

# **Dr. GreenThumb Goes to Washington: A Scientific Argument for the Legalization of Medical Marijuana**

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### I. INTRODUCTION

For years, marijuana was a taboo subject in America. Recently, however, medical marijuana has earned its place as the “scientific, mystical one,” finding legalization in many states even in the face of federal prohibitions.<sup>1</sup> Some laws authorizing even recreational use have been enacted.<sup>2</sup> It is undeniable that marijuana, recreational *or* medical, is considered illegal under the federal Controlled Substances Act.<sup>3</sup> With states passing their own laws regarding usage, there is confusion concerning the federal government’s enforcement priorities and its position with regard to medical marijuana.<sup>4</sup> For purposes of this Comment, the terms medicinal and medical marijuana have the same common meaning and are used interchangeably.

Part II of this Comment will address the state approaches to medical marijuana by presenting a brief overview of legislation in several key states to show how quickly support for usage has spread. Part III will address the status of medical marijuana prior to 2015 and will discuss the federal Controlled Substance Act (“CSA”) and other Congressional measures regarding marijuana. It will also provide a brief overview of the singular Supreme Court case on the issue, *Gonzales v. Raich*.<sup>5</sup> In addition, Part III will detail the role of the executive branch in marijuana reclassification as well as discuss internal guidance from the Obama Administration pertaining to prosecutorial discretion. Part IV will explain the federal Farr-Rohrabacher Amendment and its impact on medical marijuana. It will also discuss the Ninth Circuit’s analysis of the Amendment in *United States v. McIntosh*.<sup>6</sup> This section further highlights

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<sup>1</sup> Cypress Hill, *Dr. Greenthumb*, on Cypress Hill IV (Ruffhouse Records 1998).

<sup>2</sup> See Ballotpedia, Alaska Marijuana Legalization, *Ballot Measure 2* (2014), [https://ballotpedia.org/Alaska\\_Marijuana\\_Legalization\\_Ballot\\_Measure\\_2\\_\(2014\)](https://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_(2014)); Ballotpedia, Maine Marijuana Legalization, *Question 1* (2016), [https://ballotpedia.org/Maine\\_Marijuana\\_Legalization\\_Question\\_1\\_\(2016\)](https://ballotpedia.org/Maine_Marijuana_Legalization_Question_1_(2016)); Ballotpedia, Massachusetts Marijuana Legalization, *Question 4* (2016), [https://ballotpedia.org/Massachusetts\\_Marijuana\\_Legalization\\_Question\\_4\\_\(2016\)](https://ballotpedia.org/Massachusetts_Marijuana_Legalization_Question_4_(2016)); Ballotpedia, Nevada Marijuana Legalization, *Question 1* (2016), [https://ballotpedia.org/Nevada\\_Marijuana\\_Legalization\\_Question\\_2\\_\(2016\)](https://ballotpedia.org/Nevada_Marijuana_Legalization_Question_2_(2016)).

<sup>3</sup> 21 U.S.C. § 801 et. seq. (2012).

<sup>4</sup> Steve Contorno, *Barack Obama Says It’s Up to Congress to Change How Feds Classify Marijuana*, POLITIFACT (Feb. 4, 2014, 6:20 PM), <http://www.politifact.com/truth-o-meter/statements/2014/feb/04/barack-obama/barack-obama-says-its-congress-change-how-feds-cla/>.

<sup>5</sup> 545 U.S. 1 (2005).

<sup>6</sup> 833 F.3d 1163 (9th Cir. 2016).

the conflict and contradiction of the federal prohibition on marijuana with the actions of the executive and legislative branches in response to the Farr-Rohrabacher Amendment.

Part V will detail a scientific argument for expanding access to research for states in order to foster well-informed decisions over the fate of medical marijuana. It will discuss several approaches the Trump Administration may take and the likelihood of success with each. This Comment will argue that it would be most beneficial to suspend enforcement of the Controlled Substance Act, specifically as it applies to medical marijuana. Suspension will be beneficial in order to allow the states to experiment legally and to ultimately take the lead on the future of medical marijuana, consistent with traditional norms of our federalist system.

## II. THE STATES AND MEDICAL MARIJUANA: A SPEEDY ACCEPTANCE

Unlike the federal government, many states have passed medical marijuana laws that generally allow for the cultivation and use of marijuana when recommended by a doctor to treat serious conditions.<sup>7</sup>

After a prohibition which originated in the early twentieth century, California became the first state to allow the use of medical marijuana in 1996.<sup>8</sup> The state's Compassionate Use Act<sup>9</sup> permits the use of medical marijuana for serious health conditions, as determined by a state health agency.<sup>10</sup> It also allows for the treatment for other illnesses which may be assuaged by marijuana.<sup>11</sup> Two years later, Washington state followed California and passed its own medical marijuana bill.<sup>12</sup> Like California's law, Washington's bill made the drug available for certain conditions that are not relieved by standard treatment.<sup>13</sup> Although Washington's bill also created an affirmative defense against state prosecution, it did not provide protections against federal arrests.<sup>14</sup> On the same day that Washington's bill was enacted, Oregon passed a medical marijuana law with similar provisions and eligibility conditions as both California and Washington.<sup>15</sup>

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<sup>7</sup> Jay M. Zitter, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R.6th 353, § 2 (2017).

<sup>8</sup> Troey E. Grandel, *One Token over the Line: The Proliferation of State Medical Marijuana Laws*, 9 U.N.H.L. REV. 135, 136 (2010).

<sup>9</sup> Cal. Health & Safety Code § 11362.5 (Lexis 2017).

<sup>10</sup> See Grandel, *supra* note 8 at 141–142.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 142

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Grandel, *supra* note 8 at 142–43.

Since then, a number of states have passed legislation allowing for “comprehensive public medical marijuana and cannabis programs.”<sup>16</sup> In these states, patients are typically required to provide a doctor’s written authorization as well as obtain a prescription, subject to select conditions and diseases.<sup>17</sup> Some states, such as Colorado, also allow for the limited use of Cannabidiol (“CBD”)<sup>18</sup> products for medical reasons or as a legal defense.<sup>19</sup> Alaska, Colorado, Oregon, Washington, and the District of Columbia have all authorized marijuana use in small amounts for recreational purposes.<sup>20</sup> Other states, such as New Hampshire and Vermont have proposed legislation to legalize marijuana by removing criminal penalties for its use and possession.<sup>21</sup> In the 2016 election cycle, four states voted and approved medical marijuana measures to expand or establish its availability for medical purposes.<sup>22</sup> Despite all of these state reforms and initiatives, marijuana is still illegal under federal law.

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<sup>16</sup> State Medical Marijuana Laws, MEDICINAL CANNABIS CONFERENCE (Mar. 1, 2017), <http://www.medicinalcannabisconference.com/?p=896>. The states include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Dakota, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming, the District of Columbia, Guam, and Puerto Rico. See Dean M. Nickles, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253 (2016); See also The National Conference of State Legislatures, *Medical Marijuana Laws*, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>17</sup> Beth P. Zoller, *Hazy Future: Reconciling Federal and State Laws on Marijuana Use*, XpertHR Legal Insight 9666 (Lexis 2017).

<sup>18</sup> Unlike delta-9 tetrahydrocannabinol (“THC”), which causes the high, CBD is not intoxicating and does not cause a high; it is cited as one of the reasons why the restrictions on marijuana should be relaxed. See Nora Volkow, *Researching Marijuana for Therapeutic Purposes: The Potential Promise of Cannabidiol (CBD)*, THE HUFFINGTON POST (Jul. 23, 2016), [http://www.huffingtonpost.com/nora-volkow/cannabidiol\\_b\\_7834066.html](http://www.huffingtonpost.com/nora-volkow/cannabidiol_b_7834066.html).

<sup>19</sup> See Volkow, *supra* note 18.

<sup>20</sup> See Ballotpedia, *supra* note 2.

<sup>21</sup> See Zoller, *supra* note 17.

<sup>22</sup> Katy Steinmetz and David Johnson, *Election 2016: States Where Marijuana Is on the Ballot*, TIME (Nov. 4, 2016), <http://time.com/4557417/election-2016-marijuana-pot-legal-ballot/>; See also Ballotpedia, North Dakota Medical Marijuana Legalization, *Initiated Statutory Measure 5* (2016), [https://ballotpedia.org/North\\_Dakota\\_Medical\\_Marijuana\\_Legalization\\_Initiated\\_Statutory\\_Measure\\_5\\_\(2016\)](https://ballotpedia.org/North_Dakota_Medical_Marijuana_Legalization_Initiated_Statutory_Measure_5_(2016)); Ballotpedia, Florida Medical Marijuana Legalization, *Amendment 2* (2016), [https://ballotpedia.org/Florida\\_Medical\\_Marijuana\\_Legalization\\_Amendment\\_2\\_\(2016\)](https://ballotpedia.org/Florida_Medical_Marijuana_Legalization_Amendment_2_(2016)); Ballotpedia, Arkansas Medical Marijuana Amendment, *Issue 6* (2016), [https://ballotpedia.org/Arkansas\\_Medical\\_Marijuana\\_Amendment\\_Issue\\_6\\_\(2016\)](https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment_Issue_6_(2016)); Ballotpedia, Montana Medical Marijuana Initiative, *I-182* (2016), [https://ballotpedia.org/Montana\\_Medical\\_Marijuana\\_Initiative\\_I-182\\_\(2016\)](https://ballotpedia.org/Montana_Medical_Marijuana_Initiative_I-182_(2016)).

### III. THE STATUS OF MEDICAL MARIJUANA UNDER FEDERAL LAW THROUGH 2015

The federal government prohibits the use of marijuana completely, even if used for medicinal purposes.<sup>23</sup> However, a closer examination shows that there are discrepancies amongst the three branches regarding how strictly this prohibition is viewed. Subsection A will address the Congressional approach to medical marijuana. It will detail relevant sections of the CSA as well as illustrate more recent legislative efforts, suggesting that at least some members of the legislative branch are open to the acceptance of medical marijuana. Subsection B will review the Supreme Court's stance on medical marijuana as cemented in *Gonzales v. Raich*.<sup>24</sup> Finally, Subsection C will discuss the executive branch's role under the CSA, including the various agencies involved in the rescheduling considerations to remove Marijuana from the list of Schedule I drugs as well as the enforcement of federal law, including internal guidance issued on medical marijuana. This section will also address a failed attempt by the executive and the legislative branches to reclassify medical marijuana.

#### A. Congress

Marijuana is illegal under federal law. More specifically, it is highly regulated under the CSA and is classified as a Schedule I drug, the most restrictive classification.<sup>25</sup> The CSA classifies drugs as Schedule I if they (1) have a "high potential for abuse," (2) have "no currently accepted medical use in treatment in the United States," and if (3) "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision."<sup>26</sup> Schedule I drugs may be lawfully obtained and used only by doctors who have submitted a detailed research protocol for approval to the Food and Drug Administration ("FDA"), and who agree to abide by strict rules pertaining to recordkeeping and storage rules.<sup>27</sup> Further, the Attorney General, under the authority of the Drug Enforcement Administration ("DEA") may reschedule a drug if he or she finds that the drug no longer meets the criteria under the schedule for which it has been assigned.<sup>28</sup> This decision is based upon "[s]cientific evidence of [the drug's]

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<sup>23</sup> 21 U.S.C. § 812(c)(10) (2012).

<sup>24</sup> 545 U.S. 1 (2005).

<sup>25</sup> See 21 U.S.C. § 812, *Supra* note at 23.

