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Laws for my Enemies: An Argument for Federal Cannabis Legalization

Lauren Romero

I. INTRODUCTION

Amidst a global pandemic, cannabis has been declared an essential business in eleven states,¹ yet remains a Schedule I federally illegal drug. This has buoyed the cannabis industry during the economic fallout created by the pandemic.² Despite a lack of evidence that the drug should remain illegal, cannabis holds a complicated legal status throughout the United States.³ From 2010 to 2018, over 500,000 people were arrested for cannabis-related offenses annually, despite a majority of states having at least partially decriminalized cannabis and a growing number of states having fully legalized recreational and medical cannabis for adult use.⁴ Given the extraordinarily long and complex process to change the federal schedule classification of cannabis with the Drug Enforcement

¹ Brett Schuman et al., *Will COVID-19 Transform The Cannabis Industry?*, LAW 360 (Apr. 3, 2020, 6:06 PM), <https://www.law360.com/articles/1260007> [<https://perma.cc/SE3V-FWKH>].

² See Patricia Tortolani, *Why the Pandemic Was a Breakout Moment for the Cannabis Industry*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/05/31/business/cannabis-marijuana-industry-pandemic-dispensaries.html> [<https://perma.cc/MC8H-8C3T>].

³ See generally Aristos Georgiou, *WHO Recommends Rescheduling Cannabis in International Law for First Time in History*, NEWSWEEK (Feb. 8, 2019, 12:23 PM), <https://www.newsweek.com/who-recommends-rescheduling-cannabis-international-law-first-time-history-1324613> [<https://perma.cc/W2J6-3WQD>]; see also ACLU, *A TALE OF TWO COUNTRIES RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM* 5 (2020), https://www.aclu.org/sites/default/files/field_document/tale_of_two_countries_racially_targeted_arrests_in_the_era_of_marijuana_reform_revised_7.1.20_0.pdf [<https://perma.cc/HP7Z-P2LU>].

⁴ ACLU, *supra* note 3, at 21; see DISA, *Map of Marijuana Legality by State*, <https://disa.com/map-of-marijuana-legality-by-state> [<https://perma.cc/ZD36-XY6M>].

Administration (DEA) and federal courts' unwillingness to resolve the controversy over the classification, this comment argues for federal legislation, adapted from best practices among current legal state legislation frameworks, legalizing cannabis for adult recreational and medical use. The resulting tax revenue and job creation from federal cannabis legalization would provide a desperately needed economic boost as the pandemic continues to ravage our economy.

This paper will use the term “cannabis” to refer to all products consumed recreationally or medicinally coming from the *cannabis sativa*, *cannabis indica*, or *cannabis ruderalis* plant, excluding hemp. The term “marijuana,” which people use synonymously with cannabis, gained popularity and use from racialized fear tactics and propaganda campaigns undertaken in the early 1900s.⁵ Cannabis, the generic term for hemp, derives its roots from both Greek and Sanskrit words describing the plant known today as cannabis.⁶ This paper will use the term cannabis to refer to all parts of the cannabis plant that produce substances otherwise known as marijuana. In addition, this paper discusses decriminalization and legalization. For the purposes of this comment, decriminalization means criminal charges are not applied and may be replaced by civil penalties, whereas legalization means removing both criminal and civil penalties for the possession and personal use of the drug, and regulating its production, sale, and consumption.⁷

First, this comment will examine the historical and legal background of cannabis regulation and prohibition throughout United States history. Second, this comment will briefly discuss previous attempts at changing the

⁵ Alex Halperin, *Marijuana: Is it Time to Stop Using a Word with Racist Roots?*, THE GUARDIAN (Jan. 29, 2018, 5:00 AM), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> [<https://perma.cc/VZ4X-XRKM>].

⁶ MARTIN BOOTH, *CANNABIS A HISTORY* 1–2 (Thomas Dunne Books, 1st ed. 2004).

⁷ Alcohol and Drug Foundation, *Overview: Decriminalisation vs Legalisation*, (Apr. 28, 2021), <https://adf.org.au/talking-about-drugs/law/decriminalisation/overview-decriminalisation-legalisation/> [<https://perma.cc/GAW8-ZRY8>].

schedule classification of cannabis and why those have been unsuccessful. Third, this comment will discuss several current legal states' frameworks and describe the current system of federal cannabis prohibition. Fourth, this comment will apply a best practice legal state framework to propose suggested additions and clarifications needed in Senator Tina Smith's (D-MN) proposed legislation and any future cannabis legislation. Finally, this comment will address the criticisms associated with federal cannabis legalization and conclude by reiterating the importance of legalizing cannabis federally.

II. HISTORICAL & LEGAL BACKGROUND

The earliest direct evidence for consumption of cannabis by humans was discovered in a 2,500-year-old cemetery in Central Asia.⁸ Cannabis has been used throughout history for reasons relating to both the plant's economic utility and the psychoactive qualities the plant possesses when consumed.⁹ Cannabis has played a central role in the spiritual practices of several religions.¹⁰ Numerous claims, beginning in 1936, have been made about cannabis's role in early Christianity, and the subsequent research has tended to support the hypothesis that cannabis may have played a role in the healing ministry of Jesus Christ.¹¹

⁸ Michelle Z. Donahue, *Earliest Evidence for Cannabis Smoking Discovered in Ancient Tombs*, NAT'L GEOGRAPHIC (June 12, 2019), <https://www.nationalgeographic.com/culture/article/earliest-evidence-cannabis-marijuana-smoking-china-tombs> [https://perma.cc/8JBE-HEYN].

⁹ BOOTH, *supra* note 6, at 20.

¹⁰ Eric Stober, *Cannabis and Religion: Exploring the Religious Use of Cannabis Throughout History*, GREENCAMP (Jan. 21, 2020), <https://greencamp.com/cannabis-and-religion/> [https://perma.cc/7R8C-5GZC].

¹¹ BOOTH, *supra* note 6, at 23; see also *Great Moments in Weed History: Did Jesus Use Cannabis to Perform Healing Miracles?*, SPOKE MEDIA (Mar. 27, 2018) (downloaded using Spotify).

Cannabis was first targeted in federal regulation by the Pure Food and Drug Act in 1906.¹² The act required patent medicine companies to list cannabis on the labels of their products alongside opiates, narcotics, and other ingredients wary consumers may have sought to avoid.¹³ Cannabis was widely used medicinally in the United States, but recreational usage was not introduced until a wave of Mexican immigration occurred after the Mexican Revolution of 1910.¹⁴ The Mexican immigrants brought the practice of smoking cannabis recreationally, and the practice quickly gained popularity in the United States.¹⁵ With the surge in popularity, the Spanish word for cannabis, “marijuana,” began to be used regularly, and sensational headlines about cannabis began to appear, conflating cannabis use and crime rates.¹⁶ Cannabis began to be associated with marginalized communities in Mexico that most heavily used the substance, which, when coupled with sensationalized press and prohibitionist attitudes of the elites, allowed for the demonization of cannabis users.¹⁷

A flurry of studies were undertaken to show the connection between cannabis and criminal behavior.¹⁸ However, the association between cannabis use and violent crime was not based on scientific research, but rather sold to the public by journalists and filmmakers searching for

¹² Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history> [<https://perma.cc/L6ZU-8LGC>]; Pure Food and Drug Act of 1906, Pub. L. No. 59-384 (1906) (current version at 21 U.S.C. § 209).

¹³ 21 U.S.C. § 209.

¹⁴ PBS, *Marijuana Timeline*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/5JPU-GBJH>].

¹⁵ Alyssa Pagano, *The Racist Origins of Marijuana Prohibition*, BUS. INSIDER (Nov. 4, 2020, 3:30 PM), <https://www.businessinsider.com/racist-origins-marijuana-prohibition-legalization-2018-2> [<https://perma.cc/PBP5-KH3K>].

¹⁶ *Id.*

¹⁷ Olivia B. Waxman, *The Surprising Link Between U.S. Marijuana Law and the History of Immigration*, TIME (Apr. 20, 2019, 1:30PM), <https://time.com/5572691/420-marijuana-mexican-immigration/> [<https://perma.cc/HFE3-73R7>].

¹⁸ Siff, *supra* note 12.

sensational headlines.¹⁹ Criminalization of cannabis began locally, in small towns along the United States southern border with Mexico, as a way to control migrant populations.²⁰ Cannabis use was criminalized through bans on its sale and possession.²¹ Once the potential for controlling migrant populations through cannabis legislation was realized, the practice spread quickly to other jurisdictions, and state legislatures began to lobby Washington to take federal action towards cannabis.²²

In 1914, Congress passed the Harrison Narcotics Tax Act, which constitutionally prohibited the sale of narcotics to individuals without a prescription from a licensed physician.²³ Not only did the act set certain limits for narcotics by requiring prescriptions for products that exceeded such limits, but it also mandated record-keeping for physicians and pharmacists who prescribed and dispensed narcotics.²⁴ Though cannabis was not named among the substances included in this act, the act generally constitutes the beginning of the United States' drug war and discrimination towards certain substances.²⁵

In the early 1900s, anti-drug advertising and propaganda films used very racialized tones as they warned of "reefer madness," conflating cannabis use with violent criminal behavior and other crimes associated with

¹⁹ *Id.*

²⁰ BOOTH, *supra* note 6, at 133.

