

THE DECRIMINALIZATION OF RECREATIONAL CANNABIS IN CALIFORNIA: COMMERCIAL CULTIVATION COULD COST GROWERS AN ARM, A LEG, AND THEIR FREEDOM

I. INTRODUCTION

Both veteran and amateur farmers in California, the leading agricultural producer in the United States, are eyeing the newest and largest cash crop in the state, cannabis.¹

With the passage of the Marijuana Legalization Initiative Proposition on November 8, 2016, 57.14% of California voters armed their position on recreational cannabis by breathing life into a years-long effort to destigmatize, but more importantly, decriminalize recreational cannabis.²

¹ CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA AGRICULTURAL STATISTICS REVIEW 2015-2016 (2017), *available at* <https://www.cdfa.ca.gov/statistics/PDFs/2016Report.pdf> [hereinafter CALIFORNIA AGRICULTURAL STATISTICS REVIEW]; Angela Hart, *Wine country looking more like cannabis country in California*, THE FRESNO BEE (May 11, 2017), <http://www.fresnobee.com/news/state/california/article149815769.html>; *California's marijuana production is already mind boggling*, THE ORANGE COUNTY REGISTER (Dec. 29, 2016), <http://www.oregister.com/2016/12/29/californias-marijuana-production-is-already-mind-boggling/>.

² 2016 CAL. LEGIS. SERV. PROP. 64 (Proposition 64) (2016) (Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act", commonly known as "The Adult Use of Marijuana Act" ("AUMA")) (The AUMA added sections 11018.1, 11018.2, 11362.1, 11362.2, 11362.3, 11362.4, 11362.45, 11362.712, 11362.713, 11362.84, 11362.85, 11361.1, 11361.8 to the CAL. HEALTH & SAFETY CODE (2017); amended sections 11362.755, 11357, 11358, 11359, 11360, 11361.5, 11018, 11018.5 of the CAL. HEALTH & SAFETY CODE (2017); added Division 10 (commencing with Section 26000) to the CAL. BUS. & PROF. CODE (2017); added Section 147.6 to the CAL. LAB. CODE (2017); amended Section 13276 of the CAL. WATER CODE (2017); added Part 14.5 to Division 2 (commencing with Section 34010) of the CAL. REV. & TAX. CODE (2017); amended Sections 81000, 81006, 81010 of the CAL. FOOD AND AGRIC. CODE (2017); repealed Section 81007, 81008 of the CAL. FOOD AND AGRIC. CODE (2017)) [hereinafter AUMA]; *California Proposition 64, Marijuana Legalization (2016)*, [https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_\(2016\)](https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_(2016)).

Far from an overwhelming victory, the imprint was nonetheless made.³ However, the federal government has the ability to erase the slow progression of the legalization of cannabis that many other states adopted prior to California's recent shift in its position.⁴ The current federal law enforcement position is not in the favor of commercial cannabis cultivators and that is the chief issue prospective growers must recognize.⁵

This Comment will discuss the varying legal implications of the cultivation and general commercial operation of recreational cannabis in light of conflicting federal, state, and local regulations.⁶ Part II of this Comment will illustrate the rising commercial interest in cannabis production in light of the legal issues prospective marijuana producers face. Part III will detail the hierarchy of authority governing drug laws and violations as they relate to cannabis production, starting with the constitutional framework lying at the heart of the divide. Part IV analyzes how the federal and state conflict exists, how cannabis legalization is working in other states, and the impact of civil forfeiture and conspiracy claims with respect to federal law violations. Part V provides recommendations for mitigating federal exposure by navigating the opposing laws as they currently stand, in addition to legislative proposals. Finally, this Comment concludes that the Constitution reserves preemptive authority in the federal government to regulate and enforce drug laws should it choose to do so, thus reaffirming the view that federal drug statutes supersede state laws and expose commercial cannabis growers to the full extent of federal criminal and civil liability.

³ AUMA, *supra* note 2; *California Proposition 64, Marijuana Legalization*, *supra* note 2.

⁴ U.S. CONST. art. VI, cl. 2 (Supremacy Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); The Controlled Substances Act (“CSA”), 21 U.S.C. § 841(a)(1) (2010); 21 U.S.C. § 812 (2010); States that have legalized recreational cannabis include, among others, Colorado and Washington. Article 18, section 16 of the Colorado State Constitution was enacted when voters approved Amendment 64 on November 6, 2012, which legalized recreational cannabis use, cultivation, manufacturing, and sale in the state (C.R.S.A. CONST. art. XVII, § 16); Washington State’s Initiative 502 passed November 6, 2012 (INITIATIVE MEASURE NO. 502 (2011)); *Washington Marijuana Legalization and Regulation, Initiative 502 (2012)*, [https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_\(2012\)](https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_(2012)) (last visited Feb. 20, 2018).

⁵ Letter from Attorney Gen. Jefferson B. Sessions III to Congress (May 1, 2017), available at <https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections> [hereinafter Letter].

⁶ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812; CAL. HEALTH & SAFETY CODE § 11362.2(a)(3) (2017) (it is a criminal offense to “plant, cultivate, harvests, dry, or process more than six living cannabis plants”).

II. FACTUAL BACKGROUND

The federal and state divide traces directly to the United States Constitution.⁷ Precisely, the Supremacy Clause confers precedence to the federal government in its constitutional exercise of power in areas where the federal and state authority disagree.⁸

While the Adult Use of Marijuana Act (“AUMA”) decriminalizes the use and cultivation of recreational cannabis in California, the governing federal statute, the Controlled Substances Act (“CSA”), makes it a federal offense to manufacture, distribute, or possess cannabis for *any* purpose.⁹ The CSA does not differentiate between medical or recreational use and classifies cannabis as a Schedule I drug, within the same category as heroin and MDMA.¹⁰ Schedule I substances are the most heavily regulated, as the CSA considers them to be highly addictive and lacking any medical value.¹¹ While the CSA does not expressly preclude states from regulating controlled substances, the federal government’s position remains unaffected by evolving social norms. Even as twenty-nine states and the District of Columbia have decriminalized cannabis.¹²

Another risk related to cannabis production is evidenced in the Tenth Circuit Court of Appeals’ recent holding in *Safe Streets Alliance v. Hickenlooper* 859 F.3d 865 (2017), where private plaintiffs filed civil actions based on conspiracy claims against cannabis companies for alleged harm to their property.¹³ The court ruled that claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) against cannabis businesses could move forward if the plaintiffs could prove that neighboring cannabis operators caused injury to their property either by substantial interference with the use and enjoyment of their land or economic loss in their property value.¹⁴ The threat this poses to cannabis businesses is that RICO violations provide substantially higher damages awards than ordinary state nuisance claims.¹⁵

⁷ U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁸ U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁹ 21 U.S.C. 841(a)(1); 21 U.S.C. 812; AUMA, *supra* note 2.