<sup>26</sup> *Id.* § 812(b)(1).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

pharmacological effect, if known,” and “[t]he state of current scientific knowledge regarding the drug or other substance.”<sup>29</sup>

Drugs classified under Schedule II are those that (1) have a high potential for abuse; have a currently accepted medical use as treatment or are currently accepted with severe restrictions; and (3) if abused, may lead to severe psychological or physical dependence.<sup>30</sup> For a drug to be classified as Schedule III, IV, or V, those which are deemed acceptable for medical treatment, the Attorney General must verify the following: (1) the drug’s chemistry is known and reproducible; (2) there are adequate safety studies; (3) there are adequate and well-controlled studies proving efficacy; (4) the drug is accepted by qualified experts; and (5) there is scientific evidence widely available.<sup>31</sup>

For over forty-five years, the federal government has exercised almost exclusive control over research-grade marijuana, and has refused to allow for privately-funded and FDA-approved operations on research-grade marijuana.<sup>32</sup> While marijuana has throughout history been extensively used and researched,<sup>33</sup> no Attorney General has taken the initiative to modify the drug’s current classification as Schedule I.<sup>34</sup>

In March 2015, over a year before the DEA issued its official refusal to reclassify medical marijuana,<sup>35</sup> Republican House Representative Scott Perry (PA) introduced the Charlotte’s Web Medical Help Act.<sup>36</sup> The Act called for the exclusion of “therapeutic hemp and cannabidiol from the definition of marihuana [sic], and for other purposes.”<sup>37</sup> The bill’s namesake was a seven-year-old girl, Charlotte Figi, who suffered from Dravet Syndrome, a rare form of epilepsy.<sup>38</sup> After moving to Colorado

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<sup>29</sup> *Ams. for Safe Access v. DEA*, 706 F.3d 438, 441 (D.C. Cir. 2013).

<sup>30</sup> § 812(b)(2) (2012).

<sup>31</sup> *Ams. for Safe Access*, 706 F.3d. at 441.

<sup>32</sup> Ruth C. Stern and J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 707 (2009).

<sup>33</sup> *See* Grandel, *supra* note 8 at 136–39.

<sup>34</sup> *See generally* Department of Justice, Drug Enforcement Administration, 21 C.F.R. Chapter 11, Docket No. DEA426, Denial of Petition to Initiate Proceedings to Reschedule Marijuana (Aug. 12, 2016), *available at* <https://www.federalregister.gov/documents/2016/08/12/2016-17954/denial-of-petition-to-initiate-proceedings-to-reschedule-marijuana>. [Hereinafter *2016 DEA Denial*].

<sup>35</sup> *Id.*

<sup>36</sup> Charlotte’s Web Medical Hemp Act of 2014, H.R. 5226, 113th Cong. (2014).

<sup>37</sup> *Id.*

<sup>38</sup> Hannah Osborne, *Charlotte Figi: The Girl Who is Changing Medical Marijuana Laws Across America*, INTERNATIONAL BUSINESS TIMES (Jun. 20, 2014), <http://www.ibtimes.co.uk/charlotte-figi-girl-who-changing-medical-marijuana-laws-across-america-1453547>; Matt Ferner, *House Bill Would Legalize ‘Charlotte’s Web’ Medical Marijuana*, THE HUFFINGTON POST (Jul. 29, 2014), [http://www.huffingtonpost.com/2014/07/28/medical-marijuana-legalization\\_n\\_5627810.html](http://www.huffingtonpost.com/2014/07/28/medical-marijuana-legalization_n_5627810.html).

with her family and obtaining the help of a non-profit organization, Charlotte's seizures were successfully treated "with a strain of high-CBD, low-THC medical cannabis called 'Charlotte's Web.' Traditional pharmaceuticals failed to help Charlotte."<sup>39</sup> In general, there is genuine debate over the actual medicinal advantages for marijuana in general.<sup>40</sup> That being said, it is counterintuitive to hinder additional research on the success of THC-based extracts in treating serious conditions, such as epilepsy (particularly in children); this research could yield real medical benefits, which may save the lives of those for whom traditional treatment options do not work. As of the writing of this Comment, Representative Perry's act has not advanced beyond referral to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.<sup>41</sup>

### B. The Supreme Court

In 2005, the Supreme Court decided its only medical marijuana case to date.<sup>42</sup> The respondents in *Gonzales v. Raich* were residents of California who sought relief from various medical conditions through procurement of medical marijuana, an action that was permissible under the state's Compassionate Care Act.<sup>43</sup> After unsuccessful results from conventional drugs, board-certified family practitioners treated the respondents with marijuana, as it was the only drug that provided relief.<sup>44</sup> In August 2002, county deputy sheriffs and DEA agents came to the house of one of the respondents, conducted a thorough investigation and concluded that her use of marijuana was lawful under California law. Still, the agents seized and destroyed all six cannabis plants present.<sup>45</sup> At trial, the respondents sought injunctive relief from enforcement under the CSA given the conflict between state law and their legitimate and serious medical conditions.<sup>46</sup> They argued that enforcing the CSA was a violation of various constitutional principles, as well as and the doctrine of medical necessity.<sup>47</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> See 2016 DEA Denial, *supra* note 34; see also Craig Press, Kelly Knupp, and Kevin Chapman, *Parental Reporting of Response to Oral Cannabis Extracts as Adjunctive treatment for Medically Refractory Epilepsy*, in American Epilepsy Society Annual Meeting Abstracts (Abst. 1.326, 2014), available at [https://www.aesnet.org/meetings\\_events/annual\\_meeting\\_abstracts/view/1868031](https://www.aesnet.org/meetings_events/annual_meeting_abstracts/view/1868031).

<sup>41</sup> Charlotte's Web Medical Access Act of 2015, H.R. 1635, 114th Cong. (2015).

<sup>42</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>43</sup> *Id.* at 6–7.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 8.

The Supreme Court was not persuaded. In Justice Stevens' majority opinion, the Court applied the rational basis test, and found that "Congress was acting well within its authority to 'make all [laws] which shall be necessary and proper'" by enacting the CSA; this justified the federal government's seizure of the respondent's marijuana.<sup>48</sup> Echoing *Wickard v. Filburn*, the Court strongly emphasized that Congress possesses the authority to regulate interstate commerce, even in instances where non-commercial, intrastate activities could undercut regulation of the interstate market.<sup>49</sup> In essence, Congress may still regulate a "local" activity because that activity may have a substantial economic effect on interstate commerce.<sup>50</sup> The *Gonzales* Court determined that the CSA applied to the respondents by virtue of the Supremacy Clause, and that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."<sup>51</sup>

*Gonzales*, however, was not a unanimous decision. Writing for the dissent, Justice O'Connor was critical of the reliance on *Wickard* and rallied for federalism.<sup>52</sup> In reassessing the scope of the Commerce Clause in tandem with the CSA to account for medical use of marijuana, Justice O'Connor reasoned that respondents' private actions did not have a substantial impact on commerce because their private action failed the *Wickard* stream of commerce test; their private actions could not, therefore, impact the national market.<sup>53</sup> She also noted that the majority's application of the Necessary and Proper Clause did still require the federal government to honor "basic constitutional principles."<sup>54</sup> Further, Justice O'Connor argued that *Wickard* "did not hold or imply that personal-sized or small-scale productions are always economic and are automatically within Congress's reach."<sup>55</sup>

Justice O'Connor also proposed that medical marijuana be regulated separately from general recreational use, suggesting that the majority's reading of the CSA was far too broad and creates unnecessary federalism issues.<sup>56</sup> In her view, the action by the federal government was

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<sup>48</sup> *Gonzales*, 545 U.S. at 22 (citing U.S. CONST. art. 1, 8, cl. 18). See also Casey L. Carhart, *Will the Ever-Swinging Pendulum of Commerce Clause Interpretation Ever Stop? A Casenote on Gonzales v. Raich*, 27 WHITTIER L. REV. 833, 835 (2006).

<sup>49</sup> *Gonzales*, 545 U.S. at 17–18 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

<sup>50</sup> *Wickard*, 317 U.S. at 124–25.

<sup>51</sup> *Gonzales*, 545 U.S. at 19, 29.

<sup>52</sup> *Id.* at 42 (O'Connor, J., dissenting).

<sup>53</sup> See Carhart, *supra* note 48, at 848.

<sup>54</sup> *Id.* at 847.

<sup>55</sup> *Gonzales*, 545 U.S. at 51 (O'Connor, J., dissenting).

<sup>56</sup> *Id.* at 48; see also Carhart, *supra* note 48 at 847.



unconstitutional because California voters had decided—by ballot and by legislation—to legalize the drug, and thus any interference on the part of the federal government would deny a state the ability to give effect to its own laws.<sup>57</sup> For Justice O’Connor, it was within the states’ core powers to define their own criminal law and to protect their citizens.<sup>58</sup> The federal government’s power to, at will, interfere with a state’s traditional police power is problematic for any state wishing to decriminalize or legalize marijuana. Justice O’Connor argued that the Court’s decision in *Gonzales* is “irreconcilable” with its own prior precedent in cases *not* dealing with marijuana.<sup>59</sup> Post-*Gonzales*, it appears, states have taken Justice O’Connor’s dissent seriously. The majority’s ruling has not stopped states like Rhode Island, Montana, Michigan, New Jersey, or the District of Columbia from enacting their own medical marijuana laws in the aftermath of this decision.<sup>60</sup>

### C. The Executive Branch

The executive branch enforces the regulation of marijuana through various agencies. Under 28 U.S.C. § 811, the Attorney General, of the Department of Justice (“DOJ” or “the Department”) may add or remove drugs from the schedules as long as there is, for example, evidence of potential for abuse.<sup>61</sup> Congress, however, may decide to reschedule marijuana or remove it entirely from the Controlled Substance Act.<sup>62</sup> The DEA, the FDA, the Department of Health and Human Services (“HHS”), and the National Institute on Drug Abuse (“NIDA”) are all important agencies in medical marijuana rescheduling considerations. The DEA gathers necessary data on a drug and subsequently requests a scientific and medical evaluation and scheduling recommendation from Secretary of HHS.<sup>63</sup> Administrative responsibilities for evaluating a substance for control under the CSA are performed by the FDA, with NIDA’s concurrence.<sup>64</sup>

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<sup>57</sup> Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O’Connor: A Refusal to “Foreclose the Unanticipated”*, 39 AKRON L. REV. 373, 413.

<sup>58</sup> *Gonzales*, 545 U.S. at 43 (O’Connor, J., dissenting).

<sup>59</sup> *Id.* For additional discussions regarding the use and limitations of Congress’s ability to act pursuant to the Commerce Clause, *See United States v. Lopez*, 514 U.S. 549, 551 (1995) (finding that possession itself is not commercial activity); *See also United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000) (intrastate activities that may be regulated by Congress must be of an “apparent commercial character”).

<sup>60</sup> Grandel, *supra* note 8 at 139; *see also* Cal. Health & Safety Code § 11362.5 (1996).

<sup>61</sup> 21 U.S.C. 811 (a)(1)(A) (2012), *see also* 2016 DEA Denial, *supra* note 34.

<sup>62</sup> *See* Contorno, *supra* note 4.

<sup>63</sup> 21 U.S.C. § 811 (b) (2017).

<sup>64</sup> Memorandum of Understanding with the National Institute on Drug Abuse 50 FR 9518-02 (March 8, 1985).

The DOJ has seen a fluctuation in domestic marijuana seizures since 1984.<sup>65</sup> In 2014, the total number of seizures was at its lowest since 1986 with 74,225.<sup>66</sup> The decline late in the Obama Administration potentially corresponds with the three internal guidance memoranda utilized by the Department. Beginning in 2009, the DOJ issued memos to its prosecutors regarding their responsibilities in terms of states with medical marijuana laws. In the initial memorandum, then-Deputy Attorney General David Ogden emphasized that the priority of the Department was to prosecute criminal enterprises that create illegal markets to sell marijuana as opposed to prosecuting individuals with serious illnesses who use marijuana consistent with state law.<sup>67</sup> The DOJ was to continue its due diligence in investigations, but it would not be quick to prosecute marijuana usage claims in states that allowed medical use.<sup>68</sup> Ogden cautioned, however, that compliance in such states may be done to mask illegal operations, and that prosecutions should be made on a case-by-case basis in order for the federal government to remain consistent with guidelines on resource allocations and priorities.<sup>69</sup>

In 2013 and 2014, the Department clarified its earlier guidance and noted that while state laws authorizing marijuana production, distribution, and possession contrast with federal-state narcotics enforcement, the federal government is less threatened by states that have implemented strong, effective regulatory and enforcement schemes to oversee various forms of marijuana usage.<sup>70</sup> The subsequent memos once again expressed prosecutorial discretion in instances of chronically ill individuals abiding by state law as opposed to commercial enterprises; they noted that if states

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<sup>65</sup> Drug Enforcement Administration, *Statistics & Facts*, <https://www.dea.gov/resource-center/statistics.shtml>.

<sup>66</sup> *See id.*; see also Drug Enforcement Administration, 2015 Final Domestic Cannabis Eradication/Suppression Program Statistical Report, available at [https://www.dea.gov/ops/cannabis\\_2015.pdf](https://www.dea.gov/ops/cannabis_2015.pdf); 2014 Domestic Cannabis Eradication/Suppression Statistical Report, available at [https://www.dea.gov/ops/cannabis\\_2014.pdf](https://www.dea.gov/ops/cannabis_2014.pdf).