²¹ *Id.*

²² *Id.*

²³ DRUG ENF'T AGENCY,

THE EARLY YEARS 12, 14 (2018), <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf> [<https://perma.cc/7EJR-WL2H>]; The Harrison Narcotics Tax Act, S. 785, 63rd Cong. (1914).

²⁴ FDA, *Milestones in U.S. Food and Drug Law History* (Jan. 31, 2018), <https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/milestones-us-food-and-drug-law-history> [<https://perma.cc/YQF7-3AAS>].

²⁵ Jeremy Lesser, *Today is the 100th Anniversary of the Harrison Narcotics Tax Act*, DRUG POL'Y INST. (Dec. 16, 2014), <https://www.drugpolicy.org/blog/today-100th-anniversary-harrison-narcotics-tax-act> [<https://perma.cc/GH8F-3B9Z>].

impoverished groups at the time.²⁶ In the 1920s, anti-drug sentiment gained traction within the prohibitionist movements, which ultimately led to the passage of the Volstead Act of 1919, better known as the act of alcohol prohibition.²⁷ The Federal Bureau of Narcotics (FBN) was created in 1930, and Harry J. Anslinger was placed as its first Commissioner.²⁸

Harry Anslinger, although known as one of history's most powerful anti-cannabis voices, did not come to power on the platform of cannabis prohibition.²⁹ Two years after the establishment of the FBN, lower tax revenue caused by the Great Depression posed a threat to the organization because it caused funding cuts.³⁰ Anslinger endeavored to find a new drug to demonize, upon which he could hinge new budgetary requests for his organization.³¹ Anslinger developed a fixation on cannabis and undertook a publicity campaign to build fear of cannabis-smoking, poor, racial minorities into the American conscience.³² He pushed to include cannabis among the dangerous substances included in the Uniform State Narcotics Act.³³ At the time, many state legislatures were considering similar legislation as a way to make arrests for the use and possession of restricted substances.³⁴ The Uniform State Narcotics Act ultimately included cannabis and closed the taxation loophole created by the Harrison Act.³⁵ By 1936,

²⁶ PBS, *supra* note 14; *see also* Backstory, *All Hopped Up Drugs in America*, VA. HUMANITIES (May 20, 2016), <https://www.backstoryradio.org/shows/all-hopped-up-2016/> [<https://perma.cc/JHR2-WBTV>]. Reefer Madness was the title of a 1936 fictional movie depicting drug dealers getting teenagers addicted to cannabis cigarettes. *Reefer Madness*, IMDB, <https://www.imdb.com/title/tt0028346/> [<https://perma.cc/7YFJ-ESJH>].

²⁷ DRUG ENF'T AGENCY, *supra* note 23, at 15.

²⁸ PBS, *supra* note 14.

²⁹ BOOTH, *supra* note 6, at 147.

³⁰ *Id.* at 149.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

thirty-eight states had added cannabis to their lists of most dangerous drugs included under the act.³⁶

Commissioner Harry Anslinger led the campaign that resulted in Congress passing the Marihuana Tax Act of 1937, the first federal legislation specifically controlling cannabis.³⁷ The Marihuana Tax Act of 1937 was passed to tax the use, production, and sale of cannabis, and the act also included a penalty and additional regulations for cannabis possession.³⁸ While the act was not passed as a criminal law and did not criminalize the use or possession of cannabis, individuals were nevertheless arrested, convicted, and incarcerated for not paying the tax.³⁹ In principle, the Marihuana Tax Act of 1937 stopped individuals from using cannabis as a recreational drug; in practice however, industrial hemp also got caught up in the legislation, which effectively caused the scientific and medical research of cannabis to disappear.⁴⁰ The American Medical Association spoke out against the bill, attacking the unfounded claims that cannabis caused criminality and decrying the whole hearing process as biased.⁴¹

In June 1971, the War on Drugs officially began when then President Richard Nixon declared “war” on controlled substances by drastically increasing the size and presence of federal drug control agencies and

³⁶ *Id.*; see also Lesser, *supra* note 25. The act was not prohibitive on its surface; rather, it imposed special taxes on substances, users, producers, and prescribers.

³⁷ *Did You Know... Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT. (Dec. 20, 2019), <https://www.cbp.gov/about/history/did-you-know/marijuana> [<https://perma.cc/YV8U-SGE5>]; see also, *Leafly's Guide To The History Of Marijuana Legalization*, LEAFLY, <https://www.leafly.com/learn/legalization/marijuana-illegal-history> [<https://perma.cc/JK92-HS2R>].

³⁸ Marihuana Tax Act, S. 551, 75th Cong. (1937); see also Dwight Blake, *Marijuana Tax Act of 1937: What you need to know*, AM. MARIJUANA (Jan. 13, 2020), <https://americanmarijuana.org/marijuana-tax-act-of-1937/> [<https://perma.cc/836Q-KBG5>].

³⁹ S. 551; see also Blake, *supra* note 38.

⁴⁰ *Did You Know... Marijuana Was Once a Legal Cross-Border Import?*, *supra* note 37.

⁴¹ See *Taxation of Marihuana: Hearing before the Comm. on Ways and Means*, 75th Cong. (1937) (statement of Dr. William C. Woodward representing the Am. Med. Ass'n).

championing policies like mandatory sentencing and no-knock warrants to combat illicit substance abuse.⁴² Pending review and recommendations from a Republican-led commission aiming to study the effects of cannabis, the substance was temporarily placed in Schedule I.⁴³ The commission, organized by President Nixon and Congress, returned and unanimously recommended decriminalizing the possession and distribution of cannabis for personal use.⁴⁴ President Nixon ignored the report and rejected its findings.⁴⁵ John Ehrlichman, a top Nixon aid, later admitted:

You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.⁴⁶

President Nixon consolidated multiple federal drug agencies into what we know today as the DEA.⁴⁷ The DEA is the current federal organization used to enforce the controlled substances laws and regulations of the United

⁴² *A Brief History of the Drug War*, DRUG POL'Y ALL. <https://www.drugpolicy.org/issues/brief-history-drug-war> [https://perma.cc/V6PY-9RP5]; see also BOOTH, *supra* note 6, at 241–46.

⁴³ See Keith Stroup, A Founder Looks at 50: Keith Stroup on the Shafer Commission, NORML (May 8, 2020), <https://norml.org/blog/2020/05/08/a-founder-looks-at-50-keith-stroup-on-the-shafer-commission/> [https://perma.cc/AT7R-G3WL].

⁴⁴ *Id.*

⁴⁵ *Id.*; see Dan Baum, *Legalize It All How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> [https://perma.cc/F8W8-K3Z5].

⁴⁶ See Baum, *supra* note 45; see also *A Brief History of the Drug War*, *supra* note 42.

⁴⁷ Mark Perry, *The Shocking Story Behind Richard Nixon's 'War On Drugs' That Targeted Blacks And Anti-War Activists*, AEIDEAS (June 14, 2018), <https://www.aei.org/carpe-diem/the-shocking-and-sickening-story-behind-nixons-war-on-drugs-that-targeted-blacks-and-anti-war-activists/> [https://perma.cc/GFS4-4KB5].

States.⁴⁸ Its mission includes investigating illicit drug trade and use, bolstering state and local enforcement efforts, and cooperating with international organizations working towards similar goals.⁴⁹ The Controlled Substances Act of 1970 (CSA), passed in Congress and signed by President Nixon, created the list of controlled substances subjected to DEA enforcement.⁵⁰ The act set up the current system of drug scheduling that the United States still has in place today.⁵¹

III. CURRENT SYSTEM

The CSA, codified in 21 USC § 812, established the current schedule system for classifying controlled substances.⁵² Drugs and certain chemicals used to manufacture drugs are currently classified into five categories or “schedules” depending on the drug’s accepted medical use and potential for abuse or dependency.⁵³ Cannabis is currently listed as a Schedule I drug, defined as “drugs with no currently accepted medical use and a high potential for abuse.”⁵⁴ The act further provides that “[u]nless specifically excepted or unless listed in another schedule,” the drugs listed in Schedule I will remain illegal unless the schedule of a specific drug is challenged.⁵⁵

The War on Drugs took a slight hiatus through the 1970s, with President Jimmy Carter running on a platform to decriminalize cannabis and eleven

⁴⁸ *Mission*, DRUG ENF’T AGENCY, <https://www.dea.gov/mission> [<https://perma.cc/L8EX-HBCA>].