¹⁰ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812.

¹¹ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812.

¹² 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812; 21 U.S.C. § 903 (1970); *29 Legal Medical Marijuana States and DC*, PROCON.ORG (Oct. 13, 2017),

<https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

¹³ *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017).

¹⁴ *Id.*

¹⁵ 18 U.S.C. § 1962 (1988); 18 U.S.C. § 1963 (2009); 18 U.S.C. § 1964 (1995); CAL. CIV. CODE § 3501 (2018) (provides for standard civil action or abatement as remedies in a private nuisance claim).

Further, the Trump administration, particularly President Trump and Attorney General Jefferson B. Sessions III (Sessions), have proclaimed their position on the matter and their opposition to altering existing federal law.¹⁶

Sessions' aversion to the legalization of cannabis has been direct and firm.¹⁷ He recently stated,

I reject the idea that America will be a better place if marijuana is sold in every corner store. And I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana, so people can trade one life-wrecking dependency for another that's only slightly less awful.¹⁸

Sessions wrote to Congress on May 1, 2017, requesting the Rohrabacher-Farr amendment, which prohibits the allocation of federal resources to enforce federal drugs laws in states with medical cannabis laws, not be renewed as it has the last three fiscal years.¹⁹ President Trump echoed Sessions' request by omitting the amendment from the first budget he presented to Congress.²⁰ Despite Sessions' request, Congress voted to renew the spending ban.²¹ It is interesting to note that while the Rohrabacher-Farr amendment provides some relief to the industry, the spending ban is exclusive to medical cannabis claims,

¹⁶ Janet Burns, *Sessions To Congress: Please Forgo Federal Law Protecting Medical Marijuana States*, FORBES (June 13, 2017), <https://www.forbes.com/sites/janetwburns/2017/06/13/sessions-to-congress-please-forgo-federal-law-protecting-medical-marijuana-states/#b34744f727ba>.

¹⁷ Letter, *supra* note 5.

¹⁸ Thomas Fuller, *Marijuana Industry Presses Ahead in California's Wine Country*, N.Y. TIMES (Mar. 18, 2017), https://www.nytimes.com/2017/03/18/us/california-marijuana-wine-country.html?mwrsm=Email&_r=0.

¹⁹ H.Amdt. 332 to H.R.2578, 114th Cong. (2015) (enacted), known as the Rohrabacher-Farr amendment, *available at* <https://www.congress.gov/amendment/114th-congress/house-amendment/332>; Letter, *supra* note 5; Tom Angell, *Exclusive: Sessions Asks Congress To Undo Medical Marijuana Protections*, MASSROOTS (Jun. 12, 2017), <https://www.massroots.com/news/exclusive-sessions-asks-congress-to-undo-medical-marijuana-protections>.

²⁰ Douglas Berman, *AG Jeff Sessions has urged Congress to end limit on DOJ appropriations concerning state-compliant medical marijuana actors*, LAW PROFESSORS BLOG NETWORK (Jun. 12, 2017), http://lawprofessors.typepad.com/marijuana_law/2017/06/ag-jeff-sessions-has-urged-congress-to-end-limit-on-doj-appropriations-concerning-state-compliant-me.html.

²¹ Matt Ferner, *Senators Defy Jeff Sessions And Vote To Extend Medical Marijuana Protections*, HUFFINGTON POST (Jul. 27, 2017), http://www.huffingtonpost.com/entry/senators-vote-to-extend-medical-marijuana-protections-in-defiance-of-jeff-sessions_us_597a4177e4b02a4ebb7420a1.

leaving all other cannabis violations within the Department of Justice's ("DOJ") jurisdiction.²²

Due to their opposing views on cannabis, the existing state and federal authorities cannot be reconciled.²³ That is the unknown journey that prospective commercial cultivators are embarking upon as they await their state-issued commercial licenses to produce and sell recreational cannabis.²⁴ With the uncertainty of federal enforcement of cannabis prohibition, the viability of this precarious endeavor is questionable.²⁵

California began issuing commercial licenses for recreational cannabis cultivation on January 1, 2018.²⁶ While cannabis has long been the largest cash crop in the state, the decriminalization of its recreational use and cultivation is certain to make an even bigger industrial impact.²⁷

Steve Dutton (Dutton), Executive Director of the Sonoma County Farm Bureau, is a fifth-generation farmer who has grown just about every viable crop on more than 1300 acres.²⁸ When asked if he would venture into cannabis farming, he replied, "I really don't know that I would grow marijuana. If the money was there, I wouldn't say no to anything."²⁹ The money he is referring to is the value of cannabis which is estimated to yield \$1.1 million per acre.³⁰ To put that into perspective, an acre of grapes in the same region is worth \$75,000 to \$185,000 – a fraction of the value of cannabis.³¹

Dutton further stated that there is talk of other traditional growers considering farming cannabis, although he made it clear that cannabis has long had a strong presence in Wine Country, albeit undercover.³²

²² *Id.*

²³ 21 U.S.C. 841(a)(1); 21 U.S.C. 812; AUMA, *supra* note 2.

²⁴ 21 U.S.C. 841(a)(1); 21 U.S.C. 812; AUMA, *supra* note 2.

²⁵ Memorandum from Former Deputy Attorney General James A. Cole, to All United States Attorneys (Aug. 29, 2013), commonly known as the "Cole Memo," *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo]; Telephone Interview with Christopher Coleman, Resident Agent in Charge, Fresno Drug Enforcement Administration (Sept. 29, 2017).

²⁶ AUMA, *supra* note 2.

²⁷ CALIFORNIA GENERAL ELECTION, NOVEMBER 8, 2016, OFFICIAL VOTER INFORMATION GUIDE, PROPOSITION 64, *available at* <http://voterguide.sos.ca.gov/en/propositions/64/analysis.htm> [[hereinafter OFFICIAL VOTER INFORMATION GUIDE], provides that the legalization of cannabis in California is estimated to bring \$1 billion in new state tax revenue in addition to reduced criminal justice costs associated with cannabis violations.

²⁸ Telephone Interview with Steve Dutton, Executive Director, Sonoma County Farm Bureau, (July 5, 2017).

²⁹ *Id.*

³⁰ Hart, *supra* note 1.