<sup>67</sup> David Ogden, *Memorandum for Selected United States Attorneys re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Oct. 19, 2009, available at <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [hereinafter *Ogden Memo*]; James M. Cole, *Memorandum for All United States Attorneys re: Guidance Regarding Marijuana Enforcement*, Aug. 29, 2013, available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter *2013 Cole Memo*]; James M. Cole, *Memorandum for All United States Attorneys re: Guidance Regarding Marijuana Related Financial Crimes*, Feb. 14, 2014, available at <http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf> [hereinafter *2014 Cole Memo*].

<sup>68</sup> *See* Ogden Memo, *supra* note 67.

<sup>69</sup> *Id.*

<sup>70</sup> *See* 2014 Cole Memo, *supra* note 67.

lack “robust” enforcement efforts, the federal government may challenge the regulatory structure as well as pursue legal action.<sup>71</sup> With this guidance, the federal government may take action against states, despite the presence of strong state regulatory structures, if certain conduct or people threaten federal priorities.<sup>72</sup> The discretion allotted in the guidance and in state laws does not constitute valid defenses to any action taken by the federal government in terms of enforcement.<sup>73</sup> The federal government may always act to enforce, but the guidance gives states and marijuana users insight as to when the federal government is likely to do so. The DOJ charged its attorneys with monitoring conditions in the states in order to assess when to use its limited budget for prosecutions, but it has not provided specificity as to how it will monitor users within states with medical marijuana laws.<sup>74</sup>

Simply because there is prosecutorial discretion regarding enforcement does not mean the DEA under President Obama was eager to reclassify marijuana from Schedule I. In November 2011, then-Governors Lincoln D. Chafee (RI) and Christine O. Gregoire (WA) petitioned the DEA to reclassify marijuana away from Schedule I and repeal the relevant rules and regulations that kept it as such.<sup>75</sup> The petition stated that “cannabis has an accepted medical use in the United States, is safe for use under medical supervision, and has a relatively low abuse potential compared to other Schedule II drugs.”<sup>76</sup> The DEA requested scientific and medical evaluation and schedule recommendations from HHS, which ultimately found that marijuana possesses a high potential for abuse, has no accepted medical use in the United States, and lacks the appropriate level of safety for use under medical supervision.<sup>77</sup> The DEA formally rejected the request to reclassify marijuana in July 2016.<sup>78</sup> In its report, the agency noted that the FDA approval of a New Drug Application is not the only means through which a drug can be determined to have an

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<sup>71</sup> *Id.*

<sup>72</sup> See 2014 Cole Memo, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> See generally U.S. Gov’t Accountability Office, GAO-16-1, *Report to Congressional Requesters: State Marijuana Legalization, DOJ Should Document Its Approach to Monitoring the Effects of Legalization* (2015), <http://www.gao.gov/assets/680/674464.pdf>.

<sup>75</sup> U.S. Department of Justice, *Schedule of Controlled Substances: Maintaining Marijuana in Schedule I of the Controlled Substance Act* (2016), 1, <https://www.deadiversion.usdoj.gov/schedules/marijuana/Maintaining%20Marijuana%20in%20Schedule%20I%20of%20the%20Controlled%20Substances%20Act.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2. For discussion regarding the specific reasoning the DEA gave for these categories, see *id.* at 54–75.

<sup>78</sup> See generally *id.*

accepted medical use in treatment in the United States.<sup>79</sup> Citing to *Alliance for Cannabis Therapeutics v. DEA*,<sup>80</sup> the DEA outlined a five-part test to determine if a drug has a “currently accepted medical use”<sup>81</sup> in the United States: “(1) the drug’s chemistry must be known and reproducible . . . ; (2) there must be adequate safety studies . . . ; (3) there must be adequate and well-controlled studies proving efficacy . . . ; (4) the drug must be accepted by qualified experts . . . ; and (5) the scientific evidence must be widely available[.]”<sup>82</sup>

In examining these prongs, HHS concluded that marijuana does not meet any of the requirements.<sup>83</sup> More specifically, the HHS determined that marijuana’s chemistry is such that (1) a standardized dose cannot be created due to the irreproducibility of the drug; that the variation of the drug’s chemistry complicates safety evaluations; (2) that there are no adequate or well-controlled studies to document marijuana’s efficacy; (3) that there is currently no evidence of a consensus amongst qualified experts that marijuana is an effective and appropriate treatment measure; (4 and 5) and that the current data on the drug is insufficient to allow for scientific scrutiny, emphasizing that the chemistry of a specific cannabis strain suggesting standardization and reproducibility does not exist.<sup>84</sup> Despite the efforts of Governors Chafee and Gregorie to show that there was evidence of acceptance in the medical community and that the chemistry is known and reproducible, the DEA found that “informative, conclusions on long-term use of marijuana cannot be applied to the general population.”<sup>85</sup>

The federal government’s refusal to reconsider its stance is interesting (or noteworthy), in light of the fact that marijuana is the only Schedule 1 drug that non-DEA-licensed private laboratories and researchers are not allow to produce in a scientific study environment.<sup>86</sup> In 2007, a DEA Administrative Law Judge recommended a University of Massachusetts professor be granted permission by the DEA to grow marijuana for medical purposes after her petition had been pending for six years.<sup>87</sup> The Administrative Law Judge found “the existing supply of licensed cannabis inadequate, [deeming the] application to cultivate marijuana for research purposes to be ‘in the public interest’ and

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<sup>79</sup> *Id.* at 32.

<sup>80</sup> 15 F.3d 1131 (D.C. Cir. 1994).

<sup>81</sup> See 2016 DEA Denial, *supra* note 34 at 53700.

<sup>82</sup> *Id.* at 53739.

<sup>83</sup> *Id.* at 53700.

<sup>84</sup> *Id.* at 53700–01.

<sup>85</sup> *Id.* at 53760; see also *infra* Part V.

<sup>86</sup> See Stern and DiFonzo, *supra* note 32 at 707.

<sup>87</sup> *Id.*

recommended it be granted.”<sup>88</sup> The determination, however, was subject to review by the DEA Administrator and, as with the Administrative Law Judge’s earlier decision on rescheduling, was rejected.<sup>89</sup> However, not all those who seek authorization to research are denied; they may just have to wait a decade or so.<sup>90</sup>

In 2008, the American College of Physicians prepared a position paper strongly supporting “increased research and evaluation on marijuana’s therapeutic benefits.”<sup>91</sup> It boldly noted that the overly strict federal government oversight created a “clear discord . . . between the scientific community and federal, legal, and regulatory agencies over the medical value of marijuana, which impedes the expansion of research.”<sup>92</sup> Similarly, in 2009, the American Medical Association put forth a report cited by Governors Chafee and Gregorie’s 2011 request.<sup>93</sup> The report accepted marijuana’s safety and efficacy, but cautioned that: (1) it was not endorsing state-based medical marijuana programs; (2) was not advocating for the legalization of marijuana, and; (3) was not suggesting that scientific evidence on the therapeutic use of cannabis meets the same and current standards for a prescription drug product.<sup>94</sup>

#### IV. THE FARR-ROHRABACHER AMENDMENT: THE FEDERAL GOVERNMENT VS. THE FEDERAL GOVERNMENT IN 2015 AND BEYOND

Through 2015, the states that passed their own legislation legalizing medical marijuana did so despite federal prohibitions. Congress, which has outlawed marijuana under the CSA, has also proposed laws that would allow for the use of marijuana-derivatives to treat medical conditions.<sup>95</sup> Likewise, memoranda exists from the DOJ promoting prosecutorial discretion in states that have legalized medical marijuana, despite the Department’s role in enforcing the CSA.<sup>96</sup> Inevitably, the consequences

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See also Janet Burns, *Trump Extends Cannabis Protections ‘Til December as Plans for Study, States Remain Hazy*, Forbes (Date of Access), <https://www.forbes.com/sites/janetwburns/2017/09/25/trump-budget-extends-cannabis-protections-til-december-as-plans-for-study-states-remain-hazy/#c77e5c947ffe> (“Last year, the DEA began accepting applications to grow more cannabis for research, and it’s reportedly received 25 such proposals as of this month. In order to proceed, however, researchers would need the Justice Department’s approval, and have so far come up entirely short.”) (last visited Jan. 1, 2018).

<sup>91</sup> Stern DiFonzo, *supra* note 32 at 708.

<sup>92</sup> *Id.* (internal citation omitted).

<sup>93</sup> See 2016 DEA Denial, *supra* note 34 at 53756.

<sup>94</sup> *Id.* (internal citations omitted).

<sup>95</sup> See *supra* Part III, Section A.

<sup>96</sup> See *supra* Part III, Section C.

of conflicting enforcement policies have led to a shift in oversight. In 2015, Congress passed a spending bill that included the Farr-Rohrabacher Amendment, which gave states with medical marijuana laws a reprieve from inconsistent federal enforcement.<sup>97</sup> Subsection A will detail the Farr-Rohrabacher Amendment itself. Subsection B will explore the implications of the Amendment, including *McIntosh*, a case in which the Ninth Circuit upheld the constitutionality of the Amendment.<sup>98</sup> Section C will focus on the aftermath of *McIntosh* as faced by Congress and by the executive branch.

#### A. *The Farr-Rohrabacher Amendment*

In December 2015, Congress passed the Consolidated Appropriations Act 2016, which President Obama signed on the same day.<sup>99</sup> Section 538 is referred to as the Farr-Rohrabacher Amendment (“the Amendment” or “§ 538”).<sup>100</sup> It was co-sponsored by Democratic Representative Sam Farr (CA) and Republican Representative Dana Rohrabacher (CA). The Amendment took many forms, while continually offered for debate in the House of Representatives since 2003.<sup>101</sup> While the Amendment first formally appeared in the 2015 omnibus bill, it was the 2016 Amendment, containing the same language, which was at issue in *McIntosh*, discussed in Subsection B below.<sup>102</sup> The Amendment provides as follows:

None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming,

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<sup>97</sup> See *infra*, Part IV, Section A.

<sup>98</sup> 833 F.3d 1163.

<sup>99</sup> Consolidated Appropriations Act 2016, Pub. L. No. 114-113, 114 Cong. (2015).

<sup>100</sup> In the previous spending bill, Consolidated and Further Continuing Appropriations Act 2015, Pub. L. No. 113-235, 113 Cong. (2014), the Amendment is located at Section 538, available at: <https://www.congress.gov/113/plaws/publ235/PLAW-113publ235.pdf>.

<sup>101</sup> Douglas H. Fischer, *Clearing the Smoke Around the Farr-Rohrabacher Amendment*, LAW360.COM (Mar. 10, 2015, 12:35 PM), <https://www.law360.com/articles/628782/clearing-the-smoke-around-the-farr-rohrabacher-Amendment>.

<sup>102</sup> See *United States v. Firestack-Harvey*, 2014 U.S. Dist. LEXIS 60959, 2014 WL 1744255 (relying on a previous iteration of the appropriation bill). Reader should note that the Amendment language is consistent in the appropriations bills. See also Fischer, *supra* note 101.

or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.<sup>103</sup>

By pulling on the purse strings, Congress is protecting states with valid laws only from prosecution. It does not prohibit the federal government from surveilling states irrespective of marijuana laws or from prosecuting individuals in those states without medical marijuana legalization laws.<sup>104</sup> The Amendment was included in past appropriation bills<sup>105</sup> and was allotted for in the 2017 Appropriations Acts.<sup>106</sup> At the time of the 2016 Appropriations Bill, Representative Farr remarked that the Amendment served not only to protect the states with medical marijuana laws from federal intrusion, but also residents who lawfully comply with those state laws from apprehension by the federal government.<sup>107</sup> Representative Farr cited a Pew Research Center survey which found that 61% of Republicans and 76% of Independents favored legalization of medical marijuana and argued that shifting social opinions were influential in including this Amendment.<sup>108</sup> Much of the Congressional record reflects similar arguments made in the 2016 DEA report,<sup>109</sup> namely, that there is no medical evidence for such claims of efficacy and that the drug is highly addictive.<sup>110</sup> Ultimately, the arguments

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<sup>103</sup> See *supra* note 99 at § 542.

