The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap

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SUMMARY

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The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap

Marijuana is a psychoactive drug that generally consists of leaves and flowers of the cannabis sativa plant. Its history dates back thousands of years, but in the United States it became popular as a recreational drug in the early 20th century. Not long after its rise in popularity, the federal government began to exercise control over marijuana and other substances through its taxing authority, and it enacted criminal penalties for violations of drug laws. In 1970, the federal government enacted the Controlled Substances Act (CSA), which imposed a unified legal framework at the federal level to regulate certain drugs—whether medical or recreational, and legally or illicitly distributed. The CSA criminalized the manufacture, distribution, dispensation, and possession of marijuana, which included all of varieties of cannabis at the time (in 2018, the farm bill [P.L. 115-334] amended the CSA to exclude hemp—plant material that contains no more than 0.3% delta-9-tetrahydrocannabinol [delta-9-THC] on a dry weight basis).

Under the CSA, marijuana and its derivatives are classified as Schedule I controlled substances, which means the cultivation (or manufacture), possession, and distribution of marijuana are illegal except for the purposes of sanctioned research. While the CSA definition of marijuana changed in 2018, which resulted in the removal of hemp from the definition of marijuana, the status of marijuana as a Schedule I substance has remained unchanged for over 50 years. Many states, however, have established a range of laws and policies allowing for the medical and recreational use of marijuana over the last several decades. Most of these states have deviated from an across-the-board prohibition of marijuana, and it is now more the rule than the exception that states have laws and policies allowing for some cultivation, sale, distribution, and possession of marijuana or low-THC cannabis—many of which are contrary to the CSA. As of April 1, 2022, 37 states, as well as Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia, allow for the comprehensive *medical use* of marijuana, while 11 additional states allow for the medical use of low-THC cannabis. Also, 18 states, the District of Columbia, Guam, and the Northern Mariana Islands allow for *recreational use* of marijuana. These developments have spurred a number of questions regarding potential implications of the federal and state marijuana policy gap for federal law enforcement activities, for individuals who comply with state marijuana law but violate federal marijuana law, and for the nation's drug policies as a whole.

Under the principles of federalism, the federal government may preempt state marijuana laws and enforce the CSA. Thus far, the federal response to state actions to legalize marijuana has largely been to allow states to implement their own laws on the drug. The gap between federal marijuana law and federal enforcement policy and the issues it creates continue each year, although Congress has partly addressed this gap by restricting the Department of Justice's (DOJ's) ability to expend funds to enforce the CSA in states that allow medical marijuana. DOJ has nonetheless reaffirmed that marijuana growth, trafficking, and possession remain crimes under federal law irrespective of states' marijuana laws. To date, federal law enforcement has generally focused its efforts on criminal networks involved in the illicit marijuana trade.

Many observers voice apprehension over possible negative outcomes of marijuana legalization, including, but not limited to, (1) potential increases in marijuana use, particularly among youth; (2) potential increases in traffic accidents involving marijuana-impaired drivers; (3) marijuana trafficking from states that have legalized it into neighboring states that have not; and (4) U.S. compliance with international treaties. Proponents of legalization have pointed to possible positive outcomes that could result from marijuana legalization, including a new source of tax revenue for states and a decrease in marijuana-related arrests that would free up resources for other law enforcement needs. Many states have yet to completely assess the full range of outcomes of their medical or recreational marijuana programs, particularly those that have only recently legalized the drug.

The marijuana policy gap creates unique consequences for individuals who act in compliance with state law but violate federal law. As organizations and individuals have pressed forward with the manufacturing, sale, and use of marijuana, consequences of the gap have arisen—two of the more publicized consequences for individuals are termination of employment due to marijuana use in states that have legalized medical or recreational marijuana, and a range of implications for researchers and postsecondary students on college campuses. Other consequences include, but are not limited to, an inability to obtain or dismissal from certain types of employment, the inability to purchase and possess a firearm, inadmissibility for federal housing, and ineligibility for certain visas.

The marijuana policy gap between the federal government and states has widened almost every year for over 25 years as more states legalize medical and/or recreational marijuana. It has only been a few years since states began to legalize recreational marijuana, but over 25 years since they began to legalize medical marijuana—no state has reversed its legalization, medical or recreational, since California first legalized medical marijuana in 1996. In addressing state-level legalization efforts and considering marijuana's current placement on Schedule I of the CSA, Congress could take one of several routes. It could elect to take no action, thereby maintaining the federal government's current marijuana policy and allowing the policy gap to expand if additional states legalize medical or recreational marijuana. Alternatively, it may decide that the CSA must be strictly enforced and not allow states to implement marijuana laws that conflict with the CSA. Or, it may take smaller steps to address the policy gap, such as continuing to include appropriations provisions that restrict DOJ's ability to expend funds to enforce federal law.

Congress could also choose to reevaluate marijuana's classification as a Schedule I controlled substance. If Congress were to alter the federal status of marijuana by lowering its schedule or even creating a new schedule, it may devote more resources to the Food and Drug Administration (FDA) to manage and assess the many medical marijuana products available across the country. If Congress alters marijuana's schedule, there are a number of issues that policymakers might address. These include, but are not limited to, issues surrounding availability of financial services for marijuana businesses, federal tax treatment, and the role of federal law enforcement in marijuana investigations. If Congress chooses to remove marijuana as a controlled substance under the CSA and remove criminal provisions, this would at least partly eliminate the policy gap with states that have authorized medical and recreational marijuana programs.

Whether Congress decides to address the gap with the states or not, federal control of cannabis has evolved from the strict laws and enforcement policies of the 20th century to allowing most states to implement laws authorizing the production and distribution of marijuana. Among other things, Congress may halt and reverse this evolution, continue to relinquish federal criminal control, or alter or eliminate federal criminal control of cannabis entirely.

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Introduction

Marijuana is a psychoactive drug that generally consists of leaves and flowers of the cannabis sativa plant. Its history dates back thousands of years, but in the United States it became popular as a recreational drug in the early 20th century.[1] The delta-9-tetrahydrocannabinol (THC) content, which is the primary (but not the only) psychoactive chemical compound (cannabinoid) in cannabis,[2] is dependent on both the variety of the cannabis plant and the part used (see **Appendix A** for definitions of key terms used through this report).

Marijuana is the most commonly used illicit drug in the United States.[3] The percentage of the population 12 and older that reported using marijuana in the past month (i.e., current users) has generally increased over the last decade—from 6.9% in 2010 to 11.8% in 2020.[4] For youth (aged 12-17), the rate of past-month marijuana use over the same time period had some small year-to-year percentage changes, but the rate has remained relatively stable, especially when compared to adult use rates—the rate of past-month marijuana use among youth was 7.4% in 2010 and 6.7% in 2020.[5] During this time span, nearly half of the youth surveyed had a general perception that marijuana was relatively easy to acquire if desired.[6] Marijuana is readily available throughout most of the United States; in 2020, most Drug Enforcement Administration (DEA) field divisions reported that marijuana availability was high in their jurisdictions, and since that time more states have enacted laws authorizing medical and recreational marijuana programs.[7]

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[1] David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York: Oxford University Press, 1999), p. 219.

[2] Other psychoactive compounds, such as delta-8-THC, are also found in cannabis.

[3] In 2020, an estimated 32.8 million individuals in the United States aged 12 or older (11.8% of this population) were current users of marijuana. The Substance Abuse and Mental Health Services Administration (SAMHSA) defines *current use* as having used at least once in the past month. See Department of Health and Human Services (HHS), SAMHSA, *Results from the 2020 National Survey on Drug Use and Health: Detailed Tables*, October 2021, Tables 1.1A and 1.1B, https://www.samhsa.gov/data/report/2020-nsduh-detailed-tables (hereinafter, "*2020 NSDUH Tables*").

[4] For each year from 2010 to 2020, the estimated percentage of the population currently using marijuana was 6.9%, 7.0%, 7.3%, 7.5%, 8.4%, 8.3%, 8.9%, 9.6%, 10.1%, 11.5%, and 11.8% respectively. The difference between each year's estimate from 2010 to 2018 and the 2019 estimate (11.5%) is statistically significant at the .05 level. SAMHSA recommends using caution when comparing estimates between 2020 and prior years because of methodological changes for 2020. Due to these changes, SAMHSA did not conduct significance testing between 2020 and prior years. For 2002-2020 data, see *2020 NSDUH Tables*, Table 7.3B. Of note, some warn of potential bias in drug usage survey data because of misreporting by respondents. See Beau Kilmer, Jonathan P. Caulkins, and Gregory Midgette et al., *Before the Grand Opening: Measuring Washington State's Marijuana Market in the Last Year Before Legalized Commercial Sales*, RAND Drug Policy Research Center, 2013.

[5] For some years the difference from one year's estimate to the next were not statistically significant at the .05 level. SAMHSA recommends using caution when comparing estimates between 2020 and prior years because of methodological changes for 2020. Due to these changes, SAMHSA did not conduct significance testing between 2020 and prior years. See *2020 NSDUH Tables*, Table 7.6B.

[6] In 2010, nearly half (48.6%) of surveyed youth (ages 12-17) indicated that marijuana would be "fairly easy" or "very easy" to obtain. In 2020, this figure had decreased to 41.0%. See HHS, SAMHSA, *Results from the 2010 National Survey on Drug Use and Health: Summary of National* Findings, September 2011, p. 5; and 2020 *NSDUH Tables*, Table 3.1B.

[7] Just as the CSA does not distinguish between recreational and medical marijuana (it is all prohibited under the CSA), DEA does not distinguish between medical and recreational marijuana in discussing its availability, nor does it distinguish between state-authorized and non-state-authorized marijuana availability. U.S. Department of Justice (DOJ), Drug Enforcement Administration (DEA), *2020 National Drug Threat Assessment*, DEA-DCT-DIR-008-21, March 2021.

Under federal law, marijuana and its derivatives[8] are classified as Schedule I controlled substances under the Controlled Substances Act (CSA) unless specifically exempted or listed in another schedule (see the "Controlled Substances Act" section)—thus, their cultivation, distribution, or possession, except in the context of approved research studies, is prohibited at the federal level. In contrast, states have established a range of laws and policies allowing for the medical and recreational use of marijuana. Most states have deviated from an across-the-board prohibition of marijuana, and it is now more the rule than the exception that states have laws and policies allowing for some cultivation, distribution, and possession of marijuana or low-THC cannabis—many of which are contrary to the CSA. The gap between federal and state laws and policies on marijuana has expanded each year as states continue to enact laws that allow for the medical or recreational use of marijuana.

This report provides an historical background on federal marijuana policy; an overview of state trends with respect to marijuana decriminalization and legalization, for both medical and recreational uses; and an analysis of the gap between federal and state marijuana law and policy and certain implications and consequences of the gap. It reviews federalism and federal authority to preempt state marijuana laws and analyzes relevant issues for federal law enforcement and the consequences of state marijuana legalization. The report also outlines a number of related policy questions and options that Congress may consider, including federal tax treatment of marijuana, financial services for marijuana businesses, the medical nature of cannabis, oversight of federal law enforcement, evaluation of marijuana as a Schedule I controlled substance, and some options for addressing the gap.

Cannabis Terms

The Cannabis sativa plant is often referred to as *cannabis*, an umbrella term that includes marijuana and hemp. Marijuana generally refers to the cultivated plant used as a psychotropic drug (whether for medicinal or recreational purposes). Hemp, which was removed from the CSA definition of marijuana in 2018, is cultivated for use in the production of a wide range of products, including foods and beverages, personal care products, dietary supplements, fabrics and textiles, paper, construction materials, and other manufactured and industrial goods. THC and cannabidiol (CBD) are thought to be the most abundant cannabinoids in the Cannabis sativa plant and are among the most researched cannabinoids for their potential medical value. While THC is the primary psychoactive compound found in marijuana, CBD is a nonpsychoactive compound found in both marijuana and hemp.

Historical Background of Federal Marijuana Policy

To understand the evolution of U.S. marijuana control and the current marijuana policy gap between the states and the federal government, it is important to examine the history of marijuana as a controlled substance in the United States.

[8] The Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334) removed hemp and hemp derivatives from the CSA definition of marijuana. Industrial hemp is a variety of the cannabis plant that has low THC content and is cultivated for use in the production of a wide range of products. Hemp-derived cannabidiol (CBD) is promoted as treatment for a range of conditions, including epileptic seizures, post-traumatic stress disorder, anxiety, and inflammation—despite limited scientific evidence to substantiate many of these claims.

Early 20th Century

Prior to 1937, growing and using marijuana was legal under federal law.[9] During the course of promoting federal legislation to control marijuana, Henry Anslinger, the first commissioner of the Federal Bureau of Narcotics (FBN),[10] and others submitted testimony to Congress regarding the immorality and harms of marijuana use, claiming that it incited violent and insane behavior.[11] Among other observations, Commissioner Anslinger noted that "the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender."[12] States had already begun to ban the possession of marijuana during this time. The federal government created a de facto ban of marijuana under the Marihuana Tax Act of 1937 (MTA; P.L. 75-238).[13] The MTA imposed a high-cost transfer tax stamp on marijuana sales, but these stamps were rarely issued by the federal government.[14]

Early 20th Century Marijuana Control

In the early 20th century, enforcement of drug laws was primarily the responsibility of local police, and the Federal Bureau of Narcotics (FBN) occasionally assisted.[15] Due to reduced appropriations during the Great Depression, the FBN budget and the number of narcotic agents declined and remained low for years. Publicity and warnings of the dangers of narcotics, in particular marijuana, were primary methods of drug control for the FBN.[16] In seeking federal control of marijuana and uniform narcotic laws, Commissioner Anslinger and public officials from some states made personal appeals to civic groups and legislators and pushed for, and received, editorial support in newspapers; some newspapers maintained a steady stream of anti-marijuana messaging in the 1930s.[17]

Mid-20th Century

In the decades that followed the enactment of the MTA, Congress continued to pass drug control legislation and further criminalized drug use. For example, the Boggs Act (P.L. 82-255), passed in 1951, established mandatory prison sentences for some drug offenses, while the Narcotic Control Act (P.L. 84-728) in 1956 further increased penalties for drug offenses, including marijuana offenses. In conjunction with growing support for a medical approach to addressing drug abuse,

[9] States regulated marijuana, and some banned it prior to 1937.

[10] In 1930, the Federal Bureau of Narcotics (FBN) was established within the U.S. Treasury Department to handle narcotics enforcement.

[11] See statements by H. J. Anslinger, Commissioner of Narcotics, Federal Bureau of Narcotics, U.S. Department of the Treasury, and Dr. James C. Munch, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002.

[12] U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002, p. 7.

[13] Congressional testimony indicated that marijuana, while it was a problem in the Southwest United States starting in the mid-1920s, became a "national menace" in the mid-1930s (1935-1937). See statement by H. J. Anslinger, Commissioner of Narcotics, Federal Bureau of Narcotics, U.S. Department of the Treasury, before the U.S. Congress, House Committee on Ways and Means, *Taxation of Marihuana*, 75th Cong., 1st sess., April 27, 1937. In Leary v. United States (395 U.S. 6 (1968)), the MTA was overturned by the U.S. Supreme Court as a violation of the Fifth Amendment's privilege against compelled self-incrimination.

[14] Charles F. Levinthal, *Drugs, Society, and Criminal Justice*, 3rd ed. (New York, NY: Prentice Hall, 2012), p. 58.

[15] David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York, NY: Oxford University Press, 1999), pp. 183-200, p. 228.

[16] Ibid., p. 214.

[17] Richard J. Bonnie and Charles H. Whitebread II, *The Marijuana Conviction: A History of Marijuana Conviction in the United States* (New York, NY: The Lindesmith Center, 1999), pp. 94-95; and Eric Schlosser, "Reefer Madness," *The Atlantic*, August 1994.

there was a strong emphasis on law enforcement control of drugs, including marijuana—which was gaining popularity as a recreational drug. Congress shifted the constitutional basis for drug control from its taxing authority to its power to regulate interstate commerce,[18] and in 1968 the FBN merged with the Bureau of Drug Abuse Control and was transferred from Treasury to the Department of Justice (DOJ).[19] Three years later, President Richard Nixon would declare a war on drugs.[20]

Congress and President Nixon enhanced federal control of drugs through the enactment of comprehensive federal drug laws—including the CSA, enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513). The CSA placed the control of marijuana and other plant and chemical substances under federal jurisdiction regardless of state regulations and laws. In designating marijuana as a Schedule I controlled substance, this legislation officially prohibited the manufacture, distribution, dispensation, and possession of marijuana except for purposes of sanctioned research.[21]

Controlled Substances Act

Marijuana's listing as a Schedule I controlled substance under the CSA[22] indicates that the federal government has determined that

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.[23]

Controlled Substances Act (CSA)

The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[24] It regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. The CSA establishes how the federal government (1) regulates and facilitates the lawful production, possession, and distribution of controlled substances; (2) prevents diversion[25] of these substances for illegitimate purposes; and (3) penalizes unauthorized activities involving controlled substances.

[18] As stated in Article I, Section 8, clause 3 of the U.S. Constitution, "Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." For more information about the commerce clause, see CRS Report R43023, *Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases*.

[19] David F. Musto, *The American Disease: Origins of Narcotic Control*, 3rd ed. (New York, NY: Oxford University Press, 1999), p. 239. The shift in constitutional authority was part of the Drug Abuse Control Amendments of 1965 (P.L. 89-74).

[20] For a broader discussion of the federal government's drug enforcement history, see CRS Report R43749, *Drug Enforcement in the United States: History, Policy, and Trends*.

[21] 21 U.S.C. §812 and §841. Of note, growing a marijuana plant is considered *manufacturing* marijuana. Marijuana (spelled as "marihuana") is defined under 21 U.S.C. §802(16).

[22] For more information on the CSA, see the text box, "Controlled Substances Act (CSA)," and U.S. DOJ, DEA, *The Controlled Substances Act*, https://www.dea.gov/controlled-substances-act.

[23] 21 U.S.C. §812(b)(1).

[24] P.L. 91-513; 21 U.S.C. §801 et. seq.

[25] DEA has explained that the term *diversion*, used in the context of the CSA, refers to "the redirection of controlled substances which may have lawful uses into illicit channels." Controlled Substances Quotas, 83 *Federal Register* 32784 (July 16, 2018).

Under the CSA, there are five schedules under which substances may be classified—Schedule I being the most restrictive. Substances placed onto one of the five schedules are evaluated on

- actual or relative potential for abuse;
- known scientific evidence of pharmacological effects;
- current scientific knowledge of the substance;
- history and current pattern of abuse;
- scope, duration, and significance of abuse;
- risk to public health;
- psychic or physiological dependence liability; and
- whether the substance is an immediate precursor of an already scheduled substance.

For an overview of the CSA and a discussion of select legal issues that have arisen under the act, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*.

The CSA places various substances in one of five schedules based on characteristics such as their medical use, potential for abuse, and safety or dependence liability.[26] The five schedules are progressively ordered, with substances regarded as the least dangerous and addictive classified as Schedule V and those considered the most dangerous and addictive classified as Schedule I.[27] As described in law, Schedule I substances have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and cannot safely be dispensed under a prescription.[28] Schedule I substances may be lawfully used only for bona fide, federal government-approved research studies.[29]

The CSA has two overlapping legal schemes. Registration provisions require entities working with controlled substances, such as those who research marijuana,[30] to register with the government, take steps to prevent diversion and misuse of controlled substances, and report certain information to regulators.[31] Trafficking provisions establish penalties for the production, distribution, and possession of controlled substances outside the legitimate scope of the registration system.[32] DEA enforces both registration and trafficking provisions.

A violation of the CSA's registration requirements—including failure to maintain records or detect and report suspicious orders, noncompliance with security requirements, or dispensing controlled substances without the necessary prescriptions—generally does not constitute a criminal offense unless the violation is committed knowingly. However, in the event of a knowing violation, DEA may make an arrest and refer the case to the U.S. Attorney's Office, which may bring criminal charges against both individual and corporate registrants. A first criminal violation of the registration requirements by an individual is punishable by a fine and/or up to a year in

[26] 21 U.S.C. §812(b).

[27] When Congress enacted the CSA in 1970, it established "initial schedules" of controlled substances (21 U.S.C. §812(c), but specified that the schedules "shall be updated" periodically (21 U.S.C. §812(a)). The current list of controlled substances within their designated schedules may be found in 21 C.F.R. Sections 1308.11–15.

[28] 21 U.S.C. §812(b).

[29] 21 U.S.C. §823(f).

[30] Every person or entity who manufactures or distributes any controlled substance, such as drug manufacturing companies, and every person who dispenses any controlled substance, such as doctors and pharmacists, must register with DEA.

[31] 21 U.S.C. §§821-832.

[32] 21 U.S.C. §§841-865.

prison.[33] For other violations of the CSA, potential penalties vary. Trafficking penalties vary based on the offense and the type and amount of the controlled substance in question, and certain sections of the CSA define more specific offenses, such as distributing controlled substances near schools or to individuals under age 21.[34] Unauthorized simple possession of a controlled substance may prompt a minimum fine of $1,000 and a term of up to a year in federal prison.[35] Trafficking of large quantities of Schedule I and Schedule II substances carries a prison sentence of 10 years to life and a fine of up to $10 million for an individual or a fine of up to $50 million for an organization.[36] Penalties increase for second or subsequent offenses, or if death or serious bodily injury results from the use of the controlled substance. Simple possession penalties are low compared to trafficking penalties, and DOJ has infrequently pursued simple possession charges against offenders compared to trafficking charges.[37]

The Shafer Commission

As part of the CSA enacted in 1970, the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, was established to study marijuana in the United States.[38] Specifically, the commission was charged with performing evaluations and examining issues including, but not limited to,

> (A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;
>
> (B) an evaluation of the efficacy of existing marihuana laws;
>
> (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;
>
> (D) the relationship of marihuana use to aggressive behavior and crime;
>
> (E) the relationship between marihuana and the use of other drugs; and
>
> (F) the international control of marihuana.[39]

The Shafer Commission, in concluding its review, produced two reports: (1) *Marihuana: A Signal of Misunderstanding*, and (2) *Drug Use in America: Problem in Perspective*.[40]

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[33] 21 U.S.C. §842(c)(2)(A).

[34] See 21 U.S.C. §859, §860.

[35] 21 U.S.C. §844(a).

[36] 21 U.S.C. §841(b)(1)(A). For example, trafficking of 1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight, would carry this sentence.

[37] In FY2020, 98.4% (16,287) of 16,501 federal drug offenses involved drug trafficking. In FY2020, 19.9% (280) of 1,408 federal marijuana offenses involved marijuana possession and 80.1% (1,128) of federal marijuana offenses involved marijuana trafficking. See U.S. Sentencing Commission, *Quick Facts: Drug Trafficking Offenses*, June 2021, https://www.ussc.gov/; and *Interactive Data Analyzer*, Sentencing Outcomes for FY2020, https://ida.ussc.gov.

[38] The commission was composed of two Members of the Senate, two Members of the House, and nine members appointed by the President of the United States. President Nixon appointed Raymond Shafer as the chairman.

[39] P.L. 91-513, §601(d).

[40] National Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding*, First Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1972 (hereinafter, "First Report of the Shafer Commission"); and National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, Second Report of the National Commission on Marihuana and Drug Abuse, Washington, DC, March 1973 (hereinafter, "Second Report of the Shafer Commission").

In its first report (published in 1972), the Shafer Commission discussed the perception of marijuana as a major social problem and how it came to be viewed as such.[41] It made a number of recommendations, including the development of a "social control policy seeking to discourage marihuana use, while concentrating primarily on the prevention of heavy and very heavy use."[42] In this first report, the commission also called the application of criminal law in cases of personal use of marijuana "constitutionally suspect" and declared that "total prohibition is functionally inappropriate."[43] Of note, none of the recommendations of this report were implemented, either administratively or legislatively.

In its second report (published in 1973), the Shafer Commission reviewed the use of all drugs in the United States, not solely marijuana. It examined the origins of the country's drug problem, including the social costs of drug use, and once again made specific recommendations regarding federal and state drug policy. Among its conclusions regarding marijuana, the commission indicated that aggressive behavior generally cannot be attributed to its use.[44] The commission also reaffirmed its previous findings and recommendations regarding marijuana and added the following statement:

> The risk potential of marihuana is quite low compared to the potent psychoactive substances, and even its widespread consumption does not involve social cost now associated with most of the stimulants and depressants (Jones, 1973; Tinklenberg, 1971). Nonetheless, the Commission remains persuaded that availability of this drug should not be institutionalized at this time.[45]

At the conclusion of the second report, the Shafer Commission recommended that Congress launch a subsequent commission to reexamine the broad issues surrounding drug use and societal response.[46] While a number of congressionally directed commissions regarding drugs have since been established,[47] no such commission has been directed to comprehensively review the issues of drug use, abuse, and response in the United States.

Marijuana, Late 20th Century and Beyond

While heroin and cocaine were the primary drugs of concern for federal law enforcement during the 1970s and 80s (respectively), marijuana was also a target of the substantial investment in enforcement during the federal government's "war on drugs."[48] In the 1980s, marijuana arrests were a large part of federal drug enforcement, and there are some federal crime data available to

[41] The commission stated that three factors contributed to the perception of marijuana as a major national problem, including "[1] the illegal behavior is highly visible to all segments of our society, [2] use of the drug is perceived to threaten the health and morality not only of the individual but of society itself, and [3] most important, the drug has evolved in the late sixties and early seventies as a symbol of wider social conflicts and public issues." First Report of the Shafer Commission, p. 6.

[42] First Report of the Shafer Commission, p. 134.

[43] Ibid., pp. 142-143.

[44] Second Report of the Shafer Commission, p. 158.

[45] Ibid, p. 224. In this statement, the Shafer Commission cites the following studies: R.T. Jones, *Mental Illness and Drugs: Pre-Existing Psychopathology and Response to Psychoactive Drugs*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, 1973; and J.R. Tinklenberg, *Marihuana and Crime*, Paper Prepared for the National Commission on Marihuana and Drug Abuse, unpublished, October 1971.

[46] Second Report of the Shafer Commission, pp. 410-411.

[47] See, for example, the President's Media Commission on Alcohol and Drug Abuse Prevention and the National Commission on Drug-Free Schools.

[48] President Nixon's war on drugs involved greater emphasis on a law enforcement response to drug crimes.

illustrate this. The percentage of federal drug offenders charged with marijuana violations was 24% in 1980, increased to 40% in 1982, and decreased to 26% in 1986. Among federal drug offenders (12,285) charged with marijuana violations (3,221) in 1986, 70% were charged with distribution, manufacture, or importation, while the remaining 30% were charged with simple possession.[49] Today, the percentage of federal drug offenders charged with marijuana violations is much lower—in FY2020, 7% of federal drug offenders were marijuana offenders.[50]

Over the last several decades, federal law enforcement has generally focused its efforts on criminal networks rather than individual offenders; its current stance regarding drug (particularly marijuana) offenders appears consistent with this position.[51] DOJ has repeatedly emphasized that marijuana remains an illegal substance under the CSA, but it chooses to focus its enforcement efforts on the largest threats (e.g., transnational and domestic criminal organizations that traffic illicit drugs),[52] which generally has not included the state-authorized marijuana industries and individuals in possession of marijuana.

Since the 1990s, the federal government has shifted its stated drug control policy from one that is more focused on law enforcement to a comprehensive approach—one that focuses on prevention, treatment, and enforcement.[53] Further, sentencing for federal marijuana offenses has become less severe over the years. For various reasons, the mean prison sentence for federal marijuana offenses fell from 50 months in FY1992 to 24 months in FY2020.[54]

U.S. federal drug control policies—specifically those relating to marijuana—continue to generate debate among policymakers, law enforcement officials, scholars, and the public. Over the last 25 years since California legalized marijuana for medical purposes, the policy conversation for some has evolved from how strictly marijuana must be prohibited to how much should be allowed.[55]

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[49] DOJ, Bureau of Justice Statistics, *Federal Offenses and Offenders: Drug Law Violators, 1980-86*, June 1988. Classifications were based on the most serious offense with which the individual was charged at case filing.

[50] U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics*, Figure D-1. The U.S. Sentencing Commission derived information about the type of drug from the primary drug type (i.e., the type that produces the highest base offense level) in the case, and obtained the data from the presentence report, judgment and commitment order, or plea agreement. See **Appendix A**.

[51] See DOJ, DEA, *FY 2021 Performance Budget Congressional Budget Submission*; and U.S. Sentencing Commission, *Quick Facts: Drug Trafficking Offenses.*

[52] DOJ, DEA, *2020 National Drug Threat Assessment*, March 2021.

[53] See the annual *National Drug Control Strategy* and accompanying *National Drug Control Budget* issued by the Office of National Drug Control Policy.

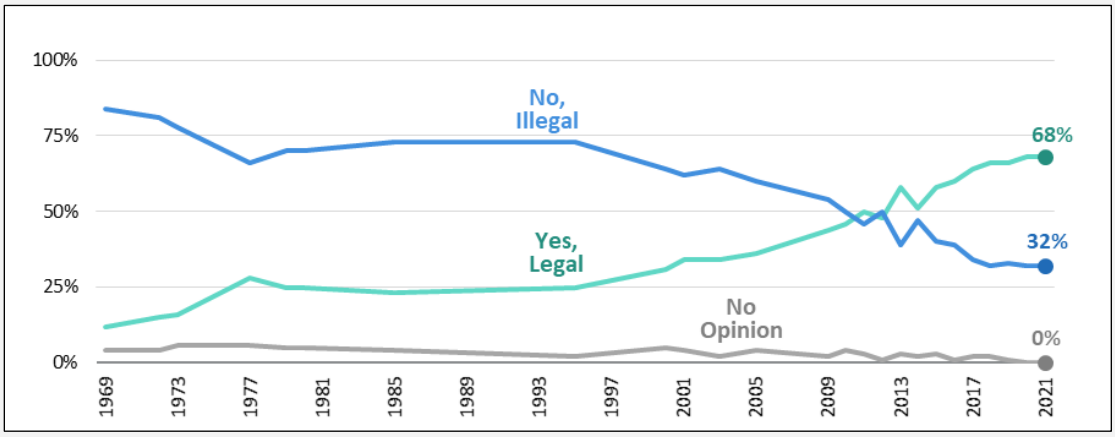
[54] Some reasons for the decline are discussed in U.S. Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, October 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf. One reason is that the number of offenders convicted of a drug crime carrying a mandatory minimum penalty had decreased by 44.7% from FY2010 through FY2016. See U.S. Sentencing Commission, *Interactive Data Analyzer*, Sentencing Outcomes for FY2020, https://ida.ussc.gov; and *1996 Sourcebook of Federal Sentencing Statistics*, Figures I and U.

[55] For example, see U.S. Congress, House Committee on Interstate and Foreign Commerce, Subcommittee on Public Health and Welfare, *Drug Abuse Control Amendments, 1970, Part 1*, 91st Cong., February 3-4, 1970; Robert S. Weppner and James A. Inciardi, "Decriminalizing Marijuana," *International Journal of Offender Therapy and Comparative Criminology*, vol. 22, no. 2 (June 1, 1978), pp. 115-126; U.S. Congress, House Committee on the Judiciary, *Full Committee Markup on H.R. 3884, the "Marijuana Opportunity Reinvestment and Expungement Act,"* 116th Cong., 2nd sess., November 21, 2019; and U.S. Congress, House Committee on the Judiciary, *Miscellaneous Measures*, Markup of the H.R. 3617, the Marijuana Opportunity Reinvestment and Expungement Act of 2021 or the MORE Act of 2021 (among other legislation), 117th Cong., 1st sess., September 29, 2021.

Evolution of Public Opinion

Changes in state and local marijuana laws over time have corresponded with a general shift in public attitudes toward the substance (see **Figure 1**). In 1969, 12% of the surveyed population supported legalizing marijuana; in 2021, that percentage had increased to 68% (+/- 3.0 percentage points).[56] Much of the shift in public opinion has occurred over the last 20 years. In addition, 59% (+/- 2.9 percentage points) of respondents indicated in 2015 that the federal government should not enforce federal marijuana prohibition laws in states that allow for its use.[57]

Figure 1. Public Opinion on Legalization of Marijuana, 1969-2021



Source: CRS presentation of data from Gallup News Service, *Gallup Poll Social Series: Crime*, http://www.gallup.com.

Notes: The question was "Do you think marijuana should be made legal or not?" Sample sizes and margins of error vary from year to year. Data from 2021 are based on landline and cellular telephone interviews conducted October 1-19, 2021, with a random sample of 823 adults aged 18 and older living in the United States.

The Federal Status of Marijuana and the Expanding Policy Gap with States

In 1970, the CSA placed the control of marijuana under federal jurisdiction *regardless* of state regulations and laws, and while the definition of marijuana has recently been amended to exclude

[56] The specific question asked was "Do you think marijuana should be made legal or not?" See Gallup, *Support for Legal Marijuana Holds at Record High of 68%*, November 4, 2021 (based on poll data from October 2021). For purposes of this question, the poll does not distinguish between medical and recreational marijuana, nor does Gallup explain to respondents what "made legal" means. Of note, in September 2019 the Pew Research Center found similar (67%) levels of support for marijuana use to be legalized among American adults. For this poll, the specific question was "Do you think that the use of marijuana should be made legal, or not?"; see Andrew Daniller, *Two-thirds of Americans Support Marijuana Legalization*, Pew Research Center, November 14, 2019—data from Pew Research Center's online American Trends Panel conducted September 3-15, 2019. In a subsequent poll in 2021, Pew asked a different marijuana legalization question of survey respondents: "Which comes closer to your view about the use of marijuana by adults?" 60% of respondents chose "[i]t should be legal for medical AND recreational use"; 30% chose "[i]t should be legal for medical use ONLY"; and 8% chose "[i]t should NOT be legal." See Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Recreational or Medical Use*, Pew Research Center, April 16, 2021—data from a survey of U.S. adults conducted April 5-11, 2021.

[57] Pew Research Center for the People & the Press (Pew), *In Debate Over Legalizing Marijuana, Disagreement Over Drug's Dangers*, April 14, 2015 (based on poll data from March 2015). Of note, Pew has not asked about federal enforcement of marijuana prohibition laws since the 2015 poll.

hemp and its derivatives, marijuana's Schedule I classification has remained unchanged for over 50 years. While the federal government maintains marijuana's current placement as a Schedule I controlled substance, states have established a range of laws and policies regarding its medical and recreational use.

To help illustrate the policy gap between the federal government and states, it is useful to compare the policies for the cultivation and distribution of marijuana. At the federal level, the cultivation and distribution of marijuana (regardless of whether it is for medical or recreational purposes) is considered drug trafficking, and the average prison sentence given to an individual convicted in federal court of marijuana trafficking was 29 months in FY2020.[58] In contrast, in many states the cultivation and distribution of marijuana is lawful and regulated (see **Figure 2**), and marijuana businesses that follow state law and regulation can earn profits from the cultivation and distribution of marijuana.

While the federal government maintains that marijuana has no medicinal value,[59] most states and territories allow for its use as medicine. While the federal government maintains a prohibition on marijuana because it is believed to have a high potential for abuse and to be a dangerous substance, 18 states, the District of Columbia (DC), and two territories allow for its recreational use. Since the federal government amended its definition of marijuana to exclude hemp, farmers in states have also forged ahead with hemp production, but they must be careful not to cultivate a product that has a THC value greater than 0.3% or they would instead be cultivating marijuana.

State Cannabis Law and Policy Trends

Over the past few decades, most states have deviated from an across-the-board prohibition of cannabis. It is now more the rule than the exception that states have laws and policies allowing for some manufacturing, sale, distribution, and possession of marijuana—all of which are contrary to the CSA, except for the purposes of sanctioned research.[60] Evolving state-level positions on marijuana include decriminalization measures as well (for definition of terms such as *decriminalization* and *legalization*, see **Appendix A**). See **Figure 2** for a map of the various cannabis laws by state.