³¹ *Id.*

³² Thomas Fuller, *Legal Marijuana Is Almost Here. If Only Pot Farmers Were on Board*, N.Y. TIMES (Sept. 9, 2017),

Another threat Dutton mentioned is the challenge of managing cash, which flows directly from growers' decision to operate covertly.³³ Banking the crop risks triggering suspicious activity reports by financial institutions which would then alert federal enforcement agencies, such as the Drug Enforcement Administration.³⁴ Dutton also cited the threat of violence that is prevalent in the cash management of a federally-banned substance.³⁵ He mentioned that there have been numerous instances of growers becoming victims of crime due to the appeal of cash and drugs.³⁶ In one case, a California teenager was fatally shot by a cannabis farmer when he discovered the teenager attempting to steal cannabis from his property.³⁷ In another incident, a homeowner was killed after he confronted three people growing illegal cannabis on his rural property.³⁸

While the potential profits from cannabis are appealing from an economic standpoint, the federal penalties are substantial, including property seizures and bank account closures.³⁹ Dutton commented that with the possibility of tightened federal enforcement, he believes that most growers will continue to operate in the shadows.⁴⁰ Accordingly, prospective growers should consider the full scope of the legal implications of their operations when contemplating the cannabis industry.⁴¹

<https://www.nytimes.com/2017/09/09/us/california-marijuana-growers.html?mcubz=1>, explains that “about 3,500 of 32,000 farmers in the Emerald Triangle, which covers Mendocino, Humboldt and Trinity counties — have applied for permits.”; Telephone Interview with Steve Dutton, *supra* note 28.

³³ Telephone Interview with Steve Dutton, *supra* note 28.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Telephone Interview with Steve Dutton, *supra* note 28; Fuller, *supra* note 32 (“David Eyster, the Mendocino district attorney, said the surge in the marijuana business had brought with it violent crime, which did not appear to be going away anytime soon...people being robbed, kidnapped and in some cases murdered.”).

³⁷ Pablo Lopez, *Marijuana grower linked to Sanger's teen's killing goes to prison*, THE FRESNO BEE (May 23, 2016),

<http://www.fresnobee.com/news/local/crime/article79382522.html>.

³⁸ Jason Oliveira, *Man killed after confronting suspected marijuana growers on Madera County property, authorities say*, ABC30 ACTION NEWS, Aug. 8, 2017, <http://abc30.com/man-killed-after-confronting-suspected-marijuana-growers-on-madera-county-property-authorities-say/2285039/>.

³⁹ Telephone Interview with Christopher Coleman, *supra* note 25.

⁴⁰ Telephone Interview with Steve Dutton, *supra* note 28.

⁴¹ Telephone Interview with Christopher Coleman, *supra* note 25.

III. LEGAL AUTHORITY

A. Constitutional Considerations Support Federal Preemption of Cannabis Regulation

1. The Supremacy Clause

The Supremacy Clause of the United States Constitution provides that the Constitution, and federal law in general, is the Supreme Law of the Land, binding states in matters deemed to be within federal authority.⁴² The Supremacy Clause further proscribes state interference with the federal government's constitutional authority.⁴³

The Supreme Court of the United States addressed the federal and state positions specifically as they relate to controlled substances in *Gonzales v. Raich*, 545 U.S. 1 (2005).⁴⁴ The Court held that the federal authority prevails in matters of cannabis production and use by declaring that the Supremacy Clause unequivocally grants the federal government precedence in any matter where the state and federal law disagree.⁴⁵ In *Gonzales v. Raich*, the defendant contended that his compliance with state law precluded federal enforcement under the CSA, but the Court rejected that claim entirely on the ground that federal law preempts state law where the two authorities cannot coexist.⁴⁶

2. The Commerce Clause

The Commerce Clause of the United States Constitution grants authority to Congress to regulate interstate commerce.⁴⁷ If commercial growers ship or sell cannabis outside of California, they would be subject to federal enforcement pursuant to the Commerce Clause.⁴⁸

More than a quarter of California's agricultural production is exported.⁴⁹ However, the prospect of transporting or selling the lucrative product across state lines indisputably falls under federal regulation under the Commerce Clause, as concluded by the court in *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 964 (8th Cir.2009).⁵⁰ *Monson* rejected

⁴² U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁴³ U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁴⁴ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

⁴⁸ *Id.*

⁴⁹ CALIFORNIA AGRICULTURAL STATISTICS REVIEW, *supra* note 1.

⁵⁰ *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 964 (8th Cir. 2009).

local growers' plea for declaratory relief on the ground that their prospective cannabis cultivation was precluded from federal regulation under the CSA.⁵¹

Further, *Gonzales v. Raich* held that even intrastate cannabis farming falls within Congress' grasp under the Commerce Clause.⁵² The Court based its determination on the principle that federal regulation of cannabis plants is not so inconsistent with Congress' intent to control both lawful and unlawful drug activity within the meaning of the CSA.⁵³ The Supreme Court's holding in *Gonzales v. Raich* remains valid as it has not been successfully challenged since it was decided in 2005.⁵⁴

B. Federal Regulation: The Controlled Substances Act's Absolute Ban on Cannabis

Cannabis has not always been on the federal government's radar.⁵⁵ It was not until 1937 when the federal government took note of the perceived "addictive qualities and physiological effects" of the substance and sought to regulate it.⁵⁶ To bring uniformity to federal drug enforcement, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁵⁷ Title II of the Comprehensive Drug Abuse Prevention and Control Act, also known as the Controlled Substances Act, was enacted "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."⁵⁸ In this effort, Congress established a comprehensive regulatory scheme to regulate controlled substances within the confines of the CSA.⁵⁹

The federal statute is in direct conflict with the state authority, the Adult Use of Marijuana Act, because it considers any act of possession, cultivation, or production of cannabis a federal offense.⁶⁰ The CSA does not differentiate

⁵¹ *Id.*

⁵² *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. Ch. 13 § 801 et seq. and 21 U.S.C. Ch. 13 § 951 et seq.).

⁵⁶ *Id.*; *Gonzales v. Raich*, 545 U.S. 1, 11 (2005).

⁵⁷ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. Ch. 13 § 801 et seq. and 21 U.S.C. Ch. 13 § 951 et seq.).

⁵⁸ *Gonzales v. Raich*, 545 U.S. 1, 12 (2005).

⁵⁹ 21 U.S.C. §§ 841(a)(1), 844(a) (1990).

⁶⁰ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812; CAL. HEALTH & SAFETY CODE Division 10, Uniform Controlled Substances Act Chapter 6, Article 2. Cannabis (Sections 11357-11362.9) (2018).

between medical or recreational use, but rather classifies cannabis as a Schedule I drug for its high potential for abuse and lack of medical value.⁶¹

Further, federal crop insurance is not available to cannabis growers due to its federal scheduling.⁶² The recent wildfires that devastated Northern California destroyed substantial cannabis fields, yet those farmers lack protections readily available to growers of legal crops because of the federal cannabis ban.⁶³ The federal government's stance is clear: cannabis possession and use is absolutely prohibited.⁶⁴ The CSA in its current form is not flexible even as states continue to enact laws in favor of state decriminalization.⁶⁵

C. Federal Conspiracy Claims: Racketeer Influenced Corrupt Organizations Act

Congress' intent in enacting RICO was, and still is, to combat racketeering activities of criminal organizations.⁶⁶ Congress specifically stated:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.⁶⁷

RICO charges can stem from the commission of two acts of the thirty-five crimes outlined in the statute within a ten-year period.⁶⁸ Although not all cannabis growers are involved in racketeering activity, the industry as a whole may still be subject to the threat of steep RICO penalties, both civil and criminal.⁶⁹ Penalties include up to \$25,000 in fines, up to twenty years imprisonment, forfeiture of all property gained from the racketeering activity, and treble civil damages.⁷⁰

⁶¹ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812.