<sup>104</sup> See *infra* Part IV, Section C; see also Daniel J. Hurteau, et al., *Confusion Persists over Medical Marijuana Enforcement*, LAW360.COM (Jan. 15, 2015, 2:12 PM), <https://www.law360.com/articles/613191/confusion-persists-over-medical-marijuana-enforcement>.

<sup>105</sup> See *supra* note 100.

<sup>106</sup> See 114 P. L. 114-223 (Lexis 2017) (“The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2017, and for other purposes . . . [including]: The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (division B of Public Law 114–113)”). To avoid a government shutdown following the appropriation’s September 20, 2016 expiration date, Congress extended the amendment under the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriation Act, 2017, and Zika Response and Preparedness Act. See also 114 P. L. 114-254 (further extending appropriations through April 28, 2017).

<sup>107</sup> 160 Cong. Rec. H4982-85 (daily ed. May 29, 2014); see also Brief of Members of Congress Rohrabacher (R-CA) and Farr (D-CA) as Amici in Support of Charles C. Lynch’s Motion for Rehearing En Banc, *United States v. Lynch*, Nos. (9th Cir. 2015) (Nos. 10-50219, 10-50264).

<sup>108</sup> 160 Cong. Rec. H4982-85, H4983 (daily ed. May 29, 2014); see also *Public Support for Legalizing Medical Marijuana*, Pew Research Center (Apr. 1, 2010), <http://www.people-press.org/2010/04/01/public-support-for-legalizing-medical-marijuana/>.

<sup>109</sup> See *supra* Part III. See generally 2016 DEA Denial, *supra* note 34.

<sup>110</sup> 160 Cong. Rec. H4982-85, H4985 (daily ed. May 29, 2014).

were not persuasive and the House of Representatives passed the appropriations bill with the Amendment in it on April 30, 2015, by a vote of 255-163.<sup>111</sup> Of those 255 votes of “yea,” 236 were Republicans and 19 were Democrats.<sup>112</sup> On November 10, 2015, the Senate passed the bill with changes, which required the House’s approval.<sup>113</sup> The collective bill was approved on December 18, 2015 with a vote in the Senate of 65-33, with 27 Republicans and 37 Democrats agreeing with the passage.<sup>114</sup>

Numerous questions arise from such vague language concerning enforcement, executive power, and the fact that federal government’s attention is still not fully diverted from marijuana, even for medical purposes.<sup>115</sup> As will be shown in Subsection B, courts engage in narrow interpretation when there is a dispute over congressional intent, since Amendments do not follow the same legislative process as regular laws and the stakes are very high.<sup>116</sup> Appropriation Amendments are a clever, though controversial, way for Congress to exert dominance over executive power.<sup>117</sup>

*B. United States v. McIntosh: The Ninth Circuit’s Dance with Mary Jane*

In August 2016, the Ninth Circuit upheld the constitutionality of the Farr-Rohrabacher Amendment.<sup>118</sup> In *McIntosh*, ten cases were consolidated on interlocutory appeals and petitions for writs of mandamus from appellants who were indicted for various infractions under the CSA.<sup>119</sup> In *McIntosh*, five co-defendants allegedly ran four marijuana stores in the Los Angeles and San Francisco areas and were indicted for conspiracy to: manufacture; possess with intent to distribute; and distribute more than 1,000 marijuana plants in violation of the CSA.<sup>120</sup> In *United States v. Lovan*, the DEA and the Fresno County Sheriff’s Office executed a federal search warrant on land located in Sanger, California, where more than 30,000 marijuana plants were found on the property, leading to the indictment of four co-defendants in violation of the CSA.<sup>121</sup>

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<sup>111</sup> Actions Overview H.R.2029 – 114th Congress (2015-2016), available at <https://www.congress.gov/bill/114th-congress/house-bill/2029/actions>.

<sup>112</sup> *Id.*

<sup>113</sup> Consolidated Appropriations Act, H.R. 2029, 114th Cong. (2016).

<sup>114</sup> *Id.*

<sup>115</sup> See Hurteau et al., *supra* note 104.

<sup>116</sup> *Id.*

<sup>117</sup> See Fischer, *supra* note 101.

<sup>118</sup> *McIntosh*, 833 F.3d at 1168.

<sup>119</sup> *Id.* at 1169–70.

<sup>120</sup> *Id.* at 1169.

<sup>121</sup> *Id.*



In the final consolidated case, *United States v. Kynaston*, five co-defendants faced charges relating to Washington State’s Controlled Substance Act, which lead to an ultimate indictment under the CSA, as well as illegal firearm possession.<sup>122</sup> In *McIntosh* and *Kynaston*, the lower courts found that the defendants did not meet the burden necessary to demonstrate compliance with state medical marijuana laws, and denied the motions to dismiss or to enjoin on the basis of the Amendment from the bench.<sup>123</sup> In *Lovan*, the court found that a jury trial was necessary to determine if defendants complied with state law, and that the motion to dismiss would only be revisited post-trial.<sup>124</sup>

On appeal, the Ninth Circuit noted that these cases were unusual, as federal criminal prosecutions do not typically provide for injunctive relief and interlocutory appeals for ongoing litigation.<sup>125</sup> Congress’s enactment of the Amendment led the court to note that it is “the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish [its] relative priority for the Nation.”<sup>126</sup> Moreover, the court stated that, once Congress delegates its powers or otherwise prioritizes a certain area, it is up to courts to enforce such policies when enforcement is sought.<sup>127</sup> As such, the court found that it could not “ignore the judgment of Congress”, one that was “deliberately expressed in legislation” and is authorized to exercise jurisdiction if a district court denies a request for injunctive relief.<sup>128</sup> The court limited the scope of its analysis in a footnote, stating that it did not need to decide how the district courts should resolve claims that the DOJ is in violation of the Amendment.<sup>129</sup>

The court based its decision on several factors, including its understanding of the Amendment text, and then engaged in statutory interpretation.<sup>130</sup> In addressing the Amendment, the court stated, “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law . . . .”<sup>131</sup> Appellants argued, and the court agreed, that if the DOJ were spending money in violation of § 542 of the Amendment, it would be in violation of the Constitution, furthering their

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *McIntosh*, 833 F.3d at 1169.

<sup>125</sup> *Id.* at 1172.

<sup>126</sup> *Id.* (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 497 (2001)).

<sup>129</sup> *Id.* at 1172, n.2.

<sup>130</sup> *McIntosh*, 833 F.3d at 1169–75.

<sup>131</sup> U.S. CONST. Art I. § 9, cl. 7.

claims pertaining to separation of powers.<sup>132</sup> In his motion to dismiss the federal government's complaint, individual appellant McIntosh argued given that the government's own complaint noted that the defendants were operating under California's state medical marijuana laws with state issued permits and tax registration, the federal government clearly prevented California from implementing its own laws.<sup>133</sup> The court addressed the Supremacy Clause in a footnote, merely noting that § 542 did "not provide immunity from Federal prosecution", and that no state law actually legalizes the "possession, distribution, or manufacturing of marijuana."<sup>134</sup> While the CSA remains in effect, states cannot authorize activity that remains prohibited by federal law.<sup>135</sup>

The court engaged in statutory interpretation to determine if there truly was a constitutional violation of the appropriations bill by including the Amendment.<sup>136</sup> The court emphasized that under appropriations law, it could only consider the text of the Amendment, not any "expressions of intent" from any legislative history.<sup>137</sup> Unless otherwise defined, the court stated, "words will be interpreted as taking their ordinary, contemporary, common meaning."<sup>138</sup> After assessing the common meaning of the words "them", "their own laws," and "implement," the court found that § 542, as written, prohibits the DOJ from financing actions that impact medical marijuana states from giving practical effect to their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana.<sup>139</sup> In its defense, the DOJ unsuccessfully argued that by taking action against private individuals and not against the states themselves, it was not in violation of the Amendment, and it was not preventing states from enforcing their own laws.<sup>140</sup> The court stated that the DOJ, by taking actions against individuals as opposed to states, prevented the states from giving effect to their own laws that specifically provide for "non-prosecution of individuals who engage in permitted conduct."<sup>141</sup>

It is important to note that the court was explicit in stating two principles: (1) that § 542 only applies to lawful medical marijuana use, distribution, and cultivation; and (2) that it applies to a wide variety of

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<sup>132</sup> *McIntosh*, 833 F.3d at 1175.

<sup>133</sup> Def.'s Motion to Dismiss at 5, *McIntosh*, 833 F.3d 116.

<sup>134</sup> *McIntosh*, 833 F.3d at 1179, n.5.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1178.

<sup>138</sup> *Id.* at 1175 (citing *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)).

<sup>139</sup> *Id.* at 1176.

<sup>140</sup> *McIntosh*, 833 F.3d at 1176.

<sup>141</sup> *Id.* at 1176–77.

laws in flux,<sup>142</sup> limiting power of the executive branch to some extent.<sup>143</sup> To establish these principles, the court returned to interpreting the Amendment, finding that the ordinary meaning of the Amendment restricts the DOJ from allowing states to implement their laws that only authorize medical marijuana use.<sup>144</sup>

The court emphasized that no state law may legalize “possession, distribution, or manufacturing of marijuana.”<sup>145</sup> In remanding the case,<sup>146</sup> the court did not provide much guidance for district courts who must determine the precise remedy “in the first instance and in each case.”<sup>147</sup> The decision tipped its hat to *Gonzales* in a footnote by stating: “[u]nder the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. Thus, while the CSA remains in effect, states cannot authorize the ‘manufacture, distribution, or possession of marijuana’. Such activity remains prohibited by federal law.”<sup>148</sup>

This decision is not necessarily a political one. The ruling on the basis of the law itself does not cater to one side or another, especially given the support for the Amendment,<sup>149</sup> but rather looks strictly to the plain-meaning of words at issue in the Amendment as opposed to outside intent, a factor which could otherwise persuade a judge if he or she agrees with such intent.<sup>150</sup> *McIntosh* makes clear that the issues from *Gonzales* are still present even though, more than a decade later, states continue to legalize marijuana through the democratic process.<sup>151</sup>

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<sup>142</sup> Perhaps referring to state recreational laws in effect across the country.

<sup>143</sup> *McIntosh*, 833 F.3d at 1178.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1179, n.5.

<sup>146</sup> See *United States v. McIntosh*, No. 14-cr-00016-MMC-1, 2017 U.S. Dist. LEXIS 39920 (N.D. Cal. Mar. 20, 2017) (noting that the Ninth Circuit’s holding does not constitute “a change in the applicable law, but, rather, an application of the rule established [by the Ninth Circuit] that a district court looks to state law to determine whether the defendant’s conduct is authorized and thus exempt from federal prosecution”).

<sup>147</sup> *McIntosh*, 833 F.3d at 1179.

<sup>148</sup> *Id.* at 1179, n.5. (internal citations omitted).

<sup>149</sup> See *supra* note 108.

<sup>150</sup> *McIntosh*, 833 F.3d at 1178.

<sup>151</sup> See Steve Birr, *Activists Hopeful Marijuana Ballots Will Spark Nationwide Reform*, THE DAILY CALLER (Oct. 28, 2016, 7:19 PM), <http://dailycaller.com/2016/10/28/activists-hopeful-marijuana-ballots-will-spark-nationwide-reform/> (citing California’s Proposition 64: that “would allow anyone over 21 to possess one ounce of Marijuana and grow up to six plants in their home, with a 15 percent tax on any sales. Experts say that California often serves as the national model for legislative reforms.”); California is spearheading the movement and other states (Arizona, Maine, Massachusetts, and Nevada) have recreational legislation on the ballot but it would still not be affected by this holding and it is likely that there would still be contention between the federal government and the states.