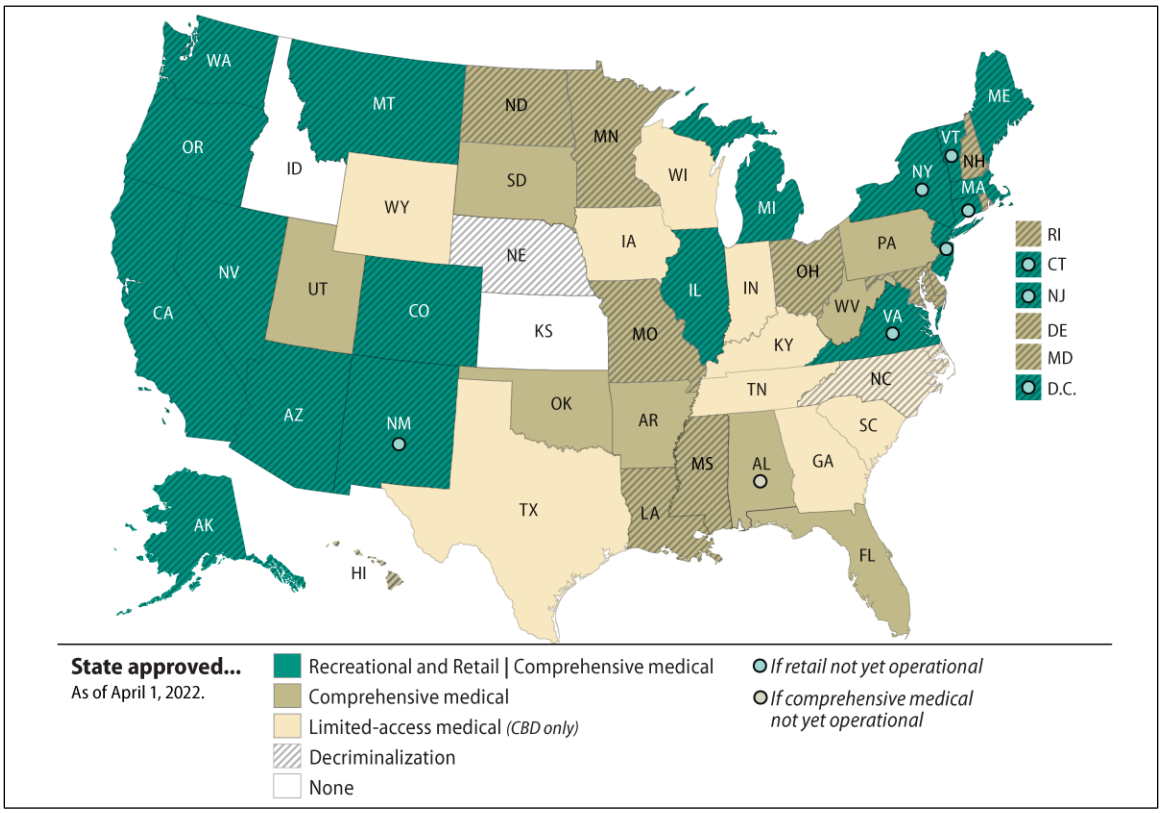
[58] U.S. Sentencing Commission, *Quick Facts: Marijuana Trafficking Offenses*, June 2021, https://www.ussc.gov/.

[59] See Appendix C for a discussion FDA and National Academies evaluations for the health effects of marijuana.

[60] With the change to the CSA definition of marijuana in the 2018 farm bill, the states that distribute CBD containing no more than 0.3% THC may not be in violation of the CSA.

Figure 2. State Cannabis Laws

April 2022



Source: CRS presentation of data from the National Conference of State Legislatures and CRS review of laws of the 50 states, territories, and District of Columbia (DC).

Notes: *Limited-access medical* refers to cannabis with low THC content or CBD oil used for a limited list of medical conditions. *State-approved* refers to state laws that either (1) allow for recreational and/or medical marijuana use and/or (2) decriminalize the possession of marijuana in small amounts. *Decriminalization* refers to a state's action to remove accompanying criminal penalties for possession of marijuana in small amounts; however, civil penalties remain. Of note, some states allow medical marijuana only for certain specified conditions. Further detail for the states with state-approved recreational use with no retail include the following: (1) While DC has approved recreational retail of marijuana, Congress has blocked DC from using funds to regulate and tax marijuana sales; (2) while Vermont has approved recreational use, it does not have a regulatory system for production or retail; and (3) the remaining states just recently approved recreational marijuana through a ballot measure and have not yet set up their retail systems. In 2020, South Dakota (SD) voters approved ballot measures to legalize recreational and medical marijuana, however, in 2021 a circuit court judge ruled the recreational measure to be unconstitutional. The SD Supreme Court upheld this ruling in 2021. The SD medical marijuana program is not yet operational. A 2018 Kansas (KS) law allowed for the sale of CBD products with 0% concentration of THC, but there is some confusion over the legality of CBD in KS because most CBD products have trace amounts of THC. Of the U.S. territories, Guam (GU) and the Northern Mariana Islands (MP) have approved recreational marijuana use and retail. GU, Puerto Rico, MP, and the U.S. Virgin Islands (USVI) have approved medical marijuana use. USVI has also approved decriminalization of marijuana. American Samoa has not taken any action to either decriminalize marijuana or approve recreational or medical marijuana.

Medical Marijuana

In 1996, California became the first state to amend its drug laws to allow for the medicinal use of marijuana. As of April 1, 2022, 37 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have comprehensive laws and policies allowing for the medicinal use of

marijuana.[61] Eleven additional states allow for "limited-access medical cannabis," which refers to cannabis with low THC content or CBD oil used for a limited list of medical conditions.[62] Idaho, Kansas, Nebraska, and American Samoa do not allow either comprehensive medical marijuana or low-THC cannabis. While the Northern Mariana Islands allow recreational marijuana, it has not authorized medical marijuana in any capacity.[63]

As noted, the CSA does not recognize the distinction states are making between the medical and recreational use of marijuana. Marijuana's classification as a Schedule I controlled substance reflects a finding that marijuana has "no currently accepted medical use in treatment in the United States."[64] Thus, states allowing its use for medical purposes are still at odds with the federal position. Federal law enforcement officers and attorneys may investigate, arrest, and prosecute individuals for medical marijuana-related offenses[65]; however, annual provisions in DOJ appropriations restrict DOJ's ability to expend funds to enforce the CSA in states that allow for *medical* use of marijuana (see the "Limiting Federal Enforcement in States: Directives through Federal Appropriations" section; the appropriations provision does not apply to state laws allowing recreational use of marijuana). Notwithstanding the appropriations rider, marijuana-related activity in states that allow for it may still result in serious legal consequences under federal law. DOJ-issued guidance in 2018 reaffirmed the authority of federal prosecutors to exercise prosecutorial discretion to target federal marijuana offenses "in accordance with all applicable laws, regulations, and appropriations."[66] DOJ emphasizes the investigation and prosecution of growers and dispensers who are violating state law and does not target those that are in compliance with state law and individual users of medical marijuana.[67] (Federal enforcement priorities are discussed further in the "Federal Response to State Divergence" section.)

[61] In November, 2020, Mississippi voters passed a ballot initiative to allow for medical marijuana, but it was overturned by the Supreme Court of Mississippi on May 14, 2021. On February 2, 2022, a new comprehensive medical marijuana law was enacted in Mississippi. See National Conference of State Legislatures, *State Medical Marijuana Laws*, February 3, 2022. "Comprehensive" medical programs describe those that allow adults to use a range of marijuana products (not only low-THC cannabis) to treat specified medical issues. Most states specify conditions for which medical marijuana may be used as treatment. Prior to enactment of the 2018 farm bill, CBD was considered to be marijuana under the CSA. See the "Change to CSA Definition of Marijuana" section of this report.

[62] As previously mentioned, CBD is a chemical compound in marijuana. Unlike THC, it does not have a psychoactive component.

[63] National Conference of State Legislatures, *State Medical Marijuana Laws*, February 3, 2022 and CRS review of laws of the 50 states, territories, and District of Columbia (DC).

[64] 21 U.S.C. §812(b)(1).

[65] Several courts have interpreted the appropriations rider to bar DOJ from expending any appropriated funds to prosecute activities involving marijuana that are conducted in "strict compliance" with state law. See United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016); Duval v. United States, 372 F. Supp. 3d 544, 555-56 (E.D. Mich. 2019); Sandusky v. Goetz, 2018 WL 6505803 at *4-5 (D. Colo. December 11, 2018); United States v. Jackson, 2019 WL 3239844 at *6-8 (E.D. Pa. June 5, 2019). However, activities that fall outside the scope of state medical marijuana laws remain subject to prosecution. For example, in United States v. Evans, the Ninth Circuit upheld the prosecution of medical marijuana growers who smoked some of the marijuana they grew because the defendants failed to show they were "qualifying patients" who acted in strict compliance with state medical marijuana law.

[66] Attorney General Jefferson B. Sessions, *Memorandum for All United States Attorneys*, U.S. Department of Justice, Marijuana Enforcement, Washington, DC, January 4, 2018.

[67] Communication between CRS and DEA on December 29, 2020. See also discussion in the "Enforcement Focused on Traffickers" section.

Recreational Marijuana

Recreational marijuana *legalization* measures remove all state-imposed penalties for specified activities involving marijuana. As of April 1, 2022, 18 states, DC, Guam, and the Northern Mariana Islands allow for the *recreational use* of marijuana. Until 2012, the recreational use of marijuana had not been legal in any U.S. state since prior to the passage of the CSA in 1970. In November 2012, citizens of Colorado and Washington voted to legalize, regulate, and tax marijuana for recreational use.[68] In November 2014, recreational marijuana legalization initiatives also passed in Alaska, Oregon, and DC. Two years later, in November 2016, recreational marijuana legalization initiatives passed in Massachusetts, California, Maine, and Nevada. In 2018, Michigan voters approved recreational marijuana use through a ballot initiative, and Vermont approved recreational marijuana use through the legislative process—the first state to approve recreational marijuana via legislation as opposed to a ballot initiative. In 2019, Illinois became the second state to enact legislation approving recreational marijuana use. In 2020, voters in Arizona, Montana, New Jersey, and South Dakota approved measures to allow recreational marijuana; however, in February 2021 a circuit judge ruled the South Dakota recreational marijuana measure to be unconstitutional.[69] In 2021, New York, Virginia, and Connecticut approved recreational marijuana through the legislative process.

These recreational marijuana initiatives legalized the possession of specific quantities of marijuana by individuals aged 21 and over, and (with the exception of DC and Vermont) set up state-administered regulatory schemes for the sale of marijuana[70]; however, there are variations among the initiatives. For example, Alaska, Arizona, California, Colorado, Connecticut, Massachusetts, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Vermont, Virginia, and DC allow individuals to grow their own marijuana plants for recreational use,[71] while Illinois, New Jersey, and Washington do not. Currently, New York allows hemp farmers[72] to grow marijuana for recreational purposes, while all adults age 21 and older will be allowed to grow their own plants 18 months after retail sales begin in the state.[73] Recreational marijuana legalization initiatives also specify that many activities involving marijuana remain crimes. For example, in most states that have legalized recreational marijuana, it remains illegal to consume marijuana in a public place.

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[68] For more detail regarding both Washington Initiative 502 and Colorado Amendment 64, see CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*.

[69] On November 24, 2021, the South Dakota Supreme Court upheld this decision. See Teo Armus, "South Dakota voters said yes to legalizing marijuana. But a judge ruled it's unconstitutional," *The Washington Post*, February 9, 2021; and Jonathan Ellis and Joe Sneve, "South Dakota Supreme Court strikes down recreational marijuana amendment," *Argus Leader*, November 24, 2021.

[70] Regulatory schemes include restrictions and requirements for licensing the production, processing, and retail of marijuana, and procedures for the issuance of licenses.

[71] South Dakota's Constitutional Amendment A would have allowed individuals to grow their own marijuana plants for recreational use, but a circuit court judge ruled the amendment to be unconstitutional. When New York enacts regulations for home grown marijuana plants, individuals in the state will be allowed to grow plants as well. Connecticut will allow for recreational home cultivation beginning July 1, 2023. See Teo Armus, "South Dakota voters said yes to legalizing marijuana. But a judge ruled it's unconstitutional," *The Washington Post*, February 9, 2021; Don Cazentre, *NewYorkUpstate.com*, "Legal marijuana in NY: What you need to know about possession, growing, business opportunities," April 6, 2021; and State of Connecticut, Governor Ned Lamont, *Governor Lamont Signs Bill Legalizing and Safely Regulating Adult-Use Cannabis*, press releases, June 22, 2021.

[72] In order to meet state licensing requirements, farmers must have been growing hemp for at least two of the previous four years. See NY S.B. 8084.

[73] See Marijuana regulation and taxation act, 2021, NY S.B. 854.

Decriminalization

Marijuana *decriminalization* differs markedly from *legalization*. A state decriminalizes conduct by lowering (e.g., making it a low-level misdemeanor with no possibility of jail time) or removing the accompanying criminal penalties; however, civil penalties may remain. If, for instance, a state decriminalizes the possession of marijuana in small amounts,[74] possession of it may still violate state law, but possession of quantities within the specified *small amount* may be considered a civil offense and subject to a civil penalty (e.g., a civil fine), not criminal prosecution. By decriminalizing possession of marijuana in small amounts, states are *not legalizing* its possession. *Legalizing* possession or other conduct involving marijuana would make that activity legal, or allowable under law, but that is not what decriminalization does. It may remain a low-level misdemeanor, or it may become a civil or local infraction.

Decriminalization initiatives by the states do not appear to be at odds with the CSA because both maintain that possessing marijuana is in violation of the law. For example, individuals in possession of one ounce or less of marijuana in Nebraska are in violation of both the CSA and Nebraska state law. The difference lies in the associated penalties for these federal and state violations. Under the CSA, a person convicted of simple possession (first offense) of marijuana may be punished with up to one year imprisonment and/or fined not more than $1,000.[75] Under Nebraska state law, a person in possession (first offense) of an ounce or less of marijuana is subject to a civil penalty of not more than $300.[76]

Decriminalization in Cities

Just as there are disparities between state and federal marijuana laws and policies, some cities' decriminalization initiatives run contrary to the laws and policies of their states. Several cities have by law or policy decriminalized marijuana possession independent of what has occurred at the state level. For example, in November 2014, prior to New York State's decriminalization of marijuana possession in 2019, former New York City (NYC) Mayor de Blasio and former-NYC Police Commissioner Bratton announced a change in marijuana enforcement policy; individuals found to be in possession of 25 grams or less of marijuana[77] may have been eligible to receive a summons instead of being arrested.[78]

In Pennsylvania, the state government has not decriminalized marijuana possession,[79] but Pittsburgh, Philadelphia, State College, Harrisburg and other cities in Pennsylvania have all decriminalized possession in some form. For example, in 2016 Harrisburg's city council

[74] Typically one ounce or less, but the amount varies from state to state.

[75] 21 U.S.C. §844.

[76] Also, the judge may order the offender to attend a drug use and abuse education course. See Section 28-416 of the Nebraska Revised Statutes.

[77] Under NY Pen. Law Section 221.10 in 2014, a person was guilty of criminal possession of marijuana in the fifth degree when he knowingly and unlawfully possessed "1. marihuana in a public place ... and such marihuana is burning or open to public view; or 2. one or more preparations, compounds, mixtures or substances containing marihuana and... are of an aggregate weight of more than twenty-five grams."

[78] City of New York, *Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy*, November 10, 2014.

[79] Under Pennsylvania state law, the possession of 30 grams or less of marijuana is a misdemeanor offense punishable by 30 days in jail and/or a $500 fine.

unanimously voted to make possession of 30 grams or less of marijuana punishable by a $75 fine and public use punishable by a $150 fine.[80]

Marijuana as Medicine and Federal Involvement

During the past 25 years, there have been significant policy shifts at the state level to allow certain patients to obtain marijuana for medicinal purposes. However, the federal government does not recognize marijuana as having any currently accepted medical use, and it continues to be listed on Schedule I under the CSA. Under federal law, a drug must be approved by the Food and Drug Administration (FDA) before it may be marketed in the United States. To date, FDA has not approved a marketing application for marijuana for the treatment of any condition. However, FDA has approved one marijuana-derived drug and three marijuana-related drugs that are available by prescription. Epidiolex, which contains CBD as its active ingredient, is approved for the treatment of seizures associated with two rare and severe forms of epilepsy. It is the first (and only) FDA-approved drug containing a purified drug substance derived from marijuana.[81] Following its approval, DEA issued an order placing FDA-approved drugs that contain cannabis-derived CBD with no more than 0.1% THC on Schedule V of the CSA, and in April 2020 DEA notified GW Pharmaceuticals that Epidiolex is no longer subject to the CSA.[82] FDA has also approved two drugs containing synthetic THC (i.e., Marinol [and its generic versions] and Syndros) and one drug containing a synthetic substance that is structurally similar to THC but not present in marijuana (i.e., Cesamet). These products are used to treat nausea and vomiting caused by chemotherapy as well as loss of appetite for individuals with human immunodeficiency virus (HIV). Additional drugs containing marijuana-derived THC and CBD are reportedly being developed (see **Appendix B** for further discussion).[83]

Although FDA has approved only one marijuana-derived drug and three marijuana-related drugs for specific purposes, some states allow for dispensing of marijuana for a wide range of medical conditions. To date, there is insufficient scientific evidence to support claims of the effectiveness of marijuana for treating many of these conditions. In 2017, the National Academies of Sciences, Engineering, and Medicine (NASEM) issued a report evaluating the use of cannabis and its constituent substances for various diseases and conditions (for more information about the report, see **Appendix C**). In general, the NASEM found conclusive or substantial evidence that cannabis or cannabinoids (but not necessarily marijuana or marijuana-derived cannabinoids) are an effective treatment for chronic pain, chemotherapy-induced nausea and vomiting, and self-reported symptoms of spasticity (i.e., intermittent or constant involuntary muscle movement) among patients with multiple sclerosis. However, for the remaining conditions examined, the

[80] Christine Vendel, "It's official: Harrisburg council reduces penalties for pot possession," *Penn Live*, July 5, 2016; and City of Harrisburg, City Council.

[81] The U.S. Food and Drug Administration (FDA), "FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy," June 25, 2018, https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm.

[82] DOJ, DEA, "Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements," 83 *Federal Register* 48950, September 28, 2018; GW Pharmaceuticals, *GW Pharmaceuticals plc and Its U.S. Subsidiary Greenwich Biosciences, Inc. Announce That EPIDIOLEX® (cannabidiol) Oral Solution Has Been Descheduled And Is No Longer A Controlled Substance*, press release, April 6, 2020, https://ir.gwpharm.com/news-releases/news-release-details/gw-pharmaceuticals-plc-and-its-us-subsidiary-greenwich-1.

[83] National Institutes of Health (NIH), National Library of Medicine, Clinicaltrials.gov, accessed January 13, 2022, https://clinicaltrials.gov/ct2/results?cond=&term=Cannabidiol&cntry=&state=&city=&dist=.

NASEM found insufficient or no evidence of potential therapeutic effects of cannabis or cannabinoids.

Randomized controlled trials (RCTs) are considered the gold standard of clinical and epidemiologic research to determine if a proposed treatment (e.g., marijuana) is more effective than an existing treatment or no treatment (i.e., placebo). As of January 2022, a database maintained by the National Library of Medicine (NLM) at the National Institutes of Health (NIH) lists numerous domestic and international RCTs involving cannabinoids—including THC and CBD—derived from marijuana as treatment for a variety of conditions, including Amyotrophic Lateral Sclerosis (ALS), pain, and schizophrenia.[84] However, much of this research is in its nascent stages; therefore, conclusive evidence on the use of marijuana to treat various health conditions will likely not be available for some time. There are also still many unknowns regarding *how* marijuana would be used as a medical treatment if approved, including the individual and combined clinical benefits of THC, CBD, and other cannabinoids; proper dosage; and effects of different routes of administration, among others.[85] In addition, the short- and long-term health effects of marijuana use are also largely unknown, in part due to the challenges of researching marijuana in the United States.[86]

Federal Regulation of Marijuana Research

Conducting research with marijuana involves several federal agencies: DEA, FDA, and the National Institute on Drug Abuse (NIDA), which is housed within NIH. Before conducting research with marijuana, an investigator must obtain a DEA registration,[87] an FDA review of an investigational new drug application (IND) or research protocol, and marijuana from NIDA or another DEA-registered source.[88] The U.S. Department of Health and Human Services (HHS) has issued guidance to aid researchers in conducting medical research on marijuana in compliance with DEA, FDA, and NIDA requirements if the researcher chooses to obtain their marijuana through NIDA's Drug Supply Program (DSP).[89] For all controlled substances, researchers must obtain a registration issued by the Attorney General (DEA, by delegation of authority),[90] in

[84] See NIH's database at https://clinicaltrials.gov/ct2/home (accessed January 13, 2022).

[85] National Academies of Sciences, Engineering, and Medicine (NASEM), *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, doi: 10.17226/24625, p. 396.

[86] The Schedule I status of marijuana has reportedly created difficulty for researchers who seek to study marijuana but are potentially unable to meet the strict requirements of the CSA or seek a different strain, potency, or quality of marijuana for their research than what is lawfully available. See Heike Newman, "Cannabis Clinical Investigations in Colorado 2019," *Food and Drug Law Institute*, July/August 2019; L. Sanders, "The CBD Boom is Way Ahead of the Science," *Science News*, March 27, 2019; and NASEM, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, doi: 10.17226/24625, p. 396.

[87] A separate, additional registration is needed for Schedule I substances.

[88] As of April 1, 2022, there are five federally registered manufacturers of marijuana.

[89] DEA has registered additional marijuana growers outside of NIDA's DSP, and researchers will have options beyond what is available through the DSP. See DOJ, DEA, "Controls To Enhance the Cultivation of Marihuana for Research in the United States," 85 *Federal Register* 82333-82355, December 18, 2020; and NIH, "Announcement for the Department of Health and Human Services' Guidance on Procedures for the Provision of Marijuana for Medical Research," May 1999, https://grants.nih.gov/grants/guide/notice-files/not99-091.html. For regulatory requirements under the CSA, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*.

[90] As authorized under 21 U.S.C. Section 871, the Attorney General may delegate any of his/her control and enforcement functions under the CSA to any DOJ officer or employee—many of these functions are performed by DEA.

accordance with relevant federal law and regulations.[91] Among other requirements, DEA and FDA regulations require registrants to comply with strict storage requirements for controlled substances.[92] CSA requirements are most stringent for Schedule I substances (these requirements are discussed further in **Appendix B**). In addition to federal requirements, some states require researchers to comply with state-specific medical or government requirements to conduct clinical trials or other activities involving Schedule I substances.[93]

To obtain a DEA registration for purposes of conducting research with a Schedule I controlled substance (e.g., marijuana), the applicant must submit to DEA a protocol containing specified information, including a description of the planned research and information about the quantity of the substance to be used for it.[94] DEA must process the registration application and research protocol and forward a copy of each to the HHS Secretary (FDA, by delegation of authority) within seven days of receipt. If the Schedule I controlled substance is intended to be studied in human clinical trials, the researcher must obtain a pre-IND number from FDA, submit the IND to FDA, and certify to DEA that the IND has been submitted to FDA.[95] An IND must include information about the proposed clinical study design, completed animal test data, and the lead investigator's qualifications, among other things.[96] For INDs concerning Schedule I controlled substances, FDA is required, within 30 days of receipt, to review and comment on the scientific merit of the studies and qualifications of the investigators conducting the research and to report this information to DEA.[97] For a research protocol, FDA must provide this information to DEA within 21 days of receipt of the protocol.[98]

If FDA determines that the applicant is qualified and competent and the research protocol is meritorious, it notifies DEA of such determination. If FDA determines that the protocol is not meritorious and/or the applicant is not qualified or competent, it must notify DEA of this determination and provide the reasons for it.[99] DEA is required to issue a certificate of registration within 10 days of receiving FDA's notice, unless DEA determines that the certificate should be denied.[100] DEA makes the final determination on approving research using Schedule I substances and drugs.[101]

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[91] See 21 U.S.C. §822. This requirement is also described under 21 C.F.R. Section 1301.11(a): "Every person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance shall obtain a registration unless exempted by law or pursuant to §§1301.22 through 1301.26."

[92] For the purposes of ensuring the secure storage and distribution of *all* controlled substances, all applicants and registrants must generally "provide effective controls and procedures to guard against theft and diversion of controlled substances." See 21 C.F.R. §1301.71. FDA's investigational new drug regulations provide that if the investigational drug is a controlled substance, the investigator must take adequate precautions, including proper storage of the drug "to prevent theft or diversion of the substance into illegal channels of distribution." See 21 C.F.R. §312.69.

[93] NASEM, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, doi: 10.17226/24625, p. 380.

[94] 21 C.F.R. §1301.18.

[95] NIH, "Announcement for the Department of Health and Human Services' Guidance on Procedures for the Provision of Marijuana for Medical Research," May 1999, https://grants.nih.gov/grants/guide/notice-files/not99-091.html.

[96] 21 C.F.R. Part 312.

[97] 21 C.F.R. §1301.32(a).

[98] Ibid.

[99] 21 C.F.R. §1301.32(c).

[100] 21 C.F.R. §1301.32(b).

[101] 21 C.F.R. §1301.32; and FDA Manual of Policies and Procedures MAPP 4200.1, "Consulting the Controlled Substance Staff on INDs and Protocols That Use Schedule I Controlled Substances and Drugs," https://www.fda.gov/

Researchers should soon be able to acquire marijuana for research through DEA and its registered marijuana growers. Currently, researchers may only gain access to marijuana through NIDA. If researchers continue to access marijuana through NIDA, they must comply with NIH requirements. NIDA supplies researchers with marijuana from the National Center for Natural Products Research at the University of Mississippi, which has a contract with NIDA. This was the only official source in the United States through which researchers could obtain marijuana for research purposes for over 50 years.[102] Researchers who seek to use this source need to make an inquiry to NIDA to determine availability and associated costs. If NIDA determines that marijuana is available for the researcher's study, it will provide the researcher with a letter of authorization (LOA) to reference NIDA's marijuana Drug Master File (DMF) on file with FDA.[103] As of April 1, 2022, DEA has five registered manufacturers of marijuana. According to DEA, researchers will be able to obtain marijuana from these growers with minimal DEA involvement.[104]

Some researchers have argued that the federal regulations that guide marijuana research unnecessarily impede its advancement.[105] DOJ and HHS have taken some steps to make marijuana research easier, including the following:

- In June 2015, HHS eliminated one step in obtaining research-grade marijuana for research that is not funded by NIH. HHS eliminated the Public Health Service review of non-federally funded research protocols involving marijuana and the utilization of the existing FDA IND process for drug development.[106]
- In December 2015, DEA announced a waiver to make it easier for researchers conducting clinical trials with CBD to modify their research protocols and obtain more CBD than was initially approved.[107]
- In August 2016, DEA announced a new policy intended to increase the number of approved sources of research-grade marijuana.[108]

media/71646/download.

[102] NIDA, "NIDA's Role in Providing Marijuana for Research," https://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research.

[103] A DMF is a submission to FDA "that may be used to provide confidential detailed information about facilities, processes, or articles used in the manufacturing, processing, packaging, and storing of one or more human drugs." See FDA, "Drug Master Files (DMFs)," https://www.fda.gov/drugs/forms-submission-requirements/drug-master-files-dmfs.

[104] See DOJ, DEA, "Controls To Enhance the Cultivation of Marihuana for Research in the United States," 85 *Federal Register* 82340, December 18, 2020.

[105] See NASEM, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, doi: 10.17226/24625, p. 382; and Pet. for Writ of Mandamus at 13, In re Scottsdale Research Inst., No. 19-1120 (D.C. Cir. June 6, 2019).

[106] HHS, "Announcement of Revision to the Department of Health and Human Services Guidance on Procedures for the Provision of Marijuana for Medical Research as Published on May 21, 1999," 80 *Federal Register* 35960-35961, June 23, 2015.

[107] DOJ, DEA, "DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol," press release, December 23, 2015.

[108] DOJ, DEA, "Applications to Become Registered under the Controlled Substances Act to Manufacture Marijuana to Supply Researchers in the U.S.," 81 *Federal Register* 53846-53848, August 12, 2016.

- In August 2019, former Attorney General Barr announced that DEA is "moving forward with its review of applications for those who seek to grow marijuana legally to support research."[109]
- In December 2020, DEA published a final rule that, among other things, requires all registered manufacturers who cultivate marijuana (for research purposes only) "to deliver"[110] their total crops to DEA with limited exception; however, the crops may remain at the manufacturers' registered locations. DEA is to purchase and take possession of such crops (not later than four months after harvest ends) by designating a secure storage mechanism at the registered location and controlling access to the marijuana.[111]

Some have contended that marijuana provided to researchers is "both qualitatively and quantitatively inadequate."[112] DEA's addition of new manufacturers of marijuana may lead to better quality and a sufficient quantity of marijuana for research purposes. As of April 1, 2022, DEA has five registered marijuana growers listed on their website.[113] (For further discussion of the marijuana supply policy issue, see **Appendix B**.)

Exemption of Hemp from the CSA and Implications for Hemp and CBD Oil

From 1970 until 2018, the federal government's definition of marijuana included hemp and its derivatives, and widespread hemp production was generally prohibited. In 2018, Congress amended the definition to reflect the differences in the chemical and psychoactive properties between hemp and marijuana.

[109] DOJ, DEA, *DEA announces steps necessary to improve access to marijuana research*, press release, August 25, 2019, https://www.dea.gov/press-releases.

[110] The marijuana is not technically delivered to DEA but rather DEA travels to the manufacturer and accepts delivery at the manufacturer's registered location, where DEA will maintain possession or designate a different location if adequate storage does not exist at the manufacturer's registered location.

[111] DOJ, DEA, "Controls To Enhance the Cultivation of Marihuana for Research in the United States," 85 *Federal Register* 82333-82355, December 18, 2020.

[112] Marc Kaufman, "Federal Marijuana Monopoly Challenged," *Washington Post*, December 12, 2005; and DOJ, DEA, "Lyle E. Craker; Denial of Application," 74 *Federal Register* 2101, January 14, 2009.

[113] DOJ, DEA, Diversion Control Division, *Marihuana Growers Information*, https://www.deadiversion.usdoj.gov/drugreg/marihuana.htm.

Distinguishing Between Hemp and Marijuana Plants for Law Enforcement Purposes

It is difficult for law enforcement to distinguish between hemp and marijuana plants—both are cannabis plants, but hemp is defined in statute as containing no more than 0.3% delta-9-THC. These plants look, smell, and feel the same. Drug-sniffing dogs are unable to distinguish between them.[114]

While a binary roadside test is available to U.S. law enforcement[115] to help determine the nature of a product (i.e., whether it is hemp or marijuana), a roadside test that gives the exact percentage of THC is not yet available.[116] These precision tests must currently be conducted in a laboratory.

Change to CSA Definition of Marijuana

The 2018 farm bill (P.L. 115-334) amended the CSA to exclude hemp—plant material that contains no more than 0.3% delta-9 THC on a dry weight basis[117]—from the statutory definition of marijuana.[118] This provision allows for the cultivation of hemp and hemp-derived products at or below the 0.3% delta-9 THC threshold,[119] as defined in statute, from being regulated as a Schedule I controlled substance. A DEA registration is no longer required to cultivate or research hemp and hemp-derived products; however, hemp remains subject to U.S. Department of Agriculture (USDA) regulation. Further, it remains subject to DEA scrutiny due to the nature of cannabis and methods of production.[120] Changes enacted in the 2018 farm bill now allow for the cultivation, processing, marketing, and sale of hemp and hemp-derived products that meet the statutory definition of hemp—if it is produced by an authorized grower in accordance with the 2018 farm bill, associated federal USDA regulations, and applicable state regulations.[121] (See **Appendix D** for further information regarding federal regulation of hemp production.)

[114] Debra Cassens Weiss, "New Hemp Laws Leave Police and Prosecutors Dazed and Confused," *ABA Journal*, August 9, 2019.

[115] The test turns one color when detecting products with a higher concentration of THC and another color if the product has low THC. Jodie Fleischer, Katie Leslie, and Steve Jones et al., "New Police Drug Test Aims to Tell Pot From CBD," *NBC Washington*, July 18, 2019; and CRS correspondence with DEA, July 9, 2019.

[116] New field tests with more precision are in development. See, for example, Olga Kuchment, "Is it hemp or marijuana? Scanning technology may provide an instant answer," *AgriLife Today*, February 10, 2020.

[117] *Dry weight basis* means the weight of the material after it has been dried at high temperature (generally until reaching a constant mass).

[118] For the CSA definition of *marijuana*, see 21 U.S.C. §802(16).

[119] While Epidiolex—a marijuana-derived drug—contains less than 0.3% delta-9 THC, it was approved and placed in Schedule V prior to the enactment of the 2018 farm bill (i.e., prior to the change in the statutory definition of marijuana). As such, despite meeting the current statutory definition of *hemp* in 7 U.S.C. Section 1639o, it remains in Schedule V. 83 *Federal Register* 48950, September 28, 2018.

[120] Remaining concerns for farmers and manufacturers of hemp and CBD products are accidental growth of marijuana plants instead of hemp plants and the THC level changes (sometimes over the 0.3% threshold) during the manufacturing process. In August 2020, DEA issued an interim final rule to formally provide in their regulations the scope of DEA regulatory controls over marijuana, THC, and other marijuana-related constituents and acknowledge the change to the CSA definition of marijuana to exclude hemp and its constituents. See DOJ, DEA, "Implementation of the Agriculture Improvement Act of 2018," 85 *Federal Register* 51639-51645, August 21, 2020.

[121] Regulatory plans involving hemp under the oversight of states and tribes will need to include the following requirements: maintenance of relevant production information; THC testing; procedures for disposal of plants (and products from those plants) that exceed hemp THC levels; procedures to comply with USDA's enforcement provisions; procedures for conducting random, annual inspections of hemp producers; procedures for submitting hemp production information to USDA; and certification by state and tribal regulators that they have adequate resources and personnel to implement required procedures.

Marijuana's Status Moving Forward

Over the years, several entities have submitted petitions to DEA to reschedule marijuana.[122] In August 2016, after a five-year evaluation process done in conjunction with FDA, DEA rejected two petitions, one submitted by two state governors and a second submitted by a New Mexico health provider, to move marijuana to a less-restrictive schedule under the CSA.[123] Consistent with past practice,[124] the rejections were based on a conclusion by both FDA and DEA that marijuana continues to meet the criteria for inclusion on Schedule I—namely that it has a high potential for abuse, has no currently accepted medical use, and lacks an accepted level of safety for use, even under medical supervision.[125]

Congress (through legislation and hearings) has also demonstrated interest in altering the schedule status of marijuana. In recent years, Members of Congress have introduced various bills that would change the Schedule I status of marijuana. In the 116th and 117th Congress, for instance, the House passed the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (MORE Act; H.R. 3884) and the MORE Act of 2021 (H.R. 3617), respectively. The MORE Act (both H.R. 3884 from the 116th Congress and H.R. 3617 from the 117th Congress) would remove marijuana from CSA control entirely, among other things. The Senate did not vote on the MORE Act in the 116th Congress, and as of April 1, 2022, it has not taken up H.R. 3617. Several other bills that would deschedule or alter the Schedule I status of marijuana have been introduced in the 117th Congress.

Federal Response to State Divergence

Although state laws do not affect the status of marijuana under federal law or the ability of federal law enforcement to enforce it, state legalization initiatives have spurred a number of questions regarding potential implications for federal laws and policies, including federal drug regulation and enforcement, and banking for marijuana businesses. Thus far, the federal response to states' decriminalizing or legalizing marijuana largely has been to allow states to implement their own laws on the drug. DOJ has nonetheless reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of states' marijuana laws. Federal law enforcement has generally focused its efforts on criminal networks involved in the illicit marijuana trade. Federal banking regulators have yet to issue any formal guidance in response to state and local marijuana legalization efforts; however, in February 2014 the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance on financial institutions' suspicious activity report requirements when serving marijuana businesses.

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[122] Any interested party may petition the Administrator of DEA to initiate rulemaking proceedings to reschedule a controlled substance. See 21 U.S.C. Section 811(a) and 21 C.F.R. Section 1308.43(a) for relevant rules and regulations.

[123] In 2011, the governors of Rhode Island and Washington jointly petitioned DEA to have marijuana and "related items" removed from Schedule I of the CSA and rescheduled as medical cannabis in Schedule II. In 2009, Bryan Krumm, a health provider in New Mexico, petitioned DEA to have marijuana removed from Schedule I of the CSA and rescheduled in any schedule other than Schedule I.

[124] DEA has previously denied petitions to reschedule marijuana. For example, in 2002 a petition was filed to have marijuana removed from Schedule I and rescheduled as cannabis in Schedule III, IV, or V. In 2011, DEA rejected the petition. See DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 76 *Federal Register* 40552-40589, July 8, 2011.