⁶² Jonathan Berr, *Baptism by fire for California's pot farmers*, CBS NEWS (Oct. 19, 2017), <https://www.cbsnews.com/news/california-wildfires-marijuana-prices-legal-pot/>.

⁶³ *Id.*

⁶⁴ 21 U.S.C. § 812.

⁶⁵ *Id.*; 29 *Legal Medical Marijuana States and DC*, *supra* note 12.

⁶⁶ 18 U.S.C. § 1962.

⁶⁷ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.).

⁶⁸ 18 U.S.C. § 1962; 18 U.S.C. § 1963.

⁶⁹ 18 U.S.C. § 1963 (provides for up to \$25,000 in fines, maximum of 20 years in prison, and forfeiture of all interest and property gained from the racketeering activity); 18 U.S.C. § 1964(c) (allows private plaintiffs to recover treble damages for RICO violations committed against them).

⁷⁰ 18 U.S.C. § 1963; 18 U.S.C. § 1964(c).

Racketeering activity includes:

any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.⁷¹

Civil suits against cannabis businesses for alleged RICO violations were recently filed by multiple private plaintiffs in Colorado.⁷² Plaintiffs in *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017) alleged that they suffered harm to their properties due to the defendants' adjacent cannabis operations.⁷³ The plaintiffs owned land that they frequently visited for outdoor recreational activities with their children and friends, and alleged that the newly constructed building adjacent to their property from which defendants operated a commercial cannabis business injured their property.⁷⁴ First, the plaintiffs alleged that the noxious doors emanating from the building resulted in a nuisance that substantially interfered with their use and enjoyment of the land they identified as a "pleasant residential area" and "closely-knit neighborhood."⁷⁵ The second basis for their damages claim was that the drug operation would make the neighborhood a target for crime because of the large quantities of drugs and cash stored on the defendants' property.⁷⁶ The plaintiffs contended that the value and desirability of their property would be diminished because of the alleged nuisance and heightened risk of crime.⁷⁷

The plaintiffs raised their RICO claims by alleging that the defendants' businesses qualified as illegal enterprises that conspired to cultivate and distribute cannabis in violation of federal law.⁷⁸ They further contended that the conduct of leasing property for cannabis operations combined with dealing in a federally prohibited substance sufficiently qualified as racketeering activity under RICO.⁷⁹

The Court held that the plaintiffs' claims under RICO could move forward if they could prove that the defendants' cannabis operations did, in fact, cause injury to their property.⁸⁰ The plaintiffs also contended that federal cannabis

⁷¹ 18 U.S.C. § 1961(1)(A).

⁷² See *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 880.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 883.

prohibitions preempt state law, which the Court did not definitively rule on as it dismissed the claim on the ground of procedural insufficiency.⁸¹

Growers in California may be subject to similar civil suits, especially if neighbors feel threatened by developing cannabis operations.⁸² A private plaintiff asserting a RICO claim bears the burden of establishing that the defendant committed acts prohibited by RICO, that the plaintiff suffered injury to his or her business or property, and that the RICO violation caused the injury.⁸³

Similar to the threat of federal asset forfeiture, the risk of facing civil RICO claims is heightened for legitimate businesses because they operate in the open and maintain licenses and contact information that are easier to identify and shut down.⁸⁴ Those who choose to disregard both state and federal law, however, are more difficult to track down as they operate covertly.⁸⁵ Accordingly, operating a state-compliant cannabis enterprise exposes business owners to the same substantial penalties as their covert counterparts by conducting business in the open.⁸⁶

D. Federal Civil Forfeiture

To combat the mounting drug epidemic in the country in a comprehensive manner, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“CDAPCA”).⁸⁷ Section 881(a)(7) of the Act specifically targeted drug trafficking by granting to federal authorities the authority to seize any property used, or even intended to be used, in violation of federal drug statutes.⁸⁸ In essence, Congress redesigned and deployed an effective penalty to deter drug trafficking and racketeering: asset forfeiture.⁸⁹ By subjecting federal drug violators’ intended gains to forfeiture, the Legislature sought to curtail a substantial incentive for engaging in criminal activity.⁹⁰

⁸¹ *Id.* at 884.

⁸² Fuller, *supra* note 32 (“The potent odor of the plants, which can waft for dozens of yards, is also a major irritant among some residents; complaints about smell are the most common marijuana-related calls received by the police in Mendocino, Lieutenant Smith said.”).

⁸³ 18 U.S.C. § 1962; 18 U.S.C. § 1964(c).

⁸⁴ Alicia Wallace, *Federal marijuana law enforcement: What you need to know*, THE CANNABIST (Mar. 7, 2017), <http://www.thecannabist.co/2017/03/07/federal-marijuana-enforcement-trump-administration-experts-questions/74933/>.

⁸⁵ *Id.*

⁸⁶ 18 U.S.C. § 1963; 18 U.S.C. § 1964(c); Wallace, *supra* note 84.

⁸⁷ 21 U.S.C. § 881 (2002).

⁸⁸ 21 U.S.C. § 881(a)(7).

⁸⁹ *Id.*

⁹⁰ *Id.*

Forfeiture under the statute is inevitable unless the property owner establishes that the illegal activity occurred without his or her consent.⁹¹ The "innocent owner" defense is futile for growers taking advantage of state-issued licenses and local permits, leaving no protection for commercial cultivation.⁹² The risk is especially detrimental to growers such as Dutton who have vast legacy farmland that would be subject to federal forfeiture should they enter the cannabis market.⁹³

In *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142 (N.D.Cal.2011), the plaintiffs who were involved with medical cannabis, including a medical cannabis patient, unsuccessfully argued that the Department of Justice was precluded from taking legal action against them on the ground that the CSA violated the Commerce Clause.⁹⁴ As previously noted, interstate – and in some cases intrastate – commerce is a constitutionally enumerated power in Congress to regulate for the well-being of the United States.⁹⁵

In contrast, California does not permit an official to seize property upon mere suspicion of illegal activity.⁹⁶ Instead, asset forfeiture takes place only upon conviction of a drug crime.⁹⁷ Further, cannabis cultivation alone does not permit the state to seize real property.⁹⁸ The safeguards California provides for erroneous seizures are evident, but that does little to protect growers from federal forfeiture.⁹⁹ If the federal enforcement agency determines that forfeiture is warranted, it will administer enforcement according to the authority granted by the CSA, not state law.¹⁰⁰

1. The Drug Enforcement Administration's Power to Seize Assets

The Drug Enforcement Administration ("DEA") is the enforcement arm of federal drug statutes.¹⁰¹ The Cole Memorandum ("Cole Memo"), issued on August 29, 2013, by former United States Deputy Attorney General James M. Cole was the previous standard for federal cannabis enforcement.¹⁰² The

⁹¹ *Id.*

⁹² 21 U.S.C. § 881.