*C. Congress and the Executive Branch post-McIntosh*

Section 542 is a clever workaround to the CSA. In addressing this apparent contradiction, the Ninth Circuit concluded that the DOJ can still prevent states from implementing medical marijuana laws that violate federal law, despite any medicinal purposes or state-wide acceptance.<sup>152</sup> What the DOJ cannot do, however, is spend a penny to prosecute individuals in states with valid medical marijuana laws if those laws are being followed.<sup>153</sup> The DOJ, however, is not rendered completely powerless in light of this ruling; it is merely prevented from spending funds to prosecute.<sup>154</sup> The agency is not in violation of the Farr-Rohrabacher Amendment if it pursues individuals, for example, who engage in marijuana-related conduct in states without protective laws.<sup>155</sup> Additionally, the agency is free to spend the funding allotted to make it more difficult for states' medical marijuana programs to function even under state law by increasing oversight, investigation, and surveillance of growers, dispensaries, possibly patients, and the resources necessary for businesses to survive.<sup>156</sup> Equally as important, the Amendment does not limit the DOJ from using funds to prosecute in states that *do not* have medical marijuana laws.<sup>157</sup>

The Ninth Circuit was very aware of Congress's ability to control federal purse-strings, foreshadowing that "this temporary lack of funds" could continue if Congress decides to include the Amendment in future bills.<sup>158</sup> President Obama *did* extend the Amendment when he signed into law the 2017 Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriation Act.<sup>159</sup> The Act does not contain the exact language of the Amendment but does state that funds previously made available under provisions in the 2016 measure are to be extended.<sup>160</sup> There is no specific wording allowing previously untouchable United States Treasury funds to be made available to the DOJ

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<sup>152</sup> *McIntosh*, 833 F.3d at 1176.

<sup>153</sup> *Id.*

<sup>154</sup> *See supra* note 99 at § 542.

<sup>155</sup> *McIntosh*, 833 F.3d at 1178; *see also* Lino S. Lipinksy and Joel M. Pratt, *Congress' Conflicting Approach Toward Medical Marijuana*, LAW360.COM (Jan. 13, 2016, 11:30 AM), <https://www.law360.com/articles/745597/congress-conflicting-approach-toward-medical-marijuana>.

<sup>156</sup> *See* Hurteau, et al. *supra* note 104; *see also* 2013 Cole Memo, *supra* note 67 (providing guidance to prosecutors to be mindful of seemingly legitimate claims that may be cover-ups for illicit activities, further emphasizing that despite advising against prosecuting, the DOJ is not without means to surveil).

<sup>157</sup> *See* Lipinksy and Pratt, *supra* note 155.

<sup>158</sup> *McIntosh*, 833 F.3d at 1179.

<sup>159</sup> Pub. L. No. 114-223, 114 Cong. (2016).

<sup>160</sup> *Id.*

to prosecute medical marijuana claims under the CSA.<sup>161</sup> The DOJ is forced to pick and choose its battles, as it cannot spend federal funds to prosecute individuals who lawfully engage in permissible conduct under state law.<sup>162</sup> If the federal government does choose to prosecute, according to the *McIntosh* court, “it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.”<sup>163</sup>

It is also clear that there is no protection afforded by the Amendment alone in the face of federal enforcement, even if the states allow for medical marijuana use:

The . . . observation should also serve as a warning. To be clear, § 542 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.<sup>164</sup>

Congress “chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical marijuana,” but this is not a fixed or a permanent stance.<sup>165</sup> As it stands, neither meaningfully changes marijuana’s status under federal law nor does it restrain the executive branch from enforcement.<sup>166</sup> Even though the appropriations bill was extended, the Amendment could be taken out in the next iteration, or Congress may change its mind entirely and appropriate funds for prosecutions if and when it so chooses.<sup>167</sup>

Moreover, because of how controversial the Amendment is, a court in a different jurisdiction could interpret the statute differently and hold the opposite of the Ninth Circuit.<sup>168</sup> Any decision regarding marijuana is

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<sup>161</sup> *Id.* See generally *supra* note 67.

<sup>162</sup> See *McIntosh*, 833 F.3d at 1176-77.

<sup>163</sup> *Id.* at 1177.

<sup>164</sup> *Id.* at 1179, n.5.

<sup>165</sup> *Id.* at 1178-1179.

<sup>166</sup> See Lipinsky and Pratt, *supra* note 155.

<sup>167</sup> *McIntosh*, 833 F.3d at 1179.

<sup>168</sup> See John Hudak, *McIntosh Decision Limits DOJ Powers, But Medical Marijuana Advocates Should Worry*, BROOKINGS (Aug. 19, 2016), <https://www.brookings.edu/blog/fixgov/2016/08/19/mcintosh-decision-limits-doj-powers-but-medical-marijuana-advocates-should-worry/>; see also *United States v. Nixon*, 839 F.3d 885, 888 (9th Cir. 2016) (“the CSA continues to apply in all 50 states, although the DOJ’s ability to use certain funds to pursue individual prosecutions under that statute remains circumscribed to the extent . . . explained in *McIntosh* as long as the appropriations Amendment is in effect.”).

not Congress's alone, either.<sup>169</sup> The Ninth Circuit is cognizant that a new administration could also shift the nation's priorities, casting more ambiguity on the future of medical marijuana.<sup>170</sup> With the Cole and Ogden memos providing states with some assurance that the federal government, at least under the Obama Administration, would not enforce the marijuana prohibition in every instance, it is no surprise that the Farr-Rohrabacher Amendment reflects the Obama Administration's view on medical marijuana consistent with its DOJ memos.<sup>171</sup>

## V. MEDICAL MARIJUANA IN THE FUTURE

Medical marijuana has had a long, strange trip<sup>172</sup> in Washington but where shall it go next? Writing in 2011, Professor Martin D. Carcieri of San Francisco State University stated that he expected federal marijuana prohibitions to reach a tipping point in 2013 and that, because Congress was failing to take the lead on the matter, it would have to yield—most likely—to the states.<sup>173</sup> Four years and one administration change later, the new Commander-In-Chief has options, assuming that Congress extends the Farr-Rohrabacher Amendment beyond 2017. Subsection A will discuss the options before the new administration and the likelihood of success for each. Subsection B will advocate for keeping the status quo from the Obama Administration to allow for additional scientific research in order to form a more educated decision on the future status of medical marijuana.

### A. *The Trump Administration's Options*

President Trump appointed several anti-marijuana figures to his administration and while he was swift to act on issues such as abortion<sup>174</sup>

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<sup>169</sup> See *supra* Section III, Subsection C.

<sup>170</sup> *McIntosh*, 833 F.3d at 1179, n.5.

<sup>171</sup> See Lipinsky and Pratt, *supra* note 155; Mike Riggs, *Obama Administration Overrides 2009 Ogden Memo, Declares Open Season on Pot Shops in States where Medical Marijuana is Legal*, REASON: HIT & RUN (Jun. 30, 2011, 9:32 PM), <http://reason.com/blog/2011/06/30/white-house-overrides-2009-mem>.

<sup>172</sup> THE GRATEFUL DEAD, *Truckin'*, on AMERICAN BEAUTY (Warner Bros. 1970).

<sup>173</sup> Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 331 (2011).

<sup>174</sup> See generally Lanae Erickson Hatalsky and Nathan Kasai, *Donal Trump's Coming Abortion Surge*, U.S. News and World Report (Oct. 18, 2017, 12:00 PM) <https://www.usnews.com/opinion/civil-wars/articles/2017-10-18/trumps-contraception-coverage-rollback-will-lead-to-more-abortions>; Sarah Childress and Nicole Einbinder, *At Home and Abroad, Trump Moves to Broaden Abortion Fight*, PBS FRONTLINE (Dec. 14, 2017) <https://www.pbs.org/wgbh/frontline/article/at-home-and-abroad-trump-moves-to-broaden-abortion-fight/>.

and immigration,<sup>175</sup> as of the writing of this Comment, there is no official support for or rejection of medical marijuana. Two individuals in particular play a decidedly large role in the future of marijuana, regardless of whether they remain with the administration or not. Attorney General Jeff Sessions stated on record that marijuana is a gateway drug.<sup>176</sup> He also said that marijuana legalization should be resisted, yet he has not provided any specific plans to challenge state-regulated markets.<sup>177</sup> Attorney General Sessions previously criticized President Obama during a Senate hearing for his admission of smoking marijuana in high school.<sup>178</sup> Tom Price, the Former Secretary of HHS, was also a marijuana opponent.<sup>179</sup> John Hudak of the Brookings Institution has stated that Price has consistently voted against marijuana policy reforms, even those modest ones, and the medical community, of which Price is a part, is conservative about the use of marijuana.<sup>180</sup> Interestingly, although Secretary Price, then a congressman, voted against various measures that would have prevented the DOJ from interfering with state medical marijuana laws, during his tenure Price did support “a limited measure preventing the DOJ from interfering with states that allow the medical use of cannabidiol.”<sup>181</sup> Despite his resignation, President Trump could seek to fill the position with someone with similar views to Former Secretary Price to suggest status quo on the issue.

Throughout his campaign and through mid-2017, President Trump distinguished medical marijuana from recreational marijuana, expressed support for medical marijuana, and stated that legalization should be

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<sup>175</sup> See generally Maryam Saleh, *One Year of Immigration Under Trump*, THE INTERCEPT (Dec. 31, 2017, 12:00 PM) <https://theintercept.com/2017/12/31/one-year-of-immigration-under-trump/>.

<sup>176</sup> Jeremy Berke, *Trump's Attorney General Pick is Bad News for Legal Marijuana*, BUSINESS INSIDER (Nov. 18, 2016, 1:40 PM), [http://www.businessinsider.com/prospective-trump-attorney-general-jeff-sessions-on-weed-2016-11?utm\\_source=feedburner&utm\\_medium=referral](http://www.businessinsider.com/prospective-trump-attorney-general-jeff-sessions-on-weed-2016-11?utm_source=feedburner&utm_medium=referral).

<sup>177</sup> Steven Nelson, *Sessions Beats War Drum on Pot Legalization, Concerning State Attorney Generals*, U.S. NEWS (Feb. 28, 2017, 12:16 PM), <https://www.usnews.com/news/articles/2017-02-28/jeff-sessions-beats-war-drum-on-pot-legalization-concerning-state-attorneys-general>.

<sup>178</sup> *Id.* Jeremy Berke, *Here's Where Attorney General Jeff Sessions Stands on Legal Marijuana*, BUSINESS INSIDER (Feb. 8, 2017, 7:26 PM), <http://www.businessinsider.com/attorney-general-jeff-sessions-legal-weed-2017-2>.

<sup>179</sup> Christopher Ingraham, *Donald Trump Adds Another Marijuana Opponent to his Cabinet*, THE WASHINGTON POST (Nov. 29, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/29/donald-trump-adds-another-marijuana-opponent-to-his-cabinet/?utm\\_term=.921d86164964](https://www.washingtonpost.com/news/wonk/wp/2016/11/29/donald-trump-adds-another-marijuana-opponent-to-his-cabinet/?utm_term=.921d86164964).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

implemented on a state-by-state basis.<sup>182</sup> In May 2017, his signing statement pertaining to the passing of the Consolidated Appropriations Act of 2017,<sup>183</sup> which upheld the Farr-Rohrabacher Amendment through September 2017, conflicted with his previously expressed views.<sup>184</sup> In the short paragraph addressing medical marijuana, President Trump stated that, he “will treat this provision consistently with [his] constitutional responsibility to take care that the laws be faithfully executed.”<sup>185</sup>

The implication that President Trump could disregard the bill’s limits on the use of DOJ money is nonsensical.<sup>186</sup> Steve Bell, a Senior Advisor at the Bipartisan Policy Center, stated that “[i]t is the constitutional prerogative of the Congress to spend money and to put limitations on spending,” and that President Trump’s signing statement is “an extremely broad assertion of executive branch power over the purse.”<sup>187</sup>

Attorney General Sessions has been an outspoken opponent of marijuana, including its use for medicinal purposes. He made headlines in the summer of 2017 for personally asking Congress to let him prosecute

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<sup>182</sup> See Berke, *supra* note 176. See also Jacob Sullum, *Trump’s Medical Marijuana Threat Contradicts the Law and His Own Position*, REASON: HIT & RUN (May 8, 2017, 8:00 AM), <http://reason.com/blog/2017/05/08/trumps-medical-marijuana-threat-contradi>; Tom Angell, *Where Do Presidential Candidates Stand on Marijuana?*, MARIJUANA.COM (Apr. 13, 2015, 9:51 AM), <https://www.marijuana.com/news/2015/04/where-do-presidential-candidates-stand-on-marijuana/>; C.J. Ciaramella, *White House Expects ‘Greater Enforcement’ Against States that Legalized Recreational Marijuana*, REASON: HIT & RUN (Feb. 23, 2017, 4:35 PM), <http://reason.com/blog/2017/02/23/white-house-expects-greater-enforcement>.

<sup>183</sup> *Statement by President Donald J. Trump on Signing H.R. 244 into Law*, THE WHITE HOUSE (May 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law>. It should be noted that this statement is no longer available on the White House website as of the completion of this comment.

