

## WEED FOR ME, BUT NOT FOR THEE: HOW THE LEGALIZATION OF CANNABIS HAS CREATED A POT-HOLE ON THE ROAD TO NATURALIZATION

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### I. INTRODUCTION

Of the countless obstacles that an immigrant seeking naturalization must overcome, one stands out from the rest as being particularly sinister: the good moral character test. This test, characterized by its vaguely-defined parameters, has the power to create a per se and, in some cases, permanent bar to naturalization for a specific set of actions. These are actions that an average citizen may commit without a second thought; however, when committed by an immigrant, such actions are draped in criminality and carry significant consequences. The test allows for arbitrary abuses of absolute authority, and this Comment serves as a call to action to effectuate its reform.

To illustrate the flaws of the good moral character test in the context of the immigrant experience, consider the following hypothetical scenario: Agostina is a thirty-three-year-old Guatemalan immigrant living in New Mexico. She moved to the United States when she met her now-husband while he was on a backpacking trip through Latin America and has since uprooted her entire life to live with her beloved. She was lucky enough to get her green card only two years after applying and has lived in the United States since she was thirty. Brianna is a thirty-nine-year-old U.S. citizen, who coincidentally lives two blocks away from Agostina. Brianna has been a U.S. citizen her entire life. Brianna loves tennis and is a regular at the local tennis court. When Agostina moved to the United States, she wanted to take up hobbies to make new friends. She started going to the tennis courts,

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and within a few weeks Agostina and Brianna became close. They play tennis together every week, and Brianna has made Agostina feel at home.

Recently Agostina felt pain in her joints, and after a visit to the doctor's office, she learned that she has early signs of rheumatoid arthritis. The pain has made it hard for her to fall asleep at night and has made her dread playing tennis. When she told Brianna about her diagnosis, she was surprised to learn that Brianna has the same condition. Amazed at how Brianna seems completely unaffected, Agostina asked for her secret. She learned that Brianna treats her pain with regular cannabis use. Brianna invited Agostina to her house, and after a long discussion about cannabis's effects, how it has been recently legalized in New Mexico, and how even her doctor recommended she try it, Brianna went to her backyard. She returned with a zip-lock bag full of cannabis, freshly picked from the plants she keeps out on her back porch. Brianna gave Agostina the cannabis and told her that if she just smokes a little before going to bed or to the tennis courts, her pain should ease right up. Within a couple of days, Agostina felt the positive effects and her pain reduced to near zero when smoking a joint before bed or before playing tennis. She was relieved and believed she had taken back control of her life.

Later that year, Agostina became eligible for naturalization.<sup>1</sup> She immediately filled out her Form N-400 and submitted it.<sup>2</sup> After taking her English and Civics tests, she received a notification from the U.S. Citizenship and Immigration Services (USCIS) informing her that she could proceed to the next step of the naturalization process—an interview. She arrived at the USCIS office on her scheduled date and things appeared to be going perfectly, until the USCIS agent got to the topic of drug use. He asked Agostina if she had ever used any illegal drugs. Agostina said no; she has only used legal drugs. The agent, somewhat surprised by her response, asked her to explain more, and Agostina replied that the legalization of cannabis in New Mexico has helped her with her rheumatoid arthritis. She told the agent that her friend Brianna recommended it to her, and that Brianna was kind

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<sup>1</sup> A lawful permanent resident who is married to a United States citizen is eligible for naturalization if they have resided continuously within the United States for at least three years. Immigration and Nationality Act § 319(a), 8 U.S.C. § 1430(a).

<sup>2</sup> A Form N-400 is the application form that any lawful permanent resident must fill out and submit in order to begin the naturalization process. U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION FOR NATURALIZATION, FORM N-400 (2019) [hereinafter APPLICATION FOR NATURALIZATION]; 8 C.F.R. § 316.4(a) (2011).

enough to give her a little over an ounce of cannabis to hold her over until she could start growing plants of her own.<sup>3</sup> When the interview concluded, the agent said that he could not approve her naturalization application, leaving Agostina devastated and confused. Through her innocent admission, Agostina had unknowingly failed the “good moral character test” by admitting to an act that violated U.S. federal law, even in the absence of an arrest, conviction, or formal charge. Her possession of over thirty grams of cannabis, while legal under New Mexico state law, has precluded Agostina from becoming a U.S. citizen.<sup>4</sup>

