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Reforming Federal Marijuana Laws: Necessary and Inevitable

Excerpted from a draft of *What Will Federal Marijuana Reform Look Like?*

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Walking around Denver, Colorado or leafing through the Wall Street Journal, it would be easy to forget federal law still criminalizes the distribution,¹ manufacture,² and even simple possession of marijuana.³ State-legal marijuana stores openly sell millions of dollars worth of marijuana in Colorado,⁴ seemingly unconcerned by the lengthy federal sentences their operators are risking.⁵ Meanwhile, angel investors pump money into marijuana ventures like Eaze, a “high-tech pot-delivery service”⁶—or, in the eyes of federal drug laws, a sophisticated conspiracy to illegally distribute a controlled substance. Despite the proliferation of state-legal marijuana businesses, the drug’s status under federal law is the same now as it was in 1970, when the federal Controlled Substances Act went into effect.

The disconnect between the letter of federal law and the emerging marijuana industry is, in large part, the result of an August 2013 Department of Justice (DOJ) memo, advising federal prosecutors not to interfere with state marijuana legalization laws.⁷ The memo cautions that it “is intended solely as a guide to the exercise of investigative and prosecutorial discretion” and does not give state-compliant marijuana operators any legally enforceable rights or protection.⁸ But enough marijuana operators have put their confidence in the DOJ’s non-binding guidance that it has proven to be a relatively effective short-term answer to the state-federal marijuana conflict, at least so far. With marijuana businesses operating openly, it is fair to ask whether the state-federal marijuana conflict has already been solved. Does Congress really need to change federal law or can federal prohibition and state legalization comfortably co-exist through an executive non-enforcement policy?

Though the DOJ’s marijuana non-enforcement policy could continue indefinitely, it is not a long-term solution for several reasons. First, prosecutorial guidance is just that, guidance. A new Attorney General could decide to change the policy.⁹ And, even while

¹ 21 U.S.C. § 841(a)(1).

² *Id.*

³ 21 U.S.C. § 844(a) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance[.]”).

⁴ Christopher Ingraham, *Colorado Marijuana Revenues Hit a New High*, WASH. POST WONKBLOG (Oct. 14, 2014), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/14/colorado-marijuana-revenues-hit-a-new-high/> (reporting that approximately \$34.1 million worth of recreational marijuana was sold in Colorado in August 2014).

⁵ See, e.g., 21 U.S.C. 841(b)(1)(A)(vii) (providing for a mandatory minimum sentence of 10 years for the distribution of 1,000 or more marijuana plants or 1,000 kilograms or more of marijuana).

⁶ Timothy Hay, ‘Uber for Pot’ Eaze Raises \$1.5 Million to Deliver Medical Marijuana, WALL STREET JOURNAL (Nov. 5, 2014, 8:00 AM), <http://blogs.wsj.com/venturecapital/2014/11/05/uber-for-pot-eaze-raises-1-5-million-to-deliver-medical-marijuana/>

⁷ James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

⁸ *Id.*

⁹ See, e.g., Erwin Chemerisny, Jolene Foran, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90 (2015) (observing that making a federal nonenforcement policy permanent “cannot be done by executive action alone because enforcement decisions made by one

the policy is in place, a disobedient federal prosecutor could simply ignore it.¹⁰ If that happens, the people investing in marijuana delivery startups today could be facing federal drug charges tomorrow. Because their actions violate existing federal law, there would be no *ex post facto* bar to prosecuting marijuana business operators for conduct they undertook while the non-enforcement prosecutorial guidance was in effect. As a result, every Colorado marijuana business owner who employs an armed security guard could wind up serving an effective life sentence in federal prison¹¹ when a new President is sworn into office in January 2017, even if they closed their doors in November 2016.

Second, even if the DOJ's nonenforcement policy could reliably shield marijuana businesses from federal criminal prosecution, it does not solve the conflict between federal prohibition and state legalization entirely. As Erwin Chemerinsky, Jolene Foran, Allen Hopper, and Sam Kamin explain in their recent article, *Cooperative Federalism and Marijuana Regulation*, there are a number of "substantial obstacles to businesses and adults seeking to implement and avail themselves of new state laws authorizing marijuana distribution and use" that cannot be solved by prosecutorial discretion alone.¹² These obstacles include access to banks who are far less likely to be persuaded by advisory guidance, access to attorneys who may face ethics charges for facilitating federally illegal drug operations,¹³ a "crippling" federal tax penalty for marijuana businesses,¹⁴ and risks to users in the form of potential adverse employment, probation and parole, and family law consequences.¹⁵ Federal prohibition also leaves marijuana businesses with a great deal of uncertainty when it comes to intellectual property rights,¹⁶

presidential administration could easily be overturned by the next"); Vikas Bajaj, *Will the Next Attorney General Crack Down on Marijuana?*, N.Y. TIMES (Jan. 29, 2015),

<http://mobile.nytimes.com/blogs/takingnote/2015/01/29/will-the-next-attorney-general-crack-down-on-marijuana/> (reporting on the confirmation for Loretta Lynch, President Obama's nominee to replace Eric Holder as Attorney General, and observing that "Lynch's statements serve as a reminder that the Obama administration's policy on marijuana could easily be reversed").