<sup>184</sup> While the actual signing statement is no longer available on the White House Website, see *supra* note 185, there is considerable coverage on the statement itself. See John Bowden, *Trump Pushes Back Against Ban on State Medical Marijuana Interference*, THE HILL (May 5, 2017, 10:18 PM) <http://thehill.com/policy/finance/332182-trump-pushes-back-against-ban-on-state-medical-marijuana-interference>; Carol Rosenberg and Franco Ordoñez, *Trump Warns He Might Not Obey Provisions on Guantánamo and Pot in New Spending Law*, THE MIAMI HERALD (May 5, 2017, 7:04 PM) <http://www.miamiherald.com/news/politics-government/article148944674.html>; Jeremy Berke, *Trump Indicated Where He Stands on Medical Marijuana for the First Time Since He Took Office*, BUSINESS INSIDER (May 6, 2017, 12:15 AM) <http://www.businessinsider.com/medical-marijuana-trump-administration-2017-first-statement-2017-5>.

<sup>185</sup> See Berke, *supra* note 186.

<sup>186</sup> See Sullum, *supra* note 184.

<sup>187</sup> *Id.*



medical-marijuana providers.<sup>188</sup> In his May 1, 2017 letter, Attorney General Sessions expressed his concern about the *McIntosh* decision, by citing to a historic drug epidemic, the uptick in violent crimes, and an alleged link between marijuana and the increased risk of psychiatric disorders.<sup>189</sup> The justification of a drug “epidemic,” however, does not comport with actual data.<sup>190</sup> For example, in January 2017, the National Academies of Science, Medicine and Engineering found strong evidence suggesting that marijuana is effective in dealing with chronic pain in adults, as compared to a placebo.<sup>191</sup> Attorney General Sessions may be overstating the alleged danger of marijuana. While it may be habit-forming, marijuana is significantly less addictive than opiates and has no known lethal dosage<sup>192</sup> (although earlier studies relied upon dosages given to animals),<sup>193</sup> unlike opiates. For chronic pain, many medical professionals prescribe opiates, which have a high risk of abuse and overdose.<sup>194</sup> In 2013 alone, it was estimated that 1.9 million people either “abused or were dependent on prescription opiates.”<sup>195</sup> In 2014, a study

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<sup>188</sup> Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, THE WASHINGTON POST (Jun. 13, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm\\_term=.f91d34c3a76d](https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm_term=.f91d34c3a76d).

<sup>189</sup> Letter from Jefferson B. Sessions III, Attorney General of the United States, to Senators Mitch McConnell & Chuck Schumer, Speaker Paul Ryan, and Representative Nancy Pelosi (May 1, 2017), available at <https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections>.

<sup>190</sup> See Ingraham, *supra* note 190.

<sup>191</sup> *Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report; One of the Most Comprehensive Studies of Recent Research on Health Effects of Recreational and Therapeutic Use of Cannabis and Cannabis-Derived Products*, THE NATIONAL ACADEMIES OF SCIENCES ENGINEERING MEDICINE (Jan. 12, 2017), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625&ga=1.198930671.1791292794.1484233196>; Christopher Ingraham, *Attorney General Sessions Wants to Know the Science on Marijuana and Opioids. Here it is.*, THE WASHINGTON POST (Feb. 28, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/02/28/attorney-general-sessions-wants-to-know-the-science-on-marijuana-and-opioids-here-it-is/?utm\\_term=.518798087372](https://www.washingtonpost.com/news/wonk/wp/2017/02/28/attorney-general-sessions-wants-to-know-the-science-on-marijuana-and-opioids-here-it-is/?utm_term=.518798087372).

<sup>192</sup> See Ingraham, *supra* note 193.

<sup>193</sup> *Id.*; *No, Marijuana is Not Actually “As Addictive as Heroin”*, THE WASHINGTON POST (Oct. 9, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/10/09/no-marijuana-is-not-actually-as-addictive-as-heroin/?utm\\_term=.f60869a146f0](https://www.washingtonpost.com/news/wonk/wp/2014/10/09/no-marijuana-is-not-actually-as-addictive-as-heroin/?utm_term=.f60869a146f0); *Marijuana as Medicine*, NATIONAL INSTITUTE OF DRUG ABUSE (Apr. 2017), <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>.

<sup>194</sup> Liz Szabo, *Doctors Told to Avoid Prescribing Opiates for Chronic Pain*, USA TODAY (Mar. 15, 2016, 1:02 PM), <https://www.usatoday.com/story/news/2016/03/15/cdc-issues-new-guidelines-opiate-prescribing-reduce-abuse-overdoses/81809704/>.

<sup>195</sup> *Id.*

showed that states that allowed for medical marijuana use between 1999 and 2010 had, on average, nearly 25% fewer opiate overdose deaths compared to those states without.<sup>196</sup> This study, however, has its limits in that it is purely observational and only looks at the “correlation between medical marijuana uptake and opiate deaths”; it is not “able to say that the former definitively caused the decline in the latter.”<sup>197</sup> One year later, the National Bureau of Economic Research found that states with medical marijuana dispensaries had a 15-35% decrease in “admissions to substance abuse centers” and also saw a similar decline in deaths caused by opiate overdose.<sup>198</sup> Additionally, last year, another study reported that individuals who used medical marijuana were “64 percent less likely to report opiate use” and negative medical side effects and more likely to report a good quality of life.<sup>199</sup>

Attorney General Sessions is not just up against public support for medical marijuana,<sup>200</sup> but he is also up against Congress. In July 2017, the “Senate Appropriations Committee approved the Farr-Rohrabacher Amendment by a voice vote”, meaning that the panel, including sixteen Republicans, did not find the measure controversial.<sup>201</sup> This is not necessarily an issue of partisanship, as the Republican-controlled congress

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<sup>196</sup> Marcus A. Bachhuber, MD, et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, THE JAMA NETWORK: JAMA INTERNAL MEDICINE (Aug. 25, 2014), <http://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1898878>.

<sup>197</sup> See Ingraham, *supra* note 193.

<sup>198</sup> *Id.*; compare with Gregg Bishop, *Opinions Differ About Whether Medical Marijuana Can Help Curb Opioid Overdoses*, ILLINOIS NEWS NETWORK (Aug. 11, 2017), [https://www.ilnews.org/news/health/opinions-differ-about-whether-medical-marijuana-can-help-curb-opioid/article\\_b31793b4-7df4-11e7-a336-f71d7b06986f.html](https://www.ilnews.org/news/health/opinions-differ-about-whether-medical-marijuana-can-help-curb-opioid/article_b31793b4-7df4-11e7-a336-f71d7b06986f.html).

<sup>199</sup> See Ingraham, *supra* note 193; see also David Powel, Rosalie Liccado Pacula & Mireille Jacobson, *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?* (Nat'l Bureau of Econ. Research, Working Paper No. 12345, 2015), <http://www.nber.org/papers/w21345>; see also Ashley C. Bradford and W. David Bradford, *Medical Marijuana Laws Reduce Prescription Medication Use in Medicare Part D*, 35:7 HEALTH AFFAIRS 1230 (2016).

<sup>200</sup> In April 2017, a Quinnipiac University Poll showed that 94% of participants supported medical marijuana use. See *U.S. Voter Support For Marijuana Hits New High; Quinnipiac University National Poll Finds; 76 Percent Say Their Finances Are Excellent Or Good*, QUINNIPIAC UNIVERSITY POLL (Apr. 20, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2453>.

<sup>201</sup> Jacob Sullum, *Rejecting Sessions' Plea, Senate Panel Votes to Protect Medical Marijuana*, REASON: HIT & RUN (Jul. 27, 2017, 1:20 PM), <http://reason.com/blog/2017/07/27/rejecting-sessions-plea-senate-panel-vot>; see also *Full Committee Markup of the CJS, THUS, and Legislative Branch Appropriations Bills for FY2018*, UNITED STATES SENATE COMMITTEE ON APPROPRIATIONS (JUL. 27, 2017, 10:30 AM), <https://www.appropriations.senate.gov/hearings/full-committee-markup-of-the-cjs-thud-and-legislative-branch-appropriations-bills-for-fy2018>.

has already included the measure in previous bills.<sup>202</sup> Moreover, there have been other congressional measures introduced that would expand the Amendment including those that would allow “Department of Veterans Affairs doctors to counsel patients on the use of medical marijuana”, those that would even “legalize marijuana at the federal level”, and those that would modify the “classification of marijuana to allow” precisely for what this comment is advocating for: research.<sup>203</sup>

Despite this, in September 2017, the U.S. House Rules Committee blocked the Farr-Rohrabacher Amendment, now known as the Rohrabacher-Blumenauer amendment.<sup>204</sup> However, President Trump and Democratic leaders reached a budget agreement, which, among other things, would extend the rider through December 2017.<sup>205</sup> Unsurprisingly, in order to avoid a government shutdown, Congress passed an emergency resolution which extended the amendment, amongst other spending provisions.<sup>206</sup> This extension could help cannabis business owners come into compliance with state laws without much threat of federal enforcement.<sup>207</sup> However, even if the Amendment is not renewed for the next fiscal year, Attorney General Sessions could still try to shut down state-licensed medical marijuana suppliers.<sup>208</sup> In response to the House Committee’s actions, Representatives Blumenauer and Rohrabacher stated that:

By blocking our amendment, Committee leadership is putting at risk the millions of patients who rely on medical marijuana for treatment, as well as the clinics and businesses that support them. This decision goes against the will of the American people, who overwhelmingly oppose

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<sup>202</sup> Nathan Howard, *Congress is Heading for a Confrontation with Sessions over Marijuana*, BLOOMBERG (Aug. 3, 2017, 11:09 AM), <https://www.bloomberg.com/news/articles/2017-08-03/marijuana-fight-puts-congress-on-collision-course-with-sessions>.

<sup>203</sup> *See Id.*

<sup>204</sup> The Farr-Rohrabacher amendment has since changed supporters given Senator’s Farr retirement. *See infra* note 220. Trey Williams, *Congress Gives Medical Marijuana Users a Good Reason to be Paranoid*, MARKETWATCH (Sept. 8, 2017, 6:54 AM), <http://www.marketwatch.com/story/house-blocks-medical-marijuana-budget-amendment-that-would-protect-patients-2017-09-07>; Debra Borhardt, *Congress Puts Cannabis Industry on High Alert, Blocking a Vote*, FORBES (Sept. 7, 2017, 12:14 PM), <https://www.forbes.com/sites/debraborhardt/2017/09/07/congress-puts-cannabis-industry-on-high-alert-after-rejecting-vote/#128d8f5c51fc>.

<sup>205</sup> *Supra* Burns, note 90.

<sup>206</sup> Jonathan Bach, *Congress Saves Medical Marijuana Patients From Pot Crackdown—For Now*, STATESMAN JOURNAL (Dec. 22, 2017), <http://www.statesmanjournal.com/story/news/2017/12/22/congress-saves-medical-marijuana-patients-pot-crackdown-now/977050001/>.

<sup>207</sup> *Id.*

<sup>208</sup> *See* Burns, *supra* note 90, at 14.

federal interference with state marijuana laws. These critical protections are supported by a majority of our colleagues on both sides of the aisle. There's no question: If a vote were allowed, our amendment would pass on the House floor, as it has several times before.<sup>209</sup>

President Trump has, so far, focused his policy agenda on other issues despite his own expressed desire that states be allowed to decide if marijuana is right for them. Given his work with Democratic leaders, there could be hope. The administration has several options. First, the Trump Administration could actually increase enforcement of marijuana prohibitions in a variety of ways.<sup>210</sup> Under this approach, there is likely to be strong pushback from the states regardless of whether the Amendment is included or not in the budget. Any attempts at prosecuting individuals in states with valid medical marijuana laws would likely violate the Ninth Circuit's holding in *McIntosh*, even though the court insulated itself by specifically stating that policies can change and assumed no congressional action would change the Amendment.<sup>211</sup> Individuals in the marijuana industry, however, are hopeful that the Trump Administration realizes any crackdown against "broadly popular laws" in states will create political issues, and it should instead focus on other areas.<sup>212</sup> Even if existing markets are left alone, new states may be blocked or delayed from legalizing medical marijuana by excluding those states from the Amendment in any future version or by being intentionally vague on the issue to keep state legislatures in abeyance.<sup>213</sup>

If the Amendment is not included in any future budgets, this could be problematic for suppliers and individuals who rely on medical marijuana, but it does not take away from the legality of the Ninth's Circuit's ruling. The issue was brought to the judicial forefront and it is still a pressing issue.<sup>214</sup> The disconnect amongst the branches will undoubtedly create a

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<sup>209</sup> *Id.*

<sup>210</sup> *See infra* Part II.