⁴⁹ *Id.*

⁵⁰ Jason S. Plume, *Cultivating Reform: Richard Nixon’s Illicit Substance Control Legacy, Medical Marijuana Social Movement Organizations, And Venue Shopping* (Dec. 2012) (Ph.D. dissertation, Syracuse University) (on file with SURFACE, Syracuse University).

⁵¹ *The Controlled Substances Act: Overview*, FINDLAW (Mar. 01, 2019), <https://www.findlaw.com/criminal/criminal-charges/controlled-substances-act-csa-overview.html> [<https://perma.cc/XW4N-YC4L>].

⁵² Controlled Substances Act of 1970, 21 U.S.C. § 812 (2018).

⁵³ *Drug Scheduling*, DRUG ENF’T AGENCY, <http://dea.gov/drug-scheduling> [<https://perma.cc/Y2J7-9K2M>].

⁵⁴ *Id.*

⁵⁵ 21 U.S.C § 812.

states decriminalizing cannabis possession.⁵⁶ After the Carter administration, President Ronald Reagan reignited and expanded many of the policies from Nixon's War on Drugs.⁵⁷ A combination of President Reagan's increased focus on drugs and the institution of severe penalties for drug-related crimes on both a state and federal level led to a massive increase in incarceration for drug offenses.⁵⁸

There have been many unsuccessful petitions to change cannabis's classification, dating back to 1972. The first petition took twenty-two years until a decision was issued, and the two most recent petitions, filed in 2009 and 2011, were not decided until 2016.⁵⁹ In August 2016, the DEA reaffirmed cannabis's Schedule I classification.⁶⁰ These long, unsuccessful attempts demonstrate the need to change cannabis policy through other methods.

Today, cannabis remains in a contradictory legal position because it has been legalized for full adult recreational use in many states and for medical use in a majority of states, but it is still illegal under federal law.⁶¹ The federal schedule of cannabis also appears to be inconsistent with other federal policy; for example, CBD or cannabidiol, an active non-hallucinogenic chemical contained in cannabis, has known medical uses despite its Schedule I classification.⁶² The FDA approved the drug

⁵⁶ *War on Drugs*, HISTORY (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [https://perma.cc/WY9E-3GN5].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Diane Hoffmann et al., *Will The FDA's Approval Of Epidiolex Lead To Rescheduling Marijuana*, HEALTH AFF. BLOG (July 12, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180709.904289/full> [https://perma.cc/H6CT-C8CK].

⁶⁰ *Id.*

⁶¹ *Leafly's Guide to Marijuana Legalization*, LEAFLY, <https://www.leafly.com/learn/legalization#legalization-map> [https://perma.cc/KL36-G44N].

⁶² Peter Grinspoon, *Cannabidiol (CBD) — What We Know and What We Don't*, HARV. HEALTH PUBL'G: HEALTH BLOG (Aug. 24, 2018, 6:30 AM),

Epidiolex, which contains CBD, in 2018 as a treatment for epilepsy.⁶³ In addition, the National Academies found substantial evidence that cannabis can alleviate chronic pain.⁶⁴ This should lead to a reconsideration of the federal schedule of cannabis, as there is direct evidence of the classification's inappropriateness. However, given how long the DEA reclassification process is and the unique uses and effects of the various substances produced from cannabis, cannabis legalization must be pursued through federal legislation.

Executive enforcement of current federal drug laws has changed with presidential administrations.⁶⁵ Under the Trump administration, the protections put in place by the Obama administration were abruptly rescinded in 2018 by then Attorney General Jeff Sessions, who threatened federal prosecution of cannabis businesses in states where cannabis was legal.⁶⁶ Despite broad public support, the Biden administration does not view cannabis policy as a priority and seems unlikely to move towards federal legalization.⁶⁷

<https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476> [<https://perma.cc/6BRH-W8DG>].

⁶³ James G. Hodge et al., *From Opioids to Marijuana: Out of the Tunnel and Into the Fog*, 67 U. KAN. L. REV. 879, 892 (2019).

⁶⁴ *Removing Marijuana from the Schedule of Controlled Substances*, DRUG POL'Y ALL. 1 (Jan. 2019), https://drugpolicy.org/sites/default/files/marijuana-scheduling_january_2019_0.pdf [<https://perma.cc/MA7V-LEFV>].

⁶⁵ In a memo written by then Attorney General James Cole, "The Obama administration in 2013 announced it would not stand in the way of states that legalized marijuana, so long as officials acted to keep it from migrating to places where it remained outlawed and keep it out of the hands of criminal gangs and children." Jamiles Lartey, *Jeff Sessions to Crack Down on Legalized Marijuana, Ending Obama-Era Policy*, THE GUARDIAN (Jan. 4, 2018, 4:07 PM), <https://www.theguardian.com/us-news/2018/jan/04/jeff-sessions-to-crack-down-on-legalized-marijuana-ending-obama-era-policy> [<https://perma.cc/Z8D7-GQDE>].

⁶⁶ *Id.*

⁶⁷ Kris Kane, *Enjoy Marijuana? Joe Biden Doesn't Care About You*, FORBES (Mar. 26, 2021, 9:15 AM), <https://www.forbes.com/sites/kriskrane/2021/03/26/enjoy-marijuana-joe-biden-doesnt-care-about-you/?sh=b8ae470651df> [<https://perma.cc/K5CA-UK8Z>].

IV. COURT CHALLENGES

Several court cases have challenged cannabis's inclusion in the Controlled Substances Act, with none producing a result cannabis advocates desire.⁶⁸ This paper will examine two cases that demonstrate specific aspects of the federal courts' approach to cannabis policy that make legalization through the courts unlikely. *Gonzales v. Raich* was a court challenge to the federal schedule of cannabis that reached the Supreme Court.⁶⁹ In that case, respondents sought injunctive relief prohibiting the enforcement of the federal CSA in light of California's Compassionate Use Act enacted in 1996.⁷⁰ The Supreme Court ruled that the Department of Justice can enforce federal drug laws against purely intrastate commercialization of medicinal cannabis which, in this case, was the plaintiff's homegrown cannabis for personal consumption.⁷¹ As a result, federal cannabis policy, which supersedes state protections, hinders legal cannabis states' ability to provide protections to users.⁷²

More recently, in *Washington v. Barr*, plaintiffs challenged the inclusion of cannabis in Schedule I of the CSA, but the court dismissed the claim because it found that the parties had failed to fully exhaust administrative remedies; therefore, the court refused to hear the suit and dismissed with prejudice.⁷³ Though Congress has not clearly mandated that parties are required to exhaust administrative remedies, in this particular instance, the

⁶⁸ See Kyle Jaeger, *Supreme Court Declines To Hear Marijuana Case Challenging DEA's Restrictive Classification*, MARIJUANA MOMENT (Oct. 13, 2020), <https://www.marijuanamoment.net/supreme-court-declines-to-hear-marijuana-case-challenging-deas-restrictive-classification/> [<https://perma.cc/LK42-N6ZT>].

⁶⁹ *Gonzales v. Raich*, 545 U.S. 1, 1 (2005).

⁷⁰ *Id.*; see also Kennedy Peterson, *The Compassionate Use Act of 1996*, FOUNDATIONS. L. & SOC'Y (Dec. 9, 2016), <https://foundationsoflawandsociety.wordpress.com/2016/12/09/the-compassionate-use-act-of/> [<https://perma.cc/9D3G-XY9U>].

⁷¹ *Gonzales*, 545 U.S. at 1.

⁷² See *Coats v. Dish Network*, 2015 Colo. 44, 350 P.3d 849, 852 (2015).

⁷³ *Washington v. Barr*, 925 F.3d 109, 122 (2d Cir. 2019).

court still required it as a matter of judicial discretion.⁷⁴ Given the federal courts' reluctance to resolve the discrepancy apparent in the federal classification of cannabis without administrative exhaustion, federal legislation is the most promising route to address the growing disconnect between individual attitudes towards cannabis legalization and the current federal drug policy.

V. OVERVIEWS OF LEGAL STATE FRAMEWORK

This section will provide an overview of legal states based on regulatory body/licensing requirements, cultivation, medical use, and racial equity efforts. This section will examine the policies of Colorado, Michigan, Massachusetts, Maine, Nevada, Oregon, Washington, Alaska, Maryland, and Vermont discussed in listed order as a cross section sample of state regulatory regimes.

