'lawful' outside-of-work activities."[96] "Coats is a quadriplegic and has been confined to a wheelchair since he was a teenager. In 2009, he registered for and obtained a state-issued license to use medical marijuana to treat painful muscle spasms caused by his quadriplegia."[97] Dish Network terminated Mr. Coats for using marijuana during his off hours.[98] "Coats then filed a wrongful termination claim against Dish under section 24–34–402.5, which generally prohibits employers from discharging an employee based on his engagement in 'lawful activities' off the premises of the employer during nonworking hours."[99] The Colorado Supreme Court found the termination proper as the activity was not "lawful" under federal law.[100] The Colorado Supreme Court, like the federal courts, did not find that the state regulatory scheme offered unique protection.[101]

While the decision nominally gave businesses extra freedom in employment decisions, as seen throughout this Article, it confirms the proposition that businesses cannot rely on the color of Colorado law to assure their interest and freedom from repercussions in marijuana-adjacent activity.

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89. *Id.*
90. *See id.*
91. *See id.* at 942–43.
92. *See* Coats v. Dish Network, LLC, 350 P.3d 849, 850 (Colo. 2015) (holding that the use of medical marijuana is not a "lawful" activity under federal law; therefore, it is not a "lawful" activity under Colorado state law).
93. 350 P.3d 849 (Colo. 2015).
94. *Id.* at 850.
95. *Id.*
96. *Id.*
97. *Id.*
98. *See id.* at 850–51.
99. *Id.* at 851. (citing COLO. REV. STAT. § 24-34-402.5(1) (2020).
100. *Id.*
101. *Id.*

II. RELEVANCE

The marijuana industry is wide-reaching in its economic impact and legal implications on various industries due to the tension inherent to business that is legal in a state but illegal federally. This Part provides a broad overview on marijuana's positive economic impacts; demonstrates the effect of federal regulations on marijuana-adjacent businesses such as law, real estate, security, and banking; and discusses the relevance of federal jurisprudence in this area.

A. Marijuana-Adjacent Business Are Economically Relevant

The financial impact of the marijuana business on Colorado's economy is large and continues to grow.[102] In 2019, the state recorded $1,747,990,628.00 in direct sales of marijuana alone.[103] As of April 2020, Colorado had $8,375,003,431.00 in total marijuana sales.[104] Marijuana retail also represents an "engine" for employment growth.[105] The Federal Reserve Bank estimated that within the first half of 2017 marijuana retail represented 5.5% of the total growth in Colorado employment.[106] The Federal Reserve Bank's study also estimated that "5.4 percent of all employment growth in Colorado [from] January 2014" to June 2017 was due to marijuana retail.[107] Colorado surpassed $1 billion in tax revenue collected from the sale of marijuana in 2019.[108]

Direct marijuana sales make up only a portion of marijuana's total economic impact.[109] While the indirect impact of the industry is difficult to reliably track, an industry-by-industry survey, detailed below, shows the breadth of impact on the Colorado economy.[110] Additionally, the review begins to hint at the uncertainty caused by the federal system generally, and the Tenth Circuit's antipathy towards the industry specifically.

B. Diverse Industries Face Ramifications from Uncertainty Created by Differences in Federal and State Marijuana Law

Diverse industries face uncertain ramifications from various levels of involvement with marijuana or marijuana-related industries. This Sec-

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102. *See* COLORADO MARIJUANA REVENUE, *supra* note 9, at 1–2.
103. *Id.* at 2.
104. *Id.*
105. Alison Felix & Sam Chapman, *The Economic Effects of the Marijuana Industry in Colorado*, FED. RSRV. BANK OF KAN. CITY (Apr. 16, 2018), https://www.kansascityfed.org/publications/research/rme/articles/2018/rme-1q-2018.
106. *Id.*
107. *Id.*
108. Julig, *supra* note 9.
109. Christopher Ingraham, *The Marijuana Industry Created More Than 18,000 New Jobs in Colorado Last Year*, WASH. POST (Oct. 27, 2016, 10:40 AM), https://www.washingtonpost.com/news/wonk/wp/2016/10/27/the-marijuana-industry-created-over-18000-new-jobs-in-colorado-last-year/.
110. *See* discussion *infra* Section II.B.

tion reviews the impact that disparate treatment by state and federal law has on legal, real estate, security, and banking industries.

1. Legal Practice

The tangential economic impact of the marijuana industry includes creating vast work for lawyers as diverse legal practices deal with marijuana related issues. Lawyers face issues related to the marijuana industry in various practice areas, such as corporate litigation, corporate transactional work, real estate, bankruptcy, criminal, family, and transactional law.[111] A recent Google search for "marijuana lawyers Colorado," for example, returned more than 2,050,000 results.[112] As demonstrated by Google's notation system and designation of results as "AD" content, that same search revealed lawyers using paid advertising and search engine optimization related to "Marijuana business lawyers," "Amendment 64 legal advice," "Cannabis law and policy," and "Cannabis business firm."[113]

Lawyers are faced with the inefficiencies and contradictions created by the disparities between federal and state law. These disparities, while certainly creating a robust market for legal services, have created complex ethical issues for lawyers in Colorado.[114] Through its publications American Bar Association has stated that,

> A lawyer does not violate the Model Rules of Professional Conduct, particularly Rules 1.2(d) and 8.4(c), by advising and/or representing a client in establishing, operating, or withdrawing from a medical or recreational business involving marijuana permitted by state law despite the existence of a conflict in laws between federal, state, and/or local jurisdictions.[115]

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111. *See, e.g.*, Giuliani v. Jefferson Cnty. Bd. of Cnty. Comm'rs, 303 P.3d 131, 134 (Colo. App. 2012); People v. Furtado, No. 15PDJ056, 2015 WL 7574128, at *1 (Colo. O.P.D.J. Nov. 2, 2015); *In re* Way to Grow, Inc., 610 B.R. 338, 342, 344–45 (D. Colo. 2019); *In re* Marriage of Parr, 240 P.3d 509, 510, 512 (Colo. App. 2010).

112. GOOGLE, https://www.google.com/search?q=marijuana+lawyers+colorado&oq=mar&aqs=chrome.0.69i59j69i57j0i131i433j46i131i433j69i60l4.1695j0j7&sourceid=chrome&ie=UTF-8 (last visited Jan. 19, 2021).

113. *Id.*

114. *See, e.g.*, Colo. Bar Ass'n Ethics Comm., Formal Op. 124 (2012); Colo. Bar Ass'n Ethics Comm., Formal Op. 125 (2013) (withdrawn 2014); *see also* COLO. RULES OF PRO. CONDUCT r. 1.2 cmt. 14 (Colo. Bar Ass'n. 2020).

115. Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over the Line?"*, 26 PRO. LAW. 20, 32 (2019). The Colorado Bar Association has reached the same conclusion through more formal mechanisms. As early as October 21, 2013, the Colorado Bar Association formally identified the potential ethical issues lawyers face when advising clients operating marijuana related businesses. While the Colorado Bar Association's formal ethics opinions are merely advisory, they are cited favorably as persuasive authority by Colorado courts.

The [Formal Ethics] Opinion stated in relevant part:

> "Circumstances in which the question [distinguishing permissible attorney conduct and prohibited conduct] arises are too various to permit a single, bright-line answer. It must

Wanting to provide more certainty than an informal opinion, the Colorado Supreme Court amended the Colorado Rules of Professional Conduct on March 24, 2014, to include comment 14.[116] The comment reads:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.[117]

At least for the practice of law in Colorado state courts, lawyers have formal guidance on what ethical practice entails.[118]

Still, as is the theme throughout this Article, the antipathy the federal courts show the state in its ability to regulate this marijuana-adjacent area removes that certainty, even for the profession most attuned to the impact of law on day-to-day life—lawyers.[119] This is due to the fact that federal courts have, at least partially, rejected Colorado's formal adoption of language in the ethical code.[120] Because of this rejection by the federal courts, uncertainty exists even though Colorado tried to provide clarity through formal adoption of a comment to its ethical code.[121]

This has real-world consequences for Colorado attorneys. And when the complications are increased by having a lawyer (working adjacent to the marijuana industry) interact with another marijuana-adjacent business that is regulated by federal law, it is little wonder that the nuances and contradictions have caused ethical missteps.