[125] See DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53767-53845, August 12, 2016; and DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53687-53766, August 12, 2016.

Federalism: Federal Preemption and the Anti-Commandeering Doctrine[126]

The gap between the federal CSA,[127] which criminalizes the cultivation, distribution, and possession of marijuana, and certain state marijuana laws, which authorize some of those same activities, raises questions regarding "the proper division of authority between the Federal Government and the States"[128] under both the preemption and anti-commandeering doctrines. The Supremacy Clause of the U.S. Constitution generally establishes that federal law is supreme to, and may preempt, conflicting state laws.[129] However, the federal government's preemptive authority is subject to certain limitations, including the anti-commandeering doctrine, which generally prohibits the federal government from forcing states to perform regulatory activities on the federal government's behalf.[130] See **Appendix E** for a comprehensive legal discussion of the federal preemption and anti-commandeering doctrines, and how the courts have handled the conflict between federal CSA and state marijuana laws.

Enforcement Focused on Traffickers

Federal law enforcement generally focuses its counterdrug efforts on criminal networks involved in the illicit drug trade. Federal marijuana enforcement efforts, largely focused on *traffickers and distributors* of marijuana rather than users, appear to be consistent with this position.[131] Arrests for marijuana *possession* offenses are largely made by state and local police.[132] President Barack Obama once noted that "[it] would not make sense from a prioritization point of view for us to focus on recreational drug users in a state that has already said that under state law that's legal."[133] Officials in the Trump Administration also indicated that prosecuting traffickers over users was a priority; and while there was some uncertainty about the future of marijuana policy under the Trump Administration, then-Attorney General Sessions noted that federal law

[126] This section was authored by David H. Carpenter, Legislative Attorney in CRS's American Law Division (ALD). It uses citation and other editorial styles consistent with ALD's reports.

[127] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801–904).

[128] New York v. United States, 505 U.S. 144, 149 (1992).

[129] U.S. CONST. art. VI, cl. 2.

[130] Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2019) ("The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.").

[131] DEA's mission "is to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States; and to recommend and support non-enforcement programs aimed at reducing the availability of illicit controlled substances on the domestic and international markets." See https://www.dea.gov/mission.

[132] In 2015, the Government Accountability Office concluded that DOJ has not historically targeted possession of small amounts of marijuana for personal use on private property, and has left lower-level marijuana activity to state and local law enforcement authorities through enforcement of their own drug laws. See U.S. Government Accountability Office (GAO), *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 2015, p. 9.

[133] "Marijuana Not High Obama Priority," *ABC Nightline*, December 14, 2012.

enforcement would continue to focus their marijuana-related enforcement efforts on criminal organizations over "routine cases."[134] Similarly, then-Attorney General Barr noted he would continue to "prioritize the prosecution of significant drug traffickers, rather than drug users or low-level drug offenders."[135] During his 2021 Senate confirmation hearing, Attorney General Garland indicated that the Biden Administration will maintain this position.[136]

Department of Justice Guidance Memos for U.S. Attorneys

DOJ has articulated federal marijuana enforcement policy through several memoranda providing direction for U.S. Attorneys in states that have medical use of marijuana programs. After states began to legalize the medical use of marijuana, DOJ reaffirmed that marijuana growth, possession, and trafficking remain crimes under federal law irrespective of state law.[137] In 2009, former Deputy Attorney General David Ogden authored a memo for selected U.S. Attorneys that reiterated that combating major drug traffickers remains a central priority and stated:

> [t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the [Justice] Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.[138]

In a follow-up memorandum to U.S. Attorneys in 2011, former Deputy Attorney General James Cole restated that enforcing the CSA remained a core priority of DOJ, even in states that had legalized medical marijuana. He clarified that "[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."[139] Deputy Attorney General Cole warned those who might assist medical marijuana dispensaries in any way that "[p]ersons who are in the business of cultivating, selling or distributing marijuana, *and those who knowingly facilitate such activities* [emphasis added], are in violation of the Controlled Substances Act, regardless of state law."[140] This has been interpreted by some to mean, for example, that building owners and managers are in violation of the CSA if they allow medical marijuana dispensaries to operate in their

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[134] Remarks by Attorney General Jeff Sessions at a Georgetown Law student symposium hosted by the Federalist Society, March 10, 2018, https://www.c-span.org/video/?442403-1/attorney-general-jeff-sessions-judicial-authority. He stated that federal law enforcement would not be able to, even if it wished to, take over "state enforcement of routine [marijuana] cases."

[135] William P. Barr, "Questions for the Record, William P. Barr, Nominee to be United States Attorney General," January 27, 2019.

[136] U.S. Congress, Senate Committee on the Judiciary, *The Nomination of the Honorable Merrick Brian Garland to be Attorney General of the United States: Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, 117th Cong., 1st sess., February 2021, pp. 23-25.

[137] United States Attorney's Office, "Statement From U.S. Attorney's Office on Initiative 502," press release, December 5, 2012.

[138] Deputy Attorney General David W. Ogden, *Memorandum for Selected United States Attorneys*, U.S. Department of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, Washington, DC, October 19, 2009, pp. 1-2.

[139] Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

[140] Ibid.

buildings.[141] Deputy Attorney General Cole further warned that "[t]hose who engage in transactions involving the proceeds of such activity [cultivating, selling, or distributing of marijuana] may be in violation of federal money laundering statutes and other federal financial laws."[142]

In an August 2013 memorandum (the Cole memorandum), Deputy Attorney General Cole stated that while marijuana remains an illegal substance under the CSA, DOJ would focus its resources on the "most significant threats in the most effective, consistent, and rational way," and outlined eight marijuana enforcement priorities for DOJ: [143]

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- preventing marijuana possession or use on federal property.[144]

In a February 2014 memorandum, Deputy Attorney General Cole further reinforced these enforcement priorities, specifically as they related to the prosecution of marijuana-related financial crimes. This memorandum directed the U.S. Attorneys that "in determining whether to charge individuals or institutions with ... [certain financial] offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance."[145]

In October 2014, DOJ released another memorandum to the U.S. Attorneys that asserted the applicability of the eight enforcement priorities in Indian Country.[146] It responded to the tribes' requests for guidance on CSA enforcement on tribal lands. DOJ reiterated that the 2013 Cole

[141] Jennifer Medina, "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times*, October 8, 2011, p. 10.

[142] Deputy Attorney General James M. Cole, *Memorandum for United States Attorneys*, U.S. Department of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, Washington, DC, June 29, 2011, p. 2.

[143] Deputy Attorney General James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, p. 1.

[144] Ibid., pp. 1-2.

[145] Deputy Attorney General James M. Cole, *Memorandum for All United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Related Financial Crimes, Washington, DC, February 14, 2014, p. 2.

[146] Executive Office for United States Attorneys, *Policy Statement Regarding Marijuana Issues in Indian Country*, October 28, 2014.

memorandum did not prohibit the federal government from enforcing federal law in Indian Country, and added the following:

> The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the *cultivation or use* of marijuana in Indian Country [emphasis added].[147]

Unlike the Cole memorandum, DOJ did not specifically refer to *distribution* and regulation of marijuana. It was unclear whether distribution of marijuana would be tolerated on tribal lands should tribal governments seek to legalize and distribute marijuana. Despite the lack of clarity, some tribes moved forward with plans to grow and sell marijuana at tribe-owned stores on tribal lands.[148] Since the memo was released, DEA has led some marijuana enforcement actions on tribal lands involving tribe-authorized marijuana activity.[149]

In January 2018, DOJ issued another memorandum (Sessions memorandum) to the U.S. Attorneys on marijuana enforcement. In it, then-Attorney General Sessions emphasized the CSA prohibition of marijuana cultivation, distribution, and possession and its associated penalties. He also pointed out that these marijuana activities may "serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act…. [T]hese statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime."[150] Sessions also noted in the memorandum that DOJ had "well-established principles" dating back to 1980 to decide which marijuana activities to prosecute, and because these principles exist, the previous DOJ memoranda were unnecessary and rescinded.[151]

While DOJ has not released additional memoranda on marijuana enforcement since the Sessions memorandum, then-Attorney General Barr indicated his discomfort with "ignoring the enforcement of federal law."[152] On the other hand, Barr also stated during his nomination hearing that he did not intend to target marijuana businesses that had relied on the Cole memorandum for guidance.[153] Attorney General Garland stated the following in his official responses to questions

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[147] Monty Wilkinson, *Memorandum*, U.S. Department of Justice, Policy Statement Regarding Marijuana Issues in Indian Country, Washington, DC, October 28, 2014.

[148] "Native American Tribes Approve Plan to Grow and Sell Marijuana in Oregon," *The New York Times*, December 19, 2015; Jackie Valley, "Las Vegas Paiutes' Newest Venture: Medical Marijuana," *Las Vegas Sun*, March 1, 2016; Noelle Crombie, "Warm Springs Tribes Launch Ambitious Pot Venture, Hope for Economic Windfall," *The Oregonian - Oregon Live*, April 29, 2016; John Gillie, "Two Marijuana Retailers Opening Soon in City that Still Bans Cannabis Sales," *The News Tribune*, January 28, 2017; Saint Regis Mohawk Tribal Council, *Tribal Election Board Certifies Medical Marijuana Ordinance and Adult Use (Recreational) Marijuana Referendum Results*, December 23, 2019, https://www.srmt-nsn.gov/; and Dalton Walker, "Red Lake Nation approves medical cannabis," *Red Lake Nation News*, May 29, 2020.

[149] Steven Nelson, "DEA Raid on Tribe's Cannabis Crop Infuriates and Confuses Reformers," *U.S. News & World Report*, October 26, 2015; and Cary Spivak, "Milwaukee Journal Sentinel," November 18, 2015.

[150] Attorney General Jefferson B. Sessions, *Memorandum for All United States Attorneys*, U.S. Department of Justice, Marijuana Enforcement, Washington, DC, January 4, 2018.

[151] Ibid.

[152] See comments made by former Attorney General Barr in response to questioning from Senator Murkowski, U.S. Congress, Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Hearing to review the Fiscal Year 2020 funding request and budget justification for the U.S. Department of Justice*, 116th Cong., 2nd sess., April 10, 2019.

[153] See comments made by former Attorney General Barr in response to questioning from Senator Booker, U.S. Congress, Senate Committee on the Judiciary, *Nomination of the Honorable William Pelham Barr to be Attorney General of the United States*, 116th Cong., 1st sess., January 15, 2019.

from his Senate confirmation hearing: "I do not think it the best use of the Department's [DOJ's] limited resources to pursue prosecutions of those who are complying with the laws in states that have legalized and are effectively regulating marijuana."[154]

Monitoring Enforcement Priorities

In a 2015 review of the DOJ memoranda and evaluation of DOJ efforts to monitor effects of state legalization relative to DOJ guidance (which predated the Sessions memorandum), the Government Accountability Office (GAO) concluded that "DOJ has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Rather, DOJ has left such lower-level or localized marijuana activity to state and local law enforcement authorities through enforcement of their own drug laws."[155] GAO recommended that DOJ monitor the effects of state-level marijuana legalization initiatives relative to the eight DOJ enforcement priorities outlined in the Cole memorandum. GAO's evaluation noted that DOJ was already taking a number of steps to help assess these effects. For instance, DOJ indicated that U.S. Attorneys were in contact with officials in states that had legalized marijuana, and through these interactions could communicate federal enforcement priorities, assess the implications of legalization relative to the priorities, and identify specific areas of federal concern. In addition, DOJ reported that it relies upon information from sources such as "federal surveys on drug use; state and local research; and feedback from federal, state, and local law enforcement" to assess the effects of state-level legalization initiatives.[156] GAO concluded that DOJ had not documented its specific monitoring process, and recommended that DOJ develop a "clear plan" for how it will monitor and document the effects of state marijuana legalization on federal enforcement priorities.[157] Since the Sessions memorandum rescinded the previous DOJ guidance memos (which included the enforcement priorities GAO focused on), DOJ has not indicated whether it monitors and documents the effects of state marijuana legalization on federal enforcement priorities.

Limiting Federal Enforcement in States: Directives through Federal Appropriations[158]

In each fiscal year since FY2015, Congress has included provisions in appropriations acts that prohibit DOJ from using appropriated funds to prevent certain states and territories and the District of Columbia from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[159]

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[154] U.S. Congress, Senate Committee on the Judiciary, *The Nomination of the Honorable Merrick Brian Garland to be Attorney General of the United States: Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, 117th Cong., 1st sess., February 2021, pp. 23-25.

[155] U.S. Government Accountability Office, *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 2015, p. 9.

[156] Ibid., p. 27.

[157] Ibid.

[158] This section was authored by Joanna Lampe, Legislative Attorney in CRS's American Law Division (ALD). It uses citation and other editorial styles consistent with ALD's reports.

[159] *See* Consolidated and Further Continuing Appropriations Act, 2015, P.L. 113-235 (113th Cong. 2014); Consolidated Appropriations Act, 2016, P.L. 114-113 (114th Cong. 2015); Consolidated Appropriations Act, 2017, P.L. 115-31 (115th Cong. 2017); Consolidated Appropriations Act, 2018, P.L. 115-141 (115th Cong. 2018); Consolidated Appropriations Act, 2019, P.L. 116-6 (116th Cong. 2019); Consolidated Appropriations Act, 2020, P.L. 116-93 (116th Cong. 2019); Consolidated Appropriations Act, 2021, P.L. 116-260 (116th Cong. 2020); and Consolidated

On its face, the appropriations rider bars DOJ from taking legal action against the states directly in order to prevent them from promulgating or enforcing medical marijuana laws.[160] In addition, federal courts have interpreted the rider to prohibit certain federal prosecutions of private individuals or organizations that produce, distribute, or possess marijuana in accordance with state medical marijuana laws. In the 2016 case *United States v. McIntosh*, the U.S. Court of Appeals for the Ninth Circuit held that the rider

> prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of [such rules] when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the rider].[161]

The Ninth Circuit has issued several decisions allowing federal prosecution of individuals who did not strictly comply with state medical marijuana laws, notwithstanding the appropriations rider, and several district courts have followed that holding.[162]

In the 2022 case *United States v. Bilodeau*, the U.S. Court of Appeals for the First Circuit agreed with the Ninth Circuit that the rider means "DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws."[163] However, the First Circuit declined to adopt the Ninth Circuit's holding that a defendant must demonstrate *strict compliance* with state law before the rider bars prosecution.[164] The First Circuit noted that the text of the rider does not explicitly require strict compliance with state law, and that, given the complexity of state marijuana regulations, "the potential for technical noncompliance [with state law] is real enough that no person through any reasonable effort could always assure strict compliance."[165] Thus, the court concluded that requiring strict compliance with state law would likely chill state-legal medical marijuana activities and prevent the states from giving effect to their medical marijuana laws.[166] The court further held, however, that it would not have any effect on Maine's medical marijuana laws to prosecute "the defendants' cultivation, possession, and distribution of marijuana aimed at supplying persons whom no defendant ever thought were qualifying patients under Maine law."[167]

Appropriations Act, 2022, P.L. 117-103 (117th Cong. 2022) . The FY2022 provision lists 52 jurisdictions, including most of the states, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. Continuing resolutions used to cover gaps in enacted funding for DOJ have extended the provision. *See, e.g.*, Continuing Appropriations Act, 2021 and Other Extensions Act, P.L. 116-159 (116th Cong. 2020).

[160] *Cf.* United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1044 (E.D. Cal. 2015) (citing DOJ's interpretation that the appropriations rider prohibits "federal actions that interfere with a state's promulgation of regulations implementing its statutory provisions, or with its establishment of a state licensing scheme").

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

[162] United States v. Evans, 929 F.3d 1073, 1078-79 (9th Cir. 2019); United States v. Kleinman, 880 F.3d 1020, 1027-30 (9th Cir. 2017); Duval v. United States, 372 F. Supp. 3d 544, 555-56 (E.D. Mich. 2019); United Sates v. Bloomquist, 361 F. Supp. 3d 744, 749-51 (W.D. Mich. 2019); United States v. Jackson, 2019 WL 3239844 at *6-8 (E.D. Pa. June 5, 2019).

[163] 2022 WL 225333 at *5 (1st Cir. Jan. 26, 2022).

[164] *Id.*

[165] *Id.*

[166] *Id.* While the court held that something less than strict compliance was required to avoid prosecution under the rider, it declined to "fully define [the] precise boundaries" of its alternative standard. *Id.* at *6.

[167] *Id.* at *6.

It remains to be seen whether and how the difference in reasoning between the Ninth Circuit and the First Circuit will make a practical difference in federal marijuana prosecutions. In theory, the First Circuit's analysis could make it easier for defendants to invoke the appropriations rider to bar prosecutions. In practice, however, resource limitations and enforcement priorities have historically meant that federal marijuana prosecutions target individuals and organizations that clearly have not complied with state law.[168] Thus, one of the judges in *Bilodeau* agreed with the panel's interpretation of the rider but wrote a concurrence noting that, in practice, the First Circuit's standard might not be "materially different from the one that the Ninth Circuit applied."[169]

Marijuana-related activities that fall outside the scope of the appropriations rider remain subject to prosecution under the CSA.[170] By its terms, the rider applies only to state laws related to *medical* marijuana; it does not bar prosecution of any activities related to recreational marijuana, even if those activities are permitted under state law.[171] In addition, although the appropriations rider restricts DOJ's ability to expend funds to enforce federal law for as long as it remains in effect, the rider "does not provide immunity from prosecution for federal marijuana offenses."[172] Congress could repeal the rider at any time or could decline to include it in future appropriations laws. If Congress were to repeal the rider or allow it to lapse, DOJ would be able to prosecute future CSA violations as well as violations that occurred while the rider was in effect, subject to the applicable statute of limitations.[173] In the alternative, Congress could expand the scope of the rider to include recreational marijuana or other controlled substances. Regardless of whether they are subject to criminal prosecution, participants in the cannabis industry may face numerous collateral consequences arising from the federal prohibition of marijuana.[174]

[168] *See, e.g., id.* at *9 (Barron, J., concurring).

[169] *Id.*

[170] *Cf.* United States v. Nixon, 839 F.3d 885, 886 (9th Cir. 2016) (per curiam) (holding that the appropriations rider does not "impact[ ] the ability of a federal district court to restrict the use of a medical marijuana as a condition of probation"); Sandusky v. Herrera, 2020 WL 2129212 at *4 (D. Colo. May 5, 2020) (dismissing as moot a habeas claim from an individual subject to supervised release following conviction for a marijuana offense because the U.S. Probation Office is not part of DOJ and "[t]he appropriations rider, by its plain language, does not apply to the federal courts").

[171] In practice, DOJ typically has not prosecuted individuals who possess marijuana for personal use on private property, but instead has "left such lower-level or localized marijuana activity to state and local authorities through enforcement of their own drug laws." U.S. Government Accountability Office, *State Marijuana Legalization: DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, 9 (Dec. 2015); *but cf.* Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download (reaffirming the authority of federal prosecutors to exercise prosecutorial discretion to target federal marijuana offenses "in accordance with all applicable laws, regulations, and appropriations").

[172] United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

[173] *Id.*

[174] For additional information about the collateral consequences of marijuana-related activities, see the "Marijuana Policy Gap" section of CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*, by Joanna R. Lampe.

Federal Financial Laws and Financial Services for Marijuana Businesses[175]

Because marijuana is a Schedule I controlled substance under the CSA,[176] financial institutions and their directors, officers, employees, and owners might be subject to criminal and administrative sanctions[177] for providing financial services to marijuana businesses, even if those marijuana businesses operate in states that have legalized certain marijuana-related activities.[178] Although DOJ and FinCEN have issued guidance on the interplay of federal marijuana laws and discordant state legalization efforts, many financial institutions have been unwilling to provide financial services to state-authorized marijuana businesses because of the legal risks under federal law.[179]

Bank Secrecy Act[180] and Federal Anti-Money Laundering Laws

Financial institutions generally do not sell, possess, or distribute the products or assets of their financial services customers.[181] Consequently, auxiliary liability (e.g., aiding and abetting,

[175] This section was authored by David H. Carpenter, Legislative Attorney in CRS's American Law Division (ALD). It uses citation and other editorial styles consistent with ALD's reports.

[176] For legal discussion of the CSA, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*.

[177] *See, e.g.*, United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 U.S. Dist. LEXIS 92438, 31–38 (E.D. N.Y. July 1, 2013) (approving a deferred prosecution agreement with a financial institution for, among other things, "fail[ing] to implement an effective [anti-money laundering] program to monitor suspicious transactions ... [which] permitted Mexican and Colombian drug traffickers to launder at least $881 million in drug trafficking proceeds through HSBC Bank USA undetected"; the agreement "imposes upon HSBC significant, and in some respect extraordinary, measures," including forfeiture of $1.256 billion, remedial measures, and the admission of criminal violations).

[178] United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th. Cir 2016) ("The prior observation should also serve as a warning. To be clear, § 542 [of the Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, 129 Stat. 2242, 2332–33 (2015)] does not provide immunity from prosecution for federal marijuana offenses. The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, ... a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.").

[179] *See, e.g., Guidance on Provision of Financial Services to Medical Marijuana & Industrial Hemp-Related Businesses in New York State*, N.Y. DEP'T OF FIN. SERVS., 2 (Jul. 3, 2018), https://www.dfs.ny.gov/docs/legal/industry/il180703.pdf ("Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana ... businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.").

[180] The "Bank Secrecy Act" is commonly used to refer to Titles I and II of Pub. L. No. 91-508 and includes the Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Title II, 84 Stat. 1114, 1118–24 (1970) (as amended and codified at 12 U.S.C. §§ 1829b, 1951–59; 31 U.S.C. §§ 5311–32). The Bank Secrecy Act requires reports and records of transactions involving cash, negotiable instruments, or foreign currency and authorizes the Secretary of the Treasury to prescribe regulations to insure that adequate records are maintained of transactions that have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." *Id*.

[181] Financial institutions do, at times, take legal possession of their clients' assets, such as after a customer defaults on a loan secured by real property or business inventory.

conspiracy)[182] aside, financial services institutions generally would not engage directly in actions barred by the CSA. However, financial institutions commonly acquire proceeds generated by their customers' product sales. As described below, financial institutions that acquire proceeds generated by marijuana businesses could be subject to civil and criminal asset forfeiture, prosecution under the Bank Secrecy Act and criminal anti-money laundering laws, and administrative enforcement actions.[183]

Federal law authorizes the seizure of property connected to unlawful marijuana activity through civil and criminal asset forfeiture proceedings. Consequently, federal authorities could potentially confiscate funds a bank acquires from marijuana businesses that are derived from the proceeds of marijuana sales,[184] even if state law permits those sales.[185] For example, if a bank lends to a state-authorized medical marijuana dispensary, federal authorities might be able to require the bank to forfeit loan payments the dispensary makes to the bank on the grounds that such payments can be traced to federally prohibited marijuana sales.[186]

In addition to the risk of asset forfeiture, federal anti-money laundering (AML) laws (i.e., Sections 1956 and 1957 of the criminal code) criminalize the handling of financial proceeds that are known to be derived from certain unlawful activities,[187] including selling and distributing marijuana.[188] Violators of anti-money laundering laws may be subject to fines and imprisonment,[189] and any real or personal property involved in or traceable to prohibited transactions is potentially subject to civil or criminal forfeiture.[190] For example, a bank employee could be subject to a twenty-year prison sentence and criminal fines under Section 1956 for knowingly engaging in a financial transaction involving marijuana-related proceeds with the intent to promote a further offense, such as withdrawing funds generated from marijuana sales from a business checking account to pay the salaries of medical marijuana dispensary employees.[191] Similarly, a bank officer could face a ten-year prison term and criminal fines under Section 1957 for knowingly receiving deposits or allowing withdrawals of $10,000 or more in cash that is derived from distributing and selling marijuana.[192]

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[182] 18 U.S.C. § 2 (aiding and abetting); 21 U.S.C. § 846 (conspiracy under the CSA).

[183] *See, e.g.*, 12 U.S.C. § 1818; 18 U.S.C. § 981(a)(1), 1956, 1957.

[184] 18 U.S.C. § 981(a)(1) ("The following property is subject to forfeiture to the United States ... (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title) [i.e., the list of predicate offenses for money laundering (18 U.S.C. § 1956)], or a conspiracy to commit such offense.").

[185] United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

[186] 21 U.S.C. §§ 853, 881.

[187] 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). See "Specified Unlawful Activities" in CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law* (providing a full list of predicate offenses).

[188] 18 U.S.C. §§ 1956, 1957. See CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law* (providing a detailed analysis of federal anti-money laundering laws).

[189] Section 1956 violations are punishable by imprisonment for not more than twenty years and fines of up to $500,000 or twice the value of the property involved, whichever is greater. 18 U.S.C. § 1956(a)(1). Section 1957 violations are punishable by imprisonment for not more than ten years and fines of up $250,000 (or $500,000 for organizations) or twice the value of the property involved in the transaction, whichever is greater. *Id.* §§ 1957(b), 3571, 3559. Conspiracy to violate either section carries the same maximum penalties, as does aiding and abetting the commission of either offense. *Id.* §§ 2, 1956(h). *See, e.g.*, United States v. Lyons, 740 F.3d 702, 715 (1st Cir. 2014).

[190] 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1).

[191] *Id.* § 1956(a)(1)(A)(i).

[192] *Id.* § 1957(a), (d).

Moreover, federal law requires financial institutions[193] to aid law enforcement in investigating and prosecuting those who violate federal laws, including the CSA.[194] For example, the Secretary of the Treasury has exercised authority to require financial institutions to file suspicious activity reports (SARs)[195] with FinCEN regarding financial transactions[196] suspected to be derived from illegal activities,[197] including marijuana sales.[198] Depository institutions and certain other financial institutions[199] also must establish and maintain AML programs. AML programs are designed to prevent financial institutions from facilitating money laundering and financing terrorist activity, as well as to ensure that the institutions' officers and employees have sufficient knowledge of their customers and their customers' businesses to identify when filing SARs is appropriate.[200] Additionally, federal regulators can subject financial institutions, their employees, and certain affiliated parties[201] to administrative enforcement actions for violating the Bank

[193] For the purposes of the Bank Secrecy Act and anti-money laundering laws, the term "financial institution" is defined broadly to include banks, savings associations, credit unions, broker dealers, insurance companies, pawnbrokers, automobile dealers, casinos, cash checkers, travel agencies, and precious metal dealers, among others. 31 U.S.C. § 5312(a)(2).

[194] 12 U.S.C. §§ 1951–59; 31 U.S.C. §§ 5311–32.

[195] 31 U.S.C. § 5318(g). Filing suspicious activity reports (SARs) are mandatory under certain circumstances, but financial institutions may file SARs even when not mandated by law. *See, e.g.*, 12 C.F.R. §§ 1020.320(a) (banks); 31 CFR § 1022.320(a) (money services businesses).

[196] "Transaction" is defined as:

> means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, purchase or redemption of casino chips or tokens, or other gaming instruments or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

Id. § 1010.100(bbb).

[197] 18 U.S.C. §§ 1956(c)(7), 1957(f)(3). *See* "Specified Unlawful Activities" in CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law* (providing a full list of predicate offenses).

[198] 21 U.S.C. §§ 841–90; 31 U.S.C. § 5318(g); 31 C.F.R. § 1020.320.

[199] There are several different types of depository institutions, including state- and federally chartered banks, savings associations, and credit unions.

[200] *See generally id.* §§ 5318(h)(1), 1020.200–20. *See also* 12 U.S.C. § 1786(q)(1) (credit unions); *id.* § 1818(s) (banks and savings associations). Even in the absence of suspicion, financial institutions must file currency transaction reports (CTRs) with FinCEN relating to transactions involving $10,000 or more in cash or other "currency." 31 U.S.C. § 5313; 31 C.F.R. §§ 1020.300–20, 1010.300–70. "Currency" is defined as:

> The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

Id. at § 1010.100(m).

The willful failure to file SARs and CTRs is punishable by imprisonment for not more than five years or not more than ten years in cases of a substantial pattern of violations or transactions involving other illegal activity. 31 U.S.C. § 5322. Structuring a transaction to avoid the reporting requirement exposes the offender to the same maximum terms of imprisonment. *Id.* § 5324(d). *See* CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law* (providing a detailed description of penalties for violations of Bank Secrecy Act reporting and monitoring requirements).

[201] *See, e.g.*, 12 U.S.C. §§ 1813(u) (defining "institution-affiliated party" to include, among others, "any director,

Secrecy Act or AML laws.[202] For example, federal banking regulators[203] implement comprehensive supervisory regimes that are designed to ensure that depository institutions are managed and operated safely and soundly to maintain financial stability and comply with applicable state and federal law. To this end, banking regulators have strong, flexible administrative enforcement powers, which they may use against depository institutions and their directors, officers, controlling shareholders, employees, agents, and affiliates that act unlawfully, including by engaging in marijuana-related activities that violate the CSA or anti-money laundering laws.[204] Banking regulators may, for instance, issue cease-and-desist orders, impose civil money penalties, and issue removal and prohibition orders that temporarily or permanently ban individuals from working for depository institutions.[205] Banking regulators also have authority, under certain circumstances, to revoke an institution's federal deposit insurance and to take control of and liquidate a depository institution.[206] For example, a criminal conviction for violating the Bank Secrecy Act or AML laws is an explicit ground for appointing the Federal Deposit Insurance Corporation "as receiver [to] place the insured depository institution in liquidation."[207]

Because of these legal risks, many financial institutions are unwilling to provide financial services to the marijuana industry, often leaving marijuana businesses unable to accept debit or credit card payments, use electronic payroll services, maintain checking accounts, or use other common banking services.[208] Consequently, many marijuana businesses reportedly operate exclusively in cash,[209] raising concerns about, among other things, tax collection compliance and public safety.[210]

officer, employee, or controlling stockholder ... of, or agent for, an insured depository institution," as well as any independent contractor ... who knowingly or recklessly participates in any violation of any law or regulation; any breach of fiduciary duty; or any unsafe or unsound practice which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.").

[202] *See, e.g.*, 12 U.S.C. §§ 1786, 1818, 1831o.

[203] For these purposes, the federal banking regulators are the Office of the Comptroller of the Currency (OCC) for national banks and federal savings associations; the Board of Governors of the Federal Reserve System for domestic operations of foreign banks and state-chartered banks that are members of the Federal Reserve System; the Federal Deposit Insurance Corporation (FDIC) for state savings associations and state-chartered banks that are not members of the Federal Reserve System; and the National Credit Union Administration (NCUA) for federally insured credit unions. *Id.* §§ 1766, 1813(q). The Bureau of Consumer Financial Protection (CFPB) also has certain consumer compliance regulatory authority over depository institutions. *Id.* §§ 5481–5603.

[204] *See, e.g.*, *id*. § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations). *See also* Press Release, Off. of the Comptroller of the Currency, OCC Assesses $2.5 Million Civil Money Penalty Against Gibraltar Private Bank and Trust Company for Bank Secrecy Act Violations (Feb. 25, 2016), https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-20.html (ordering the payment of a civil money penalty and remedial actions for allegedly "fail[ing] to maintain an effective Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program.").

[205] *See, e.g.*, 12 U.S.C. § 1786 (credit unions); *id.* §§ 1818, 1831o (banks and savings associations).

[206] *See, e.g.*, *id.* §§ 1786–87 (credit unions); *id.* §§ 1818, 1821, 1831o (banks and savings associations).

[207] *Id.* § 1821(c)(5)(M), (d)(2)(E).

[208] *See, e.g.*, *Guidance on Provision of Financial Services to Medical Marijuana & Industrial Hemp-Related Businesses in New York State*, N.Y. DEP'T OF FIN. SERVS., 2 (Jul. 3, 2018), https://www.dfs.ny.gov/legal/industry/il180703.pdf ("Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana ... businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.").

[209] *Id*.

[210] *See* Tom Angell, *Trump Treasury Secretary Wants Marijuana Money in Banks*, FORBES (Feb. 6, 2018),

FinCEN Guidance to Financial Institutions

In response to state and local marijuana legalization efforts, FinCEN issued guidance on marijuana-related financial crimes to advise financial institutions on SAR reporting requirements when serving marijuana businesses operating in compliance with state or local laws.[211] The guidance identified transactions that might trigger federal enforcement priorities,[212] noting:

> Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and [FinCEN regulations].[213]

FinCEN also advised financial institutions serving marijuana businesses to file SARs under the following conditions:

- A **marijuana limited SAR** should be filed when a financial institution determines, after exercising due diligence, that a marijuana-related business for which the institution is providing financial services is not engaged in any activities that violate state law or implicate the investigation and prosecution priorities outlined in the guidance, including distributing to minors and supporting drug cartels or similar criminal enterprises;[214]
- A **marijuana priority SAR** should be filed when a financial institution believes a marijuana-related business for which the institution is providing financial services is engaged in activities that implicate prosecution priorities;[215] and
- A **marijuana termination SAR** should be filed when a financial institution finds it must sever its relationship with a marijuana-related business to maintain an effective AML program.[216]

The FinCEN guidance also lists examples of red flags that may indicate that a marijuana priority SAR is appropriate.[217]

As of September 30, 2021 FinCEN reported that it has received 219,097 marijuana-related SARs and that 755 depository institutions reported providing some form of financial services to marijuana-related businesses.[218] However, the depth and breadth of financial services that

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https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#3c9bc4ed3a53.

[211] FinCEN Marijuana Guidance 2014, *supra* note 182. Although DOJ rescinded several marijuana-related guidance documents, FinCEN's guidance remains in effect. The Administration could reverse or otherwise make significant changes to its enforcement priorities and policies. *See generally* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*.

[212] FinCEN Marijuana Guidance 2014, *supra* note 182.

[213] *Id*. at 3.

[214] *Id*. at 3–4.

[215] *Id.* at 4. These enforcement priorities were originally outlined in the 2013 Cole Memorandum. 2013 Cole Memorandum, *supra* note 182.

[216] FinCEN Marijuana Guidance 2014, *supra* note 182, at 4–5.

[217] *Id.* at 5–7. Some examples of red flags noted in the guidance are, "[t]he business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law"; and "[a] customer seeks to conceal or disguise involvement in marijuana-related business activity." *Id*. at 6.

[218] *Marijuana Banking Update*, DEP'T OF TREASURY, FINCEN, https://www.fincen.gov/sites/default/files/shared/

depository institutions are providing marijuana businesses is unclear.[219] Moreover, whether these depository institutions are serving businesses that are directly involved in cultivating and selling marijuana, or are only serving entities that are indirectly involved in the marijuana business (e.g., landlords renting office space to marijuana businesses) is uncertain.[220]

Select Outcomes of State Marijuana Legalization

States' actions to legalize marijuana for medical and recreational purposes changed the landscape for the drug's availability to the states' adult populations. In 1996, California became the first state to legalize marijuana for medical purposes, and since then, 36 states have followed suit.[221] In 2012, Washington and Colorado became the first two states to expand access to marijuana to all adults by legalizing its use for recreational purposes. Since then, 16 states[222] and the District of Columbia have followed suit. Even as more jurisdictions legalize marijuana, some observers continue to voice concerns over the possible negative outcomes of legalization. Some of these concerns were outlined as enforcement priorities by DOJ in monitoring state legalization.[223] These include, but are not limited to, the potential impact of legalization on (1) marijuana use, particularly among youth; (2) traffic-related incidents involving marijuana-impaired drivers; and (3) trafficking of marijuana from states that have legalized it into states that have not. On the other hand, some observers have pointed to the potential positive outcomes from marijuana legalization, including new tax revenue for states and a potential decrease in marijuana-related arrests, which may free up resources for law enforcement to address other needs.

While state legalization of medical marijuana began over 25 years ago, state legalization of recreational marijuana is relatively recent and, as a result, not all outcomes are known. Further, while some states have taken measures to evaluate the impact of their recreational legalization programs, the same evaluation measures generally were not taken by states following medical marijuana legalization. This section of the report focuses on select issues associated with legalization of medical and recreational marijuana publicly identified by Congress and DOJ in their enforcement priorities (see the "Department of Justice Guidance Memos for U.S. Attorneys" section).[224] Of note, the data included in this section of the report on the effects of marijuana

305326_MJ%20Banking%20Update%204th%20QTR%20FY2021_Public_Final.pdf (last visited March 25, 2022).