Colorado legalized cannabis for adult recreational and medical use in 2014.⁷⁵ When Colorado enacted Amendment 64, individuals twenty-one and older became legally allowed to possess up to one ounce of cannabis at any time.⁷⁶ Property owners can ban cannabis use on any private property, and it remains illegal to consume cannabis in public.⁷⁷ However, Colorado Governor Polis signed into law several new bills that, among other things, allow for businesses to create spaces for patrons to consume cannabis.⁷⁸ HB 1234 allows for home delivery of cannabis, and SB 13 allows medical patients to use medical cannabis for anything that an opiate prescription

⁷⁴ *Id.* at 116.

⁷⁵ COLO. CONST. art. XVIII, § 16.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ H.B. 19-1230, 72nd Gen Assemb., 2nd Reg. Sess. (Col. 2019); *see also* Juliana Minn, *Consumption in Colorado: New Licenses May Help Shake up a Maturing Market*, CANNABIZ MEDIA (Feb. 4, 2020), <https://www.cannabiz.media/blog/on-site-cannabis-consumption-in-colorado-new-licenses-may-help-shake-up-a-maturing-market> [<https://perma.cc/HLJ3-YCVT>].

may treat and makes investment in cannabis businesses easier.⁷⁹ Some research has shown cannabis access was associated with reduced rates of opioid abuse and overdose deaths.⁸⁰

Michigan passed a voter-approved law in 2018 that fully legalized cannabis for adult recreational use. Then, by executive order, the governor created the regulatory agency for the licensure of new cannabis businesses and producers.⁸¹ Michigan is notable because its application process includes a plan for social equity which directs the Marijuana Regulatory Agency to identify and develop plans for engagement and resources for communities most impacted by cannabis's prohibition.⁸² Michigan also restricts the number and type of licenses an individual may possess at one time.⁸³

Massachusetts approved a ballot initiative in 2017 to legalize and regulate cannabis similarly to alcohol.⁸⁴ The state legislature amended the law, and the governor ultimately signed a compromise bill that provides for adults twenty-one and older to possess, gift, manufacture, and sell cannabis and cannabis paraphernalia to other adults.⁸⁵ Massachusetts also provides legal protection for legal cannabis users in child custody cases and allows

⁷⁹ S.B. 19-013, 72nd Gen. Assemb., 2nd Reg. Sess. (Col. 2019); H.B. 19-1234, 72nd Gen. Assemb., 2nd Reg. Sess. (Col. 2019).

⁸⁰ See *Relationship Between Marijuana and Opioids*, NORML (2021), <https://norml.org/marijuana/fact-sheets/relationship-between-marijuana-and-opioids/> [<https://perma.cc/7DGG-ZG7J>].

⁸¹ MICH. COMP. L. ANN. § 333.27001 (West, 2019); Tom Angell, *Michigan Voters Approve Marijuana Legalization*, (Nov. 6, 2018, 11:30PM), <https://www.forbes.com/sites/tomangell/2018/11/06/michigan-voters-approve-marijuana-legalization/?sh=7567ea3b47a5> [<https://perma.cc/SGQ6-JCZB>].

⁸² *Michigan's 2019 Emergency Rules to Regulate Marijuana for Adult Use*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/states/michigan/michigans-2019-emergency-rules-to-regulate-marijuana-for-adult-use/> [<https://perma.cc/4ZZ4-TQ9L>].

⁸³ MICH. COMP. LAWS ANN. § 333.27001 (West, 2019).

⁸⁴ *Massachusetts Question 4 — Legalize Marijuana — Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:25 AM), [nytimes.com/elections/2016/results/massachusetts-ballot-measure-4-legalize-marijuana](https://www.nytimes.com/elections/2016/results/massachusetts-ballot-measure-4-legalize-marijuana) [<https://perma.cc/D97C-QD6Z>].

⁸⁵ *Id.*; see also codified in MASS. GEN. LAWS ch. 94G §§1–21.

for some individuals to become eligible to immediately seal past records for cannabis possession.⁸⁶ Public use and consumption of cannabis is subject to similar restrictions seen for alcohol consumption, with public consumption largely being banned unless specifically provided for by a business or the city.⁸⁷

California has a long history of policy reform with cannabis and was one of the earliest states to begin legalizing efforts when voters approved the Compassionate Use Act in 1996.⁸⁸ The act established legal medical use of cannabis.⁸⁹ Then, in 2016, California legalized cannabis for adult recreational use by voter-approved ballot initiative.⁹⁰ Amid the COVID-19 pandemic, California was an early leader in declaring cannabis as an essential business.⁹¹ This made curbside pickup and delivery of cannabis to medical patients possible.⁹²

Maine had the first legal sale of cannabis in October 2020, four years after voters decided to legalize cannabis.⁹³ This was a significant delay considering Maine's vote to legalize cannabis occurred on the same day—November 8, 2016—as California, Massachusetts, and Nevada's votes to legalize adult recreational use.⁹⁴ Maine's medical cannabis program is notable because the legislature overrode the governor's vetoes to eliminate

⁸⁶ Nicole K. Levy, *How Does Legal Marijuana Impact Child Custody Cases?*, LYNCH & OWENS P.C. (Mar. 5, 2019), <https://www.lynchowens.com/blog/2019/march/how-does-legal-marijuana-impact-child-custody-ca/> [<https://perma.cc/9GKW-LJ2X>].

⁸⁷ See MASS. GEN. LAWS ch. 55 §§76–82.

⁸⁸ Codified in CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

⁸⁹ *Id.*

⁹⁰ *The Control, Regulate and Tax Adult Use of Marijuana Act*, CAL. GOV'T, <https://post.ca.gov/proposition-64-the-control-regulate-and-tax-adult-use-of-marijuana-act> [<https://perma.cc/7PWK-YBLX>]

⁹¹ Schuman et al., *supra* note 1.

⁹² *Id.*

⁹³ Kyle Jaeger, *Maine Marijuana Sales Can Finally Begin, Officials Announce Four Years After Voters Legalized It*, MARIJUANA MOMENT (Aug. 14, 2020), <https://www.marijuanamoment.net/maine-marijuana-sales-can-finally-begin-officials-announce-four-years-after-voters-legalized-it/> [<https://perma.cc/F557-XZE4>].

⁹⁴ *Id.*

the qualifying conditions list, the system used by most legal medical cannabis states,⁹⁵ which allows any Maine resident to use cannabis if a doctor thinks it would be helpful for them.⁹⁶ Maine has business licenses divided into cultivation, manufacturing, testing, transportation, and retail stores.⁹⁷

Nevada legalized adult cannabis use by voter initiative in 2016, and recreational cannabis retail began soon after in 2017.⁹⁸ Nevada only allows adult cultivation of cannabis plants if the individual lives twenty-five miles or more away from an operating retail cannabis store.⁹⁹ Nevada's medical cannabis laws allow for medical cannabis patient designation for listed qualifying medical conditions.¹⁰⁰

Oregon, Washington, and Alaska's cannabis legalization efforts are very similar to each other and only require a brief summary. These states all legalized cannabis through ballot initiative.¹⁰¹ These states generally require separate licensure for producers, retailers, transporters, and other cannabis industry businesses and the states provide regulation from a state-run

⁹⁵ See *infra* Part VI.

⁹⁶ ME. DEP'T ADMIN. & FIN. SERVS. OFF. MARIJUANA POL'Y, MAINE MEDICAL USE OF MARIJUANA PROGRAM (2020), https://www.maine.gov/dafs/omp/sites/maine.gov.dafs.omp/files/inline-files/Office-of-Marijuana-Policy_DAFS_MMMP-Annual-Report-2019.pdf [<https://perma.cc/RMN5-MP42>].

⁹⁷ See *generally Applications and Forms*, ME. DEP'T ADMIN. & FIN. SERVS. OFF. MARIJUANA POL'Y, <https://www.maine.gov/dafs/omp/adult-use/applications-forms> [<https://perma.cc/THC8-PQQT>].

⁹⁸ Chris Kudialis, 'Early start' program for recreational marijuana sales OK'd, L.V. SUN (May 8, 2017), <https://lasvegasun.com/news/2017/may/08/early-start-program-for-recreational-marijuana-sal/> [<https://perma.cc/7TXH-MT83>].

⁹⁹ NEV. REV. STAT. § 678D.310 (2020).

¹⁰⁰ NEV. REV. STAT. § 678C.030 (2020).