<sup>211</sup> As of February 2017, two bills on the matter have been proposed, H.R. 1227, 117<sup>th</sup> Cong. (2017) (Ending Federal Marijuana Prohibition Act of 2017) and H.R. 975, 117<sup>th</sup> Cong. (2017) (Respect State Marijuana Laws Act of 2017). The latter bill was proposed by Representative Rohrabacher and was initially introduced in 2013 and then again in 2015, prior to the passage of the Omnibus bill. *See supra* note 99.

<sup>212</sup> *See Berke, supra* note 176.

<sup>213</sup> Debra Borchardt, *5 Ways Trump Could Affect the Marijuana Industry*, FORBES (Jan. 29, 2017, 11:46 AM), <http://www.forbes.com/sites/debraborchardt/2017/01/20/5-ways-trump-could-affect-the-marijuana-industry/#237ce54d5416>.

<sup>214</sup> In January 2018, Attorney General Sessions rescinded, allegedly without notice to Congress, the Obama-era policy of discouraging prosecutors from bringing marijuana charges in states where the drug is legal. *See Charlie Savage and Jack Healy, Trump Administration Takes Step that Could Threaten Marijuana Legalization Movement*, THE NEW YORK TIMES (Jan. 4, 2018),

vacuum. Such a vacuum will cause constitutional tension and a possible showdown with the Trump administration by impacting states' abilities to give effect to their own laws.<sup>215</sup> Justice O'Connor's dissent in *Gonzales* makes specific mention of the fact that because the state citizens themselves voted for such measures, the federal government should not interfere with the state's choice.<sup>216</sup> There is concern over whether there will be enough votes to carry the Amendment into the future. Under 2017 House leadership, there has been a restriction regarding the scope of policy riders to be considered in conjunction with the rule under which spending bills are considered.<sup>217</sup> In the event that the federal government chooses not to incorporate the Amendment again, the protection ceases to exist, which could set the medical marijuana industry back, even with state authorization and public approval.<sup>218</sup> There are organizations<sup>219</sup> and individuals on both sides of the political aisle that are fighting to ensure state medical marijuana laws are honored under the Trump administration.<sup>220</sup> Disturbing the will of the people could drag the country to court, forcing a divided Supreme Court to make the ultimate decision.

The Trump Administration's second option is to keep the status quo established by the Obama Administration's DOJ memos and the passage of the Farr-Rohrabacher Amendment.<sup>221</sup> This approach would also mean

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<https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>.

<sup>215</sup> Lydia Wheeler, *Trump's DOJ Gears Up for Crackdown on Marijuana*, THE HILL (Jul. 23, 2017, 7:30 AM), <http://thehill.com/regulation/administration/343218-trumps-doj-gears-up-for-crackdown-on-marijuana>.

<sup>216</sup> *Gonzales v. Raich*, 545 U.S. 1, 43 (2005). (O'Connor, J, dissenting).

<sup>217</sup> *Id.*

<sup>218</sup> See Borchardt, *supra* note 213, at 1.

<sup>219</sup> *About Us*, UNITED STATES CANNABIS COALITION, <https://uscannabiscoalition.org/>.

<sup>220</sup> Tom Angell, *GOP Congressman Wants Trump to Help Legalize Medical Marijuana*, FORBES (Oct. 24, 2017, 1:59 PM), <https://www.forbes.com/sites/tomangell/2017/10/24/gop-congressman-wants-trump-to-help-legalize-medical-marijuana/#445330b33ddb>.

<sup>221</sup> The new medical cannabis rider is now referred to as the Rohrabacher-Blumenauer amendment. Earl Blumenauer (D.-OR) has replaced outgoing Representative Sam Farr as a co-sponsor of the rider. Jeremy Berke, *The House Rules Committee Just Blocked a Vote on a Critical Cannabis Amendment*, BUSINESS INSIDER (Sep. 7, 2017, 3:22 PM), <http://www.businessinsider.com/house-rules-committee-blocks-vote-on-rohrabacher-blumenauer-amendment-2017-9>. See also Vince Sliwoski, *BREAKING NEWS: Congress Will Continue Protecting State Medical Marijuana Programs*, CANNA LAW BLOG (May 1, 2017), <http://www.cannalawblog.com/breaking-congress-will-continue-to-protect-state-medical-marijuana-programs/> (noting the current language of the bill as follows:

SEC. 537. None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North

the executive branch would operate under the Obama-era internal guidance and would provide for minimal federal intrusion. Even though the DEA already refused to reclassify marijuana once, President Trump changed his stance on various issues since his inauguration, a fact that could prove useful to medical marijuana advocates.

A task force, comprised of prosecutors and federal law enforcement officials, assembled by Attorney General Sessions himself may have already started down this track. As of August 2017, the Task Force on Crime Reduction and Public Safety has not offered new policy recommendations to advance Attorney General Sessions' anti-marijuana views and in fact, it encourages continued research to determine whether the Obama-era hands-off policy should be changed or rescinded.<sup>222</sup> Pride may also be at play, as John Hudak of the Brookings Institute notes: "If they come out with a more progressive, liberal policy, the attorney general [sic] is just going to reject it. They need to convince the attorney general that the recommendations are the best they can do without embarrassing the entire department by implementing a policy that fails."<sup>223</sup> Despite Attorney General Sessions' plea to Congress, the report "says officials should continue to oppose rules" blocking the DOJ from interfering states that allow for medical marijuana use and distribution where it is allowed.<sup>224</sup> Even with letters sent to the governors of Colorado and Washington asking how the states would address reports of their inadequacy in regulating marijuana,<sup>225</sup> some members of Congress are not worried about a change. They pointed to comments the Attorney General made during his Senate confirmation, whereby he stated his opposition to legalizing marijuana, but added the caveat that he understands the limited federal resources, echoing those Democrats before him.<sup>226</sup> The recommendations were provided on a rolling basis but nevertheless, Attorney General Sessions has been preparing to target legal cannabis in

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Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana)

<sup>222</sup> Sadie Gurman, *Huff, Puff, Pass? AG's Pot Fury Not echoed by Task Force*, ASSOCIATED PRESS (Aug. 5, 2017), <https://apnews.com/ad37624fcb8e485a8d57a013d48a227c>.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*; See also Matt Ferner, *Legal-Weed States Tell Jeff Sessions Their Programs Are Working. He Might Crack Down Anyway*, THE HUFFINGTON POST (Aug. 3, 2017, 9:12 PM), [http://www.huffingtonpost.com/entry/legal-weed-jeff-sessions\\_us\\_59834257e4b06d488874a716](http://www.huffingtonpost.com/entry/legal-weed-jeff-sessions_us_59834257e4b06d488874a716).

<sup>226</sup> See Gurman, *supra* note 222.

at least three of the eight states that have legalized *recreational* marijuana.<sup>227</sup>

The status quo alleviates pressure on the Supreme Court to resolve this controversial issue. A potential circuit split could occur depending on what the state laws are at the time of a decision. For example, a medical marijuana decision appealed to a post-*McIntosh* Ninth Circuit may not be the same as a medical marijuana case appealed to the Sixth Circuit.<sup>228</sup> The Supreme Court would probably not take up another medical marijuana case absent a circuit split, especially in light of strong public support, despite a Republican-controlled federal government.<sup>229</sup> If the Court does take a case, it should do so on a non-partisan basis, a concept not so farfetched given the Ninth Circuit's ruling in *McIntosh*. Should the Court ultimately decide to hear a case and rule against the Amendment, this may not stop states from continuing to legalize medical marijuana, as has been the case post-*Gonzales*, which would only drag out the state-federal government tension. Thus, the burden is on Congress to either amend the CSA or exempt the substance all together, provided the states can show successful and legal use of medical marijuana and can offer valid and reliable results from such use.<sup>230</sup>

Third, the new administration could take steps to legalize medical marijuana independent of legalizing recreational marijuana more generally. The third option is, in a way, the end result of option two. Option three cannot, and certainly will not happen, without strong and convincing evidence that medical marijuana should be considered a legitimate form of medical relief. The DOJ memoranda allowing states to continue experimenting with legalized medical marijuana or Congress choosing to remove marijuana, or at least medical marijuana, from

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<sup>227</sup> Mark Joseph Stern, *Sessions' Marijuana Crackdown May Still Be Coming*, SLATE (Aug. 7, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/jeff\\_sessions\\_will\\_probably\\_crack\\_down\\_on\\_legal\\_marijuana\\_despite\\_his\\_experts.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/jeff_sessions_will_probably_crack_down_on_legal_marijuana_despite_his_experts.html).

<sup>228</sup> *United States v. Samp*, 2017 U.S. Dist. LEXIS 46291 (E.D. Mich. Dec. 13, 2016) (requiring an evidentiary hearing to see if defendant complied with Michigan's medical marijuana law, stating that "if the Government can prove, by a preponderance of the evidence, that Samp was not in full compliance with the Michigan medical marijuana law, then the Government will be allowed to continue prosecuting").

<sup>229</sup> *See Nebraska, et al. v. Colorado*, 136 S. Ct. 1034 (2016) (denying a motion for leave to file a bill of complaint in a suit brought by Nebraska Attorney General John Bruning and Oklahoma Attorney General Scott Pruitt against Colorado over its marijuana legalization law); *see also* Adam Liptak, *Supreme Court Declines to Hear Challenge to Colorado's Marijuana Laws*, THE NEW YORK TIMES (Mar. 21, 2016), [https://www.nytimes.com/2016/03/22/us/politics/supreme-court-declines-to-hear-challenge-to-colorados-marijuana-laws.html?\\_r=0](https://www.nytimes.com/2016/03/22/us/politics/supreme-court-declines-to-hear-challenge-to-colorados-marijuana-laws.html?_r=0).

<sup>230</sup> *See* Contorno, *supra* note 4.

Schedule I could create thousands of jobs nationwide.<sup>231</sup> Moreover, there could be more economic benefits, such as fees and taxes generated from allowing the states more freedom to experiment with operating under a legalized medical marijuana system.<sup>232</sup>

*B. A Scientific Argument for the Status Quo*

This Comment posits that the best approach is a scientific one. It is scientifically more productive to keep the status quo in terms of enforcement, allowing for the opportunity for new research channels either by expanding those eligible to conduct that research, or by allowing states to spend their own funds to carry out such studies. The federal government's monopoly on research and its refusal to privatize FDA-approved research has severely hampered researchers' attempts to legitimize marijuana as a legal prescription medicine.<sup>233</sup> If Congress does not want to expand the number of individuals or corporations eligible for researching the drug using any federal funding, it can let the states provide funding. By doing so, the states would be able to provide closely monitored, in-depth studies as to the efficacy of medical marijuana.

State institutions and agencies, such as medical boards, departments of healthcare services, public universities, and research hospitals would be the ideal battle labs for such studies. In fact, a recent study showed that medical providers were the ability to prescribe medical marijuana to patient, including children, "strong supported clinical trials to investigate its use [particularly, for example,] in children."<sup>234</sup> By granting more access to engage in clinical trials, Congress would be able to make an intelligent decision based upon ample results, allowing it to either amend the CSA to provide an exception for medical marijuana or to uphold its prohibition. If the states were paying for research facilities and operations with their own revenue, they would more easily provide expanded medical

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<sup>231</sup> Borchardt, *supra* note 213; see also Jacob Sullum, *The DEA Can't Legalize Medical Marijuana*, REASON: HIT AND RUN (Jul. 4, 2016), <http://reason.com/archives/2016/07/04/the-dea-cant-legalize-medical-marijuana>.

<sup>232</sup> Susan K. Livio, *Medical Pot Program Continues to Grow*, THE STAR LEDGER (Feb. 26, 2017) at A3. See also Jennifer Kaplan, *Trump Casts Cloud Over Cannabis, But Money Keeps Pouring In*, BLOOMBERG (Jun. 1, 2017, 9:57 AM), <https://www.bloomberg.com/news/articles/2017-06-01/trump-casts-cloud-over-pot-industry-but-money-keeps-pouring-in>.