[219] Robert Rowe, *Compliance and the Cannabis Conundrum*, ABA BANKING J. (Sept. 11, 2018), https://bankingjournal.aba.com/2018/09/compliance-and-the-cannabis-conundrum/ ("According to FinCEN, by the end of the third quarter 2017, it had received nearly 40,000 SARs reporting activity associated with a marijuana-related business. The great majority of those were marijuana limited SARs, indicating that the industry continues to offer some level of services to the cannabis industry. No one knows, though, how extensive those offerings are or what kinds of banking relationships do exist. Anecdotal reporting suggests it is very limited.").

[220] *Id*.

[221] See **Figure 2** for all states that have adopted a comprehensive medical marijuana program.

[222] The other 16 states that have legalized recreational marijuana are Alaska, Arizona, California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, New Jersey, New Mexico, New York, Nevada, Oregon, Vermont, and Virginia. In 2020, South Dakota legalized recreational marijuana, but in 2021 a circuit judge ruled the South Dakota recreational marijuana measure to be unconstitutional.

[223] See James M. Cole, *Memorandum for all United States Attorneys*, U.S. Department of Justice, Guidance Regarding Marijuana Enforcement, Washington, DC, August 29, 2013, pp. 1-2.

[224] See statements from U.S. Congress, House Committee on the Judiciary, *Full Committee Markup of ...H.R. 3884, the "Marijuana Opportunity Reinvestment and Expungement Act of 2019" or the "MORE Act of 2019"*, 116th Cong., 1st sess., November 20, 2019; and U.S. Congress, Senate Committee on the Judiciary, *Is the Department of Justice Adequately Protecting the Public from the Impact of State Recreational Marijuana Legalization*, 114th Cong., 2nd sess., April 5, 2016.

legalization should be interpreted with caution, as they are fairly limited. Conclusions made at this time about the comprehensive impact of marijuana legalization, specifically the impact of more recent legalization efforts, may be premature without broader inclusion of both historical data and additional years of post-legalization data, as well as consideration of other factors aside from legalization.[225] Finally, much of what is known about the implementation of recreational marijuana comes from the early adopters[226]—Washington and Colorado—and their experiences do not necessarily mean that other states share or will share the same experiences if they choose to legalize recreational marijuana.

Marijuana Use in the United States

Marijuana is the most commonly used illicit drug in the United States. In 2020, an estimated 32.8 million individuals aged 12 or older used marijuana in the past month.[227] The percentage of past-month users has gradually increased over the last 12 years (a time frame during which a majority of states legalized marijuana in some form)—from 6.1% in 2008 to 11.8% in 2020.[228] The rate of past-month marijuana use among youth (ages 12-17) during this time period declined—from 7.0% in 2008 to 6.5% in 2017 and 2018—before rising to 7.4% in 2019 and then dropping to 5.9% in 2020,[229] while adult (age 18 and older) use steadily increased—from 6.3% in 2008 to 12.4% in 2020.[230]

An increase in adult use was expected by some experts[231] given that legal medical and recreational marijuana programs increase legal access for adults but not juveniles, except under limited circumstances. A 2019 review of existing research on the impact of marijuana legalization that revealed medical marijuana laws increase adult but not adolescent use is consistent with this

[225] For example, in this section the decline in the number of marijuana arrests over time is discussed in the context of marijuana legalization, but other factors such as how the overall crime rate might have changed during the same time is not discussed. Also, drug use may be influenced by many factors including availability of the drug, family and peer influence, level of education, economic status, and community-level variables.

[226] Washington and Colorado both have produced several reports discussing the impact of marijuana legalization following recreational legalization in their respective states. Both states had previously legalized marijuana for medical purposes but did not produce such reports until recreational marijuana was legalized.

[227] Referring to the month prior to an individual's response to the survey question about drug use.

[228] *2020 NSDUH Tables*, Tables 1.1A and 1.1B. For each year from 2008 to 2020, the estimated percentage of the 12 and older population currently using marijuana was 6.1%, 6.7%, 6.9%, 7.0%, 7.3%, 7.5%, 8.4%, 8.3%, 8.9%, 9.6%, 10.1%, 11.5%, and 11.8% respectively. The difference between each year's estimate from 2008 to 2018 and the 2019 estimate (11.5%) is statistically significant at the .05 level. SAMHSA recommends using caution when comparing estimates between 2020 and prior years because of methodological changes for 2020. Due to these changes, SAMHSA did not conduct significance testing between 2020 and prior years.

[229] For some years from 2008-2019, including the difference between the 2018 and 2019 estimate, the difference from one year's estimate to the next were not statistically significant at the .05 level. Further, SAMHSA recommends using caution when comparing estimates between 2020 and prior years because of methodological changes for 2020. Due to these changes, SAMHSA did not conduct significance testing between 2020 and prior years. See *2020 NSDUH Tables*, Table 7.6B.

[230] For each year from 2008 to 2020, the estimated percentage of the adult (18 and older) population currently using marijuana was 6.0%, 6.6%, 6.8%, 6.9%, 7.3%, 7.6%, 8.5%, 8.4%, 9.1%, 9.9%, 10.5%, 11.9%, and 12.4% respectively. The difference between each year's estimate from 2008 to 2018 and the 2019 estimate (11.9%) is statistically significant at the .05 level. SAMHSA recommends using caution when comparing estimates between 2020 and prior years because of methodological changes for 2020. Due to these changes, SAMHSA did not conduct significance testing between 2020 and prior years. See *2020 NSDUH Tables*, Table 7.9B.

[231] Cari Nierenberg, "Marijuana's Popularity Among US Adults Continues to Grow. Here's Why," *Live Science*, August 10, 2017.

view.[232] Further, several studies have either concluded that state medical and recreational marijuana laws have had no effect on youth use or have shown an association between the enactment of these laws and a subsequent decline in youth use.[233] Two studies have indicated that adolescent use may decline after state recreational legalization.[234] Other studies have shown youth and/or adolescent use did not increase in states following recreational and medical marijuana legalization and that youth and/or adolescent marijuana use were already elevated in these states prior to legalization.[235]

Monitoring Use and Health Effects

Some states that have legalized marijuana are monitoring changes in drug use patterns in their states as well as changes in the emerging research on the health effects of marijuana. For example, new studies of marijuana's effect on brain functioning and development are often published in medical journals. Some have pointed to a negative effect on brain development while others point to an effect that is not necessarily positive or negative.[236] For more information on the health effects of marijuana use, see **Appendix B** and **Appendix C**.

A concern of policymakers is that youth perception of the harmfulness of marijuana may be lower in states that allow for either or both medical and recreational marijuana. Perceived harmfulness of marijuana use appears to be decreasing generally among adolescents in the United States; however, the enactment of state laws legalizing medical marijuana is associated with *increases* in perceived harmfulness among young adolescents (8th graders).[237] Researchers explained that

[232] Rosanna Smart and Rosalie Liccardo Pacula, "Early Evidence of the Impact of Cannabis Legalization on Cannabis Use, Cannabis Use Disorder, and the Use of Other Substances: Findings from State Policy Evaluations," *The American Journal of Drug and Alcohol Abuse*, October 11, 2019.

[233] Julie K. Johnson et al., "Medical marijuana laws (MMLs) and dispensary provisions not associated with higher odds of adolescent marijuana or heavy marijuana use: A 46 State Analysis, 1991-2015," *Substance Abuse* (March 2021); Aaron Sarvet et al., "Medical marijuana laws and adolescent marijuana use in the United States: a systematic review and meta-analysis," *Addiction*, vol. 113, issue 6 (June 2018), pp. 1003-1016; Carol J. Boyd, Phillip T. Veliz, and Sean Esteban McCabe, "Adolescents' Use of Medical Marijuana: A Secondary Analysis of Monitoring the Future Data," *Journal of Adolescent Health*, vol. 57, issue 2 (August 2015), pp. 241-244; Esther Choo et al., "The impact of state medical marijuana legislation on adolescent marijuana use," *Journal of Adolescent Health*, vol. 55, issue 2 (August 2014), pp. 160-166; Sarah D. Lynne-Landsman, Melvin D. Livingston, and Alexander C. Wagenaar, "Effects of State Medical Marijuana Laws on Adolescent Marijuana Use," *American Journal of Public Health*, vol. 103 (August 2013), pp.1500-1506; D. Mark Anderson, Benjamin Hansen, and Daniel I. Rees, "Medical Marijuana Laws and Teen Marijuana Use," IZA Discussion Paper Series (No. 6592), May 2012; Sam Harper, Erin C. Strumpf, and Jay S. Kaufman, "Do Medical Marijuana Laws Increase Marijuana Use? Replication Study and Extension," *Annals of Epidemiology*, vol. 22, issue 3 (March 2012), pp. 207-212; and D. Mark Anderson and Daniel I. Rees, "Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption," IZA Discussion Paper Series (No. 6112), November 2011.

[234] D. Mark Anderson, Benjamin Hansen, and Daniel Rees, "Association of Marijuana Laws With Teen Marijuana Use: New Estimates From the Youth Risk Behavior Surveys," *Journal of the American Medical Association Pediatrics*, vol. 173, no. 9 (July 2019); and Magdalena Cerda et al., "Medical marijuana laws and adolescent use of marijuana and other substances: Alcohol, cigarettes, prescription drugs, and other illicit drugs," *Drug and Alcohol Dependence*, vol. 183, issue 1 (February 2018), pp. 62-68.

[235] Kristie Ladegard, Christian Thurstone and Melanie Rylander, "Marijuana Legalization and Youth," *Pediatrics*, vol. 145 (May 2020), p.165-174; and Aaron Sarvet et al., "Medical marijuana laws and adolescent marijuana use in the United States: a systematic review and meta-analysis," *Addiction*, vol. 113, issue 6 (June 2018), p. 1003-1016.

[236] National Institute on Drug Abuse, *What are marijuana's long-term effects on the brain?*, July 2020, https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuanas-long-term-effects-brain; Catherine Orr, Philip Spechler, and Zhipeng Cao, "Grey Matter Volume Differences Associated with Extremely Low Levels of Cannabis Use in Adolescence," *The Journal of Neuroscience*, vol. 39, no. 10 (March 2019), pp. 1817-1827.

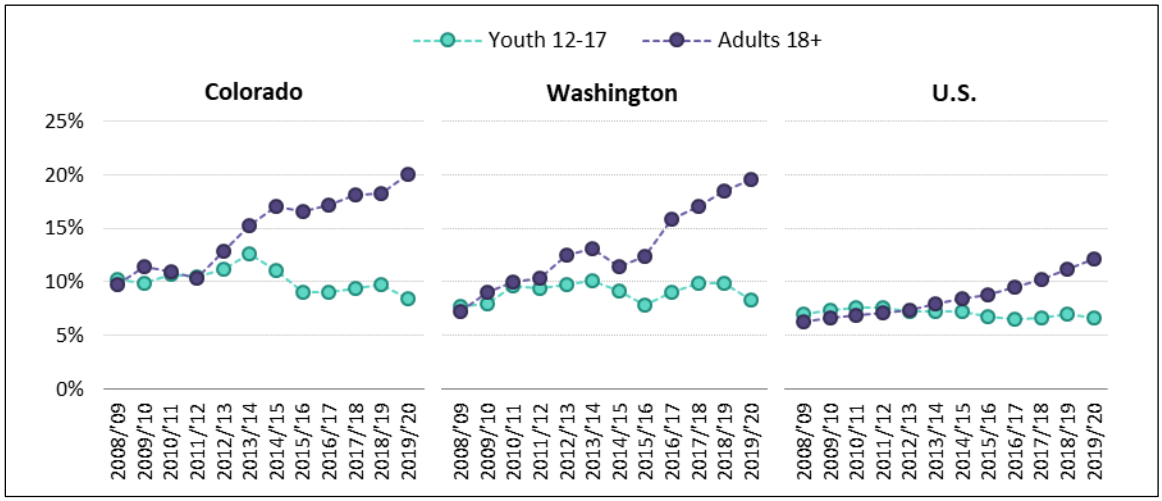
[237] Katherine M. Keyes, Melanie Wall, and Magdalena Cerdá et al., "How does state marijuana policy affect US youth? Medical marijuana laws, marijuana use and perceived harmfulness: 1991–2014," *Addiction*, vol. 111, no. 12 (July 9, 2016).

young, impressionable adolescents may decide that marijuana is something for use by individuals who are sick, which may cause marijuana use to be less appealing as a recreational activity. Further, within-state media coverage of potential harms associated with marijuana use may increase around the time that medical marijuana laws are passed, which could potentially influence their opinions as well.

State data for 2019/2020 from the National Survey on Drug Use and Health show that the 10 states (including the District of Columbia) with the highest percentages of current marijuana use among individuals 12 and older (16.80–21.85%) are all states that have legalized recreational and medical marijuana use, except for Rhode Island, which has only legalized medical marijuana).[238] However, causal inferences between the implementation of both medical and recreational marijuana programs and increased marijuana use among individuals 12 and older cannot be made for several reasons, particularly since three of the states (not including Rhode Island, which did not legalize recreational marijuana) included in this top-tier marijuana use category had either not yet legalized recreational marijuana in 2019 or 2020, or did not yet have the ability to sell recreational marijuana when the survey data were collected.

Figure 3. Estimates of Current Marijuana Use in Colorado, Washington, and the United States Overall, 2008-2020

Percentages Among Youth (ages 12-17) and Adults (ages 18 and older)



Source: Created by the Congressional Research Service (CRS) based on available population data from the Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health (NSDUH)*, State Data, 2008/2009, 2010/2011, 2011/2012, 2012/2013, 2013/2014, 2014/2015, 2015/2016, 2016/2017, 2017/2018, 2018/2019, and 2019/2020, http://www.samhsa.gov/data/.

Notes: This figure presents yearly estimates of current marijuana use in Colorado, Washington, and the United States. SAMHSA defines *current use* as having used at least once in the past month. To review year-to-year, statistically significant changes, if any, see the NSDUH state data reports. Annual state-level estimates are based

[238] Using 2019/2020 survey data, the 10 states (including the District of Columbia) with the highest prevalence estimates (by percentage of the state's population aged 12 and older) for current marijuana use are: Alaska, 17.09%; Colorado, 18.94%; the District of Columbia, 18.24%; Maine, 17.10%; Massachusetts, 16.80%; Montana, 16.98%; Oregon, 19.26%; Rhode Island, 17.69%; Vermont, 21.85%; and Washington, 18.66%. See SAMHSA, *2019-2020 National Surveys on Drug Use and Health: Model-Based Prevalence Estimates (50 States and the District of Columbia)*, Table 3. Of note, the 10 states (including the District of Columbia) with the highest prevalence estimates were nearly the same in the previous set of data (2018/2019), with one difference: Nevada (a state that authorizes recreational marijuana use) was included in the top 10, and Massachusetts was not. See *2018-2019 National Survey on Drug Use and Health National Maps of Prevalence Estimates, by State*, Table 3a.

on two calendar years of pooled NSDUH data, so two consecutive sets of estimates have a one-year overlap. For more information on the NSDUH methodology, see *2019-2020 National Survey on Drug Use and Health: Guide to State Tables and Summary of Small Area Estimation Methodology*.

Marijuana Use in Washington and Colorado

In the first two states that legalized recreational marijuana (Washington and Colorado, in November 2012), the percentages of adults (ages 18 and older) and youth (ages 12-17) who reported use in the past month changed from 2010/2011 to 2019/2020 according to survey data. For adults, the *national* data show a consistent increase (see **Figure 3**), while the Washington and Colorado data show generally larger but less consistent increases. The *national* youth use data show a slight but consistent decline from 2010/2011 to 2016/2017, then a slight increase over several years, and then a decline again in 2019/2020. Washington and Colorado youth use data have varied more over the years, but 2018/2019 levels are generally similar to or slightly below those of 2010/2011. Washington and Colorado had higher percentages of adult and youth marijuana use each year compared to national estimates—both before and after recreational legalization began—and the difference has increased after recreational legalization.[239]

The Colorado Department of Public Health and Environment (CDPHE) was given the responsibility to "monitor changes in drug use patterns, broken down by county and race and ethnicity, and the emerging science and medical information relevant to the health effects associated with marijuana use."[240] In the most recent report, the CDPHE notes a number of different trends related to marijuana exposure and hospitalizations in Colorado. For example, the number of marijuana exposures reported to Rocky Mountain Poison and Drug Safety (the poison center in Colorado) increased from 222 in 2017 to 276 in 2019, with increases mostly attributed to unintentional, marijuana-only exposures among children 0 to 5 years old. However, the number of exposure reports among adults 30 years and older have decreased over this time period. Of note, edible marijuana products continue to account for the highest proportion of marijuana product exposures reported to the poison control center in Colorado.[241] CDPHE labeled some trends in marijuana use as "encouraging" and others as "trends to continue monitoring" (see **Appendix F**).

Marijuana-Related Traffic Incidents

Marijuana has been shown to impair driving ability if the driver has recently used the drug.[242] According to the National Highway Traffic Safety Administration (NHTSA), "[l]ow doses of THC moderately impair cognitive and psychomotor tasks associated with driving, while severe driving impairment is observed with high doses, chronic use and in combination with low doses

[239] SAMHSA, *National Survey on Drug Use and Health (NSDUH)*, State Data, 2010/2011, 2011/2012, 2012/2013, 2013/2014, 2014/2015, 2015/2016, 2016/2017, 2017/2018, 2018/2019, and 2019/2020, http://www.samhsa.gov/data/. The observed differences between estimates were not evaluated in terms of statistical significance—the probability that an observed difference in the population estimates would occur due to random variability if there were no difference in the estimates being compared. To review year-to-year, statistically significant changes, see the NSDUH state data reports.

[240] Colorado Revised Statutes, Title 25, §1.5-110. The most recent report is CDPHE, Retail Marijuana Public Health Advisory Committee, *Monitoring Health Concerns Related to Marijuana in Colorado: 2020*, January 2021.

[241] Ibid., pp. 60-64.

[242] See Rebecca L. Hartman and Marilyn A. Huestis, "Cannabis effects on driving skills," *Clinical Chemistry*, vol. 59, no. 3 (March 2013), pp. 478-492; and Rebecca L. Hartman, Timothy L. Brown, and Gary Milavetz et al., "Cannabis effects on driving lateral control with and without alcohol," *Drug and Alcohol Dependence*, vol. 154 (September 1, 2015), pp. 25-37.

of alcohol."[243] However, the connection between marijuana usage and an increase in a driver's risk of crashing is not clearly established.[244] Some may be concerned that recreational or medical marijuana legalization could be associated with an increase in marijuana-related traffic incidents. In Colorado, despite limited traffic data, there are some indicators of marijuana's impact on traffic safety in Colorado. For example, from 2008 to 2019, the percentage of individuals participating in treatment for driving under the influence (DUI) and reporting marijuana as their primary drug increased from 4% to 12%.[245]

In monitoring the effects of recreational marijuana legalization in Washington State,[246] government researchers with the state's Office of Financial Management, Forecasting and Research Division report that the percentage of drivers involved in traffic fatalities testing positive for THC (either THC only or THC in combination with other drugs/alcohol) gradually declined from 2013 to 2017, while the percentage of alleged impaired drivers testing positive for THC-only gradually increased over the same time period.[247] A recent study of traffic fatalities in both Colorado and Washington shows evidence of an increase in traffic fatalities after Colorado implemented its recreational marijuana laws, but no increase in Washington. The authors pointed to differences in how the state laws were implemented (e.g., density of recreational retail sites), out-of-state marijuana tourism, and other local factors to possibly explain the different results.[248]

In several studies of the effects of medical marijuana legalization, researchers found that the enactment of medical marijuana laws were generally associated with a reduction in traffic fatalities. Some point to the hypothesis that marijuana and alcohol are substitutes for each other and reduced alcohol consumption as a possible reason for the reduction in fatalities.[249]

NHTSA has noted that there is no national marijuana impairment standard for drivers.[250] There are several reasons for this, but a primary one is that measuring marijuana impairment is not very straightforward—THC alone is not a strong indicator of impairment.[251] NHTSA is conducting research to help develop a psychomotor, behavioral, and cognitive test that would indicate the

[243] National Highway Traffic Safety Administration (NHTSA), *Drug and Human Performance Fact Sheets: Cannabis/Marijuana (Δ 9 -Tetrahydrocannabinol, THC)*, https://one.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm.

[244] For a broader discussion of this issue and marijuana and traffic safety overall, see CRS Report R45719, *Marijuana Use and Highway Safety*.

[245] Jack K. Reed, *Impacts of Marijuana Legalization in Colorado: A Report Pursuant to Senate Bill 13-283*, July 2021, p. 42 (hereinafter, "*Impacts of Marijuana Legalization in Colorado*").

[246] While medical marijuana has been legal in Washington since 1998, it may have been viewed as an individual doctor/patient decision outside the scope of public health policy. The legalization of recreational marijuana and the potential for greater availability of the drug in the state likely prompted a closer look at potential health effects on the state's population.

[247] Washington State Office of Financial Management, Forecasting and Research Division, *Monitoring Impacts of Recreational Marijuana Legalization*, 2019 Update Report, June 2019, p. 9 (hereinafter, "*Monitoring Impacts of Recreational Marijuana Legalization*").

[248] Julian Santaella-Tenorio, Katherine Wheeler-Martin, and Charles J. DiMaggio et al., "Association of Recreational Cannabis Laws in Colorado and Washington State With Changes in Traffic Fatalities, 2005-2017," *Journal of the American Medical Association Internal Medicine*, June 22, 2020.

[249] Julian Santaella-Tenorio et. al., "US Traffic Fatalities, 1985–2014, and Their Relationship to Medical Marijuana Laws," *American Journal of Public Health*, vol. 107 (January 2017); D. Mark Anderson, Benjamin Hansen, and Daniel I. Rees, "Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption," *The Journal of Law & Economics*, vol. 56, no. 2 (May 2013), p. 333-369; and D. Mark Anderson and Daniel I. Rees, "Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption," IZA Discussion Paper Series (No. 6112), November 2011.

[250] Richard P. Compton, *Marijuana-Impaired Driving - A Report to Congress*, NHTSA, DOT HS 812 440, July 2017.

[251] Ibid, p. 13.

degree of driving impairment and elevated risk of crash involvement due to marijuana use.[252] In the meantime, states have developed their own legal thresholds for marijuana impairment. Colorado law states that drivers with 5.0 ng/mL of active THC in their blood can be prosecuted for DUI. In addition, law enforcement officers may base arrests on observed impairment (for alcohol or drug-related impairment).[253]

In 2021, Congress and President Biden enacted several marijuana impairment-related provisions in the Invest in America Act (P.L. 117-58). It requires the Secretary of Transportation to submit a report and recommendations on: (1) increasing and improving access for researchers studying marijuana impairment to marijuana available at dispensaries; (2) establishing a national clearinghouse to collect and distribute marijuana for scientific research that includes marijuana available at dispensaries; (3) facilitating access for researchers located in states that have not legalized marijuana, to marijuana from such clearinghouse for purposes of research on marijuana-impaired driving; and (4) identifying "federal statutory and regulatory barriers" to marijuana research and the establishment of a national clearinghouse. Notably, this provision relies on the marijuana definition in Section 4008 of the FAST Act (P.L. 114-94) which defines marijuana as "all substances containing tetrahydrocannabinol," and presumes CSA and regulatory changes that would be necessary for researchers to be able to access marijuana from dispensaries and not from a DEA-registered source. The Invest in America Act also directs the Secretary of Transportation to establish a new competitive grant program for states and tribes to educate the public on the dangers of drug-impaired driving.

Marijuana Arrests

The number of marijuana-related arrests[254] is expected to go down in jurisdictions that have legalized marijuana for medical and recreational use, but especially in recreational marijuana states where adult use is not restricted to those with a medical card. Washington and Colorado are the focus of this section, given that they provide the most years of data. Washington reports that "between 2012 and 2015 the number of incidents including [p]ossessing or [c]onsuming [m]arijuana decreased by 65 percent [from 5,786 to 1,999]."[255] Since that time, the number of incidents involving marijuana increased in 2016 and 2017, before decreasing in 2018 to 2,397.[256]

In Colorado, since the legalization of recreational marijuana, the number of marijuana arrests has decreased by 68%, from 13,225 in 2012 to 4,290 in 2019.[257] Since 2015, the most common marijuana charge in Colorado has been possession under age 21. In FY2019, there were 3,071 recorded offenses for marijuana possession under age 21 in Colorado.[258]

[252] Ibid. NHTSA indicates that others are working on this kind of test as well.

[253] Colorado Department of Transportation, *FAQs: Cannabis and Driving*, https://www.codot.gov/safety/alcohol-and-impaired-driving/druggeddriving/marijuana-and-driving.

[254] For offenses such as marijuana sales, possession, and production.

[255] *Monitoring Impacts of Recreational Marijuana Legalization*, p. 12. "As defined by the FBI, an 'incident' occurs when any law enforcement officer investigates a scene or situation, whether that investigation results in an arrest or not. Incidents involving multiple illicit drugs or other criminal activities are only counted once, and are included in whichever category is listed first by the local law enforcement agency. The order used by those agencies is not hierarchical."

[256] *Monitoring Impacts of Recreational Marijuana Legalization*, p. 15.

[257] Marijuana arrests include those for sales, smuggling, possession, production, and "unspecified."

[258] *Impacts of Marijuana Legalization in Colorado*, p. 29.

Marijuana Trafficking

Marijuana trafficking remains a major policy issue in the United States. Officials in states that have legalized marijuana use have pointed to expectations that illicit marijuana trafficking would decline after legalization. However, officials in states that have not legalized marijuana have cited the trafficking of other-states'-authorized marijuana into their states.[259] Further, state legalization has changed the landscape of the domestic black market for marijuana and U.S. supply and demand.

Transnational Trafficking

Mexican transnational criminal organizations have historically been the primary foreign suppliers of marijuana to the United States, with smaller amounts also coming from Canada and the Caribbean.[260] While there are anecdotal reports about the effects of state legalization initiatives on the domestic marijuana black market, officials have cited an intelligence gap with respect to understanding how domestic legalization has affected the amount of Mexican-produced marijuana entering the United States.[261] For instance, estimates of domestic marijuana consumption do not speak to the source of the marijuana, and drug seizure data from federal, state, and local law enforcement agencies do not include the marijuana's origin. This is because there is no marijuana signature or profiling program like there is for cocaine, methamphetamine, heroin, and fentanyl[262] that can help determine the geographic origin of seized marijuana.

Marijuana cultivation in Mexico has declined, along with trafficking into the United States, and some have linked this to changes to state-level marijuana policies in the United States and decreased U.S. demand for lower-quality Mexican marijuana.[263] Decreased marijuana production has also been linked to an increase in Mexican production of other drugs. Reportedly, the trafficking organizations have shifted production to more profitable drugs such as heroin and methamphetamine.[264] Nonetheless, DEA's outlook on marijuana trafficking is that "Mexico-produced marijuana will continue to be trafficked into the United States in bulk quantities and may increase in quality to compete with domestic-produced marijuana."[265]

Since the first states began legalizing marijuana for recreational use in 2012,[266] there has been a decline in seizures of the drug by U.S. Customs and Border Protection (CBP). CBP seized 582,413 pounds of marijuana nationwide at and between ports of entry in FY2020, which is down

[259] See Josh Ingold and Ricardo Baca, "Supreme Court denies Oklahoma and Nebraska challenge to Colorado pot," *The Denver Post*, March 21, 2016, Updated on October 2, 2016.

[260] DEA, *2020 National Drug Threat Assessment*, March 2021, p. 57.

[261] DEA, *2015 National Drug Threat Assessment*, October 2015, p. 71.

[262] For more information on these programs, see CRS Report R45812, *Illicit Drug Flows and Seizures in the United States: What Do We [Not] Know?*.

[263] See, for example, Brianna Lee, Danielle Renwick, and Rocio Cara Labrador, *Mexico's Drug War*, Council on Foreign Relations, January 24, 2019; Seth Robins, *Marijuana Seizures Plummet in U.S. and Mexico. Will Illegal Profits Follow?*, InSight Crime, November 9, 2018; and Kate Linthicum, "With U.S. Competition Hurting Its Marijuana Business, Mexico Warms a Little to Legalization," *Los Angeles Times*, January 27, 2018.

[264] See, for example, Kate Linthicum, "With U.S. Competition Hurting Its Marijuana Business, Mexico Warms a Little to Legalization," *Los Angeles Times*, January 27, 2018; and Nick Miroff, "Losing Marijuana Business, Mexican Cartels Push Heroin and Meth," *The Washington Post*, January 11, 2015.

[265] DEA, *2020 National Drug Threat Assessment*, March 2021, p. 58.

[266] Older data were not available, and therefore trends following medical marijuana legalization are not discussed.

more than 80% from 2,822,478 pounds in FY2012.[267] There was also a "sharp decline," beginning in FY2013 and continuing through FY2020, in the number of individuals sentenced for federal marijuana trafficking offenses.[268] Experts have noted that this decline in sentencing could be driven by a number, or a combination, of factors such as a reduction in federal law enforcement actions against marijuana-related drug offenders, more successful efforts by drug traffickers to conceal their illicit contraband entering the United States, and reductions in the amount of illicit marijuana being shipped into the United States.[269]

Further, according to the United Nations Office on Drugs and Crime (UNODC), the COVID-19 global pandemic and related restrictions implemented by governments around the world has "inevitably affected all aspects of the illegal drug markets, from the production and trafficking of drugs to their consumption."[270] The impact varies based on geographic area, type of substance, and type of restrictions. For cannabis, UNODC explains that there is less of an impact on trafficking of cannabis due to the local nature of cannabis: production often takes place near consumer markets, and traffickers are less reliant on long trans-regional routes for distribution as compared to other illicit drugs.[271]

Trafficking from States That Have Legalized into Other States

The trafficking of marijuana from where it was produced in accordance with state laws and regulations into another state where it remains illegal is one area of concern for federal law enforcement. Some officials have alleged that there has been increased marijuana trafficking from states that have legalized marijuana possession or sale for medical or recreational purposes to nearby states. This is an especially acute concern for states that have legalized recreational marijuana that allows individuals from out of state to purchase marijuana from dispensaries. For instance, the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA) reported that its task force investigations in Colorado identified marijuana produced in the state that was destined for at least 21 different states in 2020.[272] In addition, the Northwest HIDTA notes that between 2012, when recreational marijuana was legalized in Washington, and August 2017, Washington-produced marijuana was destined for at least 38 states.[273] Similarly, the Oregon-Idaho HIDTA indicated that Oregon-produced marijuana was interdicted en route to 37 states between July 2015 and January 2018.[274] These HIDTA reports note that the means by which marijuana and its derivatives are transported out of state include vehicles, airplanes, and mail, sometimes facilitated

[267] U.S. Customs and Border Protection (CBP), *CBP Enforcement Statistics*, https://www.cbp.gov/newsroom/stats/drug-seizure-statistics. FY2012 and FY2013 data retrieved in February 2019.

[268] U.S. Sentencing Commission, *Quick Facts: Drug Trafficking Offenses*, FY2017. Data from FY2016 – FY2020 are from U.S. Sentencing Commission, *Quick Facts: Marijuana Trafficking Offenses*, FY2017, June 2021.

[269] Christopher Ingraham, "Federal Marijuana Smuggling is Declining in the Era of Legal Weed," *The Washington Post*, May 26, 2016, referencing statements by Beau Kilmer, a drug policy researcher at RAND Corp.

[270] United Nations, Office on Drugs and Crime, *COVID-19 and the drug supply chain: from production and trafficking to use*, 2020, p. 1.

[271] Ibid., p. 5.

[272] Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact Volume 8*, updated September 2021. For more information on the HIDTA program, see CRS Report R45188, *High Intensity Drug Trafficking Areas (HIDTA) Program*.

[273] Northwest High Intensity Drug Trafficking Area, *Washington State Marijuana Impact Report, Volume 2*, August 2017.

[274] Oregon-Idaho High Intensity Drug Trafficking Area, *An Initial Assessment of Cannabis Production, Distribution, and Consumption in Oregon 2018—An Insight Report, First Edition—Updated Version*, August 6, 2018.

by both the open web and the dark web.[275] Notably, of the marijuana produced in states that have legalized and diverted to other states, it is unclear what proportion was produced legally in compliance with state laws and regulations and what proportion was produced illegally.

In December 2014, Nebraska and Oklahoma filed a lawsuit in the U.S. Supreme Court[276] against Colorado claiming that the plaintiff states' law enforcement and criminal justice systems had been adversely affected by Colorado's laws legalizing marijuana.[277] The complaint included claims that Colorado's "statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states."[278] In March 2016, however, the Supreme Court declined to hear the case.[279]

The Changing Domestic Black Market

Changes in the domestic black market for marijuana have been reported as states have moved to legalize it for medical and recreational purposes. DEA notes that there are various sources of marijuana that may contribute to the black market in the United States: illicit marijuana (both foreign- and domestic-produced) and state-approved marijuana (for medical or recreational use) that is diverted to the black market.[280]

Demand for higher-quality marijuana has generally increased in the United States. Notably, marijuana produced in Mexico is generally considered to be a low-grade or commercial-grade product and of lower quality compared to the marijuana produced in the United States and Canada.[281] Further, it is not just U.S. consumers who demand higher-quality marijuana; for example, there have been anecdotal reports of traffickers moving high-quality marijuana produced in the United States across the Southwest border for sale and distribution in Mexico.[282] U.S. officials have not publicly reported data on the quantity or frequency of this outbound smuggling, and it is unclear what proportion of the marijuana smuggled out of the United States is being grown in accordance with state medical and/or recreational marijuana laws and subsequently diverted out of the country.

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[275] Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact Volume 5*, updated September 2018; and Oregon-Idaho High Intensity Drug Trafficking Area, *An Initial Assessment of Cannabis Production, Distribution, and Consumption in Oregon 2018—An Insight Report, First Edition—Updated Version*, August 6, 2018. For more information on the dark web, see CRS Report R44101, *Dark Web*.

[276] The Constitution provides the Supreme Court with original jurisdiction over "Controversies between two or more States," meaning such claims can be filed directly with the Supreme Court without first being litigated in the lower federal courts. U.S. CONST., art. III, §2. cl. 1.

[277] Jack Healy, "Nebraska and Oklahoma Sue Colorado Over Marijuana Law," *The New York Times*, December 18, 2014.

[278] States of Nebraska and Oklahoma v. State of Colorado, S. Ct., Complaint, p. 3.

[279] Nebraska and Oklahoma v. Colorado: Motion for Leave to File a Bill of Complaint Denied on March 21, 2016, SCOTUSblog, https://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/; see also David G. Savage, "Supreme Court Rejects Challenge to Colorado Marijuana Law From Other States," *The Los Angeles Times*, March 21, 2016.

[280] DOJ, DEA, *2020 National Drug Threat Assessment*, March 2021, p. 50.

[281] DOJ, DEA, *2020 National Drug Threat Assessment*, March 2021, p. 57.

[282] See, for example, Marissa J. Lang, "Mexico is Poised to Legalize Marijuana, but Advocates Don't Like the Details," *The Washington Post*, November 8, 2020; Jean Guerrero, "Mexico's Demand for Potent California Marijuana Creates Southbound Smuggling," *KPBS*, October 21, 2016; and John Burnett, "Legal Pot In the U.S. May Be Undercutting Mexican Marijuana," NPR All Things Considered, December 1, 2014.