¹⁰¹ See ALASKA STAT. § 17.38 (2015); Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN BUS. (Nov. 8, 2012), <https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/> [<https://perma.cc/QAC8-VJ3Y>]; codified in OR. REV. STAT. § 574.059 (2020) and OR. ADMIN. R. 855-080-022.

government cannabis regulatory agency.¹⁰² State legalization efforts have led to massive tax revenue for the states.¹⁰³ However, Alaska was notably the first state to allow on-site consumption by utilizing an endorsement system for existing businesses, which differs from Oregon and Washington.¹⁰⁴

Maryland and Vermont have both moderately decriminalized adult cannabis possession.¹⁰⁵ Vermont is significant because cannabis legalization has been driven by the state legislature instead of passing by voter initiative.¹⁰⁶ Notable inclusions in the S.54 legislations include: changing “marijuana” to “cannabis” throughout the Vermont statutes; a system of prioritization of licensure and business assistance to promote the growth of minority-owned businesses and those disproportionately affected by cannabis prohibition; and a companion bill, S.234, which would

¹⁰² *Marijuana Licensing*, WASH. STATE LIQUOR & CANNABIS BD. <https://lcb.wa.gov/mjlicense/marijuana-licensing> [https://perma.cc/HV37-STXS]; see ALASKA STAT. § 17.38 (2015); codified in OR. REV. STAT. § 475B.186 (2019) and OR. ADMIN. R. 855-080-0221; *Oregon Amend Recreational and Medical Cannabis Laws Initiative*, BALLOTPEDIA, (2020), [https://ballotpedia.org/Oregon_Amend_Recreational_and_Medical_Cannabis_Laws_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Amend_Recreational_and_Medical_Cannabis_Laws_Initiative_(2020)) [https://perma.cc/LBP7-TWZ5].

¹⁰³ Matt Leseman, *Marijuana Tax Revenues Hit New Record, More Growth Expected*, ALASKA NEWS SOURCE (Jan. 3, 2020), <https://www.alaskanewssource.com/content/news/Marijuana-tax-revenues-hit-new-record-more-growth-expected-566712861.html> [https://perma.cc/DN2Y-2VKK]; see also Kenneth W. Boyd, *Deep Dive: Recreational Marijuana Tax Revenue in the United States*, CPA ACCT. INST. FOR SUCCESS (Nov. 18, 2020), <https://www.ais-cpa.com/deep-dive-recreational-marijuana-tax-revenue-in-the-united-states/> [https://perma.cc/C2XD-99BT].

¹⁰⁴ Annie Zak, *It's Official: Alaska Adopts Rules for On-Site Marijuana Consumption at Retail Shops*, ANCHORAGE DAILY NEWS (Mar. 12, 2019), <https://www.adn.com/alaska-marijuana/2019/03/13/alaska-adopts-rules-for-on-site-marijuana-consumption-at-retail-shops/> [https://perma.cc/REH4-ECCY].

¹⁰⁵ See MD. CODE ANN. § 5 (2017); VT. STAT. ANN. tit. 6-7 (2020).

¹⁰⁶ See Jean G. Fernandez, *Vermont Legislature Passes Legalization Bills, Legalizes Retail Sales*, SHEPHERD EXPRESS (Oct. 06, 2020, 10:18AM), <https://shepherdexpress.com/cannabis/cannabis/vermont-legislature-passes-legalization-bills-legalizes-retail/> [https://perma.cc/XJK8-U563].

automatically expunge records of low-level cannabis offenses.¹⁰⁷ Maryland legalized medical cannabis and utilizes a list of qualifying conditions for medical cannabis patients' registration.¹⁰⁸

These state frameworks demonstrate the varying approaches to addressing problems associated with the federal prohibition of cannabis. Federal legalization must include specific provisions for a unique regulatory body, cultivation regulations, and a medical regime to ensure the most equitable outcomes. Federal legislation should use these existing state frameworks as examples for regulatory body structure, cultivation regulations, and medical regimes when developing a solution to cannabis prohibition.

VI. BILL BY SENATOR TINA SMITH (D-MN)

Senator Tina Smith of Minnesota introduced federal legislation for implementing cannabis legalization at the federal level named the Substance Regulation and Safety Act of 2020 or the SRSA Act.¹⁰⁹ The bill has subsequently died in committee before publication of this paper, and a new, similar bill called the Cannabis Administration and Opportunity Act was introduced by Senators Booker, Wyden, and Schumer on July 14, 2021.¹¹⁰ This paper's suggestions are applicable to any future federal cannabis legislation, as guidelines for anyone that may use Senator Smith's bill as an example, and if the bill is ever revived. Senator Smith (D-MN)

¹⁰⁷ S. 234 amending multiple sections of VT. STAT. ANN. (2020).

¹⁰⁸ See MD. CODE ANN. HEALTH-GEN §13 (2017); see MD. CODE ANN. § 5 (2017).

¹⁰⁹ Substance Regulation and Safety Act, S. 4386 116th Cong. § 2 (2020).

¹¹⁰ GovTrack, *S. 4386 (116th): Substance Regulation and Safety Act of 2020*, <https://www.govtrack.us/congress/bills/116/s4386> [https://perma.cc/4EB5-2EQ4]; Ryan Bernstein & Scott Binkley, *Update on Cannabis Administration and Opportunity Act*, JDSUPRA, (July 22, 2021), <https://www.jdsupra.com/legalnews/update-on-cannabis-administration-and-9800642/> [https://perma.cc/MK5W-X76S]. Burns & Levison LLP, *The Cannabis Administration and Opportunity Act: Too Much Too Soon? Too Little Too Late? Or Just the Right Time?*, JDSUPRA (Sept. 21, 2021), <https://www.jdsupra.com/legalnews/the-cannabis-administration-and-5667781/> [https://perma.cc/AJ3R-3HUV].

highlighted, in her floor introduction to the bill, how federal prohibition of cannabis is failed policy that has harmful, racist legacies.¹¹¹ The bill would specifically remove cannabis from the list of illegal controlled substances, require the Food and Drug Administration (FDA) to regulate cannabis and cannabis products similarly to how it regulates tobacco, and establish research to ensure practices of enforcement do not continue to perpetuate racist patterns.¹¹²

The Family Smoking Prevention and Tobacco Control Act, signed by President Obama in 2009, created a new chapter to the Food, Drug, and Cosmetic Act, which gave the FDA jurisdiction over current and new tobacco products.¹¹³ Under Senator Smith's proposed legislation, cannabis would be removed from any schedule classification, any cannabis offenses committed prior to the act would be excused, and the bill would also require consultation with "civil rights stakeholders" to evaluate enforcement and methods of detection to prevent racially disparate impacts.¹¹⁴

VII. SHORTCOMINGS OF THE SRSA

This section will discuss shortcomings of Senator Smith's (D-MN) proposed bill and discuss proposed additions and topics for further consideration that are applicable both to Senator Smith's bill and any subsequent cannabis legislation put forth.

¹¹¹ *U.S. Senator Tina Smith Introduces Marijuana Reform Legislation to Protect Health, Safety, Civil Rights*, TINA SMITH U.S. SEN. FOR MINN. (Aug. 3, 2020), <https://www.smith.senate.gov/us-senator-tina-smith-introduces-marijuana-reform-legislation-protect-health-safety-civil-rights> [<https://perma.cc/4JDE-FV2R>] [hereinafter "Sen. Tina Smith Introduces"].

¹¹² *Id.*

¹¹³ TOBACCO CONTROL LEGAL CONSORTIUM, UNCHANGED STATE AND LOCAL AUTHORITY FEDERAL REGULATION OF TOBACCO: IMPACT ON STATE AND LOCAL AUTHORITY (2009), <https://publichealthlawcenter.org/sites/default/files/fda-4.pdf> [<https://perma.cc/MV6S-2RRX>].

¹¹⁴ *See* Substance Regulation and Safety Act, S. 4386 116th Cong. § 2 (2020).

Strained state budgets from an ongoing pandemic have led state legislatures to begin seeking new sources of tax revenue.¹¹⁵ Prosecution and enforcement of drug-related offenses have cost taxpayers an enormous amount of money over decades, so cannabis legalization could alleviate some of the costs associated with cannabis prohibition.¹¹⁶ However, an unbounded cannabis industry could grow to resemble something of Big Pharma, Big Tobacco, and Big Alcohol, which prey upon vulnerable users to increase revenue when left without a sensible regulatory scheme.¹¹⁷ Based on the severe, disproportionate damage the War on Drugs has wrought upon communities of color, federal legislation must also implement a plan for social equity through licensure and expungement to ensure that those individuals who have been harmed by cannabis prohibition can access and benefit from legalized markets.

A. Definition Section

Senator Smith’s bill claims to begin to combat racism in cannabis prohibition: “The Federal prohibition on marijuana is a failed policy that contributes to mass incarceration and the racist over-policing of communities of color. It is time to end that policy.”¹¹⁸ However, the bill provides very little to address the effects of racism in past and present eras of cannabis prohibition, and Senator Smith uses the term “marijuana” when referring to cannabis in her introduction of the bill, despite cannabis being the primary term used throughout the bill.¹¹⁹ The bill lacks a basic

¹¹⁵ See Anshu Siripurapu & Johnathan Masters, *How COVID-19 is Harming State and City Budgets*, COUNCIL ON FOREIGN RELS. (Jan. 12, 2021, 7:00 AM), <https://www.cfr.org/backgrounder/how-covid-19-harming-state-and-city-budgets> [https://perma.cc/7AUC-VEYB].