> suffice to describe a spectrum *of conduct* starting with *conduct* which the Committee believes is unquestionably permissible, ending with conduct which the Committee believes is undoubtedly unethical, and circling back to the range of conduct in between as to which reasonable minds may differ.
>
> It is, for example, unquestionably permissible for lawyers to represent clients regarding the consequences of their past conduct. Just as a lawyer may ethically defend a client accused of committing a crime, so too may a lawyer ethically represent a client accused of violating Colorado's rules and regulations regarding marijuana, in any area in which that conduct may become an issue—including family law, employment law, workers' compensation law, and criminal law."

Eli Wald, Eric B. Liebman, Amanda R. Bertrand, *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, 44 COLO. LAW. 61, 64 (2015) (quoting Colo. Bar Ass'n Ethics Comm., Formal Op. 125). Despite being withdrawn, this opinion remains relevant to practice in federal courts. *See id.*

116. Wald et al., *supra* note 115, at 61.
117. COLO. RULES OF PRO. CONDUCT r. 1.2 cmt. 14.
118. *See* Wald et al., *supra* note 115, at 63–64.
119. *Id.* at 61–62.
120. *See id.* at 62.
121. *See id.* at 61–62.

For example, a lawyer, who was obligated to have a trust account for his client's money and was holding his marijuana-industry client's money, made the decision to lie to the bank.[122] The banks would not take marijuana money.[123] The attorney, therefore, chose to hide the nature of the money to obtain the trust account and fulfill the obligation regarding keeping client money in such an account.[124] This violated his duty of honest dealings with the bank.[125]

The interaction of such marijuana-adjacent, regulated industries, particularly when one of the industries is regulated by federal law, will continue to cause problems if the status quo remains and neither the federal courts nor Congress act.

2. Real Estate

One cannot practice commercial real estate in Colorado without dealing with, at a minimum, the tangential effects of the marijuana business on Colorado real estate. "Practicing" real estate encompasses broad career fields and interests, including brokers, landlords, and investors.[126] Real estate faces evolving disruption from the marijuana industry. Based on estimates from an industry group, the Federal Reserve reported that "the marijuana industry occupied 14.2 million square feet of industrial warehouse space in Denver in the fourth quarter of 2016, roughly 2.9 percent of industrial warehouse space in the metropolitan area."[127] Additionally, the National Association of Realtors conducted a study that revealed 34% to 42% of commercial members reported an increased demand for warehouse space in states where medical and recreational marijuana is legal.[128] In addition, at least another 18% have seen an uptick in retail demand and another 16% to 21% report a similar increase in land demand.[129] This drastic change in the market was met with legal action, as the Denver City Council decided to cap the marketspace available to the industry.[130] Commercial real estate's impact extends to those involved, including leasing brokers; businesses looking to lease space; landlords of the commercial space; commercial developers; city and county zoning boards; and real estate attorneys.[131]

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122. People v. Furtado, No. 15PDJ056, 2015 WL 7574128, at *1 (Colo. O.P.D.J. Nov. 2, 2015).

123. *Id.*; *see also* discussion *infra* Section II.C.

124. *See Furtado*, 2015 WL 7574128, at *1.

125. *Id.*

126. *Cf. Who's News*, COLO. REAL ESTATE J., https://crej.com/news/category/whos-news/ (last visited Dec. 22, 2020) (showing the diversity of real estate stakeholders).

127. Felix & Chapman, *supra* note 105.

128. LAWRENCE YUN, JESSICA LAUTZ, BRANDI SNOWDEN & MATT CHRISTOPHERSON, NAT'L ASS'N OF REALTORS, MARIJUANA AND REAL ESTATE: A BUDDING ISSUE 27 (2020) [hereinafter MARIJUANA AND REAL ESTATE].

129. *Id.*

130. Felix & Chapman, *supra* note 105.

131. MARIJUANA AND REAL ESTATE, *supra* note 128, at 27, 37.

Interested parties in real estate also face uncertainty from an ever-evolving regulatory scheme. As "[m]arijuana is illegal at the federal level, [this can] interfere[] with some aspects of buying, renting[,] and selling real estate."[132] This has included issues related to title insurance, forcing some buyers "to use a third-party escrow instead of [a] bank[]" if it is known the property will be used for marijuana.[133] Additionally, landlords who have a mortgage run the risk of their lender calling their loan and demanding full payment of the outstanding amount owed if the landlord is renting to a retail or industrial marijuana tenant, due to the illegality of marijuana on the federal level.[134]

Further, even local governments can pose a problem through zoning, because some municipalities are against marijuana due to its federal illegality, even though it is legal in the state.[135] For example, marijuana dispensaries operating under Colorado law may be subject to being zoned out of existence by later enacted zoning measures.[136] In *Giuliani v. Jefferson County Board of County Commissioners*,[137] the marijuana business leased a commercial space in unincorporated Jefferson County.[138] Under color of the zoning at the time of development, the marijuana business applied for permits (though "[n]one of the permit applications stated that the planned use of the property was a medical marijuana dispensary").[139] After two months of operation, county officials "issued a zoning violation notice to the [marijuana business,]" stating that marijuana businesses were not allowed.[140]

On appeal, the Colorado Court of Appeals refused to rule on the merits, finding instead that the dispute was moot based on a later enacted Board of County Commissioners decision banning all marijuana businesses.[141] The fact that an industry that has occupied 3% of commercial real estate in neighboring jurisdictions can—at a whim—be removed from the marketplace creates unique uncertainty for practitioners in the marijuana-adjacent field of commercial real estate.

Turning to real estate financing, it is common that a "mortgage will . . . have a clause that requires the [mortgagee] . . . to . . . compl[y] with

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132. Jean Lotus, *Marijuana, Hemp Businesses Bolster Commercial Real Estate*, UPI (Feb. 26, 2020, 3:00 AM), https://www.upi.com/Top_News/US/2020/02/26/Marijuana-hemp-businesses-bolster-commercial-real-estate/3121582354402/.

133. *Id.*; *see also* Ivy Lee Rosario, *Is Legal Cannabis CRE's Next Big Tenant?*, COM. PROP. EXEC. (Sept. 27, 2019), https://www.cpexecutive.com/post/is-legal-cannabis-cres-next-big-tenant/.

134. Lotus, *supra* note 132.

135. *See* Rosario, *supra* note 133.

136. *See* Giuliani v. Jefferson Cnty. Bd. of Cnty. Comm'rs, 303 P.3d 131, 139 (Colo. App. 2012).

137. 303 P.3d 131 (Colo. App. 2012).

138. *Id.* at 134.

139. *Id.*

140. *Id.*

141. *See id.* at 134–35.

all applicable laws, rules, and regulations."[142] This can create a problem for landlords who are looking to take advantage of the higher than average rate per square foot they can charge potential marijuana and marijuana-adjacent tenants.[143] Landlords risk their mortgage being called "because at the federal level, marijuana is a Schedule [I] controlled substance."[144] Landlords either have to accept this risk, or try to work out an amendment or modification to their mortgage so they do not trigger a default by leasing to a marijuana-related business.[145] Lastly, banks may refuse to accept some of the landlord's funds if they learn the landlord is leasing to marijuana tenants.[146] This is not only a risk for deposits, but lenders may also become skittish upon learning of a marijuana tenant due to marijuana and marijuana-adjacent businesses being cash only, making them a target for theft.[147]

The ripple effect from treating marijuana in the convoluted manner discussed throughout the Article impacts the diverse stakeholders in real estate.

3. Security Companies

The uncertainty of the current state and future of the law has also created large demand for new or evolved services. As marijuana businesses do a large percentage of their business in cash, and as the product itself has value, security companies—private entities providing physical protection for the assets of businesses—have played an outsized role in the business.[148]

At least one such company has sought to exploit the legal gray areas between state and federal law to deprive its employees of federal employment protections.[149] In *Kenney v. Helix TCS, Inc.*,[150] defendant Helix TCS, Inc. (Helix), which provided security services for businesses in Colorado's state-sanctioned marijuana industry, sought to avoid paying overtime under federal law because the core business was illegal under

142. Brett Cooper & Christine A. McGuinness, *Five Tips for Landlords of Cannabis-Related Businesses*, NAT'L L. REV. (Jan. 28, 2020), https://www.natlawreview.com/article/five-tips-landlords-cannabis-related-businesses.

143. *See* Rosario, *supra* note 133.

144. Cooper & McGuinness, *supra* note 142.

145. *Id.*

146. *See id.*; *see also* discussion *infra* Section II.C.