<sup>233</sup> See Stern and DiFonzo, *supra* note 32.

<sup>234</sup> See Tara Haelle, *Medical Marijuana for Children with Cancer Broadly Supported by Doctors*, FORBES (Dec. 12, 2017, 6:52 AM), <https://www.forbes.com/sites/tarahaelle/2017/12/12/medical-marijuana-for-children-with-cancer-broadly-supported-by-doctors/#605898e1795d>.



marijuana-based services to their own citizens without having to request any assistance from the federal government.<sup>235</sup>

This approach also follows the strong federalism expressed by Justice O'Connor's dissent in *Gonzales*.<sup>236</sup> This dissent is important because it provides the best solution for obtaining the best results to make the best choice about marijuana. It also would allow states to operate without pressure from potential federal enforcement even if they are following their own laws.<sup>237</sup> Even though states have passed medical marijuana legislation, they are kept in abeyance of federal prosecution and are left wondering if, or rather when, the federal government will enforce the CSA against citizens who lawfully abide by the state measures. Allowing states to give effect to their own laws while the federal government stays in abeyance would alleviate the possibility of fruitless government intervention. If Congress is content with the results arising out of the states after a reasonable and appropriate period of observation and monitoring, it could expand the Farr-Rohrabacher Amendment to include all states.

Alternatively, the DOJ could issue new guidance to ensure the states and the federal government understand each other's positions and can operate relatively freely under the current administration.<sup>238</sup> President Trump has already proven to be flexible on his campaign rhetoric and his ever-active Twitter account, and as of December 2016, produced no mention of the word "marijuana".<sup>239</sup> Before the appointment of Attorney General Sessions, marijuana opposition was removed from the White House website, suggesting that maintaining the status quo will allow the administration to focus on other priorities, and save the government the money and effort required to fight an unnecessary drug war.<sup>240</sup> The Farr-Rohrabacher (now Rohrabacher-Blumenauer) Amendment helps check the government and should remain as is for the time being. Allocating

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<sup>235</sup> *Id.*; See also John Ingold, *DEA Gives Approval to Colorado-Funded Study on Marijuana and PTSD*, THE DENVER POST (Apr. 22, 2016, 7:28 AM), <http://www.denverpost.com/2016/04/22/dea-gives-approval-to-colorado-funded-study-on-marijuana-and-ptsd/>; *Approved Medical Marijuana Research Grants*, Colorado Department of Public Health & Environment, <https://www.colorado.gov/pacific/cdphe/approved-medical-marijuana-research-grants>.

<sup>236</sup> *Gonzales*, 545 U.S. 1 at 42 (O'Connor, J. dissenting).

<sup>237</sup> See 2014 Cole Memo, *supra* note 67 at 3.

<sup>238</sup> See Borchardt, *supra* note 213.

<sup>239</sup> Katy Steinmetz, *7 Reasons President Trump is Unlikely to Fight Legal Marijuana*, TIME (Dec. 8, 2016), <http://time.com/4594445/legal-marijuana-trump-sessions-policy/>.

<sup>240</sup> *Id.*; see also Carl Wellstone, *Donald Trump Removes Marijuana Opposition from White House Website*, WEED NEWS (Jan. 20, 2017, 6:28: PM), <http://www.weednews.co/donald-trump-removes-marijuana-opposition-from-white-house-website/>.

funds to raid businesses that are operating validly under state law will likely anger constituents of members of Congress from marijuana states from marijuana states.<sup>241</sup>

Science is the best and most effective way to address the legalization of marijuana. We live in a time of scientific uncertainty. Agencies, and the scientific community more broadly, are under a tremendous amount of scrutiny.<sup>242</sup> Even more than the attack on science is the attack on the health of seriously ill Americans who, because of federal oversight, may be denied alternative treatment options, exacerbating already debilitating illnesses. In cases like Charlotte Figi's,<sup>243</sup> parents are forced to keep their children on strong pharmaceuticals that may cause severe side effects and offer only marginal relief.<sup>244</sup> In 2017, Melvin Washington, a retired NFL player; Alexis Bortell, an eleven-year-old girl with severe epilepsy; and Jose Belen, a disabled veteran with PTSD, filed suit against Attorney General Sessions, the DEA, and the DOJ over the constitutionality of the CSA and the listing of marijuana as a Schedule I drug.<sup>245</sup> The suit alleges that by classifying cannabis as a Schedule I drug, methamphetamines and cocaine (Schedule II drugs) are considered more benign than marijuana thus rendering the classification "irrational" and in violation of the Constitution.<sup>246</sup> In light of this irrationality, "the federal government is aware that the system is flawed," according to the plaintiffs.<sup>247</sup>

This Comment suggests that there could be potential medicinal benefits from marijuana more broadly, and not just from low-THC medical cannabis.<sup>248</sup> Limiting research in this way poses serious consequences for those with no other option. Moral opposition to marijuana does not

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<sup>241</sup> *Id.*

<sup>242</sup> See Marianna Brady, *House Votes to Restrict EPA's Use of Scientific Studies*, U.S. NEWS (Mar. 29, 2017, 8:50 PM), <https://www.usnews.com/news/national-news/articles/2017-03-29/house-votes-to-restrict-epas-use-of-scientific-studies>; see also J. Craig Wheeler, *NASA Budget is Good, but Other Science Funding May Wither*, DALLAS NEWS (Mar. 29, 2017), <http://www.dallasnews.com/opinion/commentary/2017/03/29/nasa-budget-good-science-funding-may-wither>.

<sup>243</sup> See Ferner, *supra* note 38.

<sup>244</sup> See Charlotte's Web Medical Hemp Act, *supra* note 36; see also Brian Resnick, *The Case for Legalizing Medical Cannabis for Kids*, THE ATLANTIC (Apr. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-case-for-legalizing-medical-cannabis-for-kids/454359/>.

<sup>245</sup> Christine Rousselle, *Jeff Sessions Sued by Medical Marijuana Patients Over Controlled Substances Act*, Town Hall (Jul. 26, 2017, 9:10 AM), <https://townhall.com/tipsheet/christinerousselle/2017/07/26/jeff-sessions-sued-by-medical-marijuana-patients-over-controlled-substances-act-n2359992>.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See Ferner, *supra* note 38.

preclude positive scientific results. For the federal government to say there is no medical benefit<sup>249</sup> while restricting research, as opposed to allowing private entities or state-funded agencies,<sup>250</sup> universities, or hospitals to research is to effectively not “pass the pipe” of research.<sup>251</sup> Private pharmaceutical firms and state-institutions would be ideal experiment laboratories because of non-federal funding. In keeping its monopoly over research outlets, the federal government is harming those who could benefit from marijuana medically.<sup>252</sup> In coveting research, there can be no progress in the scientific or medical communities.

## VI. CONCLUSION

This Comment advocates for the government to formally allow for more private and state-funded research opportunities. If Congress feels compelled to regulate this, it would be beneficial to at first allow states with medical marijuana laws to do such research. Congress could provide

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<sup>249</sup> See Stern and DiFonzo, *supra* note 32.

<sup>250</sup> Cf. Aaron Gregg, *Johns Hopkins was Ready to Test Pot as a Treatment for PTSD. Then it Quit the Study*, THE WASHINGTON POST (Apr. 2, 2017), [https://www.washingtonpost.com/local/md-politics/hopkins-was-ready-to-test-pot-as-a-treatment-for-ptsd-then-it-quit-the-study/2017/03/31/311c5212-1488-11e7-833c-503e1f6394c9\\_story.html?utm\\_term=.1421013c3dd0](https://www.washingtonpost.com/local/md-politics/hopkins-was-ready-to-test-pot-as-a-treatment-for-ptsd-then-it-quit-the-study/2017/03/31/311c5212-1488-11e7-833c-503e1f6394c9_story.html?utm_term=.1421013c3dd0) (“The university said its goals were no longer aligned with those of the administrator of the study, the Santa Cruz, Calif.-based Multidisciplinary Association for Psychedelic Studies (MAPS) . . . [I]n a PBS report that said the government-grown marijuana provided for the study was of poor quality and contaminated with mold. Hopkins quit the study two days later. Although MAPS will continue the research at a private lab in Arizona, the departure of the well-known university in Baltimore is a blow, analysts said, in part because the campus was considered a prime test site that could draw on Maryland’s large population of veterans.”).

<sup>251</sup> But see Delia A. Deschaine et al., *DEA Keeps Marijuana in Schedule I While Expanding Access for Research and Clarifying Rules on Hemp*, HOGAN LOVELLS (Aug. 12, 2016), <http://www.hlregulation.com/2016/08/12/dea-keeps-marijuana-in-schedule-i-while-expanding-access-for-research-and-clarifying-rules-on-hemp/>. (“In a policy statement, DEA explained that persons may become registered with DEA to grow marijuana not only to supply federally funded or other academic researchers, but also for strictly commercial endeavors funded by the private sector and aimed at drug product development. This marks a significant change from DEA’s historic policy to only permit the cultivation of marijuana from one federal source, the University of Mississippi under contract with the National Institute of Drug Abuse.”).

<sup>252</sup> See Maria Loreto, *New Research Suggests that Medical Marijuana Can Treat Herpes*, NEW YORK DAILY NEWS (Aug. 10, 2017, 2:22 PM), <http://www.nydailynews.com/life-style/new-research-suggests-medical-marijuana-treat-herpes-article-1.3400532> (“Cannabis oil and topicals have been known to produce impressive results with skin conditions like eczema, psoriasis and different kinds of abrasions. A study conducted in 2010 tested a facial lotion that contained cannabinoids on people with postherpetic neuralgia, a pain condition similar to shingles, and the results were very surprising, demonstrating that the lotion reduced pain by 87 percent. New research suggests that several components in the cannabis plants may produce similar effects for herpes outbreaks.”).

the oversight and guidelines to those private and state actors studying marijuana but, before it can do that, it must be clear in its decision to suspend enforcing the CSA in order to alleviate the threat of possible enforcement, which was discretionary under the Obama Administration. If enforcement continues to be discretionary under the Trump Administration, there must be guidance as to which states may participate in and fund this scientific research. Only then will Congress be able to once and for all remove medical marijuana from the Controlled Substance Act.

There is no way to make an intelligent decision about medical marijuana without allowing for all research avenues to be explored. Advancing society can only be done by advancing scientific objectives anything short of that cripples the future, whether it is with regard to medical marijuana as a federally permissible treatment option or more generally. Science is vital to societal progression. Medical marijuana is progress for those who are out of treatment options for serious illnesses or may even open the door to other medicinal capabilities. Medical marijuana has a place in society as well, as demonstrated by continuously growing state and public support.<sup>253</sup> When medical marijuana is distributed in accordance with state law, it is properly prescribed, and that is progress. The current consensus in the country leans towards support for medical marijuana;<sup>254</sup> there is just a difference in the details as to how it should be legalized and regulated. In order to get to a point where marijuana is properly distributed and regulated, the federal government must turn to science. Science can help raise awareness about marijuana's effectiveness, or it could show that it is not helpful. Without research, however, there is no way to know for sure.

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<sup>253</sup> See e.g., Associated Press, *Push for Medical Marijuana on Ballot Moving to Signature Drive*, DAILY HERALD (Aug. 12, 2017), [http://www.heraldextra.com/news/local/govt-and-politics/push-for-medical-marijuana-on-ballot-moving-to-signature-drive/article\\_f3c3e9af-f6c7-58fc-bd1c-9ebb5a7f0f9d.html](http://www.heraldextra.com/news/local/govt-and-politics/push-for-medical-marijuana-on-ballot-moving-to-signature-drive/article_f3c3e9af-f6c7-58fc-bd1c-9ebb5a7f0f9d.html); Kathleen Gray, *Pot Petition Drive Officially Begins for 2018 Michigan ballot*, DETROIT FREE PRESS (May 5, 2017), <http://www.freep.com/story/news/local/michigan/2017/05/05/marijuana-petition-michigan-ballot/101324068/>; *Two States with Pending Medical Marijuana Legislation*, PROCON.ORG (Aug. 2, 2017), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481>.

<sup>254</sup> See Jennifer Kaplan, *Pot Growers High on Future in Trump America*, THE STAR LEDGER, March 26, 2017, at A19 (“About 71 percent of voters say ‘the government should not enforce federal laws against marijuana in states that have legalized medical or recreational use,’ according to a poll from Quinnipiac University.”).