¹¹⁶ See ACLU, *supra* note 3, at 13–14.

¹¹⁷ Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We’re Going*, 43 SEATTLE U. L. REV. 883, 900 (2020).

¹¹⁸ Sen. Tina Smith Introduces, *supra* note 111.

¹¹⁹ *Id.*

definition section.¹²⁰ A definition section is necessary to create shared understanding of the substances to be regulated, and this distinction would inform future policy decisions. Precision in terminology contained in regulations and statutes may also begin to remove some of the stigma that has historically been associated with cannabis.

B. Regulatory Body

Federal legislation must include a mechanism to promote social equity and restorative justice through a licensure program. Senator Smith's bill fails to do so. For example, Michigan requires a social equity plan to be submitted with the application for licensure and provides advisory organizations to women and minority business owners looking to enter the legal cannabis market.¹²¹ Vermont, California, Illinois, and Michigan have done the most to help expand access and resources to marginalized communities by providing reduced license fees, grants, and technical assistance.¹²² Federal legislation should include similar programs to increase access to those communities most affected by cannabis prohibition. The federal legislation proposed by Senator Smith's bill requires existing agencies to adapt and take on added responsibilities related to cannabis legalization.¹²³ A specific regulatory body could devote more time, labor, and resources than an existing agency to combat inequalities in enforcement and access in a newly legalized marketplace. Given how much racism has been at play throughout the United States' history of cannabis prohibition, it

¹²⁰ See Chester Harper, *All Is for the Best in the Best of All Possible Worlds: The Unnecessary Environmental Costs of Federal Cannabis Prohibition*, 21 VT. J. ENVTL. L. 55, 71–72 (2019); see also *supra* Introduction.

¹²¹ See *supra* Part VI.

¹²² Kayla Siam, *Social Equity Programs in Cannabis – Worth their Weight?*, BLUNT TRUTH (Feb. 27, 2020), <https://www.blunttruthlaw.com/2020/02/social-equity-programs-in-cannabis-worth-their-weight/> [<https://perma.cc/2XLF-RPEP>].

¹²³ See Substance Regulation and Safety Act, S. 4386 116th Cong. § 2 (2020).

would be irresponsible for any federal solution to not include language creating a specific regulatory body to undertake cannabis regulation.

For example, a federal Secretary of the Department of Cannabis would function similarly to how cannabis czars in legal states do that oversee the whole state's cannabis industry agenda and lead on policy proposals.¹²⁴ A cannabis czar, like the drug czar (head of the Office of National Drug Control Policy), would increase the communication and coordination of efforts to effectively regulate and grow state medical cannabis programs with resources and directions from federal agencies.¹²⁵

C. Medical v. Recreational

Senator Smith's bill also fails to address the unique medicinal aspects of cannabis, effectively erasing the dichotomy between recreational and medicinal cannabis.¹²⁶ Cannabis, unlike alcohol, can be used to treat a variety of ailments; therefore, medical cannabis regulation should be undertaken in the same manner as public health policy.¹²⁷ Federal legislation should provide separate rules and regulations for the medicinal use of cannabis that provide protections for employees who use medical cannabis.¹²⁸ Sample language based on Michigan's medical cannabis program is provided in Appendix C.¹²⁹

Treating cannabis as a substance to be regulated exactly like tobacco diminishes the documented medical benefits of cannabis that have

¹²⁴ See Andrew Ward, *The Various Roles of Cannabis Czars Across the United States*, HIGH TIMES (May 8, 2020), <https://hightimes.com/news/politics/the-various-roles-cannabis-czars-across-united-states/> [https://perma.cc/QQZ3-KNBH].

¹²⁵ See *Office of National Drug Policy*, WHITE HOUSE, <https://www.whitehouse.gov/ondcp/> [https://perma.cc/LA87-TGXC].

¹²⁶ See Substance Regulation and Safety Act, S. 4386 116th Cong. § 2 (2020).

¹²⁷ See generally *supra* Part IV.

¹²⁸ See generally Anne Marie Lofaso, *Say "No" to Discrimination, "Yes" to Accommodation: Why States Should Prohibit Discrimination of Workers Who Use Cannabis for Medical Purposes*, 43 SEATTLE U. L. REV. 955 (2020).

¹²⁹ See *supra* Part V; see also *infra* Appendix C.

contributed greatly to the push for further legalization.¹³⁰ While erasing the somewhat arbitrary line between medicinal and recreational cannabis could potentially help further remove stigma from cannabis, the downside is a lack of protections for medical patients who use cannabis medicinally, which leads to greater risk of losing employment, benefits, and housing. Cannabis use should be protected through a medical regulatory scheme because of cannabis's unique medicinal qualities and relatively low risk for abuse.¹³¹

In addition, the bill proposed by Senator Smith should standardize medical cannabis requirements to include reciprocity over state lines for current medicinal cannabis users. At a minimum, the federal bill should provide directions to amend current health care regulations to create a database of qualifying conditions shown to benefit from medical cannabis treatment. Ideally, as access to and research on cannabis increases, such a list of qualifying conditions would no longer be necessary as the trend continues towards allowing physicians to prescribe cannabis whenever they believe it may benefit the patient, like Maine has done.¹³² A majority of legal states include medical cannabis provisions that differ from the recreational cannabis regulations.¹³³

The medicinal uses for cannabis place cannabis policy squarely within the public health realm. Short of full legalization, federal policy must immediately change to protect medical cannabis patients from employment termination and other penalties associated with lawful cannabis use. In *Coats v. Dish Network, LLC*, the Supreme Court of Colorado deemed that it is permissible for a company to fire a medical cannabis user lawfully consuming cannabis on off-duty hours because the interpretation of the

¹³⁰ *Id.*

¹³¹ DRUG POL'Y ALL., *supra* note 64, at 1.

¹³² *See supra* Part V.

¹³³ *Id.*

word “lawful” in the statute included both state and federal laws.¹³⁴ The court found that medical cannabis use, even in a legal state, remains illegal under the CSA; therefore, medical cannabis use was not protected and was a legitimate reason to fire someone for unlawful, off-duty activity.¹³⁵ This court decision and the lack of specific protections demonstrate the ongoing danger and need for employment protections for medical cannabis patients in legal states.¹³⁶

D. Cultivation

Even though several states regulate personal grow operations, such operations are not addressed in the proposed federal legislation.¹³⁷ The federal bill should include specific instructions for private cultivation and regulation of newly created markets. Cannabis prohibition has resulted in toxic contamination of public lands and clear-cutting grow sites for unregulated, illegal grow operations, which increases wildfire danger.¹³⁸ Without more specific direction and regulation contained in the legislation, federal legalization poses its own environmental threats because states have struggled to adequately advise and regulate cultivators.¹³⁹ Personal grow operations have benefited many medical cannabis patients by producing a steady supply of cannabis for the patient throughout the year; however, small limitations on plants in Colorado were exploited and mostly produced cannabis for the illegal market.¹⁴⁰ A reasonable assumption, however, is

¹³⁴ Coats v. Dish Network, 2015 Colo. 44, 350 P.3d 849, 852 (2015).

¹³⁵ *Id.*

¹³⁶ See Mark Berman, *Colorado Supreme Court says companies can fire workers for using medical marijuana in their off-hours*, WASH. POST (June 15, 2015, 2:05 PM), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/15/colorado-supreme-court-says-companies-can-fire-workers-for-using-medical-marijuana-in-their-off-hours/> [<https://perma.cc/SB3S-GKKF>].

¹³⁷ See *supra* Part IV.

¹³⁸ Harper, *supra* note 120, at 59–61.

¹³⁹ *Id.*

¹⁴⁰ Harper, *supra* note 120, at 85.

that the demand for illicit cannabis would decrease significantly if private cultivation was legalized.¹⁴¹

Private cultivation must be included in the federal bill because it is essential to guarantee access for individuals who would not otherwise have legal access to recreational cannabis. Nevada provides specific private cultivation rules for individuals who live twenty-five miles away from a dispensary to address issues of access.¹⁴² Allowing private cultivation of cannabis in federal legislation would also increase access for medical cannabis users and would address some of the concerns about legalization demand for cannabis and the resulting environmental impacts.¹⁴³

VIII. CRITICISMS OF FEDERAL CANNABIS LEGALIZATION

This section will address some of the persistent criticisms of federal cannabis legalization, including cannabis addiction, youth use, rescheduling, racially disparate enforcement persistent in legal states, and federalism concerns. This section will further discuss how federal legalization efforts can be used to address these concerns and to craft a more complete federal solution that promotes public health without continuing the harmful effects of cannabis prohibition.