¹⁰ See, e.g., Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 643-45 (2011).

¹¹ 18 U.S.C. § 924(c) provides for stiff mandatory minimum sentences for the use of a gun in furtherance of a drug trafficking crime. See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (imposing a 55-year mandatory minimum sentence under 18 U.S.C. § 924(c) for a defendant who carried a handgun to two marijuana sales and possessed guns in his home).

¹² Erwin Chemerinsky, Jolene Foran, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90-91 (2015).

¹³ Sam Kamin and Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013) (discussing how attorneys who represent state-legal marijuana businesses might risk running afoul of ethics laws).

¹⁴ Erwin Chemerinsky, Jolene Foran, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 94 (2015). See also, e.g., Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014) (discussing I.R.C. § 280E which requires sellers of federally illegal drugs to pay taxes on their gross revenue instead of their net income).

¹⁵ See generally, Erwin Chemerinsky, Jolene Foran, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90-100 (2015) (surveying impediments faced by states seeking to regulate marijuana "due to marijuana's continuing illegality under federal law").

¹⁶ Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 257 (2010) ("The federal Lanham Act bars the registration of a trademark used on any product proscribed by federal law, including marijuana."); Kieran G. Doyle, *Trademark Strategies for Emerging Marijuana Businesses*, 21 WESTLAW JOURNAL INTELLECTUAL PROPERTY 1 (2014) (explaining

the availability of insurance, and even the enforceability standard business contracts.¹⁷ While it is possible some of these hurdles can be overcome in whole or in part without legislative action, others are almost certain to remain.

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For these reasons, although the DOJ's nonenforcement policy may work as a temporary fix, legislators should not view it as a long-term solution. Of course, it is also possible for the executive to change marijuana's status under federal law even without congressional action by administratively reclassifying marijuana under the Controlled Substances Act. Under the CSA, drugs are divided into five "schedules" based on their potential for abuse, medicinal value, and addictiveness.¹⁸ The DEA has the power to add new a substance to the schedules, move a substance between schedules, or remove a currently scheduled substance entirely.¹⁹ Ever since the CSA was passed in 1970, marijuana advocates have argued the drug is improperly categorized in Schedule I, the strictest category for drugs with a high abuse potential and no currently accepted medical use.²⁰ In 2011 the governors of Rhode Island and Washington called for rescheduling and even suggested that the move could harmonize state and federal marijuana laws.²¹

Whatever the merits of rescheduling, it would not fix the state-federal conflict over marijuana. As an initial matter, so long as marijuana is scheduled, it would be illegal to sell the drug for recreational use—even Schedule V substances can only be sold for medicinal use.²² Though the CSA does permit the de-scheduling of drugs, marijuana is exceedingly unlikely to ever qualify for complete removal under the scheduling criteria.²³ Even if it could, the CSA requires scheduling decisions to meet U.S. treaty obligations, regardless of the criteria.²⁴ As a result the DEA could not remove marijuana from the CSA without a change in the international drug treaties and, very likely, could not move it any lower than Schedule II.²⁵ Rescheduling marijuana might ameliorate the conflict between federal and state *medical* marijuana laws. But even for state medical

that "the pathway toward legitimate in the eyes of the [United States Patent and Trademark Office] may be a rocky one" for marijuana businesses).

¹⁷ Erwin Chemerisky, Jolene Foran, Allen Hopper, Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 96-97 (2015) (discussing cases in which courts have declined to enforce insurance policies and other contracts for marijuana businesses and concluding that marijuana businesses "cannot rely on the contracts they sign or the insurance they pay for").

¹⁸ 21 U.S.C. § 812(b). For an overview of the Controlled Substances Act's classification scheme, see, e.g., Gerald F. Uelmen and Alex Kreit, *Drug Abuse and the Law Sourcebook 2014-2015 Edition*, §§ 1:1 – 1:16.

¹⁹ The CSA grants rescheduling power to the Attorney General but the Attorney General has delegated this authority to the head of the Drug Enforcement Administration. See Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV'T L. REV. 332, 336 (2013).

²⁰ 21 U.S.C. § 812(b)(1) (providing the criteria for placing a substance in Schedule I).

²¹ See e.g., Jonathan Martin, *Gregoire to DEA: Make Marijuana a Legal Drug*, THE SEATTLE TIMES, Dec. 1, 2011.