In the last decade, support for the legalization of cannabis has exploded across the country, with twenty-one states, two territories, and the District of Columbia legalizing adult recreational use.<sup>5</sup> The federal government has been slow to respond to these societal changes, and cannabis has remained a Schedule I drug for the purposes of federal law in the face of this recent shift in opinion by a growing minority of states.<sup>6</sup> While this disparity between federal and state law has a *de minimis* impact on citizens,<sup>7</sup> the impact is overwhelming for lawful permanent residents seeking to naturalize and become United States citizens. The antiquated “good moral

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<sup>3</sup> In New Mexico, it is legal for an adult over the age of twenty-one to possess over two ounces (fifty-six grams) of cannabis in their private residence so long as it is not visible from a public place. H.B. 2, 55th Leg., 2021 Spec. Sess. (N.M. 2021). An adult over the age of twenty-one can also cultivate up to twelve mature cannabis plants and may possess however much cannabis is produced by those plants without limit. *Id.*

<sup>4</sup> Admissions to conduct involving cannabis without a conviction will also render a lawful permanent resident inadmissible, preventing them from returning to the United States if they travel abroad. 8 U.S.C. § 1182(a)(2)(A)(i). A conviction for an offense involving cannabis can result in deportation, with an exception provided for a single offense for simple possession of thirty grams or less for personal use. *Id.*; *id.* § 1227(a)(2)(B)(i).

<sup>5</sup> Michael Hartman, NAT'L CONF. OF STATE LEGIS., CANNABIS OVERVIEW (2022), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx#1>; Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Jan. 20, 2023), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization#mz>.

<sup>6</sup> 21 U.S.C. § 812(c)(Sch. I)(c)(10). For comparison, other Schedule I drugs include heroin (diacetylmorphine), LSD (lysergic acid diethylamide), and bath salts (3,4-methylenedioxypyrovalerone). § 812(c)(Sch. I).

<sup>7</sup> It is important to note that recreational cannabis use in states where it has been legalized still comes with some risks to citizens. Being convicted of even a minor federal felony has a variety of implications, such as barring the possession of firearms, the loss of federal benefits, and possibly the right to vote, among others. *See* 18 U.S.C. § 921(a)(3); 21 U.S.C. § 862; *see, e.g.,* Richardson v. Ramirez, 418 U.S. 24 (1974).

character” test contained in the Immigration and Nationality Act bars naturalization for those who violate any state *or* federal law,<sup>8</sup> effectively negating any benefits of cannabis legalization efforts for noncitizens seeking to naturalize.

Much has been written in support of removing the Schedule I classification from cannabis, but this Comment takes a different approach. This Comment calls for a reformation of the good moral character test to eliminate the disparate treatment noncitizens face when attempting to naturalize. Part II discusses the current process in place for naturalization and the current state of cannabis legalization at the state level. Part III examines the impact that the current system has on noncitizens, namely the lack of adequate due process and the increased hardship that low-income noncitizens face. Part IV analyzes how the recognition of gay marriage in the immigration context might serve as a useful parallel in determining how long meaningful reform to the good moral character test could take, absent any of the measures proposed in this Comment. Part V suggests potential remedies that can be taken by either Congress or the Executive Branch to fix this discrepancy and why these remedies should be effectuated as soon as possible.

## II. HIGH AS A KITE: AN OVERVIEW OF NATURALIZATION AND CANNABIS LAW IN THE UNITED STATES

An obstacle that every lawful permanent resident must overcome before naturalizing is the good moral character test.<sup>9</sup> This test considers a wide variety of the applicant’s characteristics in order to determine whether they are of good moral character, including any past drug use.<sup>10</sup> The good moral character test itself is just a small part of the tedious and intimidating naturalization process, and a general understanding of the process as a whole is crucial to grasp how the legalization of cannabis can have such a monumental impact on someone’s chances of becoming a U.S. citizen. Section A sets forth the basic requirements a lawful permanent resident must meet to qualify for naturalization. Section B surveys the recent developments in cannabis law throughout the United States. Section C analyzes the federal government’s response to the legalization of cannabis at the state level. Lastly, Section D focuses specifically on the federal

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<sup>8</sup> § 1182(a)(2)(A)(i)(II).

<sup>9</sup> *Id.* § 1427(d).

<sup>10</sup> *Id.* § 1101(f).

government's response to the legalization of cannabis as it relates to the good moral character test.