147. *See* Cooper & McGuinness, *supra* note 142.

148. *See* Susanna Donato, *Beyond the Vault*, MARIJUANA BUS. MAG., May–June 2020, at 90, 92; *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=526338043c68; Will Yakowicz, *The Highly Trained Security Force Protecting Colorado's Weed Stash*, INC. (Apr. 20, 2015), https://www.inc.com/will-yakowicz/inside-the-backbone-of-the-cannabis-industry.html.

149. *See* Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1108 (10th Cir. 2019).

150. 939 F.3d 1106 (10th Cir. 2019).

the CSA.[151] "Helix provide[d] security, inventory control, and compliance services to" a wide variety of "marijuana [businesses] in Colorado."[152] Employee and plaintiff Robert "Kenney's job duties at Helix included monitoring security cameras, patrolling assigned locations, investigating and documenting all facility-related incidents, and enforcing client, local, state, and federal policies and regulations."[153] Mr. Kenney regularly worked more than forty hours a week.[154] Mr. Kenney claimed entitlement to the protection of the Fair Labor Standards Act (FLSA) (which requires certain pay for time worked in excess of forty hours) for this work.[155] Helix asserted that the FLSA does not apply to workers such as Mr. Kenney because Colorado's recreational marijuana industry is in violation of the CSA.[156] While continuing to acknowledge the view that the CSA renders the Colorado regulatory scheme illegal, the Tenth Circuit found that "case law has repeatedly confirmed that employers are not excused from complying with federal laws just because their business practices are federally prohibited."[157] Still, the fact that this argument was available to the employer on an interlocutory appeal demonstrates the uncertainty created by the conflicting state and federal regulations and, specifically, the federal bar's hostility towards the marijuana industry.

4. Banking Industry

The banking industry's inability to participate in the federal system and accommodate state-law compliant marijuana businesses permeates all of the above industries and is therefore critically relevant to those advising marijuana-adjacent businesses. As demonstrated throughout this Article, the federal system's refusal to give deference to the state regulatory scheme continues to create challenges for businesses.[158] This is especially true when it comes to banking, because access to banking implicates how businesses can conduct transactions and where and how they can store their money.

In a decision with three concurring opinions, from a three-judge panel, the Tenth Circuit refused to allow necessary access to the Federal Reserve Bank for entities trying to solve this issue through compliance with state law.[159] In *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*,[160] a credit union was established for the specific

151. *Id.* at 1108.
152. *Id.*
153. *Id.*
154. *Id.* at 1109.
155. *See id.* at 1108.
156. *Id.*
157. *Id.* at 1112.
158. *See supra* Section I.B.3.
159. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1053 (10th Cir. 2017) (per curiam).
160. 861 F.3d 1052 (10th Cir. 2017) (per curiam).

purpose of "'provid[ing] much needed banking services to compliant, licensed [marijuana] and hemp businesses' and to marijuana-legalization supporters."[161] It sought a master account with the Federal Reserve Bank.[162] "A master account is required to purchase services that are indispensable for all financial institutions."[163] The Federal Reserve Bank refused to provide such an account.[164] Fourth Corner Bank brought the action to obtain such a master account.[165] Ultimately, the Tenth Circuit chose to "vacate the district court's order and remand[ed] with instructions to dismiss the . . . complaint without prejudice."[166]

Judge Moritz would have had the credit union's action dismissed with prejudice, as "a court won't use its equitable power to facilitate illegal conduct."[167]

On the merits, Judge Bacharach would have ruled that Fourth Corner Credit Union was entitled to a master account.[168] "A master account," he opined, "is required to purchase services that are indispensable for all financial institutions."[169] Critical to the decision was the credit union's promise to comply with federal orders finding marijuana banking illegal.[170] Essentially, Judge Bacharach would have allowed the bank to exist but not for the purpose of marijuana banking. Procedurally, Judge Bacharach, and the third jurist, Judge Matheson, for different reasons, agreed that the case should be dismissed without prejudice, and thus that was the order of the court.[171]

But critically, as demonstrated above, a majority of the court agreed that a bank could not be established for marijuana banking.[172]

As illustrated in this Section, these marijuana-adjacent businesses face varied and significant legal challenges.[173] The continued, presumed supremacy of federal law over state regulatory schemes affects individuals who work in and are affiliated with banking, real estate, the legal profession, security companies, and many others.

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161. *Id.* at 1053.
162. *Id.*
163. *Id.* at 1064.
164. *Id.* at 1053.
165. *Id.* at 1054.
166. *Id.* at 1053.
167. *Id.* at 1053–54 (citing Warner Bros. Theatres, Inc. v. Cooper Found., 189 F.2d 825, 829 (10th Cir. 1951).
168. *See id.* at 1064–65.
169. *Id.* at 1064.
170. *Id.* at 1080.
171. *Id.* at 1053.
172. *See id.* at 1079.
173. *See supra* Section II.B.

C. An Exemplar in the Relevancy of Providing a Permanent Legal Fix to the Current State of Federal Marijuana Law Supremacy: The Marijuana Industry and Banks

This Section provides a history of the challenges faced by marijuana-adjacent businesses to safely bank under federal law even though marijuana is legal at the state level. This Section reviews the federal guidance and memoranda issued that relate to marijuana and banking. These documents highlight how quickly and easily enforcement priorities and the risk associated with engaging in marijuana or marijuana-adjacent businesses may change without action by Congress or the courts that would cement policies into law.

Much of the banking guidance as it relates to marijuana has been issued through memoranda and guidance manuals, as opposed to more concrete legislation or regulations.[174] For example, as of March 31, 2020, the Financial Crime Enforcement Network (FinCEN) reports that 710 depository institutions (525 banks, 185 credit unions) provide banking services to marijuana related businesses[175] out of over 5,000 total institutions.[176] This represents a significant portion of the financial sector by total institution.[177] There are a variety of complex legal frameworks banks must comply with when dealing with marijuana-related businesses due to marijuana's status as a Schedule I drug under the CSA.[178] The American Bankers Association describes this challenge as a "rift between federal and state law [that] has left banks trapped between their mission to serve the financial needs of their local communities and the threat of federal enforcement action."[179]

1. The Ogden Memorandum

The federal government first issued guidance on legal marijuana in 2009.[180] On October 19, 2009, Deputy Attorney General David Ogden

174. As of September 2020, there is not any federal legislation or regulations that govern or provide guidance for federal agencies on what to do with legalized marijuana.

175. *See* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, MARIJUANA BANKING UPDATE 1 (2020), https://www.fincen.gov/sites/default/files/shared/508_293283_MJ_Banking_Update_2nd_QTR_FY2020_Public_Final.pdf.

176. FED. DEPOSIT INS. CORP., STATISTICS AT A GLANCE: HISTORICAL TRENDS AS OF MARCH 31, 2020 (2020), https://www.fdic.gov/bank/statistical/stats/2020mar/fdic.pdf.

177. This represents approximately 14%. *See id.*

178. *See* discussion *infra* Sections II.C.1–4 (discussing banking guidance and memoranda from the Department of Justice and FinCEN); *see also infra* Part III (explaining the Bank Secrecy Act, Anti-Money Laundering Control Act, and regulatory mechanisms).

179. *Cannabis Banking: Bridging the Gap between State and Federal Law*, AM. BANKERS ASS'N, https://www.aba.com/advocacy/our-issues/cannabis (last visited Dec. 22, 2020).

180. *See* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just., to Selected U.S. Attorneys 1 (Oct. 19, 2009) [hereinafter Ogden Memo] (on file with authors). Prior to the Ogden Memo there is no evidence of the federal government evaluating its role in legal marijuana on the state level. California was first to legalize medical marijuana in 1996. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 10, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Colorado and Washington legalized recreational marijuana in 2012. *Marijuana Overview*, NAT'L CONF. OF STATE

issued a memorandum (Ogden Memo) on investigations and prosecutions in states where medical marijuana was legalized.[181] The Ogden Memo stated that the Department of Justice was committed to enforcing the CSA in all states.[182] It also stated that the U.S. Attorneys' Manual gives U.S. Attorneys broad discretion over what crimes to prosecute.[183] In relevant part, the Ogden Memo stated:

> The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority . . . and the Department's investigative and prosecutorial resources should be directed towards these objectives . . . . [P]ursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.[184]

The Ogden Memo concluded by stating that it should only be used as guidance for how to use prosecutorial discretion and should not be interpreted to (nor did it) provide a defense for the use of marijuana—even when complying with state law.[185]

2. The Cole Memoranda

As legalized medicinal marijuana use took off across the country, the federal government also began to change its tune. On June 29, 2011, Deputy Attorney General James Cole issued a memorandum (Cole I) to provide guidance on the Ogden Memo.[186] In many ways, Cole I reiterated the Ogden Memo by stating:

> [P]rosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers.[187]

While Cole I did not provide new information, it reframed medical marijuana as no longer being a priority and restated the Ogden Memo in light of state ballot initiatives to legalize marijuana.[188]

LEGISLATURES (Oct. 17, 2019), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

181. *See* Ogden Memo, *supra* note 180, at 2–3.