⁹³ See Telephone Interview with Christopher Coleman, *supra* note 25.

⁹⁴ See *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142 (N.D.Cal.2011).

⁹⁵ *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 964 (8th Cir. 2009).

⁹⁶ CAL. HEALTH & SAFETY CODE § 11470 (2015).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 21 U.S.C. § 881; CAL. HEALTH & SAFETY CODE § 11470.

¹⁰⁰ 21 U.S.C. § 878 (2010); 21 U.S.C. § 871 (1970); 21 C.F.R. § 1316.31 (1996).

¹⁰¹ 21 U.S.C. § 878; 21 U.S.C. § 871; 21 C.F.R. § 1316.31.

¹⁰² Cole Memo, *supra* note 25.

DEA's cannabis enforcement was previously limited to the scope of the Cole Memo.¹⁰³

Recognizing the need to properly allocate scarce federal enforcement resources, the Cole Memo restricted DEA involvement to violations that compounded the detrimental effects of cannabis possession, use, and distribution.¹⁰⁴ Cannabis violations subject to increased federal scrutiny under the Cole Memo included distribution to minors; financial support to criminal organizations; distribution to states with existing cannabis prohibitions; legal cannabis activity serving as a pretext for other crimes; use of violence and firearms; impaired driving and other heightened health risks; and possession, use, and cultivation on public and federal property.¹⁰⁵

If a cannabis handler's conduct fell within one or more of the eight points highlighted in the memo, the DEA would use its various enforcement tools to investigate the matter.¹⁰⁶ Once the agency determined that probable cause that a crime had been committed existed, it would seize assets and present the case to United States Attorneys for prosecution.¹⁰⁷ If the conduct did not fit within the Cole Memo's guidelines and the cannabis operator was deemed to be functioning within state and local compliance, the DEA would avoid enforcement efforts because of the limited federal resources available to prosecute cannabis offenses.¹⁰⁸ A California court further held that compliance with state cannabis laws may shield businesses from federal prosecution under the CSA as a result of the "Congressional prohibition on expenditures."¹⁰⁹ The court noted that prosecution of cannabis offenses may proceed if Congress enacts an appropriations bill allowing such action.¹¹⁰

While the Cole Memo guidelines served as the DEA's enforcement framework as recently as January 2018, Attorney General Sessions rescinded the Cole Memo and called for a more broad approach to cannabis

¹⁰³ *Id.*

¹⁰⁴ *Id.*; Telephone Interview with Christopher Coleman, *supra* note 25.

¹⁰⁵ Cole Memo, *supra* note 25.

¹⁰⁶ 21 U.S.C. § 878; Telephone Interview with Christopher Coleman, *supra* note 25.

¹⁰⁷ Telephone Interview with Christopher Coleman, *supra* note 25.

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016); *United States v. Pisarski et al.*, No. CR14-278, 2017 WL 3447188 (N.D. Cal., May 21, 2014) (order granting motion for temporary stay); Dennis Romero, *Court Slams Brakes on Federal Prosecution of California Pot Growers*, LA WEEKLY (Aug. 14, 2017), <http://www.laweekly.com/news/feds-blocked-in-attempt-to-prosecute-marijuana-growers-8517655>.

¹¹⁰ *United States v. Pisarski et al.*, No. CR14-278, 2017 WL 3447188 (N.D. Cal., May 21, 2014) (order granting motion for temporary stay), citing *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

enforcement.¹¹¹ His letter, dated January 4, 2018, urges federal prosecutors to administer the CSA as it exists rather than restrict their efforts to the eight points of the Cole Memo.¹¹² While the memo rescinds previous guidelines, it still provides discretion to prosecutors to prioritize limited federal resources in their enforcement of cannabis offenses.¹¹³ In light of the federal government's limited resources, Sessions' memo calls for prosecutors to prioritize the seriousness of the offense, the deterrent effect, and public impact of marijuana violations.¹¹⁴

Resource allocation is another unsettled matter because while it is undisputed that possession, cultivation, and sale of cannabis is banned under the CSA, the government does not have unlimited resources at its disposal to enforce the CSA.¹¹⁵ There are more devastating drugs causing an imminent threat to the country than cannabis.¹¹⁶ Christopher Coleman, Resident Agent in Chief of the DEA field office in Fresno, California, stated, "Our top priority now is heroin and fentanyl because people are dying, and that's all across the country. We look at availability, affordability, and how lethal it is. Methamphetamine is still a large priority and California supplies the nation. Marijuana is not as high as those."¹¹⁷

Although there are other drugs that the DEA currently prioritizes over cannabis, the enforcement scheme can shift at any moment as Attorney General Sessions contends that tighter cannabis control is essential to curb the national drug epidemic.¹¹⁸ The unpredictability of federal enforcement renders commercial cannabis operations even more precarious.¹¹⁹

E. California's Legalization of Recreational Cannabis

The passage of Proposition 64 on November 8, 2016 decriminalized the use, possession, and sale of recreational cannabis in California.¹²⁰ While the legalization of personal use and cultivation became effective immediately,

¹¹¹ Cole Memo, *supra* note 25; Memorandum from Attorney General Jefferson B. Sessions, to All United States Attorneys (Jan. 4, 2018), *available at* <https://www.justice.gov/opa/press-release/file/1022196/download> [hereinafter Sessions Memo].

¹¹² Sessions Memo, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Cole Memo, *supra* note 25; Telephone Interview with Christopher Coleman, *supra* note 25.

¹¹⁶ Telephone Interview with Christopher Coleman, *supra* note 25.

¹¹⁷ *Id.*

¹¹⁸ Letter, *supra* note 5.