Illicit domestic marijuana cultivation is carried out by U.S. residents as well as by foreign criminal networks, and it may be grown at both indoor and outdoor grow sites—including on public lands.[283] DEA has noted that cultivation on public lands is "undiminished despite state legalization."[284] DEA further notes that indoor cultivation has certain advantages over outdoor grow sites such as privacy, security, and climate control providing the potential for year-round harvests. In addition, DEA has indicated that marijuana concentrates such as hash, hash oil, and kief remain a concern for federal law enforcement, in part because they have much higher percentages of THC.[285] DEA has also stated that one effect of state marijuana legalization initiatives has been an increase in seizures of marijuana concentrates and an increase in the number of THC extraction laboratories in the United States.[286]

In addition to black market marijuana that is grown illegally, there is a gray market in which marijuana is being *grown legally* in accordance with state laws and regulations but then *sold illegally.* For instance, in some jurisdictions it may be legal to grow and possess small quantities of marijuana, but there may be no regulatory structure for, or even a prohibition on, selling it. In some instances, marijuana may be provided as a *gift* to individuals who purchase other, non-marijuana goods.[287] Another gray market example involves entities that are operating as legal marijuana businesses but are not licensed as such. For instance, there are reports of marijuana businesses in California that have not acquired the necessary licenses but are nonetheless operating. Some claim that gray market businesses may be able to undercut legitimate businesses because they not only save money by not acquiring licenses, but they also save money by not following regulations on security and testing, and might even sell counterfeit goods.[288]

Notably, public discourse around the potential effects of legalization on the black and gray markets often involves discussions of *recreational* legalization even though medical marijuana is not immune from being diverted to the black or gray markets. Many question whether or how a regulated and taxed recreational marijuana framework would affect the black market. However, policymakers may similarly question how a medical marijuana framework might also or alternatively affect the black and gray markets. For instance, some jurisdictions—such as in Colorado—have reported black and gray market activity associated with early medical use initiatives in addition to later recreational legalization.[289]

Legalization Impact on Criminal Proceeds

Various organizations have assessed the potential profits generated from illicit drug sales, both worldwide and in the United States, but estimates of illicit sales of marijuana are uncertain. For example, the former National Drug Intelligence Center (NDIC) estimated that the sale of illicit drugs in the United States generates between $18 billion and $39 billion in wholesale drug proceeds for Colombian and Mexican drug trafficking organizations annually.[290] The proportion

[283] See, for example, NPR Morning Edition, "Illegal Pot Operations in Public Forests are Poisoning Wildlife and Water," November 12, 2019.

[284] DEA, *2020 National Drug Threat Assessment*, March 2021, p. 53.

[285] Ibid., p. 55.

[286] Ibid.

[287] See, for example, discussions of Michigan and District of Columbia laws by Mike Adams, "Cannabis Businesses in Michigan Gift Marijuana to Bypass Law," *Forbes*, December 15, 2018.

[288] See, for example, Alex Halperin, "Can Legal Weed Ever Beat the Black Market?," *The Guardian*, March 18, 2019.

[289] Colorado Office of the Governor, *Marijuana Grey Market*, August 16, 2016.

[290] DOJ, National Drug Intelligence Center, *National Drug Threat Assessment 2009*, December 2008, p. 49.

of this estimate that is attributable to marijuana sales, however, is unknown.[291] Without a clear understanding of (1) actual proceeds generated by the sale of illicit drugs in various markets across the United States, (2) the proportion of total proceeds attributable to the sale of marijuana, and (3) the proportion of marijuana sales controlled by criminal organizations and affiliated gangs, any estimates of how state marijuana legalization, for medical and recreational purposes, has affected, or may in the future affect, drug trafficking organizations are likely to be speculative or anecdotal.

Illicit marijuana proceeds are generated at many points along the supply chain, including production, transportation, and distribution. Experts have debated which aspects of this chain—and the related proceeds—would be most heavily affected by marijuana legalization. In addition, the potential effect of marijuana legalization in some subset of the states (complicated by varying legal frameworks and regulatory regimes) may be more difficult to model precisely than the effect of federal marijuana legalization. For instance, in evaluating the potential fiscal effect from the 2012 Washington and Colorado legalization initiatives on the profits of Mexican drug trafficking organizations, the Organization of American States (OAS) hypothesized that "at the extreme, Mexican drug trafficking organizations could lose some 20 to 25 percent of their drug export income, and a smaller, though difficult to estimate, percentage of their total revenues."[292]

Other scholars have based their estimates of the potential financial effects of marijuana legalization on drug trafficking organizations on a hypothetical federal legalization of marijuana. Large transnational drug trafficking organizations have historically generated a majority of their marijuana-related income from exporting the drug to the United States and selling it to wholesalers on the U.S. side of the border.[293] This revenue could be jeopardized if the United States were to legalize the production and consumption of recreational marijuana. Of note, the Tax Foundation has estimated that the annual U.S. marijuana market is $45 billion.[294] Another organization, the ArcView group, estimated that marijuana sales across the United States and Canada generated a combined $53.3 billion in 2016—of which $46.4 billion was attributed to the black market.[295] Under a legalization regime, some portion of the revenue that might otherwise be generated by traffickers could be lost to authorized sellers (in the form of profits) and governments (in the form of taxes).

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[291] A 2006 Office of National Drug Control Policy figure estimated that over 60% of Mexican drug trafficking organizations' revenue could be attributed to marijuana sales. However, this estimate is over a decade old, and a number of researchers and experts have questioned the accuracy of the number and provided other estimates of marijuana proceeds. See, for example, Beau Kilmer, *Debunking the Mythical Numbers about Marijuana Production in Mexico and the United States*, RAND Drug Policy Research Center. See also U.S. Government Accountability Office (GAO), *Drug Control: U.S. Assistance has Helped Mexican Counternarcotics Efforts, but Tons of Illicit Drugs Continue to Flow into the United States*, GAO-07-1018, August 2007. Another estimate has placed the proportion of Mexican DTO export revenues attributable to marijuana at between 15% and 26% of total drug revenues. See Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

[292] Organization of American States, *The Drug Problem in the Americas: Studies: The Economics of Drug Trafficking*, p. 41.

[293] Beau Kilmer, Jonathan P. Caulkins, and Brittany M. Bond et al., *Reducing Drug Trafficking Revenues and Violence in Mexico: Would Legalizing Marijuana in California Help?*, RAND International Programs and Drug Policy Research Center, 2010.

[294] Gavin Ekins and Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, Tax Foundation, May 12, 2016.

[295] Will Yakowicz, "Illegal Pot Sales Topped $46.4 Billion in 2016, and That's Good News for Marijuana Entrepreneurs," *Inc.*, January 17, 2017. Of note, ArcView is a cannabis investment and market research firm.

Even if legalization of marijuana in the United States undercuts drug trafficking organizations' marijuana profits, it is important to consider the shifting landscape of how these traffickers generate proceeds, which may include other illicit drugs, commodities, or activities. For instance, researchers and officials have noted declines in marijuana seizures by border officials coinciding with increasing state-level marijuana legalization initiatives and production of domestic marijuana in the United States.[296] At the same time, there have been increases in seizures of other illicit drugs;[297] increased seizures could reflect, among other things, greater smuggling activity associated with increased production and demand for other illicit drugs, as well as profits from their sale. As such, even if domestic legalization initiatives are associated with declining foreign marijuana production and smuggling by transnational criminal networks, these criminals may be generating increased proceeds from a shift to other illicit drugs and related activities. In addition, they could generate proceeds from black or gray market operations within the United States.

Tax Revenue

Proponents of marijuana legalization often point to new tax revenue as a positive outcome of state legalization of retail sale. All of the states that have legalized marijuana for recreational purposes levy some combination of specific taxes (or excise taxes) and business licensing fees at the marijuana cultivation and/or retail sales levels, in addition to general state sales taxes.[298] Excise tax rates on the cultivation and retail sales of marijuana are more commonly levied on an ad valorem basis, or as a percentage of retail price.[299] According to calculations of state data by the Institute on Taxation and Economic Policy (ITEP), annual excise tax revenue collected by states with legalized recreational sales surpassed $1 billion in 2018.[300]

The tax treatment of medical marijuana varies by state. In some states, medical marijuana is indirectly taxed further back on the distribution chain at the cultivator level. In Pennsylvania, for example, state law requires growers/processors to pay a 5% excise tax on the "gross receipts from the sale of medical marijuana to the dispensary."[301]

While some states utilize marijuana-related revenue streams for general spending purposes, others have approved measures to dedicate a portion of this revenue for spending on a wide range of programs, such as education, economic development, public safety and criminal justice, and public health and substance abuse.[302]

[296] See, for example, David Agren, "Mexican Cartels Pushing More Heroin after U.S. States Relax Marijuana Laws," *USA Today*, February 20, 2018.

[297] See CBP enforcement statistics at https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.

[298] For a summary of these rapidly changing state law developments, see resources such as Federation of Tax Administrators, "Status of State Taxation/Sales of Marijuana," at http://m.taxadmin.org/marijuana/#; Carl Davis et al., "Taxing Cannabis," Institute on Taxation and Economic Policy (ITEP), January 23, 2019, at https://itep.org/taxing-cannabis/; and Janelle Cammenga, "How High Are Taxes on Recreational Marijuana in Your State?" Tax Foundation, April 24, 2019, at https://taxfoundation.org/2019-recreational-marijuana-taxes/. As mentioned in the "Recreational Marijuana" section of this report, Washington, DC, has not legalized the commercial sale of recreational marijuana.

[299] This is in contrast to federal and state conventions to tax products like cigarettes and tobacco on a per unit basis.

[300] See Figure 5 in Carl Davis et al., "Taxing Cannabis," Institute on Taxation and Economic Policy (ITEP), January 23, 2019, at https://itep.org/taxing-cannabis/.

[301] Pennsylvania Department of Revenue, *Medical Marijuana Gross Receipts Tax*, https://www.revenue.pa.gov/GeneralTaxInformation/.

[302] See Appendix A in Carl Davis et al., "Taxing Cannabis," Institute on Taxation and Economic Policy (ITEP), January 23, 2019, at https://itep.org/taxing-cannabis/.

Overall, these tax and spending regimes have been subject to change, as government officials and voters respond to changes in revenue collections and budget priorities.

Employment and Educational Consequences of the Marijuana Policy Gap for Individuals

The marijuana policy gap between the federal government and states has widened nearly every year for over 25 years. Consequences of the gap are discussed throughout this report, and this section examines a selection of consequences for individuals who act in compliance with state law but violate federal law. As individuals have pressed forward with manufacturing, sale, and use of marijuana, consequences of the gap have arisen—two of the more publicized consequences for individuals in states that legalized marijuana, as discussed in this section of the report, are termination of employment due to marijuana use and implications for postsecondary students.

Employment and Legal Marijuana Use[303]

Although 18 states and the District of Columbia now permit the recreational use of marijuana, these developments have not restricted the ability of employers to terminate employees for such use. The laws of most of the states that have legalized recreational marijuana use indicate that employers may continue to maintain policies that prohibit employees' use of the drug.[304] For example, California law provides that nothing in the statute legalizing recreational marijuana use "affect[s] the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent[s] employers from complying with state or federal law."[305] It is the case, however, that the laws of some states that have legalized medical marijuana specifically aim to protect medical marijuana users from discrimination in the workplace.[306]

In two jurisdictions that permit both medical and recreational marijuana use but do not explicitly address in law an employer's ability to prohibit or discourage such use by employees, courts have declined to recognize wrongful termination claims involving the medical use of the drug.[307] A claim of wrongful termination in violation of public policy is permitted in many jurisdictions as an exception to the common law employment-at-will doctrine, which allows an employer to terminate an employee for any reason other than what is prohibited by law.[308] A wrongful termination claim is premised on the belief that the law should not permit an employee to be discharged for engaging in an activity that is beneficial to the public welfare.[309] In general, a wrongful termination claim encompasses four broad categories of conduct: (1) refusing to commit

[303] This section was authored by Jon Shimabukuro, Legislative Attorney in CRS's American Law Division (ALD). It uses citation and other editorial styles consistent with ALD's reports.

[304] *See*, *e.g.*, Alaska Stat. § 17.38.220(a); Cal. Health & Safety Code § 11362.45(f); Colo. Const. Art. 18, § 16(6)(a); 410 Ill. Comp. Stat. 705/10-50(a); Mass. Gen. Laws ch.94G, § 2(e); Nev. Rev. Stat. § 595.180.1(a); Vt. Stat. Ann. tit. 18, § 4230a(e)(3).

[305] Cal. Health & Safety Code § 11362.45(f).

[306] Iris Hentze, *Cannabis and Employment: Medical and Recreational Policies in the States*, National Conference of State Legislatures, November 1, 2021.

[307] Roe v. TeleTech Customer Care Management (Colorado) LLC, 257 P.3d 586 (Wash. 2011); Coles v. Harris Teeter, LLC, 217 F.Supp.3d 185 (D.D.C. 2016).

[308] *See* John F. Buckley IV and Ronald M. Green, 2018 State by State Guide to Human Resources Law § 5.04 (2018).

[309] *Id*.

an unlawful act; (2) exercising a legal right; (3) fulfilling a public obligation, such as military service; and (4) whistleblowing.[310]

An employee asserting a wrongful termination claim must often establish a clear public policy that would be undermined if the individual's dismissal were sustained.[311] This public policy may be located in a state's statutes or regulations.[312] After reviewing medical marijuana laws in Washington and the District of Columbia, courts in these jurisdictions rejected wrongful termination claims on the grounds that these laws did not establish a clear public policy that would require an employer to accept its employee's medical marijuana use.[313]

In *Roe v. TeleTech Customer Care Management (Colorado) LLC*, a newly hired employee who was authorized to use marijuana to treat her migraine headaches was terminated after she tested positive for marijuana in a drug test.[314] The employee maintained that her termination was in violation of a clear public policy allowing medical marijuana use in compliance with the Washington State Medical Use of Marijuana Act (MUMA), which provides a defense against the prosecution of physicians who authorize the use of the drug and patients who are engaged in its medical use.[315] The Washington Supreme Court concluded, however, that MUMA's provisions could not support a "broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana."[316] The Court explained that the statute made little reference to medical marijuana use and employment, and that no other Washington court had found an unimpeded right to use the drug for medical purposes.[317]

Similarly, in *Coles v. Harris Teeter*, a District of Columbia federal district court rejected an employee's wrongful termination claim on the grounds that the District's Legalization of Marijuana for Medical Treatment Amendment Act did not provide a clear public policy mandate for an employer to accept an employee's medical marijuana use.[318] Rather, the court maintained that the act appeared to "leave room for employers to remove workers who fail a drug test for marijuana use or violate workplace drug-prevention policies."[319] In addition, the court observed that the District's decision to permit medical marijuana use should not be construed to establish a clear public policy against an employer's ability to terminate an employee for such use. The court observed:

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[310] *Id*.

[311] *See, e.g., Coles*, 217 F.Supp.3d at 188 ("[A] plaintiff pleading a wrongful-termination claim based on the public-policy exception must identify a policy source that provides a 'clear mandate' in support of his claim.").

[312] *TeleTech Customer Care Mgmt.*, 257 P.3d at 595 ("A statute may provide a public policy mandate for purposes of a wrongful termination claim even where the employer's conduct is beyond the reach of the statute's remedies."); *Coles*, 217 F.Supp.3d at 188 ("District of Columbia courts ... recognize a very narrow public-policy exception for cases in which the employee's termination offends some mandate of public policy that is firmly anchored in either the Constitution or in a statute or regulation which clearly reflects the particular public policy being relied upon.") (internal quotation marks omitted).

[313] *TeleTech Customer Care Mgmt.*, 257 P.3d at 596; *Coles*, 217 F.Supp.3d at 188.

[314] *TeleTech Customer Care Mgmt.*, 257 P.3d at 589.

[315] *Id*.

[316] *Id*. at 596.

[317] *Id*.

[318] *Coles*, 217 F.Supp.3d at 188.

[319] *Id*.

> [T]he District here can at most be said to maintain a public policy that decriminalizes and allows the consumption of marijuana for private medical reasons. That is a far cry from prohibiting employers from terminating such users.[320]

Although *TeleTech Customer Care Management* and *Coles* involved medical rather than recreational marijuana use, they arguably suggest that a wrongful termination claim based on recreational use may not be successful if a state's laws do not clearly address whether an employer must accommodate an employee's recreational marijuana use.

Issues for Students at Postsecondary Institutions

Differing state and federal laws regarding the treatment of marijuana have brought to light a range of implications for postsecondary students at institutions of higher education (IHEs), as discussed below.

Federally Required Institutional Drug Abuse Prevention Policies

Section 120 of the Higher Education Act (HEA; P.L. 89-329), as amended, specifies that to be eligible to receive funds or other forms of financial assistance under any federal program, an IHE must certify to the Department of Education (ED) that it has adopted and implemented a program to prevent the use of illicit drugs and alcohol by students and employees.[321] IHEs must, among other requirements, annually distribute to students and employees standards of conduct that "clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on the institution's property or as part of any of the institution's activities" and that describe applicable local, state, or federal legal sanctions.[322] Thus, because marijuana is designated as a Schedule I drug under federal law, many IHEs, including those located in states or localities that have legalized or decriminalized marijuana, prohibit the possession, use, or distribution of it on campus.[323]

An IHE's prohibition of marijuana on campus may have varying implications. For example, it may affect students with medical marijuana prescriptions. In these instances, students may be required to store and use medical marijuana off campus. This issue may be particularly acute for students who live in on-campus residences and may have limited access to off-campus locations at which they could use their medical marijuana without risking sanctions by their IHE.[324] In addition, due to an IHE's prohibition of marijuana on campus, some IHEs may choose not to conduct research on marijuana, as they may be at risk of losing federal funds should they do so.[325]

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[320] *Id*.

[321] This requirement was first enacted under the Drug-Free Schools and Communities Act Amendments of 1989 (P.L. 101-226).

[322] HEA §120(a)(1); 20 U.S.C. §1011i(a)(1).

[323] See, for example, University of Colorado, Boulder, "CU Boulder Alcohol & Other Drugs Policy," https://www.colorado.edu/aod/penalties, accessed March 23, 2022.

[324] Eric S. Davidson, "Marijuana and the Drug Free Schools and Campuses Act," November 2015, https://www.eiu.edu/ihec/Marijuana%20and%20DFSCA.pdf.

[325] Owen Daugherty, "Risk of losing federal funding reason why medical marijuana research won't happen," *The Lantern*, August 23, 2017, https://www.thelantern.com/2017/08/risk-of-losing-federal-funding-reason-why-medical-marijuana-research-wont-happen/. See also Marijuana Moment, "Lawmakers want legal protections for universities that research marijuana," *Boston Globe*, April 26, 2019.

Student Eligibility for Federal Student Aid

Title IV of the HEA authorizes the primary federal programs that provide financial assistance for postsecondary education. These programs include the Pell Grant program[326] and the Direct Loan program.[327] For over 20 years, HEA Section 484(r) specified that individuals convicted of specified drug-related offenses were ineligible for HEA Title IV student federal student aid.[328] Individuals who were convicted of the possession or sale of controlled substances under federal or state (but not local or municipal) law during a period of enrollment for which they are receiving HEA Title IV federal student aid were subject to having that aid eligibility temporarily or indefinitely suspended.[329] An individual's period of ineligibility depended on whether the conviction was for the sale or possession of drugs and whether he or she had previous offenses. An individual who lost eligibility temporarily could regain it the day after the period of ineligibility ended, or when he or she successfully completed a qualified drug rehabilitation program that included passing two unannounced drug tests. An individual who lost eligibility for an indefinite period could regain eligibility after successfully completing a qualified drug rehabilitation program that includes passing two unannounced drug tests (the individual was not required to complete the rest of the program after passing the two tests), or having the conviction reversed, set aside, or removed from his or her record and meeting additional criteria.[330] In December 2020, the FAFSA Simplification Act (Division FF, Title VII of the Consolidated Appropriations Act of 2021; P.L. 116-260) repealed the HEA Section 484(r) provisions relating to ineligibility for HEA Title IV aid due to drug-related convictions. Beginning with the 2021-2022 award year (July 1, 2021-June 30, 2022), the HEA Section 484(r) restrictions on HEA Title IV aid eligibility due to drug-related convictions no longer impact a student's eligibility for such aid.[331]

Separately, the Anti-Drug Abuse Act of 1988 (P.L. 100-690) authorizes federal and state judges to deny certain federal benefits, including HEA Title IV student aid, to individuals convicted of drug trafficking or possession under federal or state law. The suspension of benefits is at the discretion of the court and may range from up to one year for a first drug possession conviction to permanent ineligibility for a third drug trafficking conviction.[332]

Other Consequences of Marijuana Use Under Federal Law

Aside from the consequences already discussed in this section, marijuana use may subject an individual to a number of other consequences under federal law regardless of whether that individual has been convicted of a marijuana-related offense. Other consequences include, but are not limited to, the inability to purchase and possess a firearm, inadmissibility for federal housing, and ineligibility for certain visas.

[326] For additional information, see CRS Report R45418, *Federal Pell Grant Program of the Higher Education Act: Primer*.

[327] For additional information, see CRS Report R45931, *Federal Student Loans Made Through the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers*.

[328] The provision was first enacted under the Higher Education Amendments of 1998 (P.L. 105-244).

[329] HEA §484(r); 20 U.S.C. §1091(r).

[330] For additional information, see U.S. Department of Education, Office of Federal Student Aid, *2019-2020 Federal Student Aid Handbook*, vol. 1, pp. 20-21.

[331] Institutions of higher education were authorized to implement these changes as early as June 17, 2021, but were required to implement them no longer than 60 days thereafter. U.S. Department of Education, Early Implementation of the FAFSA Simplification Act's Removal of Requirements for Title IV Eligibility Related to Selective Service Registration and Drug-Related Convictions, 86 *Federal Register*, 32252-32253, June 17, 2021.

[332] 21 U.S.C. §862.

Firearms: Marijuana users may lose their ability to purchase and possess a firearm. Under the Gun Control Act of 1968 (18 U.S.C. Chapter 44), as amended, it is unlawful to possess, ship, transport, receive, or dispose of any firearm or ammunition to any person "who is an unlawful user of or addicted to any controlled substance" as defined by the CSA.[333]

Federally Assisted Housing: Federal law establishes that "illegal drug users" are ineligible for federally assisted housing.[334] The law requires public housing agencies and owners of federally assisted housing to establish standards that would allow the agencies or owners to prohibit admission to, or terminate the tenancy or assistance of, any such applicant or tenant.[335]

Immigration: Under the Immigration and Nationality Act (8 U.S.C. Chapter 12), individuals may be deemed ineligible for immigrant and nonimmigrant visas if they are violators of any (federal, state, and foreign) laws or regulations involving controlled substances.[336]

International Policy Context and Response

As states have continued to legalize recreational and medical marijuana and widened the policy gap between the states and federal government, some observers have expressed concern regarding the United States' compliance with international treaties.

International drug control is based on three foundational U.N. treaties: the (1) 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol, (2) 1971 Convention on Psychotropic Substances, and (3) 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[337] These treaties generally seek to curb the recreational use of dangerous and addictive narcotics and psychoactive substances while ensuring their availability for legitimate medicinal and scientific uses.

With respect to marijuana, state parties to the U.N. drug control treaties have committed to strict controls on the nonmedical, nonscientific cultivation, production, and use of cannabis, cannabis resin, extracts and tinctures of cannabis, as well as organic and synthetic cannabinoids, including THC and dronabinol.[338]

Despite international commitments to limit the global marijuana market, the drug remains among the most widely used in the world—leading multiple countries to call for changes in the international community's approach to its control. According to the United Nations, some 200 million people aged 15 to 64 years reported in 2019 using cannabis at least once in the past year (4.0% of the world's population).[339] Cannabis plant cultivation is also nearly ubiquitous around the world. According to the United Nations, cannabis plants were cultivated in at least 151 countries between 2010 and 2019.[340] According to the International Narcotics Control Board (INCB), established by the 1961 Single Convention on Narcotic Drugs as an independent body to

[333] 18 U.S.C. §§922(g)(3), 924(a)(2) and 27 C.F.R. §478.11.

[334] 42 U.S.C. §§13661-13662.

[335] For a broader discussion of legal consequences of marijuana use, see CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*.

[336] 8 U.S.C. §1182(a)(2)(A).

[337] The texts of the three drug control treaties and the updated schedules of narcotic drugs and psychotropic substances under international control are available at https://www.unodc.org/unodc/en/commissions/CND/conventions.html.

[338] Dronabinol is a cannabinoid and is the active ingredient in Marinol. See **Appendix A**.

[339] United Nations Office on Drugs and Crime (UNODC), *World Drug Report 2021*, Booklet 2, June 2021, p. 21.

[340] UNODC, *World Drug Report 2021*, Booklet 3, June 2021, p. 11.

monitor country compliance with their treaty commitments, global licit production of cannabis grew from 1.4 tons in 2000 to 650.8 tons in 2020.[341]

In certain countries, national-level policy approaches to marijuana are changing. Some are considering the option to legalize and regulate marijuana, including for recreational use. The first country to legalize recreational use of marijuana was Uruguay in 2013, followed by Canada in 2018. In 2019, the Australian Capital Territory (the federal territory including Australia's capital Canberra) legalized cannabis possession and use. Several countries have decriminalized marijuana by eliminating or reducing the criminal penalties associated with some or all aspects of its cultivation, sale, and consumption.

Potentially reflecting international appetite for a change in how the international community approaches marijuana control, the Expert Committee on Drug Dependence (ECDD) of the World Health Organization (WHO) formally recommended in January 2019 to revise the scheduling of cannabis and several of its derivatives under the U.N. drug control treaties.[342] The U.N. policy-making body on drug matters, the Commission on Narcotic Drugs (CND), considered the WHO's proposals during its 63rd reconvened session, in December 2020.[343] At the meeting, States Parties voted to remove cannabis and cannabis resin from Schedule IV (most restrictive) of the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol, while continuing to list both on Schedule I.[344] The United States voted in favor of this proposal, explaining:

> The vote of the United States to remove cannabis and cannabis resin from Schedule IV of the Single Convention while retaining them in Schedule I is consistent with the science demonstrating that while a safe and effective cannabis-derived therapeutic has been developed, cannabis itself continues to pose significant risks to public health and should continue to be controlled under the international drug control conventions.
>
> Further, this action has the potential to stimulate global research into the therapeutic potential and public health effects of cannabis, and to attract additional investigators to the field, including those who may have been deterred by the Schedule IV status of cannabis.[345]

Developments in U.S. marijuana laws and policies at the state level, particularly those that relate to recreational marijuana initiatives, have raised some concerns about the United States' compliance with international treaty obligations. The INCB has long been critical of jurisdictions that legalize recreational use of marijuana, including state-level U.S. policies. In its 2020 annual report, the INCB warned that

> legalization measures or regulations that permit the use of any controlled substance, including cannabis, for non-medical purposes are inconsistent with the obligations of States parties, in particular those included in article 4, paragraph (c), of the 1961 Convention

[341] International Narcotics Control Board (INCB), *Report of the INCB for 2019*, February 27, 2020, p. 29; and *Report of the INCB for 2021*, March 10, 2022, p. 28.

[342] World Health Organization (WHO), letter to the Secretary-General of the United Nations, January 24, 2019.

[343] UNODC, *WHO Scheduling Recommendations on Cannabis and Cannabis-Related Substances*, March 2020, https://www.unodc.org/unodc/en/commissions/CND/Mandate_Functions/current-scheduling-recommendations.html.

[344] Schedule I includes substances that are liable to abuse and to produce ill effects, but may have potential therapeutic uses. Schedule IV includes substances listed under Schedule I, but whose liability risks are not offset by substantial therapeutic opportunities. Other substances listed on both Schedules I and IV include heroin and carfentanil. See United Nations, The International Drug Control Conventions, Schedules of the Single Convention on Narcotics Drugs of 1961 as amended by the 1972 Protocol, as at 7 May 2020, ST/CND/1/Add.1/Rev.6.

[345] U.S. Department of State, *U.S. Explanation of Vote on Changes in the Scope of Control of Cannabis and Cannabis-Related Substances*, December 2, 2020, https://vienna.usmission.gov/cnd-explanation-of-vote-on-changes-in-the-scope-of-control-of-cannabis-and-cannabis-related-substances/.

> [Single Convention on Narcotic Drugs of 1961] as amended. The Board calls upon all States to respect their Convention obligations in the development of their national drug control policies.[346]

Select Issues For Congress—The Path Forward

Given the current marijuana policy gap between the federal government and most states, there are a number of issues that Congress may address. These include, but are not limited to, marijuana's designation as a Schedule I controlled substance, financial services for marijuana businesses, federal tax issues for these businesses, oversight of federal law enforcement and its role in enforcing federal marijuana laws, and states' implementation of medical marijuana laws and the involvement of federal health care workers. Congress has raised these issues in hearings, through appropriations, and in bills introduced over the last several years.

Consideration of Marijuana as a Schedule I Drug: Expand, Minimize, or Eliminate the Policy Gap

As the gap between federal and state laws and policies on marijuana widens each year, policymakers might decide to reevaluate federal marijuana law and policy. In addressing state-level legalization efforts, Congress could take one of several routes. It could elect to take no action, thereby upholding the federal government's current marijuana policy and enforcement priorities and allowing states to carry on with implementation of recreational and medical marijuana laws. Alternatively, it may decide that the CSA must be enforced and direct federal law enforcement to dismantle state medical and recreational marijuana programs. Or, it could continue to take smaller steps to alleviate some of the problems associated with the policy gap, such as enacting appropriations provisions that temporarily restrict DOJ's ability to expend funds to enforce federal marijuana laws in states with medical marijuana programs, or altering the CSA definition of marijuana as it did with the 2018 farm bill. Congress may also decide to eliminate the gap altogether.

Take No Action Regarding the Gap

If Congress elects to take no action and uphold the federal government's current marijuana policy and enforcement priorities, the gap between the states' policies and those of the federal government likely will continue to expand if recent trends continue. Each year, more states legalize recreational and medical marijuana further expanding the policy gap and its consequences.

Bolster the Federal Position or Expand the Gap

Another option would be for Congress to bolster the federal position on marijuana or take action to directly expand the gap with states (presuming that states continue to take actions to legalize and continue to not reverse such actions) such as reaffirming the dangers of marijuana, allowing for increased action against or within the states that have legalized (such as removing the

[346] INCB, *Report of the INCB for 2020*, March 25, 2021, p. 66. With regard to U.S. programs, the INCB further reported in its 2018 annual report that "most medical cannabis programmes in the United States do not comply with requirements of the international drug control treaties or United States national law" due to lax regulatory controls. See INCB, *Report of the INCB for 2018*, March 5, 2019, p. 9.

appropriations riders and/or directing DOJ to take action), or increasing penalties for federal marijuana offenses.

Reaffirm the Dangers of Marijuana

Congress may choose to reaffirm that marijuana is a dangerous substance that is likely to be abused and has no recognized medical use. In report language and directives to agencies, Congress could authorize education initiatives and point to conclusions drawn by DEA and HHS in the 2016 decision to keep marijuana on Schedule I of the CSA—a decision based on the FDA's scientific evaluation and the legal standards of the CSA—that reaffirms the agencies' views that marijuana "does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse."[347] Further, Congress may choose to appoint a commission to review the comprehensive issue of marijuana use, abuse, enforcement, and treatment responses in the United States.

Increased Enforcement Action Against or Within States

Congress may decide that the CSA must be enforced and press for increased action against or within states to attempt to stop state-sanctioned, recreational or medical marijuana programs. Congress could stop utilizing the medical marijuana appropriations rider that prohibits DOJ from using appropriated funds to prevent states from implementing medical marijuana laws. This likely would create an even wider policy gap between the states and the federal government as most states have either comprehensive medical marijuana programs or allow recreational marijuana and developed retail systems, and some have both.[348] Nevertheless, as discussed in this report, federal law supersedes state law, and it is within the federal government's power to enforce all of the CSA, including marijuana law, in states and territories. It may decide to preempt all state laws authorizing recreational and medicinal use of marijuana. Arguably, this may close the gap as it would force states to realign their marijuana laws and policies with those of the federal government.

Increase Penalties for Marijuana Offenses

Congress may elect to increase penalties for federal marijuana offenses. Currently, illicit acts involving large quantities of marijuana carries a federal prison sentence of 10 years to life and a fine of up to $10 million for an individual or a fine of up to $50 million for an organization.[349] Penalties increase for subsequent offenses or if use of the substance causes death or serious bodily injury. Congress may increase the criminal fines and number of years for these offenses to reaffirm and strengthen the current federal prohibition on marijuana.

Minimize the Gap

Congress could choose to minimize the gap between the states and federal government, and begin to alleviate the consequences of the gap on individuals, state governments, and federal agencies.

[347] DOJ, DEA, *Acting Administrator Rosenberg Response to request for Marijuana Rescheduling*, August 11, 2016.

[348] Of note, federal law enforcement arguably lacks the manpower and resources to tackle the issue. DEA confronts a variety of drug threats in the United States and abroad. It would have to considerably realign resources to target the marijuana industry in the United States. See DOJ, DEA, *FY2022 Performance Budget Congressional Budget Submission*.

[349] 21 U.S.C. §841.

Smaller Steps

In taking smaller steps to minimize the gap, Congress could adopt measures similar to the DOJ appropriations rider to minimize enforcement of federal law in states with medical marijuana programs, and alleviate the impact of the Schedule I status of marijuana on institutions, businesses, and individuals. For example, it could eliminate the education funding provision that an IHE must certify to ED that it has adopted and implemented a program to prevent the use of illicit drugs and alcohol by students and employees in order to receive federal funding.[350] It could also pass measures to prevent DOJ from using funds to prevent states from implementing *recreational* marijuana laws[351] or pass measures to increase researchers' access to a wider variety of marijuana for scientific research purposes or streamline Schedule I requirements for researchers.[352]

Reevaluate Marijuana

Similar to what was done with the Shafer Commission and the study of marijuana (see "The Shafer Commission"), Congress may consider establishing a commission of experts[353] to evaluate the efficacy of marijuana laws in the United States and address other issues such as the medicinal value and harm of marijuana use.[354] If a commission were to determine that marijuana no longer should be a Schedule I substance, Congress could decide to take legislative action to remove it from Schedule I. In doing so, Congress might (1) place marijuana on one of the other schedules (II, III, IV, or V) of controlled substances; (2) create another schedule or separate classification for marijuana under the CSA; or (3) remove marijuana as a controlled substance altogether.[355]

If marijuana remains a controlled substance under the CSA under any existing schedule, the existing conflict with states that have legalized recreational marijuana would remain, but if Congress chooses to reschedule, that may help resolve conflicts with comprehensive state medical marijuana laws. A Schedule II-V classification under the CSA would allow for lawful prescriptions for marijuana. Alternatively, the creation of a new schedule solely for marijuana would give Congress an opportunity, aside from rescheduling to Schedules II-V or removing it

[350] This requirement was first enacted under the Drug-Free Schools and Communities Act Amendments of 1989 (P.L. 101-226). See "Issues for Students at Postsecondary Institutions."

[351] For example, in the 117th Congress, an amendment was offered (to amend H.R. 4505) that, if it had been enacted, would have prohibited DOJ from interfering with *any* state marijuana laws in FY2022 regardless if the laws allow medical or recreational.

[352] For example, the Medical Marijuana Research Act (H.R. 5657; as passed by the House on April 4, 2022) would amend Schedule I registration requirements to ease the process for those who wish to register to research marijuana. It would also direct DEA to register (1) practitioners to conduct medical marijuana research, and (2) manufacturers and distributors to supply marijuana for such research. Further, it would direct HHS (jointly with DOJ) to implement a specialized process for supplying marijuana products available through state-authorized marijuana programs to researchers until manufacturers and distributors can provide a sufficient supply of marijuana for medical research. Alternatively, the Cannabidiol and Marihuana Research Expansion Act (S. 253; as passed by the Senate on March 24, 2022) would establish new CSA research protocols specifically for marijuana and direct DEA to accelerate the process for the agency to respond to applicants that seek to manufacture marijuana for research, among other things. Unlike H.R. 5657, it would not direct HHS/DOJ to implement a process for researchers to use products from state-authorized marijuana programs.

[353] Experts may include law enforcement, medical doctors, drug policy researchers, and drug treatment experts, among others.

[354] This would be similar to the efforts of the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, which was established under the CSA to study marijuana in the United States. See "The Shafer Commission" for further discussion.

[355] Congress has introduced a number of bills that would, among other things, either move marijuana to another schedule or remove it from the CSA altogether.

from the CSA, to modify the legal status of marijuana under the CSA. For example, it could design a new schedule that allows for medical and recreational distribution while maintaining some control over the amount and quality of the substance.

Eliminate the Gap

As previously noted, Congress may decide to preempt all state laws authorizing recreational and medicinal use of marijuana, and arguably, this may close the gap as it would force states to realign their marijuana laws and policies with those of the federal government. Pursuant to the Supremacy Clause, Congress can preempt state law through federal statutes like the CSA; however, the CSA provides that it does not preempt state laws "unless there is a positive conflict between [the CSA] and that State law so that the two cannot consistently stand together" (see **Appendix E** for further discussion of the Supremacy Clause and preemption).

If Congress chooses to remove marijuana as a controlled substance under the CSA and its criminal provisions, this would largely eliminate the policy gap with states that have authorized recreational and comprehensive medical marijuana. In eliminating criminal control over marijuana and all cannabis, Congress may still take actions that allows for regulatory control. These are a few examples:

- it could devote additional resources to the FDA and USDA to ensure the safety and quality of the many different available cannabis products,
- it could seek to regulate and tax commercial marijuana activities, and
- it could enable and promote the trade of cannabis products made in the United States.