182. *Id.* at 1.

183. *Id.*

184. *Id.* at 1–2.

185. *Id.* at 2–3.

186. *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to U.S. Attorneys 1–2 (June 29, 2011) [hereinafter Cole I] (on file with authors).

187. *Id.* at 1.

188. *See id.* at 1–2.

In 2013, the Deputy Attorney General issued another memorandum (Cole II) on marijuana enforcement.[189] Cole II updated previous guidance to provide further assistance to U.S. Attorneys across the country in light of states legalizing, or contemplating legalizing, recreational marijuana.[190] Here, Cole II laid out eight enforcement priorities for marijuana.[191] They are:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.[192]

These priorities are intended to be broad.[193] Cole II gave an example that preventing distribution to minors can include marijuana trafficking near an area associated with minors and marketing in a manner that appeals to minors.[194] By saying that the federal government prioritizes enforcing only eight areas, one can reasonably infer that activities outside the eight priorities are safe to engage in under federal law for marijuana and marijuana-adjacent businesses.[195] Just like the Ogden Memo and

189. *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to All U.S. Attorneys 1 (Aug. 29, 2013) [hereinafter Cole II] (on file with authors).
190. *Id.*
191. *Id.* at 1–2.
192. *Id.*
193. *See id.* at 2, 4.
194. *Id.* at 2 n.1.
195. *See id.* at 1–2; Lisa Rough, *The Cole Memo: What Is It and What Does It Mean?*, LEAFLY (Sept. 14, 2017), https://www.leafly.com/news/cannabis-101/what-is-the-cole-memo (stating that "[t]he memo indicated that prosecutors and law enforcement should focus only on the [listed] priorities related to state-legal cannabis operations"); *see also* Brad Auerbach, *How Cannabis Entrepreneurs Feel About Sessions' Reversal of the Cole Memo*, FORBES (Mar. 3, 2018, 7:32 PM), https://www.forbes.com/sites/bradauerbach/2018/03/03/how-cannabis-entrepreneurs-feel-about-sessions-reversal-of-the-cole-memo/#3b7aa6ec4ae9 (stating that "[t]he Cole Memo was a policy

Cole I concluded, Cole II was only intended as a guide for using resources and prosecutorial discretion.[196] While the memoranda helped guide marijuana and marijuana-adjacent businesses on how to operate generally, these memoranda did not directly address banking with a marijuana client.

Prior to Deputy Attorney General Cole's leaving office, he issued another memorandum (Cole III), related to financial crimes and marijuana.[197] This directly addressed and affected marijuana-adjacent businesses by guiding banks on how to deal with businesses who may transact with recreational or medicinal marijuana businesses.[198] Importantly, Cole III stated the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the Bank Secrecy Act (BSA) may all be implicated by banking with marijuana-related businesses.[199] The money laundering statutes make it:

> [A] criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as [grounds] for prosecution under [the unlicensed money transmitter statute]. Additionally, [banks] that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA.[200]

In order to be prosecuted for these offenses, an underlying marijuana-related conviction is not required under state or federal law.[201] However, Cole III stated the investigation and prosecution for marijuana-related activity should have the same priorities and consideration as Cole II.[202] While this does not relieve banks and marijuana-adjacent businesses from liability, it takes pressure off knowing that U.S. Attorneys may, in a sense, be looking the other way.[203] Cole III explicitly states a bank

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memo created during the Obama administration that mostly protected marijuana-legal states from federal scrutiny").

196. *See* Rough, *supra* note 195.

197. *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., to All U.S. Attorneys 1 (Feb. 14, 2014) [hereinafter Cole III] (on file with authors).

198. *See id.* at 2.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.* at 3 (explaining that banks can feel safer lending to or transacting with those businesses that comply with state laws as they are not a priority for enforcement); *see also* Tom Firestone, *2 Years After Sessions Rescinded Cole Memo, Prosecutors Continue to Adhere to Obama-Era Enforcement Guidelines*, BENZINGA (Jan. 8, 2020, 12:24 PM), https://www.benzinga.com/markets/cannabis/20/01/15093079/2-years-after-sessions-rescinded-cole-memo-prosecutors-continue-to-adhere-to-obama-era-enforceme (stating that no "cases involving the

cannot be "willfully blind" to their customers' activities.[204] This requires the banks to inquire into the activities of some marijuana-adjacent businesses when evaluating their revenue streams.[205]

Cole III was issued concurrently with the 2014 FinCEN guidance and states banks should follow the FinCEN guidance.[206] Cole III concludes like prior memoranda, stating it should only serve as guidance for "investigative and prosecutorial discretion."[207] While limiting prosecutorial discretion is not an ironclad green light for marijuana or marijuana-adjacent businesses, it relieves some pressure. At the same time, both sets of guidance further muddied the water for those who are risk averse and seeking to take advantage of the economic opportunities presented by legal marijuana, while also complying with federal law and being able to access the U.S. banking system.

3. Attorney General Sessions Removes Partial Marijuana Protection

When President Trump assumed office, Attorney General Jeff Sessions revoked "previous nationwide guidance specific to marijuana enforcement," on January 4, 2018.[208] He then issued guidance instructing U.S. Attorneys to follow the principles of all federal prosecutions stated in "chapter 9-27.000 of the U.S. Attorneys' Manual."[209] Businesses that had been operating for years with knowledge and comfort that they were not a priority for federal enforcement were once again back in the middle of a tenuous relationship between federal and state government powers. But now they faced greater risk.

U.S. House Representative Denny Heck asked for clarity on FinCEN's expectations since the marijuana memoranda were revoked by Attorney General Jeff Sessions.[210] FinCEN stated: "The SAR [Suspicious Activity Report] reporting structure [set forth] in [FinCEN's] Feb[ruary] 14, 2014, guidance remains in place . . . . FinCEN will continue to work closely with law enforcement and the financial sector to combat illicit

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prosecution of financial institutions for laundering marijuana proceeds" could be identified); Rough, *supra* note 195 (stating that "[s]ince the issuance of the memo, federal cannabis prosecutions have petered off in legal states").

204. Cole III, *supra* note 197, at 2.

205. *See id.* (providing that if a "financial institution or individual" cannot be willfully blind, then they must conduct an evaluation to some extent to remain in compliance with federal law).

206. *Id.* at 2 n.1.

207. *Id.* at 3.

208. *See* Memorandum from Jefferson B. Sessions, III, Att'y Gen., U.S. Dep't of Just., to All U.S. Attorneys (Jan. 4, 2018) (on file with authors).

209. *Id.*

210. Alicia Wallace, *Congressmen: Rescinding Marijuana Banking Guidance Would be 'Dangerous and Imprudent'*, THE CANNABIST (Jan. 19, 2018, 1:06 PM), https://www.thecannabist.co/2018/01/17/marijuana-banking-guidance-perlmutter-heck/96670/.

finance, and we will notify the financial sector of any changes to FinCEN's SAR reporting expectations."[211]

FinCEN has not issued any guidance since the January 31, 2018, comment, leaving the 2014 FinCEN guidance in place for BSA compliance. However, Sessions's term ended in November 2018.[212] This led to yet another wave of possible enforcement priorities when a new Attorney General inevitably stepped in to lead the organization.