¹¹⁹ *Id.*

¹²⁰ AUMA, *supra* note 2.

the sale and taxation of recreational cannabis went into effect January 1, 2018.¹²¹

Proponents of Proposition 64 argued that the lack of recreational cannabis regulation in California not only robbed the state of substantial tax revenue, but also fostered a breeding ground for damaging environmental, judicial, and public safety concerns.¹²² By establishing a uniform system of governmental oversight, the authors of the initiative sought to create structure and accountability in a thriving, unregulated underground cannabis market.¹²³

1. Local Ordinances on the Fast-Track to Commercial Cultivation

Among California's 58 counties and 482 localities, several municipalities are ahead of the curve in the commercialization of recreational cannabis.¹²⁴ Sonoma, Monterey, Humboldt, Trinity, Mendocino, Calaveras, and San Luis Obispo Counties among others have established local ordinances and permitting requirements in anticipation of the state issuance of commercial licenses.¹²⁵ Recognizing the potential economic impact of recreational cannabis, these counties have sought to create a favorable legal climate for growers and investors.¹²⁶ In fact, investors from around the country have poured hundreds of millions of dollars into properties in Northern California in an effort to cash in on the impending industrial boom.¹²⁷ They view the region as the ideal location to center their cannabis endeavors not only for its welcoming legal stance, but also for the superior quality of the product grown in the area.¹²⁸

In contrast, several counties, including Fresno, Santa Barbara, San Bernardino, and Ventura, enacted regulations more akin to the federal ban on

¹²¹ *Id.*

¹²² OFFICIAL VOTER INFORMATION GUIDE, *supra* note 27.

¹²³ AUMA, *supra* note 2.

¹²⁴ *Counties in California*, BALLOTPEDIA, https://ballotpedia.org/Counties_in_California.

¹²⁵ Julie Johnson, *Sonoma County opens its doors for cannabis business applications July 5*, SONOMA INDEX-TRIBUNE (July 12, 2017), <http://www.sonomanews.com/business/7161281-181/story.html?artslide=0>.

¹²⁶ SONOMA COUNTY, CAL. ORDINANCE NO. 6187, § I(A), Exh. A-2) (2016); SONOMA COUNTY, CAL. ORDINANCE NO. 6189, § II(D)(Exh. A-2) (2016); MONTEREY COUNTY, ORDINANCE NO. 5272 (2016); HUMBOLDT COUNTY, CAL. ORDINANCE NO. 2559 (2016); TRINITY COUNTY, CAL. ORDINANCE NO. 315-816 (2016); TRINITY COUNTY, CAL. ORDINANCE NO. 315-823 (2016); MENDOCINO COUNTY, CAL. ORDINANCE NO. 4383 Code 9.31 (2017); CALAVERAS COUNTY, CAL. ORDINANCE NO. 3094 (2018).

¹²⁷ Hart, *supra* note 1.

¹²⁸ *Id.*

cannabis.¹²⁹ The Fresno City Council, for example, voted to ban all cannabis operations within city limits in response to the passage of Proposition 64.¹³⁰

Although the state has legalized recreational cannabis, not all localities have followed suit.¹³¹ A divided state with regard to cannabis regulation complicates matters further due to the lack of a consistent regulatory system.¹³²

IV. ANALYSIS

A. California Case Law Reaffirms Courts' Reluctance to Impede Federal Law

Because the legalization of recreational cannabis in California is still in its infancy, there is no case law on point to analyze the implications of the state-authorized recreational cannabis commercialization.¹³³ Medical cannabis, however, has been legal in the state since 1996 and is a solid starting point to gauge the inherent risks commercial cultivators can expect.¹³⁴

Marin Alliance For Medical Marijuana v. Holder, 866 F.Supp.2d 1142 (2011) involved multiple plaintiffs attempting to fend off federal enforcement of medical cannabis.¹³⁵ This case demonstrates that even medical cannabis businesses and patients lack the ability to evade federal authority pertaining to cannabis.¹³⁶ Medical cannabis dispensaries, one of their landlords, and a patient brought suit to prevent the Department of Justice “from arresting, prosecuting, or otherwise seeking sanctions or forfeitures” under the CSA.¹³⁷ The plaintiffs argued that their actions were lawful pursuant to California

¹²⁹ FRESNO COUNTY, CAL. ORDINANCE NO. 2017-52, § 1 (2017); FRESNO COUNTY, CAL. ORDINANCE NO. 2014-20 § 2 (2014); SANTA BARBARA COUNTY, CAL. ORDINANCE NO. 4954, § 1 (2016); SAN BERNARDINO COUNTY, CAL. ORDINANCE NO. 4309 (2016); VENTURA COUNTY, CAL. ORDINANCE NO. 4514 (2017); Tim Sheehan, *When it Comes to Buying Pot for Pleasure, Fresno Won't be on the Recreational Map*, THE FRESNO BEE (Aug. 31, 2017) (The Fresno City Council's vote included a ban on “any cultivation, manufacture, processing, storing, laboratory testing, labeling, transportation, distribution, delivery or sale of marijuana.”), <http://www.fresnobee.com/news/local/article170513217.html>.

¹³⁰ FRESNO COUNTY, CAL. ORDINANCE NO. 2017-52, § 1 (effective Nov. 2, 2017); Sheehan, *supra* note 129.

¹³¹ *California Cannabis Laws by County*, CANNABUSINESS LAW, <http://cannabusinesslaw.com/california-cannabis-laws-by-county/>.

¹³² *Id.*

¹³³ CAL. BUS. & PROF. CODE § 26069 (2017). California will begin issuing commercial licenses on January 1, 2018.

¹³⁴ CAL. HEALTH & SAFETY CODE § 11362.5 (1996).

¹³⁵ *See Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142 (N.D.Cal.2011).

¹³⁶ *Id.*

¹³⁷ *Id.*

Health and Safety Code section 11362.5.¹³⁸ The District Court disagreed, basing its holding on the fact that cannabis is still a federally banned substance, alluding to the federal preemption of cannabis regulation pursuant to the Supremacy Clause.¹³⁹ Although the cannabis operations in dispute were strictly confined to California, the Court justified its ruling against the plaintiffs on the ground that Congress has an interest in regulating both interstate and intrastate offenses.¹⁴⁰ This holding further exposes cannabis businesses to federal enforcement under the position that Congress has an interest in ensuring the overall well-being of *all* citizens.¹⁴¹

B. Cannabis Businesses Face Impending Federal Raids that Subject them to Civil Forfeiture

Looming DEA raids similar to those of the George W. Bush administration may return in full swing, depending on the direction of the current administration.¹⁴² For example, the DEA was working with local authorities in Colorado, the pioneering state in the legalization of recreational cannabis, as recently as March 2017 to raid over thirty locations that had ties to an interstate cannabis distributor.¹⁴³

The sweeping federal raids that the commercial cannabis industry experienced under George W. Bush's presidency were attributed to the enterprises' noncompliance with state laws.¹⁴⁴ With a comprehensive licensing and regulatory system, states where cannabis is legal can extend protections to commercial growers and retailers.¹⁴⁵ While compliance with state law does not ensure protection for cannabis businesses, it may temporarily shield growers by keeping them on solid footing with local authorities.¹⁴⁶

¹³⁸ CAL. HEALTH & SAFETY CODE § 11362.5.

¹³⁹ See *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142 (N.D.Cal.2011).