Whether Congress decides to address the gap with the states or not, the states have continued to act on marijuana legalization, further expanding the policy gap, and no state has reversed its legalization of either medical or recreational marijuana.[356]

Provision of Financial Services to the Marijuana Industry

Given the limited guidance issued by FinCEN and DOJ, many financial institutions remain reluctant to enter openly into relationships with state-authorized marijuana businesses.[357] Some marijuana businesses and marijuana industry proponents have raised concerns that even when marijuana businesses are able to open bank accounts or secure other financial services, those customer relationships are frequently terminated in relatively short order, especially when the existence of such relationships with the financial institutions becomes public.[358]

Over the years, legislative proposals have been introduced that are designed to jump start financial relationships with state-authorized marijuana businesses.[359] Of particular note, the

[356] Several initiatives have been overturned in court or halted by Congress.

[357] Sophie Quinton, *Why Marijuana Businesses Still Can't Get Bank Accounts*, The PEW Charitable Trusts, March 22, 2016.

[358] Ibid. See also David Migoya, "Oregon bank opens doors to Colorado marijuana businesses," *The Denver Post*, January 20, 2015,

[359] See, for example, S. 683, 114th Congress (2015); S. 1726, 114th Congress (2015); H.R. 1538, 114th Congress (2015); H.R. 2076, 114th Congress (2015); S. 1152, 115th Congress (2017); H.R. 2215, 115th Congress (2017); H.R. 1595, 116th Congress (2019); S. 1200, 116th Congress (2019); H.R. 1996, 117th Congress (2021); and S. 910, 117th Congress (2021).

Secure And Fair Enforcement Banking Act of 2021 (SAFE Banking Act; H.R. 1996; S. 910),[360] would, among other things, attempt to

- constrain federal banking regulator authority to penalize depository institutions for providing financial services to marijuana businesses operating in compliance with state laws; and
- protect depository institutions and their personnel from some legal liability under the anti-money laundering laws and asset forfeiture laws when providing financial services to, or investing proceeds derived from serving, marijuana businesses operating in compliance with state laws.

Of note, the SAFE Banking Act was added as an amendment to the National Defense Authorization Act (NDAA) for Fiscal Year 2022 (H.R. 4350) which passed the House in September 2021, but it was *not* included in the Senate version of the NDAA for FY2022 (S. 1605) which was ultimately enacted into law (P.L. 117-81). SAFE Banking Act provisions were again included in the House-passed America COMPETES Act of 2022 (H.R. 4521), but as of April 1, 2022, this bill has not been considered by the Senate.

While such measures, if enacted, might encourage some new entrants into the industry, many financial institutions and their federal regulators may remain apprehensive about ties to marijuana businesses while the drug is listed as a Schedule I controlled substance under the CSA. In the absence of legislative change to the CSA, federal marijuana enforcement priorities and policies could quickly be reversed or otherwise be significantly altered so as to greatly increase the risk of legal liability.[361]

Federal Tax Treatment

Marijuana producers and retailers may not deduct the costs of selling their product (e.g., payroll, rent, advertising) for the purposes of federal income tax filings.[362] The Internal Revenue Code (IRC) Section 280E states that

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Media reports indicate that the Internal Revenue Service (IRS) has enforced Section 280E in audits of marijuana-related businesses by refusing to accept these businesses' deductions.[363] IRC Section 280E does not prohibit a marijuana business from deducting the costs of cultivating or acquiring marijuana as a "cost of goods sold," though.[364] Effectively, the disqualification of deductions constitutes an implicit tax on marijuana-related businesses equal to the value of the tax benefit of such deductions if these firms had engaged in an industry that was legal under federal

[360] See also S. 1200, 116th Congress (2019).

[361] See, generally, CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*.

[362] For more legal analysis, see CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*.

[363] See, for example, Jeff Daniels, "IRS Said to be Auditing Colorado Marijuana Businesses," *CNBC*, July 12, 2016, http://www.cnbc.com/2016/07/12/irs-said-to-be-auditing-colorado-marijuana-businesses.html; and Will Yankowicz, "Marijuana Companies' Biggest Battle Might Be Against the IRS," *Slate*, July 1, 2016, http://www.slate.com/blogs/moneybox/2016/07/01/legal_cannabis_businesses_pay_taxes_under_a_code_reserved_for_illegal_drug.html.

[364] See CRS Report R44056, *Marijuana and Federal Tax Law: In Brief*.

law. One such public case involves the Sacramento-based Canna Care marijuana dispensary. The IRS disallowed $2.6 million in deductions for employee salaries, rent, and other costs over a three-year period, which resulted in the business owing $875,000 in additional taxes. Canna Care challenged the IRS in U.S. Tax Court, but ultimately the court upheld the IRS ruling.[365] The IRS has also successfully challenged marijuana-related businesses attempting to structure business entities, in part, to work around Section 280E.[366]

The discrepancies between federal, state, and local tax treatments of marijuana-related businesses create economic incentives to engage in the underground economy, all else being equal. In addition to the uncertainty of federal tax enforcement procedures (and costs of any related legal assistance), the inability of marijuana businesses to deduct their business expenses is effectively an implicit tax up to 37% (if organized as sole-proprietor or partnership) or 21% (if organized as a C corporation) on these expenses.[367] These implicit taxes are paid in addition to state and local sales and special excise taxes. The status quo administration of federal tax laws creates an economic advantage for illicit marijuana sellers, who are not subject to direct taxation of their sales.

Marijuana-related tax bills in the 116th and 117th Congress have varied in scope. One bill would have exempted a business that conducts marijuana sales in compliance with state law from the Section 280E prohibition against allowing business-related tax credits or deductions for expenditures in connection with trafficking in controlled substances.[368] A second bill would have removed marijuana from the schedule of controlled substances (and, indirectly, IRC Section 280E restrictions on marijuana),[369] while a third would have imposed a federal excise tax on domestic recreational marijuana retail sales that would begin at 10% of the price and escalate to 25% over four years.[370] After this phase-in period, the 25% tax rate would apply to a "prevailing sales price" of marijuana products sold in the United States in the past year, as determined by the Secretary of the Treasury. Products containing a marijuana derivative would also be taxed, in part, based on THC content. Another bill would remove marijuana's federal designation as a controlled substance and impose a federal excise tax on manufacturers' sales of marijuana and marijuana products, which would fund various business programs and create a grant program to fund services for those "most adversely affected by the War on Drugs."[371]

Like many of the state excise tax regimes, the federal proposals that would levy a tax based on a percentage of the price of marijuana, also known as an ad valorem tax, could introduce questions

[365] See Canna Care, Inc. v. Commissioner, T.C. Memo 2015-206, October 22, 2015, at https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10586. The Ninth Circuit Court of Appeals upheld the tax court's decision. For more details, see Canna Law Blog, "Cannabis Taxes and Section 280E: Canna Care v. The IRS," August 13, 2017, at https://www.cannalawblog.com/cannabis-taxes-and-section-280e-canna-care-v-the-irs/.

[366] See, for example, see Robert McVay, "Tax Court Deals Another Blow to Cannabis Management Company Model," Canna Law Blog, December 28, 2018, at https://www.cannalawblog.com/tax-court-deals-another-blow-to-cannabis-management-company-model/.

[367] With 21% being the top marginal tax bracket for corporations and 37% being the top marginal tax bracket for individuals under the federal income tax code. The 37% rate is temporary through 2025, and is before the potential application of the temporary Section 199A 20% deduction for passthrough business income. For more information on Section 199A, see CRS In Focus IF11122, *Section 199A Deduction for Pass-through Business Income: An Overview*. It is unclear whether businesses selling marijuana in states that legalized recreational sales will be able to claim Section 199A because of the prohibitions in Section 280E.

[368] The Small Business Tax Equity Act of 2019 (H.R. 1118; S. 422), 116th Congress.

[369] The Regulate Marijuana Like Alcohol Act (H.R. 420), 116th Congress.

[370] The Marijuana Revenue and Regulation Act (H.R. 1120; S. 420), 116th Congress.

[371] The Marijuana Opportunity Reinvestment and Expungement Act of 2021 (H.R. 3617), 117th Congress.

that may complicate tax compliance and administration. For example, when a product containing marijuana is bundled with non-marijuana components (e.g., edible ingredients, oils, or consumption devices), does the tax apply to the final product or just the value of the marijuana-derived component? When a marijuana producer sells input products (e.g., dried leaves, marijuana extracts) to a related, downstream producer, would the IRS have difficulties in enforcing that the two businesses applied the tax rate to an arm's length transfer price similar to two unrelated parties?

In contrast, a per unit tax typically is less likely to introduce such administrative complications.[372] It would also de-couple the projected revenues from the tax from the pre-tax price of marijuana, which would be expected to decline as production increases. The tax rate could also be indexed for inflation to maintain the purchasing power of the tax rate imposed. A per unit tax regime, though, would require specifying the types of products subject to tax and unit of tax (e.g., dried marijuana leaf weight versus freshly-picked, or wet, weight; THC content).[373] Such a tax, if imposed at the manufacturer and importer level, would also simplify and focus administration on a smaller number of collection points (compared to the retail excise tax).[374]

Oversight of Federal Law Enforcement in States that have Legalized Marijuana

Given the issues that have arisen from the marijuana policy gap, Congress may conduct oversight of federal law enforcement and its role in enforcing federal marijuana laws. There are a number of issues Congress may review including how state marijuana legalization has affected agency missions, joint operations between state and local law enforcement, and federal law enforcement policy and priorities.

Review of Agency Missions

In exercising its oversight authorities, Congress may choose to examine the extent to which (if at all) federal law enforcement missions—in particular, DEA's mission—are affected by state legalization of marijuana. For instance, policymakers may elect to review the mission of each federal law enforcement agency involved in enforcing the CSA and examine how its drug-related investigations may be influenced by the varying state-level policies regarding marijuana. As noted, federal law enforcement has generally prioritized investigations of drug traffickers and dealers over that of low-level drug users. Policymakers may question whether these policies and priorities are implemented consistently across states with different drug policies regarding marijuana.

Cooperation with State and Local Law Enforcement

One issue policymakers may debate is how to conduct oversight of multi-jurisdictional drug task forces, fusion centers, and other coordinating bodies charged with combating marijuana-related crimes and other threats to public safety. Policymakers may consider whether federal, state, and local law enforcement agencies are able to achieve task force goals related to marijuana control

[372] At the federal and state levels, per unit taxes are commonly administered on items such as cigarettes (per pack), alcoholic beverages (volume), and gasoline (volume).

[373] For a more general analysis of federal proposals to tax marijuana, see CRS Report R43785, *Federal Proposals to Tax Marijuana: An Economic Analysis*.

[374] This is similar to federal excise taxation of cigarettes and alcoholic beverages, where the tax is imposed at the manufacturer or producer level, or at the importer level.

when there is a gap between state and federal marijuana policy, and between neighboring states that have conflicting policies. Policymakers may choose to evaluate whether certain drug task force strategies and operations should be modified in states that have established laws and policies that are either inconsistent—such as in states that have *decriminalized* small amounts of marijuana possession—or are in direct conflict—including states that have *legalized* either medical or recreational marijuana—with federal drug policy. For instance, might there be any internal conflicts that prevent task force partners from collaborating effectively to carry out their marijuana-related investigations? Does it create conflict between state and federal parties when local law enforcement officers are required to return seized marijuana?

Of note, the Arizona Court of Appeals ruled that patients who possess marijuana in compliance with the Arizona Medical Marijuana Act are entitled to the return of their marijuana that law enforcement may have seized during a traffic stop.[375] In states such as Colorado, media reports indicated that some local law enforcement officers avoided seizing marijuana in certain cases because they do not want to have to return the marijuana to its owner—an act that is tantamount to distribution of a Schedule I controlled substance, a violation of federal law.[376] In 2017, the Colorado Supreme Court ruled that police officers cannot be forced to return marijuana to defendants even if they are acquitted of marijuana crimes.[377]

Evaluating Federal Enforcement Priorities and Monitoring the Effects of State Legalization of Marijuana

When states began to legalize medical and recreational marijuana, DOJ issued a series of memos describing federal enforcement priorities for states with legal marijuana programs. Additionally, according to DOJ, it monitors the effects of state legalization by

- collaborating among its own components and with other federal agencies in assessing marijuana enforcement-related data;
- prosecuting cases that threaten federal enforcement priorities; and
- consulting with state officials about areas of federal concern.[378]

As of December 2015, however, DOJ had not documented its efforts to monitor the effects of state legalization and ensure that its enforcement priorities are being emphasized. It is unclear if and how metrics[379] were being used to determine the impact of state marijuana laws and policy, and whether federal intervention is needed in states that have legalized.[380] For example, one of the eight enforcement priorities listed in the Cole memo was to prevent the diversion of marijuana to other states, such as from Colorado to neighboring Kansas, a state that has not legalized marijuana. While it seems Colorado marijuana is the prevalent illicit marijuana available in

[375] State v. Okun, 231 Ariz. 462 (Ariz. Ct. App. 2013). The U.S. Supreme Court denied certiorari in 2014. Arizona v. Okun, 572 U.S. ___, 134 S. Ct. 1759 (2014).

[376] Jessica Maher, "Law enforcement conflicts still exist with legal pot," *Reporter-Herald*, January 2, 2014.

[377] People v. Crouse, 2017 CO 5, 388 P.3d 39 (2017 Colo).

[378] U.S. Government Accountability Office (GAO), *DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 30, 2015. GAO has not reassessed DOJ's efforts to monitor state legalization since release of the 2015 report.

[379] It is unclear if DOJ used metrics, and if it did, it is also unclear what metrics were used.

[380] U.S. Government Accountability Office (GAO), *DOJ Should Document Its Approach to Monitoring the Effects of Legalization*, GAO-16-1, December 30, 2015, pp. 30-31.

Kansas,[381] DOJ did not take action against Colorado's medical or recreational marijuana programs. It is unclear what level of trafficking would be necessary to trigger action by the federal government against state marijuana laws.

Congress may choose to exercise oversight over DOJ's enforcement priorities and methods for tracking illicit marijuana-related activity in the states. DOJ may alter or reverse its enforcement priorities at any time. In May 2021, Attorney General Garland indicated that DOJ would not be using its resources to interfere with state marijuana laws.[382]

Medical Marijuana

Congress may consider a number of issues related to its authority over medical marijuana. Two of the more prominent issues for Congress has been its direction to DOJ to not interfere with states' implementation of medical marijuana laws and veterans' access to medical marijuana.

State Medical Marijuana Laws and Federal Law Enforcement

State medical marijuana laws have raised questions for federal policymakers about enforcing federal law related to marijuana when individuals or organizations are acting in compliance with state law. Since 2015 Congress has included policy riders in appropriations acts each year to prohibit DOJ from using funds to prevent states from implementing their medical marijuana laws.[383] Congress may decide to alter, maintain, or reverse this provision.[384] Notably, in a March 2021 White House press briefing, the Biden Administration signaled its support for federal decriminalization of marijuana and indirectly voiced its support for medical marijuana in referring to campaign statements made in 2020: "He [President Biden] spoke about this on the campaign. He believes in decriminalizing the use of marijuana, but his position has not changed."[385]

In the 116th Congress, legislation was introduced that would have amended the CSA such that provisions relating to marijuana would not apply to a person who is acting in compliance with relevant state law.[386] Policymakers may alternatively choose to more closely examine the finer

[381] According to a report from the Kansas Attorney General, "the major effect of Colorado marijuana 'legalization' appears to be that high grade marijuana from Colorado has to a large extent replaced lower grade marijuana from Mexico and home grown marijuana." See Attorney General, State of Kansas, *"Legalization" of Marijuana in Colorado: The Impact on Kansas*, Compiled by Assistant Solicitor General Dwight Carswell, October 10, 2016, p. 1.

[382] U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Fiscal Year 2022 Budget Request for The Department of Justice*, 117th Cong., 1st sess., May 4, 2021.

[383] See the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235), §538; the Consolidated Appropriations Act, 2016 (P.L. 114-113), §542; the Consolidated Appropriations Act, 2017 (P.L. 115-31), §537; the Consolidated Appropriations Act, 2018 (P.L. 115-141), §538; and the Consolidated Appropriations Act, 2019 (P.L. 116-6), §537. The medical marijuana provision remained in effect during the FY2020 continuing resolution (the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019; P.L. 116-59) that continued appropriations for the bureaus and agencies funded through the annual Commerce, Justice, Science, and Related Agencies appropriations until November 21, 2019.

[384] The medical marijuana policy rider would cease to be in effect if Congress does not either continue to put it in the appropriations act, or add futurity language (thereby making it permanent).

[385] The White House, Office of the Press Secretary, "Press Briefing by Press Secretary Jen Psaki, March 30, 2021," March 30, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/30/press-briefing-by-press-secretary-jen-psaki-march-30-2021/; and Bob Woods, "The cannabis industry could be a big winner on Election Day," *CNBC*, October 18, 2020.

[386] See, for example, the Responsibly Addressing the Marijuana Policy Gap Act of 2019 (S. 421/H.R. 1119) and the Compassionate Access, Research Expansion, and Respect States Act of 2019 (CARERS Act of 2019, H.R. 127).

points in state medical marijuana laws, and direct federal agencies such as DEA to intercede, as laws are not uniform across the country and law enforcement has voiced concern over some details of state medical marijuana programs. For example, according to an investigation by Rocky Mountain Public Broadcasting Service (RMPBS), federal law enforcement believes that home cultivation contributed to the growth of the black market in Colorado. While Colorado has since reduced the number of medical marijuana plants allowed to be grown, it previously allowed individuals to grow up to 99 plants (with a doctor recommendation).[387] Congress, among other options, could choose to refine its annual appropriations rider[388] to disallow laws that permit a large number of homegrown marijuana plants for personal medical use.

State Medical Marijuana Laws and the Department of Veterans Affairs

A topic of particular interest to federal policymakers has been how federal health care providers—especially those in the Department of Veterans Affairs (VA)—may have changed how they conduct their work in states with medical marijuana laws. VA policy allows for Veterans Health Administration (VHA) providers to discuss marijuana use with patients and does not deny health care services to veterans who participate in state marijuana programs. However, VHA providers are prohibited from completing the forms that are necessary for patients to access medical marijuana.[389] In recent years, Members in both chambers have introduced legislation that would allow VHA providers to complete such forms.[390] The VA is against allowing its providers to complete these forms at this time for several reasons: (1) the uncertainty about the clinical benefits of marijuana, (2) the often unknown potency in marijuana products available in state marijuana programs, and (3) based on guidance from DEA, VHA providers would not be exempt from criminal sanctions per enforcement of the CSA.[391]

Conclusion

The discrepancies between federal and state marijuana laws result in businesses and individuals operating in a lawful manner in their respective states, but in an unlawful manner under federal law. The federal government holds that a product containing 0.3% THC or more is a dangerous substance, and federal law largely prohibits its cultivation, use, and sale; however, an adult may enter a marijuana dispensary in certain states and purchase a product with up to 90% THC

[387] Colorado residents may now grow up to six plants per resident over age 21. See State of Colorado, *Home Grow Laws*, https://www.colorado.gov/pacific/marijuana/home-grow-laws; and Lori Jane Gliha, John Ferrugia, and Brittany Freeman, "Cultivating Crime: How Colorado Became a Major Exporter of Illegal Marijuana," *Rocky Mountain PBS News*, December 12, 2018, p. http://www.rmpbs.org.

[388] This is the annual appropriations rider that prohibits DOJ from using funds to prevent states from implementing their medical marijuana laws, which is discussed in other sections of this report.

[389] Department of Veterans Affairs, Veterans Health Administration (VHA), *Access to VHA Clinical Programs for Veterans Participating In State- Approved Marijuana Programs*, VHA Directive 1315, Washington, DC, December 8, 2017, https://www.publichealth.va.gov/marijuana.asp. This directive will expire on December 31, 2022.

[390] See the Veterans Equal Access Act (H.R. 1647 in the 116th Congress); the Medical Cannabis Research Act of 2019 (H.R. 601 in the 116th Congress); and the Veterans Cannabis Use for Safe Healing Act (H.R. 2191 in the 116th Congress). Other bills have also attempted to address veterans' access to cannabis including the Veterans Cannabis Use for Safe Healing Act (H.R. 430 in the 117th Congress); the Veterans Medical Marijuana Safe Harbor Act (H.R. 2588; S. 1183); the VA Medicinal Cannabis Research Act of 2021 (H.R. 2916; S. 1467 in the 117th Congress); the Veterans CARE Act (H.R. 2932 in the 117th Congress); the Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act (H.R. 3105 in the 117th Congress); and the Fully Informed Veteran Act of 2021 (H.R. 3601).

[391] U.S. Congress, House Committee on Veterans' Affairs, Subcommittee on Health, *Statement of Dr. Keita Franklin, National Director for Suicide Prevention, Office of Mental Health and Suicide Prevention, Veterans Health Administration (VHA), Department of Veterans Affairs*, 116th Cong., 1st sess., April 30, 2019, pp. 8-11.

content. Congress may address the gap between the states and the federal government in any number of ways to learn more about marijuana use. It may commission additional studies on: the medicinal benefits and the health risks of cannabis use, cannabis as a source of tax revenue, implications of legalization on criminal justice system resources, the impact of marijuana prohibition on individuals convicted of marijuana offenses, implications of marijuana legalization on the FDA and USDA, and other related issues of congressional concern.

Federal control of cannabis has evolved from the universal strict laws and policies of the 20th century to today where medical marijuana production and distribution is allowed in 37 states and 18 states allow access to marijuana for all adults. Congress may halt and reverse this evolution, take no action on the issue, continue to relinquish federal criminal control, or it may eliminate federal criminal control of cannabis altogether. Congress may consider the implications that any change to cannabis control would have for criminal drug control in the United States and around the world.

Appendix A. Key Terms Used in the Report

The following are key terms used through this report:

Cannabinoid: A naturally occurring chemical compound found in cannabis is referred to as a cannabinoid.

> *Cannabidiol (CBD):* CBD is a nonpsychoactive compound found in both marijuana and hemp. It is heavily researched for its potential medicinal value.
>
> *Delta-8-tetrahydrocannabinol (THC):* Delta-8-THC is a psychoactive compound found in the Cannabis sativa plant, but not in significant amounts.
>
> *Delta-9-THC:* Delta-9-THC is an abundant cannabinoid found in the Cannabis sativa plant, and is the primary psychoactive compound found in marijuana. Like CBD, it is heavily researched for its potential medicinal value. Generally in this report, delta-9-THC is referred to as "THC."

Cannabis: The Cannabis sativa plant is often referred to as cannabis, an umbrella term that includes marijuana and hemp. Delta-9-THC and CBD are thought to be the most abundant cannabinoids in the Cannabis sativa plant.

Criminalization: This term refers to the act of making an activity a criminal offense. Committing such an offense subjects an individual to criminal penalties.

Decriminalization: This term can be defined in different ways, but with drug offenses, generally it refers to the removal of criminal penalties for the offense (e.g., for small, personal-consumption amounts of a controlled substance), and instead, makes the offense a civil or local infraction. It may also refer to a jurisdiction making the possession of a controlled substance a very low misdemeanor with no possibility of jail time.

Hemp: Hemp is a variety of the Cannabis sativa plant that is grown specifically for industrial use. It was removed from the CSA definition of marijuana in 2018 and is cultivated for use in the production of a wide range of products, including foods and beverages, personal care products, dietary supplements, fabrics and textiles, paper, construction materials, and other manufactured and industrial goods.

Section 1639o of Title 7 of the U.S. Code defines hemp as follows:

> the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Legalization: This term refers to the act of making an activity legal, or allowable under law, which was previously illegal.

Marijuana (*or "marihuana" as it is spelled in the CSA*): Marijuana generally refers to the cultivated plant used as a psychotropic drug (whether used for medicinal or recreational purposes). Delta-9-THC is its primary psychoactive compound.

Section 802 (16) of the CSA defines marijuana as follows:

> (A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term "marihuana" does not include—(i) hemp, as defined in section 1639o of title 7; or (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Appendix B. Approved Cannabis-Related Drugs and Research

To date, FDA has not approved a marketing application for marijuana. FDA has approved Epidiolex, a prescription drug containing CBD (the primary nonpsychoactive compound in cannabis). Epidiolex—approved to treat seizures associated with two rare and severe forms of epilepsy—contains CBD extracted from the cannabis plant and is the first (and only) FDA-approved drug containing a purified drug substance derived from marijuana.[392]

FDA also has approved three marijuana-related products. Marinol and Syndros, which contain the active ingredient dronabinol (a synthetic THC), are approved as anti-emetics (to reduce nausea or prevent vomiting) for patients on chemotherapy and as appetite stimulants for patients with AIDS-related weight loss.[393] Generic versions of Marinol have been approved as well. While Marinol (capsules) and Syndros (an oral solution) have the same pharmacology, the two formulations differ in their physical and chemical properties and are in different schedules of the CSA. Marinol (and generic versions) are in Schedule III, while Syndros is in Schedule II.[394] Cesamet, which contains the active ingredient nabilone (whose chemical structure is similar to THC and is synthetically derived), is FDA-approved for treatment of nausea and vomiting associated with chemotherapy among patients who have not responded to conventional treatments.[395] Cesamet is a Schedule II controlled substance.

Other CBD and marijuana-related drugs may be in the pipeline, as evidenced by the numerous clinical trials that are ongoing, recruiting, or have been completed.[396] While not yet approved in the United States, GW Pharmaceuticals' Sativex—a cannabis-extract spray containing a 1:1 ratio of CBD and delta-9 THC—has regulatory approval in more than 25 countries for the treatment of spasticity (muscle stiffness/spasm) due to multiple sclerosis (MS).[397] For example, in Canada, Sativex is indicated as an adjunctive treatment for symptomatic relief of spasticity in patients with MS who have not responded adequately to other therapy.[398] Previously, Sativex was authorized as an adjunctive treatment for neuropathic pain in adult patients with MS and persistent background

[392] FDA, "FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy," June 25, 2018, https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm. *Epidiolex* is the proprietary or brand name of the drug, while *cannabidiol* is the nonproprietary or generic name, which is the same as the drug's active ingredient.

[393] FDA first approved dronabinol in 1985 under the trade name Marinol, which is registered to AbbVie Inc. See http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018651.

[394] Marinol was approved by FDA in 1985 and placed in Schedule II of the CSA. In July 1999, Marinol was moved to Schedule III after DEA found "that the difficulty of separating dronabinol from the sesame oil formulation and the delayed onset of behavioral effects due to oral route administration supported a lower abuse potential of Marinol as compared to substances in Schedule II." Syndros was approved by FDA in 2016, and due to its abuse potential it remains in Schedule II. See "Schedules of Controlled Substances: Placement of FDA-Approved Products of Oral Solutions Containing Dronabinol [(-)-delta-9-trans-tetrahydrocannabinol (delta-9-THC)] in Schedule II," interim rule, March 23, 2017, 82 *Federal Register* 14815, and final rule, November 22, 2017, 82 *Federal Register* 55504.

[395] FDA first approved nabilone in 1985 under the trade name Cesamet, which is registered to Meda Pharmaceuticals Inc. See http://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=018677.

[396] National Institutes of Health, National Library of Medicine, Clinicaltrials.gov, accessed January 13, 2022, https://clinicaltrials.gov/ct2/results?cond=&term=Cannabidiol&cntry=&state=&city=&dist=.

[397] GW Pharmaceuticals, "Information on Sativex," https://www.gwpharm.com/healthcare-professionals/sativex.

[398] Health Canada, Product Monograph Including Patient Medication Information SATIVEX® delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD) Solution, 27mg/mL / 25mg/mL, Buccal spray, revised December 11, 2019, https://pdf.hres.ca/dpd_pm/00054388.PDF.

pain in adult patients with advanced cancer. [399] However, these indications were removed from the Sativex monograph after confirmatory trials did not support the therapeutic advantage of Sativex for neuropathic and cancer pain.[400] In 2014, GW Pharmaceuticals announced that the FDA had granted Fast Track designation to Sativex as a potential pain reliever for patients with advanced cancer.[401] However, Phase III clinical trials previously conducted by the company found that Sativex failed to show superiority over placebo in the treatment of pain in patients with advanced cancer who experience inadequate analgesia during optimized chronic opioid therapy.[402] Furthermore, while CBD is predicted to have anti-inflammatory properties, which may play a role in its analgesic effects, preliminary evidence suggests that the analgesia is mediated by THC, and it is unclear the extent to which CBD contributes to those therapeutic effects.[403] GW Pharmaceuticals reports that it is testing cannabinoid products for treatment of various conditions, including epilepsy, spasticity and PTSD, autism spectrum disorder, and schizophrenia, among others.[404]

Much of this research is in its nascent stages; therefore, conclusive evidence on the use of marijuana to treat various health conditions will likely not be available for some time. There are also still many unknowns regarding how marijuana would be used in medical treatment, including the individual and combined clinical benefits of THC, CBD, and other cannabinoids; proper dosage; and effects of different routes of administration, among others.[405] In addition, the short- and long-term health effects of marijuana use are largely unknown, in part due to the challenges of researching marijuana in the United States.[406]

Federal Research Requirements for Marijuana

For research involving controlled substances, many of the federal research requirements are standard across all schedules; however, some requirements vary according to the assigned schedule of the particular substance. Federal regulations are more stringent for Schedule I substances—including marijuana. Examples include the following:

[399] Product Monograph for SATIVEX, as authorized for marketing by Health Canada, https://pdf.hres.ca/dpd_pm/00016162.PDF.

[400] Health Canada, Health Product InfoWatch, January 2020, https://www.canada.ca/en/health-canada/services/drugs-health-products/medeffect-canada/health-product-infowatch/january-2020.html#a4.1.

[401] GW Pharmaceuticals, "GW Pharmaceuticals Announces that Sativex Receives Fast Track Designation from FDA in Cancer Pain," press release, April 28, 2014, http://ir.gwpharm.com/releasedetail.cfm?ReleaseID=842890. For an explanation of FDA's Fast Track designation, see http://www.fda.gov/forpatients/approvals/fast/ucm20041766.htm.

[402] GW Pharmaceuticals, "GW Pharmaceuticals and Otsuka Announce Results From Two Remaining Sativex(R) Phase 3 Cancer Pain Trials," press release, October 27, 2015, http://ir.gwpharm.com/static-files/f2fc7456-a4a3-4d3b-a98c-47954ec397dd.

[403] U.S. Congress, Testimony before the United States Senate Caucus on International Narcotics Control, *The Biology and Potential Therapeutic Effects of Cannabidiol*, prepared by Dr. Nora Volkow, National Institute on Drug Abuse, National Institutes of Health, 114th Cong., 1st sess., June 24, 2015.

[404] GW Pharmaceuticals, "Therapeutic Areas," https://www.gwpharm.com/healthcare-professionals/research/therapeutic-areas#.

[405] National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, Washington, DC, 2017, p. 396, doi: 10.17226/24625.

[406] Ibid. See also, for example, L. Sanders, "The CBD Boom is Way Ahead of the Science," *Science News*, March 27, 2019.

- For Schedule I substances, such as marijuana, even if practitioners have a DEA registration for a substance in Schedules II-V, they must obtain a *separate* DEA registration for Schedule I substances.
- Individuals who seek to register to manufacture a controlled substance (for any purpose) in Schedule I or II are subject to production quota limitations as determined by DEA,[407] but registrants for substances in Schedules III-V are not subject to such quotas.
- Researchers are required to store Schedule I and II substances in electronically monitored safes, steel cabinets, or vaults that meet or exceed certain specifications[408]; they are required to store Schedule III-V substances by secure standards as well, but the requirements are less stringent.
- When researchers apply for a DEA registration to conduct research involving Schedule I controlled substances, they must comply with federal regulations specifying the form and content of the research protocols.[409] The DEA Administrator must forward a copy of the application and research protocol to HHS, which is responsible for determining "the qualifications and competency of the applicant, as well as the merits of the protocol."[410] The HHS Secretary delegates that responsibility to FDA. No equivalent process is required for Schedule II-V controlled substances.

Marijuana Supply for Researchers

Under the CSA, the Attorney General is required to register an applicant who would like to manufacture Schedule I or II controlled substances "if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971."[411] DEA thus seeks to balance the demands from researchers for a larger, more diverse supply of marijuana against the United States' obligations under international treaties.[412] Further, the supply of marijuana and other Schedule I and II controlled substances is subject to production quota limitations determined by DEA based on an annual assessment of need.

In the case of marijuana, the National Center for Natural Products Research at the University of Mississippi was previously the only registered manufacturer, operating under a contract administered by the National Institute on Drug Abuse (NIDA), which is housed in HHS's National Institutes of Health. For over 50 years, NIDA was the only official source of marijuana for research purposes—which some referred to as a "federal marijuana monopoly."[413] Some have contended that marijuana provided by NIDA to researchers is "both qualitatively and

[407] See 21 U.S.C. §826.

[408] 21 C.F.R. §§1301.72(a)(1)(i)-(iii) (specifications required for safes and steel cabinets storing Schedule I and II drugs or substances); see also 21 C.F.R. Sections 1301.72(a)(2) and 1301.72(a)(3)(i)-(vi) (specifications required for vaults storing Schedule I and II drugs or substances).

[409] 21 C.F.R. §1301.18(a).

[410] 21 U.S.C. §823(f); 21 C.F.R. §1301.32(a).

[411] 21 U.S.C. §823(a).

[412] DOJ, *Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotic Drugs*, June 6, 2018.

[413] See *NIDA's Role in Providing Marijuana for Research*, at http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research; and Marc Kaufman, "Federal Marijuana Monopoly Challenged," *Washington Post*, December 12, 2005.

quantitatively inadequate."[414] For example, some of the issues researchers have raised regarding the Center for Natural Products Research marijuana include

- mold found in the samples of bulk marijuana,[415]
- excessive age of the samples,[416]
- lower THC potency compared to local products, and
- a lower number of product options compared to what is available elsewhere.[417]

Of note, NIDA states there is currently no universally accepted standard for levels of mold on marijuana, and NIDA's Certificates of Analysis for their marijuana state that NIDA may store marijuana for up to 10 years prior to shipment.[418] NIDA provides marijuana to researchers with a range of potencies.[419]

Over the last several years, both Congress and the executive branch have addressed the marijuana supply for researchers issue.

- In 2015, the Improving Regulatory Transparency for New Medical Therapies Act (P.L. 114-89) amended the CSA and imposed deadlines on DEA to issue notice of each application for a registration to manufacture Schedule I substances for research and then act on the application.[420]
- In August 2016, DEA announced a policy change "designed to foster research by expanding the number of DEA-registered marijuana manufacturers."[421] Under the new policy, DEA stated that it would register additional growers to "operate independently, provided the grower agrees (through a written memorandum of agreement with DEA) that it will only distribute marijuana with prior, written approval from DEA."[422] In addition, under the new policy these growers would only be permitted to supply marijuana to DEA-registered researchers whose protocols have been determined to be "scientifically meritorious." This new approach, DEA stated, will allow individuals to obtain a DEA cultivation registration "not only to supply federally funded or other academic researchers,

[414] Marc Kaufman, "Federal Marijuana Monopoly Challenged," *Washington Post*, December 12, 2005; and DOJ, DEA, "Lyle E. Craker; Denial of Application," 74 *Federal Register* 2101, January 14, 2009.

[415] NIDA states there is currently no universally accepted standard for levels of mold and yeast on marijuana and "different health organizations set cutoffs for acceptable levels spanning an enormous range [from 500-200,000 colony forming units (CFU)/g]." See *NIDA's Role in Providing Marijuana for Research*, at http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research.

[416] NIDA indicates that it may store marijuana for up to 10 years prior to shipment.

[417] Heike Newman, "Cannabis Clinical Investigations in Colorado 2019," *Food and Drug Law Institute*, July/August 2019.

[418] National Institute on Drug Abuse, *NIDA's Role in Providing Marijuana for Research*, March 27, 2020; and Heike Newman, "Cannabis Clinical Investigations in Colorado 2019," *Food and Drug Law Institute*, July/August 2019.

[419] National Institute on Drug Abuse, *Marijuana Plant Material Available from the NIDA Drug Supply Program*, March 10, 2016.

[420] See 21 U.S.C. §823(i)(2).