When Attorney General William Barr was a nominee, he answered questions for the record proposed by Senator Cory Booker.[213] In response to a question about reinstating the Cole Memoranda, he said:

> I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum. I have not closely considered or determined whether further administrative guidance would be appropriate following the Cole Memorandum and the January 2018 memorandum from Attorney General Sessions, or what such guidance might look like. If confirmed, I will give the matter careful consideration. But I still believe that the legislative process, rather than administrative guidance, is ultimately the right way to resolve whether and how to legalize marijuana.[214]

4. Attorney General Barr Says He Will Accept Cole Memoranda, But Actions Show Otherwise

In April 2019, Attorney General Barr testified before Congress that he believes marijuana is a states' rights issue.[215] He said he is "accepting the Cole Memorandum for now, but [has] generally left it up to the U.S. Attorneys in each state to determine what the best approach is in that state."[216] He also said he would favor one federal rule against marijuana.[217] However, if that is not attainable, Attorney General Barr said he believes "the way to go is to permit a more federal approach so states can

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211. *Id.* (quoting Stephen Hudak, a FinCEN spokesperson). See *infra* Part III, for an explanation of SAR reporting under FinCEN guidance.

212. *See* Devlin Barrett, Matt Zapotosky, & Josh Dawsey, *Jeff Sessions Forced out as Attorney General*, WASH. POST (Nov. 7, 2018, 5:01 PM), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html.

213. Interview by Senator Cory Booker with William P. Barr, nominee, U.S. Att'y Gen. (Jan. 28, 2019).

214. *Id.*

215. *See* Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), https://www.forbes.com/sites/sarabrittanysomerset/2019/04/15/attorney-general-barr-favors-a-more-lenient-approach-to-cannabis-legalization/#151b3adfc4c8.

216. *Id.*

217. *Id.*

make their own decisions within the framework of the federal law and so we're not just ignoring the enforcement of federal law."[218]

But one wonders, does Attorney General Barr not view the CSA as a uniform federal rule against marijuana? His comments indicated he was leaning towards marijuana reform by allowing states where marijuana is legal to continue operating provided they do not implicate any of the Cole II priorities.[219] However, Attorney General Barr has not officially reinstated the Cole memoranda.[220] Even if he does reinstate the Cole memoranda, the priorities are merely guidance and do not provide any legal protection.

Contrary to his comments, Attorney General Barr took action against marijuana companies in 2019.[221] He ordered reviews of ten marijuana business mergers, spending almost 30% of the Department of Justice's antitrust budget.[222] The acting chief of staff for the assistant attorney general testified before Congress that the ten investigations into mergers "were not 'bona fide' but, rather, driven by Barr's personal dislike of the marijuana industry."[223]

The decision to investigate under antitrust instead of the CSA suggests an acceptance of the marijuana industry. In theory, Barr could have investigated, and likely successfully prosecuted, these companies under the CSA. Not only does this contradict his earlier statements to not prosecute companies relying on the Cole Memoranda, it also represents a strange tack providing little, if any, clarity on his stance. Barr's choice to not pursue marijuana companies for CSA violations, but instead alleged securities violations, indicates a greater acceptance of the marijuana industry as a legitimate industry under federal law.

III. CONTROLLED SUBSTANCES ACT AND MARIJUANA-ADJACENT BUSINESSES

The CSA prohibits the manufacturing, distributing, or dispensing of marijuana.[224] It is also illegal to aid and abet the manufacture, distribu-

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218. Kyle Jaeger, *U.S. Attorney General Says He Prefers Marijuana Reform Bill to Current Federal Law*, MARIJUANA MOMENT (Apr. 10, 2019), https://www.marijuanamoment.net/u-s-attorney-general-says-he-prefers-marijuana-reform-bill-to-current-federal-law/.

219. *See id.*

220. *See* Jodi L. Avergun, *DOJ to Accept Cole Memorandum for Now*, MONDAQ (Apr. 29, 2019), https://www.mondaq.com/unitedstates/food-and-drugs-law/801114/doj-to-accept-cole-memorandum-for-now.

221. *See Prosecutor: AG Barr Ordered Politically Motivated Probes of Marijuana Mergers*, MARIJUANA BUS. DAILY (June 23, 2020), https://mjbizdaily.com/allegation-attorney-general-william-barr-ordered-politically-motivated-probes-of-cannabis-mergers/.

222. *See id.*

223. *Id.*

224. 21 U.S.C. §§ 802(6), 841(a)(1) (2018). There are exceptions for federally sanctioned drug trials and medical research. *FDA and Cannabis: Research and Drug Approval Process*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process (last updated Oct. 1, 2020).

tion, or dispensing of marijuana[225] and to conspire to manufacture, distribute, or dispense marijuana.[226] Lastly, one can be penalized as an accessory after the fact.[227]

Colorado Federal Bankruptcy Court has held that businesses which only sell hydroponic materials to marijuana manufacturers nonetheless violate the CSA and are not entitled to bankruptcy protections.[228] This ruling has been inconsistent, as in the prior year, the Colorado Bankruptcy Court did not dismiss bankruptcy protection for a company which allegedly sold butane for use in manufacturing marijuana concentrates, stating that involvement in the marijuana industry is not a per se violation of the CSA.[229] The case law states, "all federal judges take an oath to uphold federal law, and allowing a marijuana case to proceed in federal court violates this oath."[230]

Even companies that do not directly or indirectly deal with marijuana can still be liable under federal law for complicity.[231] If a company is not "directly 'manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance[,]'" they may still be violating federal law through theories of complicity.[232] One theory of complicity is aiding and abetting criminal activity.[233] In *In re Way to Grow, Inc.*,[234] a bankruptcy case involving a company that sold materials used for home growing of marijuana, the court stated:

> [U]nder [CSA] § 2, those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime. [A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission, [or,] with full knowledge of the circumstances constituting the charged offense . . . . [A] defendant must share in the intent to commit the underlying offense.[235]

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225. 18 U.S.C. § 2 (2018) (providing that "[w]hoever . . . aids, abets, counsels, commands, induces or procures" a federal crime, or "causes [a federal criminal] act to be done[,] . . . is punishable as a principal").

226. *Id.* § 371.

227. *Id.* § 3 ("Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.").

228. *See In re* Way to Grow, Inc., 597 B.R. 111, 116 (Bankr. D. Colo. 2018).

229. *In re* B Fischer Indus., LLC, No. 16-20863-MER, ECF No. 147 (Bankr. D. Colo. Sept. 27, 2017).

230. *Way to Grow*, 597 B.R. at 121.

231. *See id.* at 123.

232. *See id.* (citing 21 U.S.C. § 841(a)(1) (2018)).

233. *See* 18 U.S.C. § 2 (2018).

234. 597 B.R. 111 (Bankr. D. Colo. 2018).

235. *Id.* at 124 (first quoting United States v. Deiter, 890 F.3d 1203, 1214 (10th Cir. 2018); then quoting United States v. Rosalez, 711 F.3d 1194, 1205 (10th Cir. 2013)).

Aiding and abetting convictions can be found based on a variety of factors "either before or at the time of the offense."[236] However, a "mental state [above] 'mere assent' or 'acquiescence' is also required[,]" but "even mere 'words or gestures of encouragement' [count as] affirmative acts."[237]

The theory of conspiracy can also make someone liable under § 846.[238]

> In the Tenth Circuit, to obtain a conviction for conspiracy in violation of § 846, the government must establish beyond a reasonable doubt: 1) there was an agreement to violate the law; 2) the defendant knew the essential objectives of the conspiracy; 3) the defendant knowingly and voluntarily took part in the conspiracy; and 4) the co-conspirators were interdependent.[239]

"The main difference between conspiracy and aiding and abetting is" that aiding and abetting does not require a prior agreement to perform a criminal act, while conspiracy does.[240] Simply providing information to a customer does not violate the CSA for complicit liability.[241] Determining if a company has violated the CSA under a theory of complicit liability depends on "whether [the individual's] conduct rises above the level of merely providing information to customers, and instead, evidences a specific intent for the [individual] to assist their customers in violating § 841(a)(1)."[242] In *Way to Grow*, the defendant was not guilty under a complicity theory because the contract between the company and their customers did "not specifically contemplate, depend upon, or require any activity that [was] *necessarily* illegal."[243] On the theory of aiding and abetting, the court concluded: "Without sharing its marijuana-connected customers' specific intent to cultivate and distribute marijuana, [the defendant is] not aiding and abetting violations of the CSA."[244]

However, the defendant was found guilty under a different provision of the CSA, § 843(a)(7), which makes it a federal crime to manufacture or distribute "any equipment, chemical, product, or material which may be used to manufacture a controlled substance or . . . knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance."[245] In the Tenth Circuit, reasonable