A. *The Weeds of the Good Moral Character Test*

Naturalization is the process used in the United States wherein citizenship may be granted to lawful permanent residents, colloquially known as “green card holders.”<sup>11</sup> Congress has the express power to establish the rules governing naturalization, which it has set forth in the Immigration and Nationality Act (INA).<sup>12</sup> The INA generally requires an applicant to be a lawful permanent resident of at least five years and physically present within the United States for half of that time before applying for citizenship.<sup>13</sup> Apart from these physical requirements, Congress has required that an applicant have a basic understanding of the English language, including the ability to read, write, and speak, as well as a fundamental understanding of U.S. history, the structure of the U.S. government, and the Constitution.<sup>14</sup> The most problematic requirement, and the focus of this Comment, is the good moral character test.

An applicant bears the burden of demonstrating that throughout the duration of the statutorily prescribed period (five years for lawful permanent residents generally, and three years for spouses of U.S. citizens<sup>15</sup>) he or she “has been and continues to be a person of good moral character.”<sup>16</sup> What exactly constitutes good moral character is vague, perhaps intentionally; the USCIS utilizes a negative definition of moral character—not included within the INA—that only identifies

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<sup>11</sup> U.S. Citizenship and Immigr. Servs., *Citizenship and Naturalization*, CITIZENSHIP RES. CTR. (July 5, 2020), <https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization>.

<sup>12</sup> U.S. CONST. art. I, § 8.

<sup>13</sup> 8 U.S.C. § 1427(a). Remember that lawful permanent residents that are married to United States citizens, such as Agostina from our example, only need to wait three years before applying for citizenship. *Id.* § 1430(a).

<sup>14</sup> *Id.* § 1423(a).

<sup>15</sup> *Id.* § 1427(a), 1430(a).

<sup>16</sup> 8 C.F.R. § 316.10(a)(1) (2021). While the regulations repeatedly reference that the good moral character test looks at conduct that occurred within the statutory period, the inquisition is in no way limited by that period of time. The USCIS may, in making its determination, take into consideration conduct by the applicant for any earlier period of time, so long as it appears to be relevant as to the applicant's present moral character. § 316.10(a)(2). The lack of narrowly defined terms allows for the USCIS to act with great discretion.

numerous ill-defined examples of what good moral character *is not*,<sup>17</sup> further compounding the obscurity of the requirements.

With regard to cannabis, an applicant cannot have “[v]iolated any law of the United States, any State, or any foreign country relating to a controlled substance, provided that the violation was not a single offense for simple possession of [thirty] grams or less of marijuana[.]”<sup>18</sup> An applicant can still be penalized absent a conviction so long as they admit to having committed the controlled substance violation in their naturalization interview.<sup>19</sup> For the admission to be considered valid, three requirements must be met. First, the interviewing officer must provide the text of law from the relevant jurisdiction.<sup>20</sup> Next, the officer must provide an adequate definition of the offense that includes all of its essential elements.<sup>21</sup> These elements must be explained in terms the applicant can understand.<sup>22</sup> Finally, the admission is only valid after the applicant voluntarily admits to having committed these elements under oath.<sup>23</sup> Record expungement provides no salvation to an applicant who is a low-level cannabis offender, as they are still considered to have been “convicted” for the purposes of the regulation.<sup>24</sup>

The practical effect of these provisions acting in tandem is that the range of activities that applicants are forbidden from participating in is substantially widened. Not only must an applicant be well versed in the laws of the state in which they reside, but they must also be aware of the variations in federal controlled substance law as well as the laws of any other country in which they consumed cannabis. The insidious effect of these variations puts applicants in the same dilemma Agostina experienced: one who judiciously studies the laws of their local jurisdiction can unknowingly ruin their chances of naturalization

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<sup>17</sup> § 316.10(b).

<sup>18</sup> § 316.10(b)(2)(iii).

<sup>19</sup> § 316.10(b)(2)(iv).

<sup>20</sup> *In re K-*, 7 I. & N. Dec. 594, 597 (B.I.A. 1957).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See In re J-*, 2 I. & N. Dec. 285 (B.I.A. 1945). It is important to note, however, that the Ninth Circuit has held that an admission will be considered valid *despite* a failure to comply with the procedural safeguards laid out in *Matter of K-*, as long as the applicant “was being questioned under oath, in the presence of his attorney.” *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 749 (9th Cir. 2007).

<sup>24</sup> § 316.10(c)(3)(i).

through the mere possession of cannabis, a luxury that their neighbors can carelessly enjoy.