¹⁴⁰ *Id.* at 1159 (quoting *Gonzales v. Raich*, 545 U.S. 1 (2005) 545 U.S. at 22, 125 S.Ct. 2195).

¹⁴¹ U.S. CONST. art. VI, cl. 2 (Supremacy Clause);

Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d 1142

(N.D.Cal.2011) (quoting *Gonzales v. Raich*, 545 U.S. 1 (2005) 545 U.S. at 22, 125 S.Ct. 2195).

¹⁴² Wallace, *supra* note 84.

¹⁴³ Associated Press, *The Latest: DEA: Raids Target Group Exporting Colorado Pot*, U.S. NEWS & WORLD REPORT (Mar. 16, 2017), <https://www.usnews.com/news/best-states/colorado/articles/2017-03-16/the-latest-dea-raids-target-group-exporting-colorado-pot>.

¹⁴⁴ Lisa M. Krieger, *Why marijuana legal sales rollout could be delayed*, THE CANNIFORNIAN (Dec. 11, 2016), <http://www.thecannifornian.com/cannabis-culture/marijuana-legalization-rollout-delayed/>.

¹⁴⁵ *Id.*; Cole Memo, *supra* note 25.

¹⁴⁶ *Id.*

Federal raids can be detrimental to both businesses and individuals involved in the cannabis industry.¹⁴⁷ The threat of losing everything is evidenced in the case of Southern California cannabis businessman Virgil Grant.¹⁴⁸ "They seized all my bank accounts--I had about a million--and took everything from my stores, took my cars. They took the jet skis in the garage, and never gave them back," Grant said.¹⁴⁹ Perhaps not a substantial concern to small-scale growers with minimal assets on the line, a multi-generational farmer such as Dutton has far more at stake if he or she chooses to jeopardize a lawfully viable farming operation for an illegal one.¹⁵⁰

E. A Look at the Other States with Recreational Cannabis Laws

Colorado and Washington, the first states to decriminalize recreational cannabis, paved the way for other states.¹⁵¹ Colorado has generated over half a billion dollars in revenue from cannabis taxes and licensing fees.¹⁵² Washington saw increased tax revenue, as high as twenty-six million dollars a month, from cannabis sales.¹⁵³ The state also experienced reduced drug arrests since the legalization of recreational cannabis.¹⁵⁴

Mark Bolton (Bolton), a cannabis advisor to Colorado Governor John Hickenlooper, stated that the state's "primary safeguard" against federal raids is a "strong regulatory system."¹⁵⁵ Bolton added, "I think we recognize that the federal government can come in and enforce the Controlled Substances Act —

¹⁴⁷ See Telephone Interview with Christopher Coleman, *supra* note 25.

¹⁴⁸ Janet Burns, *A California Plan To Save Millions On Cannabis Regulation Is Getting Props Worldwide*, FORBES (June 7, 2017), <https://www.forbes.com/sites/janetwburns/2017/06/07/a-california-plan-to-stop-wasting-millions-on-cannabis-raids-is-getting-buzz-worldwide/#26a611563ac3>.

¹⁴⁹ *Id.*

¹⁵⁰ 18 U.S.C. § 981 (2016) grants authority to the DEA, as the enforcement arm of the CSA, to seize any property suspected of being used for or generated from criminal activity.

¹⁵¹ C.R.S.A. CONST art. XVII, § 16 (enacted when voters approved Amendment 64 on November 6, 2012, which legalized recreational cannabis use, cultivation, manufacturing, and sale in the state).

¹⁵² *Colorado Exceeds \$500 Million in Cannabis Revenue Since Legalization*, VS STRATEGIES SPECIAL REPORT, Jul. 19, 2017, available at <http://vsstrategies.com/wp-content/uploads/VSS-CO-MJ-Revenue-Report-July-2017.pdf>.

¹⁵³ FORECASTING AND RESEARCH DIVISION, WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT, MONITORING IMPACTS OF RECREATIONAL MARIJUANA LEGALIZATION 2016 UPDATE REPORT, available at https://www.ofm.wa.gov/sites/default/files/public/legacy/reports/marijuana_impacts_update_2016.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ Wallace, *supra* note 3.

to the extent they have the resources.”¹⁵⁶ By creating and maintaining a strong regulatory framework that prioritizes public health and safety, Colorado has reaped substantial benefits from the legalization of cannabis, and so have the hundreds of licensed cannabis businesses operating in the state.¹⁵⁷

D. RICO Claims Can Substantially Multiply Criminal and Monetary Penalties for Cannabis Operations

One of the issues presented in *Safe Streets Alliance v. Hickenlooper* 859 F.3d 865 (2017) is the risk of federal conspiracy claims against cannabis businesses.¹⁵⁸ RICO violations provide greater damages awards than state nuisance claims, creating a major disincentive for prospective commercial producers not only in Colorado but in all states and territories where cannabis has been legalized in some form.¹⁵⁹ If the *Safe Street* litigation is resolved in the plaintiffs’ favor, other cannabis businesses operating within the auspices of state cannabis laws will be exposed to similar claims.¹⁶⁰ In that regard, growers would not only face federal prosecution for CSA violations, but also potentially unlimited civil claims filed by private parties.¹⁶¹ It is interesting to note that Congress’ intent in enacting RICO was to neutralize the detrimental impact of organized crime at a turning point in American history.¹⁶² As the statute currently stands – and was recently interpreted by the Tenth Circuit Court of Appeals – it does not limit its reach to a particular type of criminal organization, but rather provides civil claimants an opportunity to redress their alleged injuries through substantial monetary damages.¹⁶³

V. RECOMMENDATIONS

A. Navigating the Current Regulatory System

If prospective growers decide to venture into the murky waters of cannabis farming, they should start by applying for county or city licenses where they are available.¹⁶⁴ Keeping a mindful eye on legal developments, particularly in

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017).

¹⁵⁹ 18 U.S.C. § 1964(c) (allows a plaintiff in a civil action for RICO violations to recover triple the actual damages).

¹⁶⁰ *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017).

¹⁶¹ *Id.*

¹⁶² 18 U.S.C. § 1962; Section 1 of Pub. L. No. 91-452 (“Organized Crime Control Act of 1970”), available at <https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg922-3.pdf>.

¹⁶³ 18 U.S.C. § 1964(c); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (2017).