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236. *Id.* (quoting Williams v. Trammell, 782 F.3d 1184, 1192 (10th Cir. 2015)).
237. *Id.* (quoting *Williams*, 782 F.3d at 1193)).
238. *Id.*
239. *Id.*
240. *Id.* Aiding and abetting, under the CSA, does not require an agreement. However, conspiracy, under the CSA, does require an agreement. *Id.*
241. *Id.* at 125–26.
242. *Id.* at 126.
243. *Id.*
244. *Id.* at 127.
245. 21 U.S.C. § 843(a)(7) (2018).

cause to believe has been interpreted to be similar to actual knowledge, and thus a court's inquiry is subjective.[246] This is "the minority view of the *mens rea* require[ment] [for] violat[ing]" the CSA.[247] The Tenth Circuit clarified that the inquiry is whether the person has actual knowledge that what they are selling will be used to manufacture a controlled substance, or said another way, whether the seller of a product knows how the equipment will be used.[248] In *Way to Grow*, the court looked to large customers using aliases; participation in the "Cannabis Cup" and other marijuana trade shows where the defendant gave away promotional materials associated with marijuana use and had booths to build relationships; cross-promotions with dispensaries; advertisements on marijuana talk shows; approved lists of products for use in marijuana cultivation; press statements; investor decks; and internal emails to determine there is clear knowledge of selling products to customers who will and do use products to manufacture controlled substances in violation of the CSA.[249]

Furthermore, the court concluded the business model, and its execution, violated § 843(a)(7) because even if the company was never charged or prosecuted under the CSA, it was "conducting operations in the normal course of . . . business that violate federal criminal law."[250] A company can violate § 856 of the CSA by "manag[ing] or control[ling] any place . . . as an owner . . . and knowingly and intentionally rent[ing], leas[ing], profit[ing] from, or mak[ing] available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."[251] Even though the act may be legal in Colorado and the person may never be charged, tried, or convicted, the crime has been committed.[252] In *In re Rent-Rite Super Kegs West, Ltd.*,[253] a case cited by *Way to Grow* where the debtor knowingly leased warehouse space to tenants who grew marijuana,[254] the *Rent-Rite* court went as far as to say that knowingly and intentionally violating CSA is considered bad faith.[255]

Thus, if a customer is likely violating the CSA based on its business practice, a bank who helps the company do this would likely violate a series of financial regulations.

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246. *Way to Grow*, 597 B.R. at 127–28.
247. *Id.* at 128 ("At least three other circuits have held [the CSA] statutes allow conviction either upon subjective knowledge or an objective 'cause to believe.'").
248. *Id.*
249. *Id.* at 129–31.
250. *Id.* at 131–32 (quoting *In re* Rent-Rite Super Kegs West, Ltd, 484 B.R. 799, 805 (Bankr. D. Colo. 2018)).
251. 21 U.S.C. § 856(a)(2) (2018).
252. *See Rent-Rite*, 484 B.R. at 804.
253. 484 B.R. 799 (Bankr. D. Colo. 2018).
254. *Id.* at 802.
255. *Id.* at 807.

In addition to the CSA, banks must comply with various federal statutes that are implicated by marijuana and marijuana-adjacent businesses.[256] When Cole II was issued, eight priorities were laid out for prosecutorial and investigative discretion.[257] While Cole II and other memoranda related to marijuana were revoked, FinCEN's guidance remains in effect for banks doing business with marijuana-related customers.[258]

Marketing agencies, potentially a marijuana-adjacent business, should be of specific concern given how easily one bad marketing choice could be interpreted as advertising the sale of marijuana to children.[259] This would likely be interpreted, even under the Cole Memo, as violating one of the priorities, and the Department of Justice would have greater cause to prosecute the company and possibly its affiliates.[260] The Obama-era memoranda spurred in-depth looks and other guidance from federal institutions.[261] However, it was only guidance. The guidance did not promise immunity from federal law.[262]

A. Anti-Money Laundering

There are three main sets of financial laws a bank may violate by dealing with a marijuana-related business: The Money Laundering Control Act, the Bank Secrecy Act, and the USA PATRIOT Act.[263]

First, the Money Laundering Control Act specifically states a bank commits money laundering if it "knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 . . . manufacture, importation, sale, or distribution of a controlled substance . . . [is a] specified unlawful activity."[264] A bank commits money laundering by conducting a financial transaction involving the proceeds of a known specified unlawful activity while "knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of [a] specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law."[265]

256. *See* discussion *infra* Section III.A (discussing the Money Laundering Control Act, Bank Secrecy Act, and USA PATRIOT Act); *see* also discussion *supra* Section II.C (discussing federal memoranda and FinCEN guidance).

257. Cole II, *supra* note 189, at 1–2.

258. *See* discussion *supra* Section II.C.3.

259. This example is specifically identified in Cole II, footnote 1. *See* Cole II, *supra* note 189, at 2 n.1.

260. *Id.*

261. *See* discussion *supra* Section II.C.

262. *See* Cole II, *supra* note 189, at 4. Guidance explicitly states it does not give immunity from federal law. *Id.*

263. *See* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RSRV. L. Rev. 597, 610, 612 (2015).

264. *Id.* at 611 (first quoting 18 U.S.C. § 1957(a) (2018); then quoting *id.* §§ 1956(c)(7), 1957(f)(3)).

265. 18 U.S.C. § 1956(a)(1)(B).

Transactions and business related to marijuana are explicitly stated as specified unlawful activity.[266]

This puts the onus on a bank to know and understand not only the customer but the customer's customer because a bank cannot legally turn a blind eye. Marijuana is still federally illegal, even though many recent federal cases seek to avoid marijuana's illegality by giving it credence as federal courts debate marijuana's merits in areas of law outside the CSA.[267] Products related to marijuana's manufacture, importation, sale, or distribution are included as a specified unlawful activity.[268] Therefore, a bank would likely violate the Money Laundering Control Act by assisting a marijuana transportation company, delivery company, or a company who sells equipment that is used for the sale, manufacture, import, or distribution of marijuana.

Next, under the BSA and the USA PATRIOT Act, banks must have robust compliance programs to prevent money laundering.[269] In 2014, FinCEN issued guidance on their BSA expectations for marijuana related businesses.[270] FinCEN states:

> [T]he decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively . . . . [A] financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as a part of customer due diligence on a periodic basis and commensurate with the risk.[271]

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266. *See id.* § 1961(1).
267. *See* discussion *supra* Section I.B.1.
268. *See* Hill, *supra* note 263, at 611.
269. *Id.* at 612; *see* 31 U.S.C. §§ 5312(a)(1), 5318(h)(l) (2018); 31 C.F.R. §§ 1020.220(a)(1), (a)(2)(ii)(C) (2020).
270. FIN. CRIMES ENF'T NETWORK, DEP'T OF THE TREASURY, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 1 (2014) [hereinafter BSA EXPECTATIONS].
271. *Id.* at 2–3.

Financial institutions who choose to provide banking services to marijuana-related businesses are required to file a suspicious activity report (SAR) when,

> [T]he financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[272]

According to FinCEN, banks should separate their SAR narrative comments into three different filings: Marijuana Limited, Marijuana Priority, and Marijuana Termination.[273]

A Marijuana Limited filing must be made by a bank if the bank "reasonably believes, based on its . . . due diligence, [the company] does not implicate one of the [Cole II] priorities or violate state law."[274] The SAR should address:

> (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified.[275]

The bank "should use the term 'MARIJUANA LIMITED' in the narrative section."[276] The bank should then follow existing guidance on following SARs for continuing activity reports, and include "details about the amount of deposits, withdrawals, and transfers in the account since the last SAR."[277]

Alternatively, a Marijuana Priority filing must be made by a bank if it "reasonably believes, based on its . . . due diligence, [the company] implicates one of the Cole Memo priorities or violates state law."[278] The SAR should include, "(i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity."[279] The guidance notes that where a business is indirectly related to marijuana, like "a commercial landlord that leases property to a marijuana-related busi-

272. *Id.* at 3.
273. *Id.* at 3–4.
274. *Id.* at 3.
275. *Id.* at 4.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*

ness," the bank does not have to distinguish between a Marijuana Limited and Marijuana Priority filing, but the decision to provide the services should be risk-based and include an analysis of the Cole II priorities.[280]

If a bank wants to terminate its relationship with a marijuana-related business to maintain an effective anti-money laundering program, it should file a marijuana termination filing.[281] FinCEN provides a nonexclusive list of red flags in its 2014 guidance.[282]

The SAR guidance and conditional acceptance of marijuana and marijuana-adjacent businesses again indicate that marijuana and federal law have a challenging relationship, not willing to fully accept marijuana, but also not willing to reject it. This leaves the consumer and businesses in troubled water as well in evaluating their own liability.