[421] DOJ, DEA, *DEA Announces Actions Related to Marijuana and Industrial Hemp*, August 11, 2016.

[422] DOJ, DEA, "Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States," 81 *Federal Register* 53846-53848, August 12, 2016.

but also for strictly commercial endeavors funded by the private sector and aimed at drug product development."[423]

- Some attributed the delay in issuance of new registrations to a 2018 finding by the DOJ, Office of Legal Counsel (OLC) that DEA must change its current practices (registration of a single manufacturer) to adopt a framework in which it purchases and takes possession of the entire marijuana crop of each registrant after the marijuana is harvested. Further, the DOJ, OLC stated that DEA "must generally monopolize the import, export, wholesale trade, and stock maintenance of lawfully grown marijuana" to comply with the Single Convention on Narcotic Drugs.[424]
- In August 2019, former Attorney General Barr announced that DEA is "moving forward with its review of applications for those who seek to grow marijuana legally to support research."[425]
- In December 2020, DEA published a final rule that, among other things, requires all registered manufacturers who cultivate marijuana "to deliver" their total crops to DEA with limited exception;[426] however, the crops may remain at the manufacturers' registered locations. DEA is to purchase and take possession of such crops (not later than four months after harvest ends) by designating a secure storage mechanism at the registered location and controlling access to the marijuana.[427]

These actions were precursors to DEA's announcement on May 14, 2021 that it would soon be registering additional manufacturers of marijuana.[428] As outlined in the announcement, DEA provided Memoranda of Agreement (MOAs) to multiple manufacturers pending final approval of their registration applications. As of April 1, 2022, DEA has five registered marijuana growers listed on their website.[429] Additional registrations to manufacture marijuana may increase the quantity and improve facets of marijuana research, and possibly contribute to future debate on rescheduling.[430]

[423] Ibid.

[424] DOJ, Office of Legal Counsel, *Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotic Drugs*, June 6, 2018.

[425] An applicant for a registration petitioned the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) for a writ of mandamus compelling DEA to issue notice of its application, and in July 2019 the D.C. Circuit ordered DEA to respond to the petition. On August 27, 2019, DEA published a notice in the *Federal Register* (1) providing notice of the 33 applications it has received to manufacture Schedule I controlled substances for research purposes and (2) announcing the agency's intent to promulgate regulations governing the manufacture of marijuana for research purposes. See Pet. for Writ of Mandamus at 16, *In re* Scottsdale Research Inst., No. 19-1120 (D.C. Cir. June 6, 2019); Order, *In re* Scottsdale Research Inst., No. 19-1120 (D.C. Cir. July 29, 2019; and DOJ, DEA, *DEA announces steps necessary to improve access to marijuana research*, August 25, 2019, https://www.dea.gov/press-releases.

[426] 21 C.F.R. §1318.04.

[427] DOJ, DEA, "Controls To Enhance the Cultivation of Marihuana for Research in the United States," 85 *Federal Register* 82333-82355, December 18, 2020.

[428] DOJ, DEA, *DEA Continues to Prioritize Efforts to Expand Access to Marijuana for Research in the United States*, May 14, 2021.

[429] DOJ, DEA, Diversion Control Division, *Marihuana Growers Information*, https://www.deadiversion.usdoj.gov/drugreg/marihuana.htm.

[430] Both FDA and DEA identified the lack of research as a significant factor in denying the rescheduling petitions in 2016.

Appendix C. Research on Effects of Cannabis Use

Some evidence suggests that cannabis may have therapeutic benefits, for example, in the treatment of chronic pain, chemotherapy-induced nausea and vomiting, and spasticity among patients with multiple sclerosis. Further, naturally occurring compounds found in cannabis called cannabinoids such as CBD and THC have proven therapeutic uses, as the Food and Drug Administration (FDA) has approved drugs that contain CBD and dronabinol (a synthetic THC) as active ingredients (see **Appendix B**). THC and CBD interact with specific cell receptors in the brain and throughout the body to produce their intended effects. While THC activates certain receptors that then produce euphoric or intoxicating effects,[431] CBD has low affinity for those same receptors and therefore does not produce intoxicating effects.[432] Some preclinical (e.g., animal model) research suggests that CBD may interact with other brain-signaling systems that can produce therapeutic effects, such as the reduction of seizures, pain, and anxiety.[433] Still, questions remain regarding the underlying mechanism of action for therapeutic benefits of these and other cannabinoids. For example, while CBD is predicted to have anti-inflammatory properties, which may play a role in its analgesic effects, preliminary evidence suggests that the analgesia is mediated by THC, and the extent to which CBD contributes to those therapeutic effects is unclear.[434]

According to the National Institutes on Drug Abuse (NIDA) at the National Institutes of Health (NIH), researchers generally consider therapeutics that use purified chemicals derived from or based on those in the cannabis plant, such as those approved by FDA (e.g., Epidiolex), "to be more promising therapeutically" than use of the whole plant or its crude extracts.[435] Scientific evaluations conducted separately by FDA and the National Academies of Sciences, Engineering, and Medicine (NASEM) may further support this assertion. These evaluations also illustrate the challenge of meeting the required standard of evidence (for FDA approval of a substance) or to demonstrate effective medical use of cannabis. While the purposes of the evaluations differed—resulting in different approaches being taken—both FDA and the NASEM found that the evidence base at the time the evaluations were conducted was, at least partially, elusive.

FDA's evaluation, called an eight-factor analysis,[436] was conducted in 2015 pursuant to a request by DEA. As statutorily required, DEA requested a scientific evaluation from the Secretary of Health and Human Services in response to petitions asking DEA to reschedule marijuana administratively.[437] FDA evaluated the research on marijuana only, not drugs containing a plant-derived chemical constituent of marijuana or drugs containing synthetic THC. FDA's analysis of

[431] National Academies of Sciences, Engineering, and Medicine (NASEM), "The Health Effects of Cannabis and Cannabinoids: Current State of Evidence and Recommendations for Research" (Washington, DC: National Academies Press), 2017.

[432] U.S. Congress, Testimony before the United States Senate Caucus on International Narcotics Control, The Biology and Potential Therapeutic Effects of Cannabidiol, prepared by Dr. Nora Volkow, National Institute on Drug Abuse, National Institutes of Health, 114th Cong., 1st sess., June 24, 2015.

[433] Ibid.

[434] Ibid.

[435] National Institutes of Health (NIH) National Institute on Drug Abuse (NIDA), "Marijuana Research Report," July 2020, https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-safe-effective-medicine.

[436] The term *eight-factor analysis* refers to the eight factors to be included pursuant to 21 U.S.C. Section 811(c).

[437] The request for a scientific and medical evaluation is required by 21 U.S.C. Section 811(b). The results of an earlier eight-factor analysis are available at DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 76 *Federal Register* 40551-40589, July 8, 2011.

the literature on marijuana's potential therapeutic effects was limited to 11 published studies that were considered "adequate and well-controlled clinical studies" (i.e., the studies were randomized controlled trials).[438] The studies examined marijuana's use to treat neuropathic pain (five studies), stimulate appetite in patients with HIV (two studies), treat glaucoma (two studies), treat spasticity in multiple sclerosis patients (one study), and treat asthma (one study).[439] As part of the evaluation, the FDA also assessed potential risks of marijuana use. Based on the data available at the time of the evaluation, FDA determined that marijuana met the criteria for placement in Schedule I of the CSA due its high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. NIDA concurred with this recommendation. Based on FDA's recommendation and other data, DEA determined that marijuana meets the criteria for Schedule I control.[440]

In January 2017, the NASEM published the findings of an almost year-long evaluation of cannabis, its constituents, and drugs containing synthetic THC. The NASEM focused on 11 groups of health topics and concerns: (1) therapeutic effects; (2) cancer; (3) cardiometabolic risk; (4) respiratory disease; (5) immunity; (6) injury and death; (7) prenatal, perinatal, and postnatal exposure to cannabis; (8) psychosocial effects, including cognitive domains of learning, memory, and attention and developmental implications among adolescents; (9) mental health; (10) problem cannabis use; and (11) cannabis use and abuse of other substances.[441] For each of these 11 health topics, the report assessed "fair- and good-quality" research, relying on systematic reviews published since 2011 (where available) and primary research published after the systematic review (or since 1999, if no systematic review exists).[442] The report presented nearly 100 conclusions, including some related to the challenges in conducting research with cannabis and cannabinoids. For example, the NASEM found conclusive or substantial evidence that cannabis or cannabinoids are an effective treatment for chronic pain, chemotherapy-induced nausea and vomiting, and self-reported symptoms of spasticity among patients with multiple sclerosis (but limited evidence for an effect on clinician-measured spasticity). The NASEM found insufficient or no evidence to support or refute conclusions regarding potential therapeutic effects of cannabis or cannabinoids for a variety of other examined health conditions (e.g., improving symptoms of posttraumatic stress disorder and certain cancers).[443]

There is interest in studying the potential utility of cannabis and its cannabinoids for various medical conditions, as evidenced by the numerous ongoing randomized controlled trials listed on clinicaltrials.gov, a database maintained by the NIH National Library of Medicine. However, researchers face several challenges in undertaking cannabis research programs. First are the challenges that are inherent to botanical drug development. As indicated by NIDA, botanicals such as the cannabis plant "may contain hundreds of unknown, active chemicals, and it can be

[438] Randomized controlled trials randomize patients into either an intervention group(s) or a placebo group. Randomization allows for differences observed between the groups to be attributable to the intervention, rather than differences between participants. For more information, see Leon Gordis, *Epidemiology*, 5th ed. (Philadelphia, PA: Elsevier Saunders, 2014).

[439] DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53689, August 12, 2016. Memorandum from the Acting Commissioner of Foods and Drugs to the Acting Assistant Secretary for Health, "Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act," May 20, 2015.

[440] DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53689, August 12, 2016.

[441] NASEM, "The Health Effects of Cannabis and Cannabinoids: Current State of Evidence and Recommendations for Research" (Washington, DC: National Academies Press), 2017.

[442] Ibid.

[443] Ibid.

difficult to develop a product with accurate and consistent doses of these chemicals."[444] In its 2015 evaluation, FDA identified eight methodological limitations of the marijuana studies in the published literature at the time, including a lack of consistent administration and reproducible dosing of marijuana.[445] FDA has issued guidance to assist researchers and drug manufacturers with development of plant-derived drugs, including from cannabis.[446] In addition, federal and state restrictions on cannabis research further make it difficult to study the safety and effectiveness of cannabis as treatment. As discussed in this report, individuals who seek to conduct research on any controlled substance must do so in accordance with the Controlled Substances Act and other federal laws, and DEA research requirements are more stringent for Schedule I and Schedule II substances than for substances in Schedules III-V (see **Appendix B**). In its 2015 evaluation, FDA identified several aspects of federal marijuana oversight that may warrant review to promote "efficient and scientifically rigorous research with marijuana and its constituents."[447]

Given these challenges, many uncertainties remain around the health benefits and risks of cannabis use. For example, some literature suggests that cannabis may be effective in treating certain conditions such as chronic pain, which is the most common condition cited by patients for the medical use of cannabis.[448] Other evaluations indicate there is limited evidence to recommend cannabis or cannabinoids for treatment of chronic pain.[449] Some research also has suggested an inverse relationship between state availability of medical marijuana and opioid analgesic overdose mortality.[450] For example, a 2014 NIDA-funded study found that from 1999 to 2010, states with medical cannabis laws experienced slower rates of increase in opioid overdose death rates compared to states without such laws.[451] However, another 2019 NIDA-funded study re-examined this relationship using data through 2017, finding that the trend reversed.[452] In particular, the 2019 analysis reported that states with medical cannabis laws experienced an increase in opioid morality deaths. Further, HHS agencies (e.g., FDA, NIH, the Centers for Disease Control and Prevention [CDC], Substance Abuse and Mental Health Services Administration [SAMHSA]) and NASEM have indicated that cannabis use is not without risks

[444] NIH, NIDA, "Marijuana Research Report," July 2020, https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-safe-effective-medicine.

[445] DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53689, August 12, 2016.

[446] FDA, "Botanical Drug Development," Guidance for Industry, December 2016, https://www.fda.gov/media/93113/download. FDA, "Cannabis and Cannabis-Derived Compounds: Quality Considerations for Clinical Research," Draft Guidance for Industry, July 2020, https://www.fda.gov/media/140319/download.

[447] Memorandum from the Acting Commissioner of Foods and Drugs to the Acting Assistant Secretary for Health, "Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act," May 20, 2015, pp. 2-4.

[448] NASEM, "The Health Effects of Cannabis and Cannabinoids: Current State of Evidence and Recommendations for Research" (Washington, DC: National Academies Press), 2017, pp. 85-90.

[449] Jason W Busse, Patrick Vankrunkelsven, Linan Zeng et al., "Rapid Recommendations: Medical Cannabis or Cannabinoids for Chronic Pain: A Clinical Practice Guideline," *British Medical Journal (BMJ)*, September 2021, vol. 374, no. 2040, pp. 1-10.

[450] NASEM, "The Health Effects of Cannabis and Cannabinoids: Current State of Evidence and Recommendations for Research" (Washington, DC: National Academies Press), 2017, p. 87.

[451] Marcus A. Bachhuber, Brendan Saloner, Chinazo O. Cunningham et al., "Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010," *JAMA Internal Medicine*, October 2014, vol. 174, no. 10, pp. 1668-1673.

[452] Chelsea L. Shover, Corey S. Davis, Sanford C. Gordon et al., "Association Between Medical Cannabis Laws and Opioid Overdose Mortality has Reversed Over Time," *Proceedings of the National Academy of Sciences (PNAS)*, June 2019, vol. 116, no. 26, pp. 12624-12626.

and may pose both short-term and long-term adverse health outcomes, particularly for certain groups.[453] See the text box below.

Risks Associated with Marijuana Use

Marijuana can affect the central nervous system, the cardiovascular system, the respiratory system, and the immune system. Its effects may vary according to how it is consumed (e.g., inhaled or ingested), how much is consumed (including a range of THC content), how often it is consumed, over what time frame it is consumed, and other factors.

Some of marijuana's most widely recognized effects—which are largely due to the presence of THC—are among the reasons people use it recreationally: it can reduce inhibition, improve mood, enhance sensory perception, and heighten imagination, among other effects. Some common effects are more problematic: it can cause dizziness, confusion, ataxia (i.e., uncoordinated movements), delusions, and agitation, among other effects. Marijuana's acute effects can impair an individual's ability to perform daily activities, such as studying or driving. Chronic use of marijuana can lead to dependence and, in the case of heavy chronic use, the potential for withdrawal (with symptoms like insomnia, weight loss, and irritability).[454] Further, certain marijuana products, such as marijuana edibles, may present greater risk of adverse reaction, particularly for youth in situations of accidental exposure.[455]

[453] Memorandum from the Acting Commissioner of Foods and Drugs to the Acting Assistant Secretary for Health "Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act," May 20, 2015. DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53689, August 12, 2016. Centers for Disease Control and Prevention (CDC), "Health Effects of Marijuana," updated June 2, 2021, https://www.cdc.gov/marijuana/health-effects/index.html. NIH, NIDA, "Marijuana Research Report," July 2020, https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-safe-effective-medicine. Substance Abuse and Mental Health Services Administration (SAMHSA), "Learn about Marijuana Risks," updated August 12, 2021, https://www.samhsa.gov/marijuana.

[454] DOJ, DEA, "Denial of Petition to Initiate Proceedings to Reschedule Marijuana," 81 *Federal Register* 53689, August 12, 2016.

[455] Jennifer M. Whitehill, Julia A. Dilley, and Ashley Brooks-Russell et al., "Edible Cannabis Exposures Among Children: 2017-2019," *Pediatrics*, vol. 147, no. 4 (April 1, 2021).

Appendix D. Federal Regulation of Hemp and CBD

As mentioned in the main body of this report, hemp and its derivatives (including hemp-derived CBD) were removed from the CSA definition of marijuana. This cleared the path for legal production of hemp and CBD products, but federal control over production and distribution remains an issue.

USDA Regulation of Hemp Production

The 2018 farm bill included a number of provisions intended to facilitate the commercial cultivation, processing, marketing, and sale of hemp in the United States, expanding on policies enacted in the 2014 farm bill (Agricultural Act of 2014, P.L. 113-79).[456] As defined in federal agricultural law,[457] hemp is

> the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

As amended, the CSA now states "the term 'marihuana' does not include … hemp, as defined in section 1639o of title 7."[458] Accordingly, cannabis containing no more than a 0.3% concentration of THC is considered to be *hemp* and not *marijuana* for purposes of the CSA and DEA.[459] All cannabis and cannabis-derived products that do not fit the legal definition of *hemp* remain a Schedule I controlled substance under federal law and thus are subject to CSA regulations and DEA oversight (except for certain drug products approved by FDA). Prior to changes enacted in the 2018 farm bill, hemp cultivation, processing, marketing, and sale were subject to the CSA and DEA oversight.

Changes enacted in the 2018 farm bill now allow for the cultivation, processing, marketing, and sale of hemp and hemp-derived products that meet the statutory definition of *hemp*—if produced by an authorized grower in accordance with the 2018 farm bill, associated federal USDA regulations, and applicable state regulations.[460] The 2018 farm bill required that USDA establish a regulatory framework under the Agricultural Marketing Act of 1946[461] making hemp production subject to USDA regulation and oversight as an agricultural commodity.[462] USDA published its

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[456] For more background, see CRS In Focus IF11088, *2018 Farm Bill Primer: Hemp Cultivation and Processing*.

[457] 7 U.S.C. §1639o, codified in Section 297A of the Agricultural Marketing Act of 1946 (AMA). For more background on the definition of hemp, CRS Report R44742, *Defining Hemp: A Fact Sheet*.

[458] 21 U.S.C. §802(16)(B)(i).

[459] As stated in a legal opinion released by the U.S. Department of Agriculture (USDA), following enactment of the 2018 farm bill, "hemp has been removed from schedule I of the Controlled Substances Act and is no longer a controlled substance." See USDA, "Legal Opinion on Authorities for Hemp Production," May 28, 2019, https://www.ams.usda.gov/content/legal-opinion-authorities-hemp-production.

[460] Regulatory plans involving hemp under the oversight of states and tribes will need to include the following requirements: maintenance of relevant production information; THC testing; procedures for disposal of plants (and products from those plants) that exceed hemp THC levels; procedures to comply with USDA's enforcement provisions; procedures for conducting random, annual inspections of hemp producers; procedures for submitting hemp production information to USDA; and certification by state and tribal regulators that they have adequate resources and personnel to implement required procedures.

[461] 7 U.S.C. §§1621 et seq.

[462] P.L. 115-334, §10113. For more background on USDA's forthcoming Hemp Production Program, see USDA's website: https://www.ams.usda.gov/content/hemp-production-program.

final regulations in January 2021. It outlines the USDA process for approving plans submitted by states and tribes for the domestic production of hemp, and establishes a federal plan for producers in jurisdictions that do not have their own USDA-approved plan.[463] The 2018 farm bill further prohibited states and Indian tribes from interfering with the transport of hemp or hemp products produced in accordance with USDA's regulatory requirements.[464]

USDA's final hemp rule clarifies the role DEA will continue to play as part of USDA's regulatory oversight of hemp production in the United States. As required by the 2018 farm bill, USDA is to report any production of hemp without a license to the Attorney General, and report certain other information to federal, state, territorial, and local law enforcement.[465] Some in the hemp industry have objected to what they perceive to be the oversized role of DEA in USDA's hemp regulation.[466] USDA officials, however, have indicated that their interpretation of the 2018 farm bill provisions mandates DEA's role in the regulation of hemp, for both consultations with USDA and certain reporting requirements.[467]

According to USDA, because of changes enacted in the 2018 farm bill, "DEA no longer has authority to require hemp seed permits for import purposes."[468] In addition, a May 2018 internal DEA directive clarified that certain "products and materials that are made from the cannabis plant and which fall outside the CSA definition of marijuana (such as sterilized seeds, oil or cake made from the seeds, and mature stalks) are not controlled under the CSA."[469] The 2018 directive does not apply to cannabis extracts and resins.[470]

FDA Regulation of CBD Products

While the 2018 farm bill removed cannabis and cannabis derivatives that are low in THC (i.e., hemp) from the CSA definition of marijuana, the law explicitly preserved FDA's authority to regulate cannabis and cannabis-derived compounds (including hemp-derived compounds) under the Federal Food, Drug, and Cosmetic Act (FFDCA) and Section 351 of the Public Health Service Act (PHSA).[471] Because the 2018 farm bill did not change FDA law, cannabis and cannabis-derived products are subject to the same regulatory framework as other FDA-regulated

[463] USDA, Agricultural Marketing Service, "Establishment of a Domestic Hemp Production Program," 86 *Federal Register* 5596-5691, January 19, 2021.

[464] P.L. 115-334, §10114. USDA, "Legal Opinion on Authorities for Hemp Production," May 28, 2019, https://www.ams.usda.gov/content/legal-opinion-authorities-hemp-production. USDA's opinion further states that "States and Indian tribes also may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill."

[465] P.L. 115-334, §10113.

[466] Comments submitted to USDA are available at http://www.regulations.gov (docket No. AMS-SC-19-0042; SC19-990-2IR). See also CRS In Focus IF12017, *Farm Bill Primer: Horticulture Title and Related Provisions.*

[467] Verbal comments by Stephen Vaden, USDA General Counsel, at USDA's 96th Annual Agricultural Outlook Forum, February 20, 2020, https://www.usda.gov/oce/forum/2020/Program.htm#s03. See also 2018 farm bill language codified at 7 U.S.C. Section 1639r (Consultation with Attorney General) and 7 U.S.C. Section 1639q (Reporting to Attorney General).

[468] USDA, "Importation of Hemp Seeds," https://www.ams.usda.gov/content/importation-hemp-seeds. In April, 2019, USDA announced that the Plant Variety Protection Office would start accepting applications of seed-propagated hemp for plant variety protection.

[469] DOJ, DEA, "DEA Internal Directive Regarding the Presence of Cannabinoids in Products and Materials Made from the Cannabis Plant," May 22, 2018.

[470] 81 *Federal Register* 240: 90194-90196, December 14, 2016. See also DEA, "Clarification of the New Drug Code (7350) for Marijuana Extract," https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html.

[471] P.L. 115-334, §10113.

products containing any other substance. Hemp-derived products, particularly those claiming to contain CBD, are marketed in a wide range of consumer products—foods and beverages, dietary supplements, and cosmetics and personal care products, among others.[472]

Following enactment of the 2018 farm bill, FDA has maintained its position that it is "unlawful under the [FFDCA] to introduce food containing added CBD or THC into interstate commerce, or to market CBD or THC products as, or in, dietary supplements, regardless of whether the substances are hemp-derived."[473] There are several provisions of the FFDCA that FDA believes restrict the use of CBD and THC in food and dietary supplements. First, under FFDCA Section 301, it is a prohibited act to introduce into interstate commerce a food to which has been added an approved drug or a drug for which substantial clinical investigations have been instituted and made public.[474] There are several exceptions to this prohibition including, for example, if the substance was marketed in food before its approval as a drug or before clinical investigations were instituted. However, FDA has concluded that based on the available evidence these exceptions do not apply to CBD or THC.[475] FDA has the authority to promulgate regulations approving the use of a drug in food,[476] but has never done so for any substance. However, according to FDA, hemp-derived ingredients that do not contain CBD or THC may fall outside the scope of this prohibition.[477] More specifically, foods containing parts of the hemp plant that include only trace amounts of CBD or THC (e.g., hemp seed and hemp-seed derived ingredients) may be lawfully marketed under certain circumstances—pursuant to FDA approval as a food additive or a determination that the substance is generally recognized as safe (GRAS). FDA has not approved hemp as a food additive but it has evaluated three GRAS notices related to hemp seed-derived ingredients (hulled hemp seeds, hemp seed protein, and hemp seed oil), allowing them to be added to human food under specified conditions.[478]

The second FFDCA provision that FDA deems as restricting the use of CBD is specific to its use in dietary supplements. Under the FFDCA, an article that is an active ingredient in an approved drug, or that has been authorized for investigation as a new drug and the existence of such clinical investigations has been made public, is excluded from the definition of a dietary supplement and may not be marketed as such.[479] An exception to this is if FDA issues a regulation finding that use of such substance in a dietary supplement is lawful. According to FDA, CBD is an active ingredient in an FDA-approved drug (i.e., Epidiolex) and was authorized for investigation as a

[472] For more information, see CRS In Focus IF10391, *Hemp-Derived Cannabidiol (CBD) and Related Hemp Extracts*.

[473] FDA, "Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds," December 20, 2018, https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys.

[474] FFDCA §301(ll); 21 U.S.C. §331(ll). See also CRS Report R46189, *FDA Regulation of Cannabidiol (CBD) Consumer Products: Overview and Considerations for Congress*.

[475] FDA, "FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers," updated January 15, 2020, https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers.

[476] FFDCA §301(ll)(2); 21 U.S.C. §331(ll)(2).

[477] FDA, "FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers," updated January 15, 2020, https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers.

[478] FDA, "FDA Responds to Three GRAS Notices for Hemp Seed-Derived Ingredients for Use in Human Food," December 20, 2018, https://www.fda.gov/food/cfsan-constituent-updates/fda-responds-three-gras-notices-hemp-seed-derived-ingredients-use-human-food.

[479] FFDCA §201(ff)(3)(B) [21 U.S.C. §321(ff)(3)(B)].

new drug, for which substantial clinical investigations had been instituted and made public before its marketing as a dietary supplement; as such, CBD may not be sold as a dietary supplement unless FDA promulgates regulations concluding otherwise.[480] The agency maintains this is regardless of whether the CBD is hemp-derived or marijuana-derived. FDA has issued several public statements maintaining that it is unlawful to market CBD as, or in, dietary supplements.[481] Hemp-derived ingredients that do not contain CBD or THC may fall outside the scope of this exclusion.[482]

With regard to cosmetics, FDA has not made the determination that it is unlawful to add CBD to cosmetic products. FDA does not have the authority to conduct premarket review of cosmetic ingredients, and while FDA regulations prohibit or restrict certain cosmetic ingredients, the regulations do not apply to any cannabis or cannabis-derived ingredients (e.g., CBD).[483] FDA does have the authority to take certain enforcement action against adulterated or misbranded cosmetics. If a product makes therapeutic claims (i.e., that its intended use is to cure, mitigate, treat, or prevent a disease), FDA generally considers that product to be a drug and subject to premarket approval.

Delta-8 THC Products

Delta-9-THC is not the only psychoactive compound in cannabis, but it is the primary one. Other psychoactive compounds, such as delta-8-THC, are also found in cannabis, and recently, there has been a rise in delta-8-THC hemp and marijuana products available in state-authorized markets. Due to federal definitions' reference to Delta-9-THC only, these products are federally unregulated, and according to the FDA, some products may be mislabeled as hemp products given the volume of delta-8-THC and the psychoactive effects. In September 2021, both the FDA and the Centers for Disease Control and Prevention (CDC) issued a warning about the dangers of using products containing delta-8-THC.[484]

United States Postal Service (USPS) Policy on Hemp and Hemp-Derived CBD

In June 2019, the U.S. Postal Service (USPS) revised its policies regarding mailing standards for hemp and hemp-based products, including hemp-derived CBD. USPS guidance provides that these produces may be mailed if the mailer "complies with all applicable federal, state, and local laws" pertaining to hemp production, processing, distribution, and sales; and if the mailer "retains

[480] FDA, "Warning Letters and Test Results for Cannabidiol-Related Products," https://www.fda.gov/newsevents/publichealthfocus/ucm484109.htm.

[481] FDA, "Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency's regulation of products containing cannabis and cannabis-derived compounds," December 20, 2018, https://www.fda.gov/newsevents/newsroom/pressAnnouncements/ucm628988.htm.

[482] FDA, "FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers," updated April 2, 2019, https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers.

[483] 21 C.F.R. Part 700.

[484] FDA, *5 Things to Know about Delta-8 Tetrahydrocannabinol – Delta-8 THC*, September 14, 2021, https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc; and CDC, *Increases in Availability of Cannabis Products Containing Delta-8 THC and Reported Cases of Adverse Events*, September 14, 2021, https://emergency.cdc.gov/han/2021/han00451.asp.

records establishing compliance with such laws, including laboratory test results, licenses, or compliance reports, for no less than 2 years after the date of mailing."[485]

The Path Forward: Congressional Oversight of Federal Guidance on Hemp and CBD

Despite changes enacted in the 2018 farm bill, additional challenges remain for U.S. producers of hemp and hemp-derived products. Congress may exercise oversight over the USDA and FDA in their roles regulating the industry.

Oversight of USDA Regulation of Hemp Production

Two Senate committee hearings in July 2019 highlighted a range of issues.[486] These include hemp producers' uncertainty regarding the development and implementation of USDA's hemp regulations and market restrictions in some states and jurisdictions regarding hemp and hemp-derived products. Other issues include, but are not limited to, uncertainty about implementation of the 2018 farm bill's provision regarding convicted felons, regulators and enforcement officials' inability to readily and easily distinguish hemp from marijuana, and difficulty among hemp producers and businesses in obtaining financial services.[487] Additionally, some states and local jurisdictions have challenged the legality of hemp production and hemp-derived products, including hemp-derived CBD edible and ingestible products.[488] Some suggest that the 2018 farm bill's hemp provisions may be in conflict with state law, especially regarding enforcement and interstate commerce; they highlight the lack of reliable roadside testing/sampling, among other concerns.[489] Many states have established programs for hemp processors, requiring state-issued permits among other requirements, and may limit the manufacture of consumer products to regulated processors within their states.[490]

[485] U.S. Postal Service (USPS), "Publication 52 Revision: New Mailability Policy for Cannabis and Hemp-Related Products," Postal Bulletin 22521 (6-6-19), June 6, 2019. Revisions to Publication 52 (Hazardous, Restricted, and Perishable Mail), Section 453.37, "Hemp-based Products."

[486] Issues discussed and statements made by various Members of Congress at U.S. Congress, Senate Committee on Agriculture, Nutrition, & Forestry, "Hemp Production and the 2018 Farm Bill," July 25, 2019; and at U.S. Congress, Senate Banking, Housing and Urban Affairs Committee, "Cannabis Banking Challenges." July 23, 2019.

[487] For additional information on ongoing banking and credit issues, see the letters from Senator McConnell and Senator Wyden to officials of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Office of the Comptroller of the Currency, April 2, 2019; and the letter from the American Bankers Association to officials of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Financial Crimes Enforcement Network, June 21, 2019.

[488] Comments during USDA's 2018 Farm Bill Listening Session on Domestic Hemp Production Program, March 13, 2019, and a Congressional Dietary Supplement Caucus Briefing, "Cannabidiol (CBD): Understanding the Ingredient's Legal and Regulatory Status," May 7, 2019.

[489] See, for example, comments by Collin Mooney, "Commercial Vehicle Safety Alliance during USDA's 2018 Farm Bill Listening Session on Domestic Hemp Production Program, March 13, 2019 (minute 40:17). Also see *Transport Topics*, "Law Enforcement Officers Challenged to Enforce Bill Legalizing Transport of Hemp, CVSA Says," March 14, 2019.

[490] A summary of state laws is available through the National Conference of State Legislatures (NCSL), "State Industrial Hemp Statutes," http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx. See also NCSL, "Regulating Hemp and Cannabis-based products," *LegisBrief*, Vol. 25, No. 37, October 2017.

Some of these challenges may be addressed, in part, by USDA's new regulations governing U.S. hemp production.[491] In part, resolution of these challenges may hinge on the development of readily available technologies for regulators and enforcement officials to distinguish hemp from marijuana.[492]

Oversight of FDA Guidance on CBD

While the 2018 farm bill removed hemp and its derivatives from the definition of marijuana in the CSA, several obstacles may limit the marketing of hemp and its derivatives, including CBD. One of the obstacles is that many of these products remain subject to the FFDCA, and FDA has determined that, at this time, CBD cannot be added to any food that is sold in interstate commerce or be marketed as a dietary supplement. While FDA can initiate rulemaking to approve CBD as a food additive or to allow its use in dietary supplements, the agency has never issued such a rule for any substance (whether cannabis-derived or not) that is an approved drug or authorized for investigation as a new drug.[493]

Hemp and THC

The THC content of hemp remains a concern for those involved in hemp production. The process of hemp extraction can temporarily raise the THC content above the 0.3% THC threshold thereby temporarily qualifying a crop as marijuana under the CSA. In the next farm bill, Congress could consider whether to further amend the federal statutory definition of hemp (7 U.S.C. §1639o) to raise the allowable legal THC level from 0.3% to 1.0% and/or make an exception for hemp THC levels while it is being processed (e.g., H.R. 6645; S. 1005) to provide additional regulatory flexibility to hemp growers and businesses and to alleviate concern of potential intervention by federal law enforcement.

In addition to FDA's position on CBD, some states and local jurisdictions have also decided to disallow the sale of hemp-derived CBD edible and ingestible products, given that hemp-derived CBD is not an FDA-approved food additive. Other cannabis-derived CBD that does not meet the definition of hemp remains illegal under federal law—except for marijuana-derived CBD approved by FDA as a pharmaceutical drug (i.e., Epidiolex).

Although FDA has determined that it is currently unlawful to add CBD to food or to market CBD as or in dietary supplements, these products remain commercially available. In response, some Members of Congress have expressed support for a regulatory framework for hemp-derived CBD in certain FDA-regulated consumer products. In the absence of a regulatory framework for hemp-derived CBD products, Congress directed FDA in a joint explanatory statement to issue a policy of enforcement discretion with respect to CBD products that meet the statutory definition of hemp and come under FDA's jurisdiction.[494] While the statement does not explicitly require FDA to set a safe level or threshold for CBD in consumer products, the activities conducted pursuant to this directive may inform the establishment of such a level in the future.[495]

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[491] USDA, Agricultural Marketing Service, "Establishment of a Domestic Hemp Production Program," 84 *Federal Register* 58522-58564, October 31, 2019.

[492] USDA officials at a House Agriculture Committee briefing, April 5, 2019, indicated that such technologies are being reviewed within the department's Science & Technology Program; see https://www.ams.usda.gov/about-ams/programs-offices/science-technology-program.

[493] See questions 9 and 10 in "FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers," updated April 2, 2019, https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers#dietarysupplements.

[494] Joint Explanatory Statement on Division B—Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2020, p. 29, https://docs.house.gov/billsthisweek/20191216/BILLS-116HR1865SA-JES-DIVISION-B.pdf.

[495] For additional discussion, see CRS Report R46189, *FDA Regulation of Cannabidiol (CBD) Consumer Products: Overview and Considerations for Congress*.

Appendix E. Federalism: Federal Preemption and the Anti-Commandeering Doctrine[496]

As briefly discussed in the report, the gap between the federal CSA[497] and certain state marijuana laws raises questions regarding "the proper division of authority between the Federal Government and the States"[498] under both the preemption and anti-commandeering doctrines. This appendix analyzes these two legal doctrines and their application to discordant federal and state marijuana laws.

General Preemption Principles[499]

The Constitution authorizes the federal government to preempt conflicting state laws as long as it is acting within the scope of its enumerated powers.[500] The doctrine of federal preemption is grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[501] The Supreme Court has explained that "under the Supremacy Clause ... any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[502]

The Supreme Court has identified two general ways in which federal law can preempt state law. Federal law can preempt state law *expressly* where a federal statute or regulation contains explicit preemptive language—that is, where a clause in the relevant federal law explicitly states the extent to which state law is preempted.[503] Federal law can also preempt state law *impliedly*, "when Congress' command is ... implicitly contained in" the relevant federal law's "structure and purpose."[504] The Court has identified two subcategories of implied preemption. The broadest subcategory, "field preemption," occurs "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[505] The second subcategory, "conflict preemption," occurs when it is "physically impossible" to comply with both the state and federal law ("impossibility preemption") or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

[496] This appendix was authored by David H. Carpenter, Legislative Attorney in CRS's American Law Division (ALD). It uses citation and other editorial styles consistent with ALD's reports.

[497] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801–904).

[498] New York v. United States, 505 U.S. 144, 149 (1992).

[499] For a general discussion of federal preemption, see CRS Report R45825, *Federal Preemption: A Legal Primer*.