¹⁶⁴ Krieger, *supra* note 144.

other states such as Colorado that have more experience navigating clashing state and federal laws, is vital.¹⁶⁵ Maintaining strict adherence to state and local laws is the least growers could do to prevent unnecessary legal mishaps beyond those presented by federal noncompliance.¹⁶⁶ If California and its various local municipalities seek to reap the benefits of the substantial tax revenue expected from the legalization of cannabis, they must demonstrate commitment to protecting businesses from federal penalties.¹⁶⁷ Proactive measures in support of this effort include devising a comprehensive regulatory scheme that not only issues commercial licenses, but tracks cannabis transactions from seed-to-sale.¹⁶⁸ A sophisticated statutory framework will not only allow the state to monitor the impact of the commercialization of recreational cannabis, it will also support state officials in their assessment of compliance by licensed enterprises through full transparency from both the regulatory body and the businesses subject to it.¹⁶⁹

B. Legislative Recommendations

A more comprehensive method to resolve the federal and state divide is for the DEA to reschedule cannabis.¹⁷⁰ This is not a simple resolution by any means, mostly because the Legislature's initial classification of cannabis as a Schedule I drug nearly five decades ago still stands.¹⁷¹

Legislation was introduced in April 2017 calling for the DEA to reduce the classification of cannabis to a Schedule III controlled substance, which would limit federal regulation on cannabis research.¹⁷² The authors of H.R. 2020 sought to encourage further cannabis studies by alleviating the legal burdens researchers face.¹⁷³ The ultimate objective of this proposed bill is to encourage further scientific studies in an effort to yield a more accurate depiction of the

¹⁶⁵ C.R.S.A. CONST. art. XVII, § 16.

¹⁶⁶ *United States v. Pisarski et al.*, No. CR14-278, 2017 WL 3447188 (N.D. Cal., May 21, 2014) (order granting motion for temporary stay); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

¹⁶⁷ OFFICIAL VOTER INFORMATION GUIDE, *supra* note 27; LEGISLATIVE ANALYST'S OFFICE, THE 2017-18 BUDGET: THE GOVERNOR'S CANNABIS PROPOSALS (Feb. 14, 2017), available at <http://lao.ca.gov/Publications/Report/3556>.

¹⁶⁸ OFFICIAL VOTER INFORMATION GUIDE, *supra* note 27; LEGISLATIVE ANALYST'S OFFICE, *supra* note 167.

¹⁶⁹ LEGISLATIVE ANALYST'S OFFICE, *supra* note 167.

¹⁷⁰ 21 U.S.C. § 878; 21 U.S.C. § 871; 21 U.S.C. § 811 (2015); 21 C.F.R. § 1316.31.

¹⁷¹ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812.

¹⁷² H.R.2020, 115th Cong. (2017) (introduced), available at <https://www.congress.gov/bill/115th-congress/house-bill/2020>.

¹⁷³ *Id.*; Alicia Wallace, *New federal bill would reschedule marijuana as Schedule III*, THE CANNABIST (Apr. 7, 2017), <http://www.thecannabist.co/2017/04/07/marijuana-federal-rescheduling-schedule-i/76885/>.

impact of cannabis.¹⁷⁴ As a Schedule I drug, cannabis research has been limited to a single cultivator for nearly fifty years.¹⁷⁵ Recognizing that cannabis research has been hindered for decades, the DEA announced that it would permit other researchers to apply for DEA registrations.¹⁷⁶ While rescheduling cannabis would allow additional research on the substance, it would not impact the existing recreational market.¹⁷⁷ Making it easier for researchers to study the effects of cannabis is a promising starting point that could lead to outright federal decriminalization.¹⁷⁸ That is certainly not guaranteed, but at the very least, scientific studies could either validate the current scheduling of cannabis, or convince the DEA that it lacks the destructive qualities attributed to Schedule I drugs.¹⁷⁹

VI. CONCLUSION

The multifaceted and dense weapons the federal government can deploy to impede not only cannabis operations, but also to seize personal wealth cultivators have amassed, may be sufficient to deter prospective commercial producers.¹⁸⁰ On the other hand, growers risk losing the opportunity to capitalize on a lucrative new crop at its highly-anticipated commercial introduction.¹⁸¹ One decision bears the threat of forfeiting existing property while the other impairs the ability to gain an early advantage in market share for an industry expected to net four billion dollars in sales by 2020 in California alone.¹⁸²

The inherent risks of commercial cannabis operations are substantial, as evidenced in this Comment.¹⁸³ While California has embraced the decriminalization of cannabis, the governing federal statute outright bans it, but the extent of federal enforcement is not cemented.¹⁸⁴

¹⁷⁴ Wallace, *supra* note 173.

¹⁷⁵ 81 Fed. Reg. 53846 (Aug. 12, 2016), *available at* <https://www.federalregister.gov/documents/2016/08/12/2016-17955/applications-to-become-registered-under-the-controlled-substances-act-to-manufacture-marijuana-to>; Wallace, *supra* note 173.

¹⁷⁶ 81 Fed. Reg. 53846 (Aug. 12, 2016), *available at* <https://www.federalregister.gov/documents/2016/08/12/2016-17955/applications-to-become-registered-under-the-controlled-substances-act-to-manufacture-marijuana-to>.

¹⁷⁷ 21 U.S.C. § 829(b) (2016).

¹⁷⁸ 21 U.S.C. § 811.

¹⁷⁹ *Id.*

¹⁸⁰ 21 U.S.C. § 881(a)(7); 18 U.S.C. § 1963; 18 U.S.C. § 1964(c).

¹⁸¹ OFFICIAL VOTER INFORMATION GUIDE, *supra* note 27.

¹⁸² Krieger, *supra* note 144.

¹⁸³ 21 U.S.C. § 881(a)(7); 18 U.S.C. § 1963; 18 U.S.C. § 1964(c).

¹⁸⁴ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812; Cole Memo, *supra* note 25; AUMA, *supra* note 2.

Case law further reiterates the federal government's constitutionally-endowed power in drug enforcement.¹⁸⁵ The Supreme Court made clear that federal law bans all forms of cannabis use, production, and sale; federal law supersedes state law in matters of cannabis enforcement; and federal law subjects those who violate those laws to crippling consequences, particularly asset forfeiture and steep monetary penalties.¹⁸⁶

With each step California takes toward cannabis legalization, the federal stance remains firmly positioned against it.¹⁸⁷ Just as Dutton stated that he “wouldn’t do it until it was federally legal,” prospective growers should too understand – and certainly not make light of – the substantial consequences commercial cannabis cultivation brings.¹⁸⁸

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¹⁸⁵ See *Marin Alliance for Medical Marijuana v. Holder*, 866 F.Supp.2d 1142 (N.D.Cal.2011).

¹⁸⁶ See *Gonzales v. Raich*, 545 U.S. 1 (2005); 21 U.S.C. § 881(a)(7); 18 U.S.C. § 1963; 18 U.S.C. § 1964.

¹⁸⁷ CAL. HEALTH & SAFETY CODE § 11362.5; AUMA, *supra* note 2; 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812.

¹⁸⁸ Telephone Interview with Steve Dutton, *supra* note 28; 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812; 18 U.S.C. § 1963; 18 U.S.C. § 1964; 21 U.S.C. § 881.

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