B. Federal Deposit Insurance Corporation

The Federal Deposit Insurance Corporation (FDIC) has stated that "[f]inancial institutions that fail to adequately manage [relationships with bank customers and third-party payment processors who provide services to businesses] may be viewed as facilitating a payment processor's or merchant client's . . . unlawful activity and, thus, may be liable for such acts or practices."[283] The FDIC also warns financial institutions need to assure themselves that they are not facilitating fraudulent or other illegal activity.[284] Thus, the FDIC maintains broad powers to enforce civil penalties and expands the requirements for banks to know not only their customers, but extends this to the customer's customer.

C. Federal Reserve Regulation

One requirement for Federal Reserve member banks is evaluating risk management policies and complying with the BSA.[285] As stated above, a bank who does business with a marijuana-related company is at risk of violating the BSA and must comply with the 2014 FinCEN guidance.[286]

The Federal Reserve also offers, and has control over, four significant "payment services: (1) a centralized check collection system, (2) the Automated Clearinghouse (ACH) network for processing batched electronic small dollar payments, (3) the Fedwire system for larger electronic

280. *Id.* at 4 n.7.
281. *Id.* at 4–5.
282. *Id.* at 5–7.
283. Letter from Sandra L. Thompson, Dir., Div. of Risk Mgmt. Supervision & Mark Pearce, Dir., Div. of Depositor and Consumer Prot., to FDIC-Supervised Institutions (Jan. 31, 2012) (emphasis omitted) (on file with authors).
284. *Id.*
285. 31 C.F.R. § 1010.810(b)(2) (2020).
286. *See supra* Sections II.C, IV.A.

payments, and (4) coin and currency services."[287] These services are accessed through a master account.[288] As mentioned above, the Tenth Circuit upheld the Federal Reserve Bank of Kansas City's decision to deny a state-chartered credit union's application for a master account in *Fourth Corner Credit Union*, when its purpose was to be a bank for marijuana businesses, marijuana-adjacent businesses, and marijuana legalization supporters.[289] While the Tenth Circuit published three separate opinions on the matter, one by each judge, the overall message was consistent.[290] As long as marijuana is federally illegal, a federal court will not uphold or sanction a violation of federal law by marijuana businesses even when they are legal in the state and that state has approved the charter of a bank or credit union.[291] While *Fourth Corner Credit Union* confirmed that the Federal Reserve need not give banks "master accounts" if they are banking marijuana money, it is worth noting the Federal Reserve has yet to revoke a bank's master account because they are banking with marijuana-related businesses.[292] Additionally, more recent case law indicates an increased willingness to protect the rights of individuals under contracts, even though the underlying matter involves marijuana.[293] This is a departure from prior years where the action would be dismissed outright given marijuana's status under the CSA.

IV. PROPOSAL

A comprehensive reimagining of the relationship between the federal and state government's role in regulating marijuana is necessary to effectively empower local will on these issues. This Part explores two main paths forward for creating a firmer ground upon which marijuana and marijuana-adjacent businesses can stand: (1) congressional action; or (2) the U.S. Supreme Court's judicial action on *Raich*. This Part evaluates these options and concludes with the public policy implications and possible proposals.

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287. Hill, *supra* note 263, at 627–28; *see also Policies: The Federal Reserve in the Payments System*, FED. RSRV., https://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm (last updated Aug. 11, 2020); *see generally* Jonathan H. Adler, *Symposium Marijuana, Federal Power and the States: Introduction*, 65 CASE W. RSRV. L. REV. 505 (2015); *What Is the Advantage of Putting Your Money in a Fed Member Bank Versus a Bank That is a Nonmember? How Do You Know Which Banks are Fed Members?*, FED. RSRV. BANK OF S.F. (Oct. 2003), https://www.frbsf.org/education/publications/doctor-econ/2003/300ctober/member-nonmember-banks/.

288. *See generally* Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1064 (10th Cir. 2017) (per curiam).

289. *See id.* at 1053.

290. *Id.*

291. *Id.* at 1079–80.

292. The Federal Reserve can access the SAR reports that are filed under the BSA and receive a roster of institutions that have marijuana and marijuana-adjacent businesses as clients. *See* BSA EXPECTATIONS, *supra* note 270, at 3.

293. *See* discussion *supra* Section I.B.

A. Congressional Action

To completely resolve the current constellation of uncertainty from disparate state and federal rules, Congress must reschedule marijuana under the CSA. As has been outlined throughout, the issues regarding disparate treatment of marijuana under state and federal law affect diverse industries in complex ways.[294] However, the one consistency across industries is that the illegality and tension created between state and federal law stem from marijuana being scheduled as a Schedule I drug under the CSA. As discussed above, vast amounts of money are implicated, as the market must account for shocking levels of uncertainty.[295] Stopgap measures like the SAFE Act, discussed below, only remove this uncertainty in the narrow situations they specifically regulate and leave all other marijuana and marijuana-adjacent industries still subject to the prohibitions of the CSA.[296]

This leaves significant and unnecessary uncertainty in a market that states could otherwise regulate. By way of example, and not limitation, and as discussed in greater detail above, this issue creates uncertainty for at least "14.2 million square feet of industrial warehouse space in Denver," which is "roughly 2.9 percent of industrial warehouse space in the metropolitan area."[297]

Only sweeping recognition of the states' rights to regulate all intrastate aspects of the marijuana industry and related businesses resolves the uncertainty.

B. Federal Court Determinations Will Remain Relevant Until Congress Acts

Without congressional action, the influence of the federal courts will remain relevant. It is worth stating that there is bipartisan support for a solution which allows (1) state schemes to regulate marijuana and marijuana-adjacent businesses, and (2) for those state schemes to be honored by federal law.[298] For example, the most recent statewide election in Colorado saw incumbent Senator Cory Gardner running against former Governor John Hickenlooper.[299] Both had opposed recreational marijua-

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294. *See* discussion *supra* Section II.B.

295. *See supra* Part II.

296. *See* Thomas Spulak, William Durham & Chad Peterson, *Congress Could Still Pass Cannabis Legislation in 2020*, LAW360 (June 25, 2020, 4:31 PM), https://www.law360.com/compliance/articles/1286752/congress-could-still-pass-cannabis-legislation-in-2020; *see also* discussion *infra* Section IV.B.

297. Felix & Chapman, *supra* note 105.

298. Kris Krane, *The Five Best U.S. Senators on Marijuana Policy*, FORBES (Oct. 24, 2018, 8:27 AM), https://www.forbes.com/sites/kriskrane/2018/10/24/the-five-best-u-s-senators-on-marijuana-policy/.

299. *Colorado Senate Race 2020: Sen. Cory Gardner, John Hickenlooper, 'Seku' Evans and Raymon Doane on the Issues*, CPR NEWS (Oct. 12, 2020), https://www.cpr.org/2020/10/12/vg-2020-colorado-senate-cory-gardner-john-hickenlooper/.

na legalization at the time Colorado was considering legalizing marijuana through a voter referendum.[300] Both now seek to allow the states to govern their own marijuana industries.[301] Cory Gardner's senate newsroom touts his bipartisan introduction of the Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act).[302] The STATES act "would [have] let states make their own marijuana policies."[303] John Hickenlooper's platform advocates effectively the same thing, calling for a decriminalization of marijuana on a federal level and for states to create their own regulatory schemes.[304]

Despite this bipartisan support, Congress appears unwilling, or unable, to act. Cory Gardner's co-sponsor on the STATES Act was Democratic Senator Elizabeth Warren.[305] Still, despite industry and bipartisan support, the Senate has not budged on a marijuana banking bill the House passed last September, and chances of any comprehensive legislation seem slim.[306]

In fact, the intractability of the reform was evident during the debate on coronavirus-relief legislation:

> In September 2019, the House passed the Secure and Fair Enforcement, or SAFE, Banking Act with strong bipartisan support. The SAFE Act would give state-legal marijuana businesses access to banking and commercial lending services, making it easier for them to run and expand their operations.
>
> The bill stalled in the U.S. Senate, but it recently took on new life when the House incorporated it into the Health and Economic Recovery Omnibus Emergency Solutions, or HEROES, Act that passed the House on May 15.[307]

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300. *See* Krane, *supra* note 298; *see also* John Ingold, *Colorado Gov. John Hickenlooper Opposes Marijuana-Legalization Measure*, DENV. POST (Apr. 28, 2016, 8:51 PM), https://www.denverpost.com/2012/09/12/colorado-gov-john-hickenlooper-opposes-marijuana-legalization-measure/.