A. Addiction & Abuse

Senator Tina Smith's (D-MN) proposed legislation gives the FDA the power to regulate cannabis similarly to tobacco.¹⁴⁴ Under the proposed legislation, states retain authority to raise tax rates, pass smoke-free laws, counter marketing campaigns, enhance access to cessation treatments, and restrict sales, distribution, and possession—all of which are similar to

¹⁴¹ *Id.*

¹⁴² *See generally* NEV. REV. STAT. § 193.130 (2017).

¹⁴³ *See generally* Harper, *supra* note 120, at 85–87.

¹⁴⁴ Sen. Tina Smith Introduces, *supra* note 111.

tobacco regulation.¹⁴⁵ However, cannabis has been shown to carry a lower addiction rate than alcohol and tobacco.¹⁴⁶ There is concern that the low cannabis addiction rate is due, in part, to the unavailability of these substances to minors and that early use will create later use disorders, which is supported by research.¹⁴⁷ The concern then becomes that a legalized cannabis market will attempt to profit from selling to newer, younger, heavier users of cannabis.¹⁴⁸ The federal bill must address these concerns by providing states with the tax revenue from legalization to combat youth drug abuse, regulate advertising, and control packaging requirements within the states.

Critics of cannabis legalization have argued that cannabis is a “gateway drug” that leads to further illicit drug use and crime.¹⁴⁹ This claim is ill-founded as it is simply drawn from the correlation between general substance abuse and crime.¹⁵⁰ As research on substance abuse, trauma response, and addiction is growing, the so-called “causal relationship” between substance abuse and later criminal activity shows that the blame is incorrectly placed on the substance itself and not on the real sources of stress that drive people to use illicit drugs.¹⁵¹ A quick search of cannabis-

¹⁴⁵ *Id.*

¹⁴⁶ Olga Khazan, *Is Marijuana More Addictive Than Alcohol?*, THE ATLANTIC (Sept. 17, 2014), <https://www.theatlantic.com/health/archive/2014/09/is-marijuana-more-addictive-than-alcohol/380183/> [https://perma.cc/ZGZ4-Y2JW].

¹⁴⁷ See GOV'T OF CAN., IS CANNABIS ADDICTIVE? CANNABIS EVIDENCE BRIEF 4 (2018).

¹⁴⁸ See Sue Rusche, *Commentary: Legalization of Marijuana and the Impact on Children, Partnership to End Addiction*, P'SHIP TO END ADDICTION (Dec. 2011), <https://drugfree.org/drug-and-alcohol-news/commentary-legalization-of-marijuana-and-the-impact-on-children/> [https://perma.cc/7XJV-WBMT].

¹⁴⁹ See Kevin Sabet, *Marijuana and Legalization Impacts*, 23 BERKELEY J. CRIM. L. 84, 85–87 (2018).

¹⁵⁰ See NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT 13–16 (2020), <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf?v=d9e6f7cbd412ae5f340206c1a0d9c2bfd> [https://perma.cc/JC6K-EVKN].

¹⁵¹ See generally *Why Trauma Often Leads To Addiction*, GATEWAY FOUND: ADDICTION BLOG, <https://www.gatewayfoundation.org/addiction-blog/trauma-and-addiction/#:~:text=High%20levels%20of%20cortisol%20and,of%20trauma%20during%20their%20childhood.> [https://perma.cc/69N3-CEBL].

related research studies can reveal support for any position for or against cannabis legalization.¹⁵² However, the disparities in the results and conclusions could be resolved if cannabis was legalized because scientific study is severely impeded by the regulatory barriers attached to Schedule I substances.¹⁵³

B. Rescheduling

The strongest alternative to fully legalizing cannabis is rescheduling it to a lower classification. A notable constituent of this belief is President Joe Biden, whose policy documents outline a plan to “decriminalize marijuana use and reschedule it through executive action on the federal level.”¹⁵⁴ Multiple attempts in the past to reschedule cannabis have all been met with denial and extreme delay from the DEA.¹⁵⁵ The process is also constrained by statutory provisions that require the DEA to seek an opinion from Health and Human Services (HHS) and determine whether the scheduling recommendation, scientific and medical evaluation, and other relevant data constitute substantial evidence that the drug should be rescheduled as proposed in the petition.¹⁵⁶ The DEA has removed some barriers to studying

¹⁵² See generally German Lopez, *The Benefits and Harms of Marijuana, Explained By The Most Thorough Research Review Yet*, VOX (Jan. 14, 2017, 12:40 PM), <https://www.vox.com/science-and-health/2017/1/14/14263058/marijuana-benefits-harms-medical> [https://perma.cc/RQ3C-A48Q].

¹⁵³ See generally Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81 (2012).

¹⁵⁴ *Biden's Marijuana Plan Is out of Step with Public Opinion, Would Do Little to Mitigate the Failed Policy of Federal Prohibition*, NORML (July 9, 2020), <https://norml.org/blog/2020/07/09/bidens-marijuana-plan-is-out-of-step-with-public-opinion-would-do-little-to-mitigate-the-failed-policy-of-federal-prohibition/> [https://perma.cc/FTT7-X2DY].

¹⁵⁵ Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 210 (2017).

¹⁵⁶ 21 U.S.C. § 811(b); see John A. Gilbert & Larry K. Houck, *Still Not Ready for Prime Time: DEA Denies Joint Petitions to Reschedule Marijuana*, HYMAN, PHELPS & MCNAMARA PC: FDA L. BLOG (Aug. 24, 2016), <https://www.fdalawblog.net/2016/08/still-not-ready-for-prime-time-dea-denies-petitions-to-reschedule-marijuana/> [https://perma.cc/66AR-RUAT].

cannabis to grow scientific consensus on the health benefits of cannabis.¹⁵⁷ However, research is still largely cost prohibitive and would remain so even in the event cannabis is rescheduled to a lower schedule.¹⁵⁸

As previously discussed, critics of full legalization have argued that cannabis should simply be rescheduled so that it can be further researched to prevent unwanted pitfalls of full legalization, such as abuse/addiction and youth use.¹⁵⁹ The courts have been unwilling to order the DEA to reschedule cannabis because there is already an administrative process in place to achieve the same result, and though administrative exhaustion is not mandated by statute, courts have made this a requirement as a matter of judicial discretion.¹⁶⁰ Petitioning the DEA to reschedule cannabis is an onerous and ineffective process that has already been unsuccessfully attempted.¹⁶¹ Research into cannabis would still be significantly impeded if it remained a controlled substance.¹⁶² Federal legalization is quickly becoming the only viable option available for legalization advocates.

C. Racialized Enforcement and Expungement

Arrests related to cannabis have fallen in all legal states. However, even in legal states, Black people are two to three times more likely to be arrested for cannabis possession and use despite cannabis use being

¹⁵⁷ Jacob Sullum, *DEA Rejects Marijuana Rescheduling but Eliminates a Research Barrier*, REASON (Aug. 11, 2016, 6:30AM), <https://reason.com/2016/08/11/dea-rejects-marijuana-rescheduling-but-e/> [<https://perma.cc/Z5Y4-LCJ2>].

¹⁵⁸ See Sabet, *supra* note 153, at 98–99.

¹⁵⁹ See generally Sabet, *supra* note 149.

¹⁶⁰ See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005); see also Part II.

¹⁶¹ Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO STATE J. OF CRIM. L. 207, 210 (2016).

¹⁶² See John Hudak & Grace Wallack, *Ending the U.S. government's war on medical marijuana research*, BROOKINGS (Oct. 20, 2015), <https://www.brookings.edu/research/ending-the-u-s-governments-war-on-medical-marijuana-research/> [<https://perma.cc/X4U8-KW6B>]; see also Alex Halperin, *What Will Rescheduling Marijuana Mean for the Pot Industry?*, ROLLING STONE (Apr. 20, 2016, 3:01 PM), <https://www.rollingstone.com/culture/culture-news/what-will-rescheduling-marijuana-mean-for-the-pot-industry-203124/> [<https://perma.cc/X99P-7PDX>].

relatively equal across different races.¹⁶³ In addition, there have been arguments that tough policing on low-level cannabis offenses prevents future, more serious crimes, but this hypothesis has been rejected.¹⁶⁴ From 2001 to 2010, cannabis-related arrests accounted for half of all drug arrests nationwide.¹⁶⁵ This contributes greatly to the cost of the overly punitive and expensive drug enforcement in this country.¹⁶⁶ Federal cannabis legislation must include a method of taxation, regulation, and licensing that addresses the racial disparities apparent in the use and sale of cannabis in legalized industries. As previously discussed, a federal cannabis regulatory agency must provide accurate tools for measuring the disparate effects of cannabis prohibition on different racial groups. These tools involve allocating licensure preference and resources to those groups most negatively impacted. The process for licensure application must include a way to encompass the disparate effects cannabis prohibition has had on the community of the applicant and utilize this analysis to improve equity in the distribution of resources. This should include preferential access to funding, business licensure, and any other federal resources available to the cannabis industry, post-legalization. A federal solution must also include automatic expungement of all previous cannabis-related crimes because racialized enforcement and longer sentencing has disparately impacted communities of color in this country.¹⁶⁷

¹⁶³ ACLU, *supra* note 3, at 30–35. *See also* Katherine M. Keyes et al., *Race/ethnicity and marijuana use in the United States: Diminishing differences in the prevalence of use, 2006-2015*, 179 *DRUG & ALCOHOL DEPENDENCE* 379, 381 (2017).