[500] Murphy v. NCAA, 138 S. Ct. 1461, 1479 (2019) (The Supremacy Clause "specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the [federal law in question] to preempt state law, it must satisfy two requirements. First, *it must represent the exercise of a power conferred on Congress by the Constitution*; pointing to the Supremacy Clause will not do. Second, since the Constitution 'confers upon Congress the power to regulate individuals, not States,' [the federal law] at issue must be best read as one that regulates private actors.") (emphasis added) (internal citations omitted).

[501] U.S. CONST. art. VI, cl. 2.

[502] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 108 (1992).

[503] *Id*. at 98.

[504] *Id.* (internal citations omitted).

[505] *Id*.

Congress" ("obstacle preemption").[506] If a court concludes that state law is not preempted by an express preemption provision, the Court has indicated that the federal statute could still implicitly preempt state law.[507]

Several legal principles guide judicial preemption analysis. The Supreme Court has noted that, irrespective of preemption type, the "ultimate touchstone" of preemption analysis is congressional intent,[508] which is "primarily discerned" from the plain language of the legislative text.[509] Additionally, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied," the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by" federal law "unless that was the clear and manifest purpose of Congress."[510] Furthermore, the Supreme Court has noted that matters of "health and safety ... are primarily[] and historically matters of local concern."[511]

Preemption and State Marijuana Laws

The Supreme Court has held that Congress has the constitutional authority under the Commerce Clause and Necessary and Proper Clause to criminalize marijuana, including even purely intrastate cultivation and possession of the substance.[512] Consequently, Congress has broad discretion to preempt state marijuana laws that conflict with the CSA.[513] Congress has most clearly expressed its preemptive intent through Section 903 of the CSA.

CSA Section 903 provides that:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be

[506] Hillman v. Maretta, 569 U.S. 483, 490 (2013) (quoting Hines v. Davidovitz, 312 U.S. 52, 67 (1941)).

[507] Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995) (holding that the existence of an express preemption clause does not "foreclose[] any possibility of implied pre-emption."); Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[508] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[509] Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it.") (internal citations omitted).

[510] *Id*. at 485. *See also* Chateau Foghorn LP v. Hosford, 168 A.3d 824, 857 (Md. Ct. App. 2017) (in holding that Department of Housing and Urban Development-subsidized housing program lease requirements prohibiting the use of controlled substances does not preempt state landlord-tenant law, the court applied "a heightened presumption against preemption" because "[l]andlord-tenant law is an area traditionally regulated by state and local governments, and one that has never been federalized").

[511] *Id*. at 475 ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, matters of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.") (internal citations omitted). *See also* Gonzales v. Oregon, 546 U.S. 243, 270 (2006).

[512] Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that, in criminalizing "the local cultivation and use of marijuana" through the CSA, "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'") (quoting U.S. CONST., ART. I, § 8).

[513] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1479 (2019) (holding that a federal law can preempt conflicting state laws if the federal law both "represent[s] the exercise of a power conferred on Congress by the Constitution" and "regulates private actors," not states).

> within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[514]

Courts agree that the opening phrase of Section 903 expresses Congress's intent *not* to exercise field preemption in this domain.[515] The Supreme Court has explained that, by declining "to occupy the field" in Section 903, Congress chose not to exercise the full extent of its preemptive power, but instead "explicitly contemplates a role for the States in regulating controlled substances."[516] However, courts have not consistently agreed on precisely what role Congress intended to leave to the states pursuant to Section 903's closing phrase—"unless there is a *positive conflict* between that provision of this subchapter and that State law *so that the two cannot consistently stand together*."[517]

Some have indicated that Section 903's closing phrase only evokes the narrow impossibility preemption rubric,[518] meaning that a state marijuana law is not preempted unless it is "physically impossible" to comply with both the state marijuana law and the CSA.[519] However, certain courts have also analyzed state marijuana laws under the broader obstacle preemption rubric.[520] Under obstacle preemption, courts evaluate whether the state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[521] The Supreme Court has noted that the "primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets."[522]

As discussed below, although some courts have held that the CSA preempts certain discrete provisions of state marijuana regimes,[523] more permissive state marijuana laws have largely withstood both impossibility and obstacle preemption review.[524] Courts have typically found that

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[514] 21 U.S.C. § 903.

[515] Cnty of San Diego v. San Diego NORML, 165 Cal. App. 4th 798, 819 (2008) ("The parties agree, and numerous courts have concluded, that Congress's statement in the CSA [Section 903] ... demonstrates Congress intended to reject express and field preemption of state laws concerning controlled substances.").

[516] Gonzales v. Oregon, 546 U.S. 243, 251 (2005).

[517] 21 U.S.C. § 903 (emphasis added). *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE & POL'Y 5, 23 (2013).

[518] *See, e.g.*, *Cnty of San Diego*, 165 Cal. App. 4th at 825–26 (2008) (concluding that Congress only intended impossibility preemption through CSA Section 903, but evaluating the relevant state marijuana law under obstacle preemption, nonetheless). *See also* Erwin Chemerinky, *et al*., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 106–07 (2015) ("There is a reasonable argument that this straightforward [impossibility preemption] analysis should entirely settle the preemption question in the context of all state marijuana laws ... [b]ut the Court has suggested in some of its preemption decisions that even when there is an express statutory preemption provision under which a reviewing court finds no federal preemption, courts should in some circumstances still undertake an 'implied preemption' analysis. Under this analysis federal law will preempt if the state law or action at issue creates an 'obstacle to the purposes and objectives' of the federal law.").

[519] Hillman v. Maretta, 569 U.S. 483, 490 (2013).

[520] *See, e.g.*, Qualified Patients Assn. v. City of Anaheim, 187 Cal. App. 4th 734, 758–763 (Cal. App. 2010); *Cnty of San Diego*, 165 Cal. App. 4th at 825–26; Ter Beek v. City of Wyoming, 495 Mich. 1, 12 (Mich. 2014).

[521] *Hillman*, 569 U.S. at 490.

[522] Gonazles v. Raich, 545 U.S. 1, 19 (2005).

[523] *See infra* notes 94 and 96.

[524] *See, e.g.*, Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 334 (D. Conn. 2017) (holding that a state prohibition on employment discrimination for medical marijuana use was not preempted by the CSA); Reed-Kaliher v. Hoggatt, 347 P.3d 136, 141 (Ariz. 2015) (holding that a state law that prohibits conditioning probation on compliance with CSA provisions that conflict with the state's medical marijuana laws was not preempted by CSA Section 903); White Mt. Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416, 419 (Ariz. Ct. App. 2016) (holding that "the CSA does not preempt the AMMA [Arizona Medical Marijuana Act] to the extent the AMMA requires the County to

state marijuana laws survive impossibility preemption because generally it is possible for individuals to comply with both state marijuana laws and the CSA by abstaining from marijuana use.[525] However, a small subset of provisions of state marijuana laws have been successfully challenged under the impossibility preemption rubric to the extent that they have been interpreted as *requiring* CSA violations (e.g., a state law that requires an employer to reimburse an injured employee for the purchase of medical marijuana).[526] State marijuana laws have largely withstood obstacle preemption because courts have held that they do not protect individuals from prosecution under federal law and because the state laws in question address issues within a field traditionally occupied by the states that were not expressly addressed by the CSA.[527] However, at least one court has held that a discrete provision of state marijuana laws was preempted by the CSA under the obstacle preemption rubric.[528] In what is arguably an outlier due to the breadth of its interpretation of the CSA's preemptive effect,[529] the Oregon Supreme Court held that a provision of a state marijuana law was preempted "[t]o the extent that [it] affirmatively authorize[d]" marijuana use because it served "as an obstacle to the implementation and

pass reasonable zoning regulations for MMDs [Medical Marijuana Dispensaries] and process papers concerning zoning compliance or requires the State to issue documents to allow MMDs to operate"); Qualified Patients Assn. v. City of Anaheim, 187 Cal. App. 4th 734, 758–763 (Cal. App. 2010) (holding that the CSA did not preempt California's marijuana laws); *Cnty of San Diego*, 165 Cal. App. 4th at 809; Joe Hemp's First Hemp Bank v. City of Oakland, 2016 U.S. Dist. LEXIS 11668, *12 (N.D. Cal. 2016) (holding that the CSA does not preempt the city's marijuana dispensary permitting scheme); Ter Beek v. City of Wyoming, 495 Mich. 1, 12 (Mich. 2014) (holding that CSA does not preempt state medical marijuana law that immunized an individual's cultivation of marijuana for medical purposes). *See also* Erwin Chemerinky, *et al*., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 110 (2015) ("The federal government has never argued, however—nor has any court ever held—that the CSA completely preempts state marijuana laws that are more permissive than federal law.").

[525] *See*, *e.g.*, *Ter Beek*, 495 Mich. at 14–15; City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355, 385 (Cal. App. 2007).

[526] *See*, *e.g.*, Garcia v. Tractor Supply Co., 154 F. Supp.3d 1225, 1230 (D.N.M. 2016) (granting motion of dismissal, "Mr. Garcia does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require Tractor Supply to accommodate his marijuana use.... To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes."); People v. Crouse, 388 P.3d 39, 43 (Col. 2017) (holding that a state law that "requires law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charges" is preempted because it forces officers to violate and, thus, is in "positive conflict" with, the CSA); Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, 20 (Me. 2018) (holding, under the impossibility preemption rubric, that a state medical marijuana law that required a private employer to "reimburse [an employee] for the cost of []medical marijuana" was preempted because it would have required the employer to aid and abet marijuana use in violation of the CSA).

[527] *See*, *e.g.*, Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 333–34 (D. Conn. 2017) (holding that the CSA does not preempt a provision of Connecticut law that prohibits employment discrimination against individuals who are qualified to use medical marijuana under state law); White Mt. Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416, 419 (Ariz. App. 2016) (holding that "the CSA does not preempt the AMMA [Arizona Medical Marijuana Act] to the extent the AMMA requires the County to pass reasonable zoning regulations for MMDs [medical marijuana dispensaries] and process papers concerning zoning compliance or requires the State to issue documents to allow MMDs to operate").

[528] Emerald Steel Fabricators, Inc. v. Bureau of Labor Indus., 230 P.3d 518, 529 (Or. 2010).

[529] *See generally* Kathleen Harvey, *Protecting Medical Marijuana Users in the Workplace*, 66 Case W. Res. L. Rev. 209, 222 (2015) ("The *Emerald Steel* decision was an outlier. Almost every case regarding termination of medical marijuana users for a positive drug test was decided on nonpreemption grounds. The courts in the cases decided on nonpreemption grounds made suggestions about what an appropriate employee protection statute would look like if the legislature were to amend its state's medical marijuana laws. This suggests that those courts would enforce a properly drafted statute that protects medical marijuana users. It is unlikely the statute proposed in this Note would be preempted.").

execution of the full purposes and objectives of the Controlled Substances Act."[530] A sampling of these preemption cases are discussed below.

For example, a California appellate court in *County of San Diego v. San Diego NORML* ruled that state medical marijuana laws were not preempted by the CSA under either impossibility or obstacle preemption analysis.[531] The case involved a preemption challenge to California laws that require local governments to issue medical marijuana cards to qualified applicants to apprise state personnel "that [the cardholders] are medically exempt[] from the state's criminal sanctions for marijuana possession and use."[532] The court held that California laws were not vulnerable to impossibility preemption because the CSA did not outlaw the issuance of the medical marijuana cards that the California laws required.[533] Consequently, the laws survived impossibility preemption because it was possible for an individual to honor both the CSA and the California card laws.[534] Although, in the court's view, CSA Section 903 expresses congressional intent to evoke only impossibility preemption, the court also held that the relevant California laws survived obstacle preemption because they "regulate [the] state's medical practices" and do not serve as "a significant impediment" to the CSA's general goal of "combat[ing] recreational drug use."[535]

In contrast, the Supreme Court of Colorado struck down a marijuana-related provision of the Colorado Constitution, apparently under impossibility preemption. *People v. Crouse* involved a provision of the Colorado Constitution that "requires law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge."[536] A majority of the Colorado Supreme Court held that this marijuana "return provision" was "in positive conflict with and thus preempted by the federal Controlled Substances Act" because "when law enforcement officers return marijuana in compliance with [the Colorado law], they distribute marijuana in violation of the CSA."[537] Thus, the court held that police officers could not comply

[530] *Emerald Steel*, 230 P.3d at 529 (holding, under obstacle preemption analysis, that "[t]o the extent that [the Oregon statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it without effect") (internal citations omitted). *But see* White Mt. Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416, 430 (Ariz. Ct. App. 2016) ("We also decline to adopt *Emerald Steel*'s distinction between decriminalization and authorization of medical marijuana use. The authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis."); Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 333–34 (D. Conn. 2017) (holding that the CSA does not preempt a provision of Connecticut law that prohibits employment discrimination against individuals who are qualified to use medical marijuana under state law); Willis v. Winters, 253 P.3d 1058, 1064 n.6 (Or. 2011) (questioning the applicability of the *Emerald Steel* reasoning beyond the facts at the heart of that case); Callaghan v. Darlington Fabrics Corp., 2017 R.I. Super. LEXIS 88, *41–*42 (R.I. Super. 2017) (holding that the CSA does not preempt state marijuana law under either impossibility because employees can abstain from marijuana use on the job or obstacle preemption because the CSA is "too attenuated" from "the realm of employment and anti-discrimination law").

[531] Cnty of San Diego v. San Diego NORML, 165 Cal. App. 4th 798, 825 (Cal. App. 2008) ("Because Congress provided that the CSA preempted only laws positively conflicting with the CSA so that the two sets of laws could not consistently stand together, and omitted any reference to an intent to preempt laws posing an obstacle to the CSA, we interpret title 21 United States Code section 903 as preempting only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible.").

[532] *Id*. at 827.

[533] *Id*. at 825–26.

[534] *Id*. at 826.

[535] *Id*. at 826–27.

[536] People v. Crouse, 388 P.3d 39, 40 (Colo. 2017).

[537] *Id*. at 42. *See also id*. (Gabriel, J., dissenting) ("I perceive no conflict between the CSA and section 14(2)(e) of article XVIII of the Colorado Constitution, nor do I believe that it is impossible to comply with both the CSA and the Colorado Constitution, as the majority implicitly and the People expressly contend."). The majority further held that

with both the state's marijuana return provision and the CSA. As a result, the court held that the state's marijuana return provision was preempted by the CSA.[538]

Maine's highest state court followed the same reasoning as the *Crouse* court in an analogous preemption challenge to Maine's medical marijuana law.[539] In *Bourqoin v. Twin Rivers Paper Co., LLC*, an individual received an administrative order from the state's Workers Compensation Board requiring his former employer to pay for medical marijuana the employee used to treat chronic back pain stemming from an injury sustained on the job.[540] The court held that if the former employer complied with the workers compensation administrative order, it would be aiding and abetting marijuana use in violation of the CSA.[541] Therefore, "[c]ompliance with both is an impossibility."[542] Consequently, the court held that Maine's medical marijuana law was preempted to the extent that it "is used as the basis for requiring an employer to reimburse an employee for the cost of medical marijuana."[543]

In contrast, a California appellate court came to the opposite conclusions as the Colorado Supreme Court in *Crouse* when it addressed a similar marijuana return provision of California law.[544] The California Court of Appeals held that "federal supremacy principles do not prohibit the return of marijuana to a qualified user whose possession of the drug is legally sanctioned under state law."[545] The court noted that the state law does not protect individuals from federal CSA enforcement, but merely "limits *state* prosecution for medical marijuana possession[, which] simply does not implicate federal supremacy concerns."[546] Consequently, the court held that the CSA did not preempt the state's marijuana return law.[547]

CSA Section 885(d), which immunizes from civil and criminal liability law enforcement officers "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances," does not protect officers who distribute marijuana in violation of the CSA, even if such activity is authorized under Colorado law. *Id.* at 40 ("The officers here could not be 'lawfully engaged' in law enforcement activities given that their conduct would violate federal law. We thus conclude that, because section 14(2)(e) [of the Colorado Constitution] positive[ly] conflicts' with the CSA, and because § 885(d) does not protect officers acting unlawfully under federal law, the return provision is preempted and rendered void.").

[538] *Id.* at 43 ("We therefore hold that the return provision of section 14(2)(e) is in positive conflict with and thus preempted by the federal Controlled Substances Act."). A three-judge dissent in *Crouse* would have held that Colorado's marijuana return provision is not preempted by the CSA because CSA Section 885 immunizes law enforcement officers who return medical marijuana to patients in accordance with the Colorado Constitution and, consequently, it is not impossible to comply with both the Colorado law and the CSA. *Id.* (Gabriel, J., dissenting).

[539] Bourqoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, 20 (Me. 2018) ("Analytically, there is no difference between the circumstances of *Crouse* and this case: Compelling an employer to subsidize an employee's medical marijuana will require the employer to commit a federal crime—aiding or abetting the distribution and possession of marijuana just as Colorado law would have required law enforcement officers to distribute drugs in violation of the CSA.") (internal citations omitted).

[540] *Id.* at 12.

[541] *Id.* at 17.

[542] *Id.* at 19.

[543] *Id.* at 22.

[544] City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355, 362 (Cal. App. 2007).

[545] *Id.* at 386. The court also held that CSA Section 885 would immunize officers who comply with the state return law because they would be "handling controlled substances as part of their official duties." *Id.* at 390.

[546] *Id.* at 385 (emphasis added).

[547] *Id.* at 386.

In *Ter Beek v. City of Wyoming*,[548] the Supreme Court of Michigan held that the Michigan Medical Marihuana Act (MMMA), which immunized an individual's cultivation of marijuana for medical purposes, withstood both impossibility and obstacle preemption.[549] As understood by the court, the MMMA escaped impossibility preemption because it was permissive and therefore "does not require anyone to commit" a CSA violation, "nor does it prohibit punishment of that offense under federal law."[550] Consequently, the court concluded that it was not "impossible to comply with both the CSA and [] the MMMA."[551] The MMMA escaped obstacle preemption, according to the court, because it merely conveyed immunity from the consequences of *state* law.[552] The court explained that "the MMMA's limited state-law immunity for [medical marijuana] use does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished."[553] In the court's view, the MMMA "does not ... alter the CSA's federal criminalization of marijuana, or [] interfere with or undermine federal enforcement of that prohibition."[554] As a result, the court concluded that the state's medical marijuana law does not serve as an obstacle to the CSA.[555]

The Oregon Supreme Court, in an opinion that was questioned, though not expressly overturned, by the same court a little over one year later,[556] adopted a broader interpretation of CSA Section 903 under an obstacle preemption analysis in the 2010 decision, *Emerald Steel*.[557] The case involved a state-based disability discrimination charge against Emerald Steel for firing an employee without engaging in a reasonable accommodation discussion because the employee used marijuana in accordance with the Oregon Medical Marijuana Act.[558] Emerald Steel argued that the firing was permissible because the state anti-discrimination law's reasonable accommodation requirements "do not apply to persons who are currently engaged in the illegal use of drugs."[559] While Oregon law explicitly allowed the employee in *Emerald Steel* to use medical marijuana, the employer argued that marijuana use nevertheless qualified as an "illegal use of drugs" because it was prohibited by the CSA.[560] Thus, the court had to determine whether the provision of state law that authorized the use of medical marijuana was preempted by the CSA.[561] If it was preempted, then the employee's medical marijuana use would qualify as the "illegal use of drugs," thus negating Emerald Steel's duty to provide reasonable accommodation under the state's discrimination law.[562]

[548] 495 Mich. 1 (Mich. 2014).

[549] *Id.* at 12.

[550] *Id*.

[551] *Id*. at 14.

[552] *Id*.

[553] *Id*. at 15.

[554] *Id.* at 14–15.

[555] *Id*. at 14.

[556] Willis v. Winters, 253 P.3d 1058, 1064 n.6 (Or. 2011) (questioning the applicability of the *Emerald Steel* reasoning beyond the facts at the heart of that case).

[557] Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d 518 (2010).

[558] *Id*. at 520.

[559] *Id.* at 521.

[560] *Id*.

[561] *Id*. at 524.

[562] *Id*. at 524–526.

The Oregon court first held that, although "the two laws are logically inconsistent," "it is not physically impossible to comply with both the Oregon Medical Marijuana Act and the [CSA]" because individuals could simply abstain from marijuana use.[563] The court then turned to the broader obstacle preemption analysis.[564] The Oregon court concluded, based on its interpretation of U.S. Supreme Court preemption precedent, that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[565] Thus, "[t]o the extent that [the Oregon statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it without effect."[566] Consequently, the employee's medical marijuana use constituted the "illegal use of drugs" and Emerald Steel was relieved from its responsibility to provide a reasonable accommodation to the employee.

The continued viability of *Emerald Steel* may be open to question after the Oregon Supreme Court's 2011 decision in *Willis v. Winters*, which involved a preemption question under a federal gun control law rather than Section 903 of the CSA.[567] The *Willis* court suggested that *Emerald Steel*'s "affirmative authorization" obstacle preemption test should not be considered a generally applicable rule, but instead should be viewed as only applicable to the specific facts of that case.[568] The *Willis* court explained:

> *Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted. Rather it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of whether the statute contains an affirmative authorization is not straightforward, the analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule.[569]

Other courts have also distinguished *Emerald Steel* or expressly rejected its reasoning.[570] For example, the Arizona Court of Appeals "decline[d] to adopt *Emerald Steel*'s distinction between decriminalization and authorization of medical marijuana use" in a preemption challenge to various zoning requirements under Arizona's medical marijuana

[563] *Id.* at 528.

[564] *Id.*

[565] *Id.* ("To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case.") (citing Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 478 (1984)).

[566] *Id.*

[567] Willis v. Winters, 253 P.3d 1058, 1066 (2011) (holding that a state concealed gun law is not preempted because it does not prevent the federal government from enforcing the relevant provision of the federal Gun Control Act and, consequently, "does not pose an obstacle to the enforcement of [the federal] law").

[568] *Id.* at 1064 n.6.

[569] *Id.*

[570] *See, e.g.*, White Mt. Health Ctr., Inc. v. Maricopa Cnty., 386 P.3d 416, 430 (Ariz. Ct. App. 2016) ("We also decline to adopt *Emerald Steel*'s distinction between decriminalization and authorization of medical marijuana use. The authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis."); Noffsinger v. SSC Niantic Operating Co. LLC, 273 F. Supp. 3d 326, 334–35 (D. Conn. 2017) (noting a factual similarity to *Emerald Steel* but distinguishing the case from a legal perspective "because Oregon's medical marijuana statute contains no provision explicitly barring employment discrimination").

law.[571] The court concluded that the state's marijuana law did not pose as an obstacle to the CSA because it in no way affects the CSA's enforceability.[572] The Arizona law merely "provide[s] immunity from state penalties for medical use of marijuana."[573] The appellants in the case, citing *Emerald Steel*, argued that the state law "goes beyond mere decriminalization to affirmatively authorize violations of the CSA."[574] According to the court, *Emerald Steel*'s "authorization/decriminalization distinction [] seems to be primarily semantic."[575] The court made clear that the preemption question before it was whether the zoning requirements of Arizona's medical marijuana law imposes "significant and unsolvable obstacles to the enforcement of the CSA."[576] The Arizona Supreme Court had previously held, and the appellants in this case conceded, that the CSA does not preempt state laws that decriminalize certain medical marijuana use.[577] If entirely decriminalizing medical marijuana use does not pose as an obstacle to CSA enforcement, the court reasoned that state statutes that actually regulate certain medical marijuana use also are not preempted.[578]

Anti-Commandeering and State Marijuana Legalization Efforts

In a similar, though legally distinct, vein to the preemption discussion above, some have argued that the CSA's criminalization of the growth, sale, and possession of marijuana bars *states* from authorizing some of those same activities under state law.[579] For example, the Nebraska Attorney General, in an August 2019 memorandum assessing the legality of a proposed state bill (LB 110, the Medical Cannabis Act (MCA)), wrote:

> In sum, we conclude that the MCA, by creating a state regulatory scheme that would affirmatively facilitate the cultivation, processing, wholesale distribution, and retail sale of federal contraband on an industrial scale, would frustrate and conflict with the purpose and intent of the CSA. Accordingly, we conclude that the MCA would be preempted by the CSA and would be, therefore, unconstitutional.[580]

However, as discussed below, Supreme Court interpretations of the anti-commandeering doctrine, which generally provides that the federal government cannot compel states to execute regulatory activities on the federal government's behalf, arguably undermine such broad-based preemption arguments.[581]

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[571] *White Mt. Health Ctr., Inc.*, 386 P.3d at 430.

[572] *Id.* at 427.

[573] *Id.* at 428.

[574] *Id.* (internal citations omitted).

[575] *Id.* at 430.

[576] *Id.*

[577] *Id.* at 240 (citing Reed-Kaliher v. Hoggatt, 347 P.3d 136, 141 (Ariz. 2015)).

[578] *Id.* at 429 ("As we understand the Appellants' arguments, if the AMMA had merely decriminalized the manufacture, distribution, and sale of medical marijuana, the AMMA would not be preempted by the CSA any more than decriminalization of growth and possession for personal use would have been preempted. However, because the State decided to regulate MMDs, that regulation is preempted. The logic of that distinction escapes us.").

[579] *See, e.g.*, Nebraska Attorney General Legal Memorandum, CONSTITUTIONALITY OF LB 110 – ADOPTION OF THE MEDICAL CANNABIS ACT, 8 (Aug. 1, 2019), https://perma.cc/NXT2-RU2T.

[580] *Id.*

[581] Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018).

The Supreme Court has noted that "[t]he legislative powers granted to Congress are sizable, but they are not unlimited."[582] The Constitution, "rather than granting general authority to perform all the conceivable functions of government, ... lists, or enumerates, the Federal Government's powers."[583] The Supreme Court has explained that "[t]he Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it."[584] These principles are reinforced by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[585] The anti-commandeering doctrine derives from the Tenth Amendment and the other limitations imposed on the federal government by the Constitution,[586] and has been described as "a significant constitutional counterweight to the Supremacy Clause."[587]

Three Supreme Court decisions, in particular, have clarified the scope of the doctrine's limitations on congressional statutory authority.[588] In the 1992 decision *New York v. United States*, the Supreme Court invalidated under the anti-commandeering doctrine a federal law that would have forced states to either dispose of radioactive waste in accordance with federal standards or "take title ... [and] possession" of such waste.[589] The Court held that, although the federal government can preempt state laws that are "contrary to federal interests" and may "hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes," the Constitution bars the federal government from "compel[ling] the States to enact or administer a federal regulatory program."[590]

In *Printz v. United States*, the Supreme Court reiterated the same constitutional principles articulated in *New York* to strike down a federal statute that would have compelled state law enforcement officers to perform background checks on potential firearm purchasers.[591] The Court held that the federal government "cannot circumvent" the *New York* holding by "issu[ing] directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[592]

In the 2018 decision *Murphy v. NCAA*, the Supreme Court clarified that the anti-commandeering doctrine not only prohibits federal legislation that commands states to act, but also bars legislation that *prohibits* states from acting.[593] The *Murphy* Court struck down a federal law prohibiting both the "licens[ing]" and "state authorization of sports gambling."[594] The Court held

[582] *Id*.

[583] Nat'l Federation of Ind. Business v. Sebelius, 567 U.S. 519, 534 (2012).

[584] *Id*. at 534 – 35 (internal citations omitted).

[585] U.S. CONST. AMD. 10.

[586] Printz v. United States, 521 U.S. 898, 919–24 (1997).

[587] Erwin Chemerinky, *et al*., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 102 (2015).

[588] Murphy v. NCAA, 138 S. Ct. 1461 (2018); *Printz*, 521 U.S. at 898; New York v. United States, 505 U.S. 144 (1992).

[589] *New York*, 505 U.S. at 149, 153.

[590] *Id*. at 188.

[591] *Printz*, 521 U.S. at 935.

[592] *Id*.

[593] *Murphy*, 138 S. Ct. at 1478.

[594] *Id*. at 1481–82 ("[The federal sports gambling law's] prohibition of state licensing ... suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature. Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain

that by "unequivocally dictat[ing] what a state legislature can and cannot do," the federal sports gambling law attempted to place a state "under the direct control of Congress" in violation of the anti-commandeering doctrine.[595] The Court distinguished the relevant statutory provision from a permissible preemption provision by the fact that it regulates *states*, rather than *private individuals*.[596] The *Murphy* Court explained that "regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."[597] In contrast, the federal sports gambling provision in question, according to the Court, could only be interpreted as "a direct command to the States. And that is exactly what the anticommandeering rule does not allow."[598] The Court concluded that the federal sports gambling law "regulates state governments' regulation of their citizens. The Constitution gives Congress no such power."[599]

The Supreme Court's anti-commandeering precedent appears to undermine arguments, like those articulated by the Nebraska Attorney General, that the CSA broadly preempts *states* from legalizing certain marijuana-related activities.[600] Congress has the constitutional authority, under the Commerce Clause and Necessary and Proper Clause, to criminalize the sale, distribution, and possession of marijuana by *individuals*.[601] By extension, the federal government can enforce the CSA against individuals in violation of federal law, even if the federal violations occur in states that have legalized the same behavior under state law.[602] However, the same legal principles delineated in *Murphy*, in which the Court held that Congress does not have the constitutional authority to prohibit states from enacting state legislation authorizing or licensing sports gambling in the state, arguably would also apply in the context of state-enacted marijuana legalization efforts.[603] In short, while federal laws may preempt state laws that "affirmatively interfere[e]" in regulated activities, under the anti-commandeering doctrine the federal government arguably

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from enacting a law licensing sports gambling.") (internal citations omitted).

[595] *Id*. at 1478.

[596] *Id*. at 1478–79.

[597] *Id*. at 1481.

[598] *Id.* at 1481.

[599] *Id.* at 1485 (internal citations omitted).

[600] Nebraska Attorney General Legal Memorandum, CONSTITUTIONALITY OF LB 110 – ADOPTION OF THE MEDICAL CANNABIS ACT, 8 (Aug. 1, 2019), https://perma.cc/NXT2-RU2T.

[601] Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that, in criminalizing "the local cultivation and use of marijuana" through the CSA, "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'") (quoting U.S. CONST., ART. I, § 8).

[602] United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486 (2001) (holding that there is no medical necessity exception under the federal CSA that could serve as a defense to the federal government's enforcement action for the cultivation and possession of marijuana in a state that has authorized such activity).

[603] *See* Robert Mikos, *Nebraska Attorney General Gives the State Some Bad Legal Advice Concerning Marijuana Legalization*, MARIJUANA LAW, POLICY, AND AUTHORITY, Vanderbilt University Law School (Aug. 4, 2019), https://my.vanderbilt.edu/marijuanalaw/2019/08/nebraska-attorney-general-gives-the-state-some-bad-legal-advice-concerning-marijuana-legalization/ ("Simply put, the anti-commandeering rule enables states to legalize/authorize marijuana possession and sales."). *See also* Cnty of San Diego v. San Diego NORML, 165 Cal. App. 4th 798, 825–26 (2008) ("Counties also appear to assert the identification card laws present a significant obstacle to the CSA because the bearer of an identification card will not be arrested by California's law enforcement officers despite being in violation of the CSA. However, the unstated predicate of this argument is that the federal government is entitled to conscript a state's law enforcement officers into enforcing federal enactments, over the objection of that state, and this entitlement will be obstructed to the extent the identification card precludes California's law enforcement officers from arresting medical marijuana users. The argument falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws.") (citing Printz v. United States, 521 U.S. 898 (1997)).

lacks the constitutional authority to prevent states from legalizing marijuana-related activities, even if those same activities are unlawful under federal law.[604]

[604] *See* Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners, Murphy v. NCAA, 138 S. Ct. 1461, 4-6 (2018) ("Properly understood, the Supremacy Clause empowers Congress to preempt only state action that interferes with activity—not state action that lets activity alone.... When a state 'authorizes' private activity merely by removing state-law impediments to it, the state is doing no more than allowing that activity to occur. Congress can no more forbid states to allow conduct than it could compel states to disallow that conduct in the first place. Although 'authorization' necessarily means allowing some activity to occur, the term is sometimes used more broadly to include state actions that go beyond mere grants of permission. If a state 'authorizes' conduct by affirmatively interfering in that conduct, then its actions would be vulnerable to preemption. To clarify, imagine a state law that does two separate things: it repeals the state's prohibition on the possession of marijuana, and it also bars landlords from discriminating against tenants on the basis of their marijuana use. Both provisions might be understood to 'authorize' marijuana possession in some sense, but only the latter provision could be preempted, because only the latter provision interferes with activity."); Erwin Chemerinky, *et al*., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015) ("Because Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states' decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.") (internal citations omitted).

Appendix F. Monitoring Health Concerns Related to Marijuana in Colorado

The Colorado Department of Public Health and Environment (CDPHE) was given the responsibility to "monitor changes in drug use patterns, broken down by county and race and ethnicity, and the emerging science and medical information relevant to the health effects associated with marijuana use."[605] In the most recent report, the CDPHE presents the following trends in Colorado:

- From 2017–2019, CDPHE did not identify any *new* disparities in adult marijuana use by age, gender, race/ethnicity, or sexual orientation (although some continued, see below).
- Daily (or near daily) adult use of marijuana (9.1%) is lower than past-30-day binge drinking (18.2%).
- For adolescents, estimated prevalence of past-30-day marijuana use and frequencies of marijuana use have not changed since legalization.
- Adolescent (high school students) past-30-day marijuana use (20.6%) is similar to the national average (21.7%).
- Adolescent past 30-day-marijuana use (20.6%) continues to be lower than past-30-day alcohol use (29.6%) and electronic vapor products with nicotine use (25.9%).
- The majority of homes with children do not have marijuana present or being used inside the home. Among homes that do have marijuana present (14.0%), the majority are storing marijuana safely (89.6%).
- Adult marijuana use, both daily (9.1%) and past-month use (19.0%), increased since 2017.
- The gap is closing in the prevalence of women who discontinue marijuana use/consumption postpartum (marijuana consumption among postpartum-currently breastfeeding moms in Colorado increased from 3.5% in 2017 to 4.9% in 2018).
- Past 30-day marijuana use/consumption (19.0%) and daily or near daily (9.1%) use/consumption among adults in Colorado has increased in 2019.
- Adult past-30-day marijuana use (19.0%) is higher than the national average (11.9%). In Colorado, 28.8% of adults ages 18-25 reported use/consumption in the past 30 days and 14.1% reported daily or near daily marijuana use/consumption.
- Since 2017, significant increases in consumption were observed among older Colorado adults ages 35 to 64 (12.8% in 2017 to 17.3% in 2019) and ages 65 years and older (5.6% in 2017 to 9.3% in 2019).
- Since retail marijuana became available in Colorado in 2014, there have been significant increases in daily or near daily marijuana consumption among adults ages 26 and over.

[605] Colorado Revised Statutes, Title 25, §1.5-110. The most recent report is CDPHE, Retail Marijuana Public Health Advisory Committee, *Monitoring Health Concerns Related to Marijuana in Colorado: 2020*, January 2021.

- In 2019, smoking marijuana remained the most prevalent method of marijuana use/consumption among Colorado adults (14.4%), followed by eating/drinking (8.1%), vaporizing (6.1%), dabbing (3.7%), and other methods (2.2%).
- There continues to be disparities in marijuana use/consumption based on age, sex, race/ethnicity, and sexual orientation for both adults and adolescents, signifying health inequities in certain populations in Colorado.
- Since 2014, use/consumption among adults and use among adolescents has remained consistently higher in the southwest region of the state. In 2019, marijuana use/consumption among Colorado adults was highest in the southwest (19.8%) and northwest (19.2%) regions of the state.
- In 2019, more Colorado adults think daily marijuana use/consumption has slight or no risk of harm and fewer Colorado adults think daily use/consumption has a moderate or great risk of harm.
- Past 30-day marijuana use among middle school (5.2%) and high school students (20.6%) has remained stable.
- In 2019, more high school students drove a vehicle after recently using marijuana than in 2017 (9.0% in 2017; 11.2% in 2019).
- Colorado high school students dabbed (10.2%) and vaporized (6.8%) marijuana more in 2019 than previous years, however, smoking marijuana remained the most prevalent (15.3%) method of use/consumption.
- In 2019, 10.4% of homes with children in Colorado may not be storing marijuana products safely, which increases the risk of accidental ingestion of marijuana products by others, in particular children.
- Colorado children may be at risk of exposure to secondhand marijuana smoke in the home.
- In 2018, 8.2% of pregnant women used/consumed marijuana during pregnancy. This percentage is higher among those with unintended pregnancies, younger mothers, and mothers with 12 years or less of education.[606]

[606] Ibid.

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