B. *Evolving Cannabis Legislation in the United States*

The federal government and state legislatures do not agree as to whether cannabis should be classified as an illicit substance, and the ideological gap has become more pronounced in recent years as legalization efforts within states have gained momentum. The federal government has taken a hardline approach, with cannabis currently classified as a Schedule I drug, a classification that has remained unchanged since the promulgation of the Controlled Substances Act of 1970—fifty-two years ago.<sup>25</sup> This is the most restrictive classification possible, branding cannabis as a drug that presents “a high potential for abuse.”<sup>26</sup> The Schedule I classification also insinuates that cannabis “has no currently accepted medical use” and, when used under medical supervision, lacks accepted safety.<sup>27</sup> This extreme classification comes with draconian consequences. Because of cannabis’s Schedule I status, federal law prohibits any person from manufacturing, distributing, or dispensing cannabis, or possessing with the intent to do any of the above.<sup>28</sup> Federal law also penalizes the simple possession of a controlled substance.<sup>29</sup> While there is an exception for the simple possession of cannabis equal to or less than thirty grams,<sup>30</sup> there remains a tremendous impact on activities involving cannabis that any lawful permanent resident must be wise to avoid.

Legalization efforts throughout the states paint a very different picture as to the social acceptability of recreational cannabis. As of the publication of this Comment, twenty-one states, the District of Columbia, and two territories, have legalized some amount of cannabis for recreational use among adults.<sup>31</sup> This is representative of an extremely recent trend. In 2012, Colorado and Washington were the first states to legalize cannabis for adult recreational use through ballot

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<sup>25</sup> 21 U.S.C. § 812(c)(Sch. I)(c)(10).

<sup>26</sup> § 812(b)(1).

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

<sup>28</sup> *Id.* § 841(a)(1).

<sup>29</sup> *Id.* § 844(a).

<sup>30</sup> 8 C.F.R. § 316.10(b)(2)(iii) (2021). The inclusion of this exception was not a response to state legalization efforts, as it predates the legalization of recreational or medicinal use cannabis in any state. § 316.10(b)(2)(iii) (1992).

<sup>31</sup> Hartman, *supra* note 5; Hansen et al., *supra* note 5.

initiatives.<sup>32</sup> In 2014, Alaska, Oregon, and the District of Columbia legalized recreational adult-use cannabis the same way.<sup>33</sup> California, Maine, Massachusetts, and Nevada followed suit in 2016.<sup>34</sup> In 2018, Michigan and Vermont joined the pool of cannabis-friendly states,<sup>35</sup> with Vermont being the first state to legalize recreational adult-use cannabis through the state's legislature as opposed to a ballot initiative.<sup>36</sup> 2018 also saw the Northern Mariana Islands become the first United States territory to legalize recreational adult-use cannabis,<sup>37</sup> with Guam following close behind in 2019.<sup>38</sup> In 2020, Arizona, Montana, and New Jersey successfully legalized recreational adult-use cannabis through ballot initiatives,<sup>39</sup> and Illinois legalized cannabis through the state legislature.<sup>40</sup> In 2021, another large group of states legalized recreational adult-use cannabis, those being Connecticut, New Mexico, New York, and Virginia.<sup>41</sup>

The trend towards legalization continued in 2022. Rhode Island legalized recreational cannabis use through its legislature by passing the aptly named Rhode Island Cannabis Act on May 25, 2022.<sup>42</sup> In the 2022 midterm elections, cannabis legalization was achieved at the

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<sup>32</sup> Hansen et al., *supra* note 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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

<sup>36</sup> H.B. 511, 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018); VT. STAT. ANN. tit. 18, § 4230a (2021).

<sup>37</sup> H.B. 20-178, 20th Leg., 4th Reg. Sess. (N. Mar. I. 2018).

<sup>38</sup> H.B. 32-35, 2019 Gen. Assemb., Reg. Sess. (Guam 2019).

<sup>39</sup> Ryan Randazzo, *Arizona Voters Approve Proposition 207, Making Recreational Marijuana Legal in State*, ARIZ. REPUBLIC (Nov. 4, 2020, 3:43 PM), <https://www.azcentral.com/story/news/politics/elections/2020/11/03/arizona-marijuana-proposition-207-election-results/5997553002>; German Lopez, *Montana Just Voted to Legalize Marijuana*, VOX (Nov. 4, 2020, 6:02 AM), <https://www.vox.com/2020/11/4/21514885/montana-marijuana-legalization-cil18-i190-results>; Amanda Hoover, *Election 2020: N.J. Voters Approve Legal Weed Ballot Question*, NJ.COM (Nov. 4, 2020, 7:36 AM), <https://www.nj.com/marijuana/2020/11/election-2020-nj-voters-approve-legal-weed-ballot-question.html>.