²² 21 U.S.C. § 829(c) ("No controlled substance in schedule V which is a drug may be distributed or dispensed other than for medical purposes.").

²³ For this reason, alcohol and tobacco are both statutorily exempt from regulation under the Controlled Substances Act. 21 U.S.C. § 802(6).

²⁴ 21 U.S.C. § 812(d).

²⁵ *National Organization for the Reform of Marijuana Laws v. Drug Enforcement Administration*, 559 F.2d 735, 742 (D.C. Cir. 1977) (reporting that the DEA concluded United States treaty commitments would permit marijuana to be moved to Schedule II but not lower). See also, Gerald F. Uelmen and Alex Kreit, *Drug Abuse and the Law Sourcebook 2014-2015 Edition*, §§ 1:15.

marijuana laws, federal rescheduling would raise as many questions as answers. This is because state medical marijuana regimes are far more expansive than federal oversight for Schedule II and III drugs. Indeed, because marijuana does not have FDA approval, it is unclear that marijuana could actually be marketed as a medicine at all even if it were rescheduled.²⁶

Of course, not everyone would like to see the federal government accommodate state marijuana reforms. Those who favor marijuana prohibition might be inclined to leave the federal prohibition of marijuana in place (though polling indicates substantial support for deferring to states, even among legalization opponents.)²⁷ If federal marijuana prohibition had been successful at blocking state medical and recreational marijuana laws, federal marijuana prohibition might be a viable long-term option. The trouble for would-be supporters of the status quo is that federal marijuana prohibition has proven itself incapable of stopping state legalization laws.²⁸

Between 1996 and 2008, the federal government unambiguously opposed state medical marijuana laws and fought hard to block their implementation.²⁹ Even as recently as late-2012, a state-legal Montana medical marijuana provider was convicted of federal charges carrying eight decades of mandatory federal prison time in late-2012.³⁰ Despite their best efforts, however, federal drug enforcement officials were not able to stop states from passing and implementing medical marijuana laws. To be sure, vigorously enforced federal marijuana prohibition made life more difficult for state-legal marijuana operators, with an unlucky few now serving federal prison sentences. But because the federal government depends almost entirely on state law enforcement resources to enforce drug prohibition laws, it did not have the resources to deter medical marijuana businesses from openly operating.³¹ As a result, federal marijuana prohibition enforcement efforts served mostly to make state medical marijuana laws less well

²⁶ See Kevin A. Sabet, *Much Ado About Nothing: Why Rescheduling Won't Solve Advocates' Medical Marijuana Problem*, 58 WAYNE L. REV. 81, 82-83 (2012).

²⁷ Jacob Sullum, *Poll Finds Most Americans Support Treating Marijuana Like Alcohol; Even More Think the Feds Should Let States Do So*, REASON (Jan. 31, 2013, 12:41 PM),

<http://reason.com/blog/2013/01/31/poll-finds-most-americans-support-treati> (reporting on poll results in which only about half of respondents supported marijuana legalization but 68% said the federal government should not arrest marijuana growers who are in compliance with state law).

²⁸ See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

²⁹ Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 566-70 (2010) (providing an overview of federal enforcement efforts against medical marijuana providers from 1996 and 2008).

³⁰ The defendant, Chris Williams, ultimately received a 5-year sentence after prosecutors took the extraordinary step of reducing the charges after trial. Gwen Florio, *Montana Medical Marijuana Grower Gets 5 Years in Federal Prison*, MISSOULIAN (FEB. 1, 2013) http://missoulian.com/news/local/montana-medical-marijuana-grower-gets-years-in-federal-prison/article_89211f90-6ca5-11e2-aa17-001a4bcf887a.html

³¹ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-67 (2009) (arguing that the federal government's limited law enforcement resources mean that it cannot arrest and prosecute more than a small fraction of marijuana offenders).

controlled than they otherwise might have been.³² Though the Supremacy Clause might give a glimmer of hope to federal marijuana prohibition, so far courts have largely rejected the argument that federal law preempts state marijuana laws.³³ Unless that changes, whatever one thinks about the merits of state legalization, federal law is powerless to stop it. Nearly two decades of experience point to the almost inescapable conclusion that so long as states continue to pass marijuana legalization laws, nationwide federal prohibition is not a realistic policy option. Perhaps more than anything else, this fact is what makes federal marijuana reform inevitable.

³² Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 569-75 (2010) (arguing that federal enforcement made it more difficult for states to effectively regulate and control medical marijuana).

³³ See, e.g., *Beek v. City of Wyoming*, 495 Mich. 1 (2014) (finding that Michigan's medical marijuana was not preempted by federal law); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 37 (2013) (“[T]he CSA, properly understood preempts only a handful of the [marijuana] laws now being promulgated throughout the states.”).