301. Krane, *supra* note 298; *Marijuana*, HICKENLOOPER, https://hickenlooper.com/issues/marijuana/ (last visited Dec. 22, 2020).

302. *See* Press Release, Cory Gardner, Sen., U.S. Senate, Gardner, Warren Reintroduce STATES Act with Broad Bipartisan Support (Apr. 5, 2019) [hereinafter Gardner Press Release] (on file with authors).

303. Krane, *supra* note 298.

304. *Marijuana*, *supra* note 301.

305. Gardner Press Release, *supra* note 302.

306. Natalie Fertig, *Coronavirus Spells Doom for Federal Cannabis Legislation*, POLITICO (May 12, 2020, 5:38 PM), https://www.politico.com/news/2020/05/12/coronavirus-cannabis-legislation-252313.

307. Spulak et al., *supra* note 296.

In critiquing the House Bill, Senate Majority Leader Mitch McConnell took specific issue with sections related to the marijuana industry, indicating the difficulty of passing meaningful legislation.[308]

While eventual clarity and certainty for marijuana-adjacent industries will likely have to come from legislative enactment, as Congress continues to appear unwilling or unable to pass such legislation, the influence of the federal bench remains critically relevant.

C. Supreme Court Should Revisit Raich

Alternatively, the Court could return such control to the states through revisiting its outlier ruling in *Raich*. As discussed in the dissents in *Raich*, current Supreme Court jurisprudence finds that the federal government does not have a compelling interstate commerce interest in regulating violence against women or certain aspects of gun control but does have an interest in completely *intra*state marijuana transactions.[309] To many, including justices still on the Court, these positions are irreconcilable.[310] As Congress continues to fail to act, revisiting the precedent becomes necessary. As discussed above, a number of the justices who joined in the majority in *Raich* have been replaced with justices who may be swayed by Justice Thomas's originalist dissent, that state action around marijuana is wholly intrastate and thus the Commerce Clause does not apply, and thus a challenge may be successful.[311] The Court should adopt the position of the dissents in *Raich*, stating that intrastate action and regulation of marijuana should be left up to the states themselves, and allow states to regulate intrastate marijuana industries and their consequences. Specifically, petitioners should design an appeal to have the Court find that marijuana industries participating exclusively in intrastate industries should not be subject to federal intervention and should be exclusively controlled by the laws of their respective states.

A ruling that recognizes the ability of states to regulate completely intrastate versions of the marijuana industry and frees the state and federal courts from needing to defer to the CSA would achieve nearly the same broad result as rescheduling marijuana.

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308. Mitch McConnell (@senatemajldr), TWITTER (May 15, 2020, 2:00 PM), https://twitter.com/senatemajldr/status/1261385930180489217?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1261385930180489217%7Ctwgr%5E&ref_url=https%3A%2F%2Fwww.newsweek.com%2Fsecond-stimulus-check-this-month-coronavirus-relief-bill-1505659.

309. *See* Gonzales v. Raich, 545 U.S. 1, 45 (2005) (O'Connor, J., dissenting) ("In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account.").

310. *Id.* at 43.

311. Sol Wachtler, *Brett Kavanaugh is an Originalist*, LAW.COM (Sept. 20, 2018, 11:57 AM), https://www.law.com/newyorklawjournal/2018/09/20/brett-kavanaugh-is-an-originalist/.

D. Public Policy Implications

Giving the states the ability to regulate the marijuana industry and adjacent businesses will give greater certainty to the markets, allow greater democratic participation by giving the decisions to local populations, and allow for the states to serve as the laboratories of democracy. As discussed above, the diverse impacts of creating a marijuana industry, particularly with disparate state and federal regulations, have added uncertainty and unpredictability to the market.[312] Uncertainty adds risks and costs to a free market.[313] Allowing the states to smooth this uncertainty will increase the economic benefits of these industries.

The local voters will be in the best position to balance this economic benefit with any social costs. Disparate regional and political views on the consequences of marijuana consumption can be maintained by returning control to states. This is a stated policy and premise of American federalism and is recognized as public policy by the Tenth Amendment to the U.S. Constitution.[314]

This policy underlies the United States' federalist system and has served it well. The United States has remained innovative and dynamic, at least in part, because the states can serve as laboratories of democracy. As Justice Brandeis wrote in a powerful dissent to the federal government's intervention into such innovation:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system 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.[315]

As explored above, this problem affects diverse and large industries. Marijuana is legal in eleven states for adults over the age of twenty-one,[316] and legal for medical use in thirty-three states and the District of Columbia.[317] Of the remaining seventeen states, four have decriminalized or partially decriminalized marijuana.[318] As evidenced in the case law above, the current system is rife with uncertainty and, therefore, inefficiency. Now is the time to end that confusion. Returning control to the

312. *See supra* Part II.

313. *See* Edmund L. Andrews, *Why "Uncertainty Shocks" are Part of the Trump-Era Economy*, STAN. GRADUATE SCH. OF BUS. (Sept. 6, 2018), https://www.gsb.stanford.edu/insights/why-uncertainty-shocks-are-part-trump-era-economy.

314. *See* Bob Ewegen, *50 Laboratories of Democracy*, DENV. POST (Sept. 28, 2007, 11:27 AM), https://www.denverpost.com/2007/09/28/50-laboratories-of-democracy/.

315. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

316. *See Marijuana Overview*, *supra* note 180.

317. *State Medical Marijuana Laws*, *supra* note 180.

318. *See id.*; *see also Marijuana Overview*, *supra* note 180.

states will demonstrate what works, and does not work, better than a one-size-fits-all federal rule.

CONCLUSION

Congressional action, or a change in the interpretation of the federal government's right to intervene in state regulatory schemes, is needed. Under the current system, federal law, and specifically the CSA, is supreme. As discussed throughout this Article, this prevents courts generally, and the Tenth Circuit specifically, from giving deference to state regulatory schemes, robbing those schemes of the protections they are designed to create.

Decisive action by Congress could take a variety of forms. Removing marijuana from the CSA would be the most straightforward option. This would allow states to legalize marijuana and regulate it as each saw fit. Anything short of this, like the SAFE Act, would only further muddy the waters, as demonstrated by banking and bankruptcy law discussed above. Bankruptcy law holds a crucial place in our society to protect both debtors and creditors, and its inability to deal with major businesses has societal costs. Unbanked money similarly costs society.[319]

Alternatively, the Supreme Court needs to revisit the merits of *Raich*, cited in virtually all the cases discussed above for the supremacy of the CSA, and reevaluate its holding that state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession. The current composition of the Court may be amenable to arguments challenging the federal government's authority under the Commerce Clause. Such authority is already difficult to reconcile with other Commerce Clause jurisprudence.[320] A definitive statement allowing states to regulate intrastate commerce is warranted.

From a public policy perspective, confusion also needs to be eliminated on this matter. While states should still be free to determine that marijuana is illegal, the vast majority of Americans should not have to suffer through the confusion of being told by one controlling sovereign an activity is legal and another it is illegal, and the courts should not be wasting resources trying to both uphold the substantive state law while also avoiding running afoul of their sworn duties as officers of federal courts.

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319. *See* Karl Racine, *Time to Bank the Unbanked Legal Marijuana Industry in This Nation*, THE HILL (Mar. 18, 2019, 10:00 AM), https://thehill.com/opinion/finance/434471-time-to-bank-the-unbanked-legal-marijuana-industry-in-this-nation.

320. *See* Gonzales v. Raich, 545 U.S. 1, 45 (2005) (O'Connor, J., dissenting) ("In my view, the case before us is materially indistinguishable from *Lopez* and *Morrison* when the same considerations are taken into account."); *see also id.* at 58 (Thomas, J., dissenting) ("Respondents' local cultivation and consumption of marijuana is not 'Commerce . . . among the several States.'" (quoting U.S. CONST. art. I, § 8, cl. 3)).

The status quo must be altered.