¹⁶⁴ Amanda Geller & Jeffrey Fagan, *Pot as a Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 *J. EMPIRICAL LEGAL STUD.* 591, 618 (2010).

¹⁶⁵ ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [<https://perma.cc/E68D-Y83Z>].

¹⁶⁶ ACLU, *supra* note 3, at 33–35; *see also* ACLU, *supra* note 165, at 68–78.

¹⁶⁷ *See* Katherine Beckett, *Race, Drugs, and Law Enforcement: Toward Equitable Policing*, 11 *CRIMINOLOGY & PUB. POL’Y* 416 (2012).

Across the legal states, Black and Latinx Americans are still more likely to be arrested for cannabis-related offenses.¹⁶⁸ Generally, arrests are significantly lower in legal states than in states where cannabis remains illegal, but the numbers for arrests still show disparate effects due to race and that those arrests cost between \$1.2 and \$6.0 billion annually.¹⁶⁹ This disparity highlights the need for federal solutions to include expungement for all cannabis-related offenses and furthers the argument that more scrutiny will be needed to improve equitable outcomes from federal cannabis legalization.

D. Federalism

Commenters on federal cannabis legalization have also raised federalism concerns because cannabis legalization has solely been a state-led effort.¹⁷⁰ The fluctuations in enforcement regimes with presidential administration changes mean that states are constrained in their cannabis policy making ability.¹⁷¹ The Supreme Court decided in *Gonzales v. Raich* that regulating cannabis was squarely within Congress's Commerce Clause power regardless of cannabis's legal status.¹⁷² With the results of the 2020 election, full federal legalization looks increasingly unlikely as the Biden/Harris administration seems to have backpedaled on their support of cannabis reform, now only supporting the decriminalization of possession.¹⁷³ However, legalization is likely to continue as a trend across

¹⁶⁸ Keyes et al., *supra* note 163, at 381; *see also* John Hudak, *Marijuana's racist history shows the need for comprehensive drug reform*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/23/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform/> [<https://perma.cc/5KG9-FPVU>].

¹⁶⁹ ACLU, *supra* note 3, at 30–35; *see also* ACLU, *supra* note 165, at 68–78.

¹⁷⁰ *Marijuana*, CTR. FOR THE STUDY OF FEDERALISM (Mar. 2018), <https://encyclopedia.federalism.org/index.php/Marijuana> [<https://perma.cc/7RJF-S97B>].

¹⁷¹ *Id.*

¹⁷² *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

¹⁷³ Kane, *supra* note 67.

the states and remains the best option for addressing future federalism concerns.

States vary widely in terms of medical cannabis laws, commercial systems, law enforcement, and quality control with regard to cannabis products.¹⁷⁴ Some of these disparities could be addressed through the previously mentioned cooperative federalism approach which would establish cannabis policy baselines for states. But the most effective method to address all of the concerns underlying cannabis policy is still full federal legalization because the federal government can leverage the experience, expertise and funding of its administrative agencies to develop a comprehensive, equitable cannabis policy.

IX. CONCLUSION

The federal prohibition of cannabis has been a failed, expensive policy that for decades has led to devastating effects on communities of color in this country. Previous attempts to make changes to cannabis's schedule classification have been defeated by both the DEA and the courts. Cannabis is a unique substance that has both recreational and medicinal uses, making it unlike alcohol or tobacco and requiring special consideration when imposing regulations. Cannabis policy in this country has also been marked by significant racism in both the rise of prohibition and its enforcement. For the aforementioned reasons, federal legalization of cannabis must include the creation of a specific regulatory agency to provide guidelines for enforcement rules, licensure, and regulations to promote social equity.

¹⁷⁴ Alice Mead, *Legal and Regulatory Issues Governing Cannabis and Cannabis-Derived Products in the United States*, FRONTIERS IN PLANT SCI. (June 14, 2019), <https://www.frontiersin.org/articles/10.3389/fpls.2019.00697/full> [<https://perma.cc/X326-9RGA>].

Appendix A: Sample Definition Section

Definitions

In this Act, the following definitions apply:

(a) “Cannabis” means all parts of the plant cannabis sativa, cannabis indica, or cannabis ruderalis plant, whether growing or harvested and includes:

- (1) The mature flowers of the cannabis plant intended for consumption;
- (2) The seeds of the plant;
- (3) Resin extracted from any part of the plant; and
- (4) Any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.

(b) “Mature plant” means a cannabis plant that has flowered and has visible buds.

(c) “Immature plant” means a plant that has not flowered and does not have visible buds.

(e) “Marijuana” or “marihuana” shall be replaced with “cannabis” in all present and future legislation and will no longer be used interchangeably.

(f) “Cannabis” does not include:

- (1) The mature stalks of the plant and fiber made from the stalks,
- (2) Oil or cake made from the seeds of the plant, or
- (3) Hemp or hemp products

Appendix B: Sample Regulatory Body Establishment Section

SEC. 1. CANNABIS DEPARTMENT; MISSION.

(a) ESTABLISHMENT.—There is established a Department of Cannabis within the Food and Drug Administration (FDA)

(b) MISSION.—

(1) IN GENERAL.—The primary mission of the Department is to—

(A) provide licensure to cultivators, transporters, producers, refiners, retailers, medical patients;

(B) regulate both commercial and personal cannabis cultivation;

(C) provide guidance, resources, and oversight to state agencies;

(D) provide annual reports, proposals, and resources to equity-based community outreach;

(E) research and monitor the environmental impacts of cannabis cultivation to update regulations as new information becomes available;

(F) create an industry licensure program based on merit and social equity measuring system that preferences licensure, counseling, and resources to individuals most disparately affected by cannabis prohibition;

(G) create a separate medical research program for cannabis which provides information, research, and resources to physicians about prescribing cannabis to patients and creates base guidelines for state medical cannabis programs.

SEC. 2. SECRETARY; FUNCTIONS.

(a) SECRETARY.—

(1) IN GENERAL.—There is a Secretary of Department of Cannabis, through the Department, who

shall regulate cannabis products in the same manner, and to the same extent, as the Secretary regulates tobacco products under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), including by applying all labeling and advertising requirements that apply to tobacco products under such Act to cannabis products. In addition, the Secretary will provide separate recommendations and regulations for medicinal cannabis use in accordance with prevailing scientific and medical research for the use of cannabis.

Appendix C: Sample Medical Cannabis Program Establishment and Protections Section

Purpose

A commencement of Legislation to allow under federal law the medical use of cannabis; to provide protections for the medical use of cannabis; to provide for a system of registry identification cards for qualifying patients and primary caregivers; to impose a fee for registry application and renewal; to make an appropriation; to provide for the promulgation of rules; to provide for the administration of this act; to provide for enforcement of this act; to provide for affirmative defenses; and to provide for penalties for violations of this act.

Medical Cannabis Prescription Guidelines

As used in this Act:

(a) “Physician-patient relationship” means a treatment or counseling relationship between a physician and patient in which all of the following are present:

- (1) The physician has reviewed the patient’s relevant medical records and completed a full assessment of the patient’s medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
- (2) The physician has created and maintained records of the patient’s condition in accord with medically accepted standards.
- (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical cannabis as a treatment of the patient’s debilitating medical condition.
- (4) If the patient has given permission, the physician has notified the patient’s primary care physician of the patient’s debilitating medical condition and certification for the medical use of cannabis to treat that condition.

Protections for the Medical Use of Cannabis

(a) A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of cannabis in accordance with this act, provided that the qualifying patient possesses an amount of cannabis that does not exceed a combined total of 2.5 ounces of usable cannabis and usable cannabis equivalents.

(b) The privilege from arrest under this subsection applies only if the qualifying patient presents his or her registry identification card that bears a photographic image of the qualifying patient.

Appendix D: Sample Cultivation Section

Private production for personal use

- (a) Home cultivation of cannabis for personal use shall be lawful for adults 21 years of age and older;
- (b) If minors are present, reasonable measures must be taken to prevent underage consumption;
- (c) Private cultivation for personal use shall not exceed 6 mature plants at one time, per adult 21 years of age and older.