<sup>40</sup> H.B. 1438, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

<sup>41</sup> S.B. 1201, 2021 Gen. Assemb., June Spec. Sess. (Ct. 2021); H.B. 2, 55th Leg., 2021 Spec. Sess. (N.M. 2021); S.B. S854A, 2021 Leg. Sess. (N.Y. 2021); S.B. 1406, 161st Leg., 1st Spec. Sess. (Va. 2021).

<sup>42</sup> Press Release, State of Rhode Island, Governor McKee Signs Legislation Legalizing and Safely Regulating Recreational Cannabis in Rhode Island (May 25, 2022), <https://governor.ri.gov/press-releases/governor-mckee-signs-legislation-legalizing-and-safely-regulating-recreational>.



ballot boxes of Missouri and Maryland.<sup>43</sup> The momentum behind this surge of cannabis legalization does not show signs of slowing down, and various states are currently working towards legalization.

The means through which states have attempted to legalize cannabis since 2012 reflect an increasingly positive shift in public opinion towards the plant. Efforts began with the use of ballot initiatives in fairly progressive states such as Colorado and Washington.<sup>44</sup> It was not until six years after Colorado legalized recreational adult-use cannabis that a state achieved legalization through the legislature in 2018.<sup>45</sup> Since 2018, a state's legislature has become the preferred vehicle for cannabis legalization despite the early reluctance, with eight out of thirteen states legalizing cannabis through their state legislatures, as well as both the Northern Mariana Islands and Guam.<sup>46</sup> This reflects a new-found confidence within state representatives, assured that they are acting on behalf of the desires of their constituencies. Idaho, Kansas, Nebraska, and American Samoa are the only jurisdictions that presently have no recreational or medical programs that allow for the use of some form of cannabis or CBD oil.<sup>47</sup> This means that forty-seven states and four U.S. territories have identified the value that cannabis can provide to a population, despite the decades of anti-cannabis sentiment that had a stranglehold over the country.

Colorado and Washington conducted this experiment as every other state watched with intrigue, and clear success of these early adopters has led to a rapidly growing minority of states following in their footsteps. The makeup of states that have chosen to partake in this novel experiment has had an unintentional yet disproportionate impact on immigrants. States like California, New York, New Jersey, and Illinois are some of the largest migratory hubs in the country, and

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<sup>43</sup> Andrew DeMillo, *Voters Approve Recreational Marijuana in Maryland, Missouri*, A.P. NEWS (Nov. 9, 2022), <https://apnews.com/article/marijuana-legalization-2022-midterm-elections-c693f5e23e0faf2f39168df6a2f80ab2>; Note that legalization within Maryland has not yet taken effect but is set to officially begin in mid-2023. Jacob Knutson et al., *Where Voters Legalized Recreational Marijuana in the Midterm Elections*, AXIOS (Nov. 9, 2022), <https://www.axios.com/2022/11/09/midterm-election-marijuana-legalization-ballot>.

<sup>44</sup> Hartman, *supra* note 5.

<sup>45</sup> H.B. 511, 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

<sup>46</sup> Hartman, *supra* note 5; Hansen et al., *supra* note 5.

<sup>47</sup> *State Medical Cannabis Laws*, NAT'L CONF. STATE LEGISLATURES (Sept. 12, 2022), <https://www.ncsl.org/health/state-medical-cannabis-laws>.

they have all legalized recreational, adult-use cannabis.<sup>48</sup> At this moment, it is more likely that a person will immigrate to a state with cannabis legalized either recreationally or medically than to a state where cannabis remains illegal.<sup>49</sup>

C. *The Federal Government's Response to State Legalization*

The federal government's reaction to this revolution in cannabis use can only be described as incremental and underwhelming. The first major reaction to the legalization of cannabis was the Rohrabacher-Farr Amendment to the Consolidated Appropriations Act of 2015, wherein Congress explicitly prohibited the Department of Justice from using any funds to prevent states from implementing laws "that authorize the use, distribution, possession, or cultivation of medical marijuana" where the medicinal use of cannabis had been legalized.<sup>50</sup> The amendment has been revised and passed every year to expand the list of states that have legalized medicinal cannabis in the interim.<sup>51</sup>

There are two primary issues with the Rohrabacher-Farr Amendment that diminish its effectiveness in protecting legal cannabis from federal scrutiny. The first is that the amendment exclusively applies to medicinal cannabis.<sup>52</sup> There are currently no amendments that protect states from the Department of Justice interfering with the implementation of laws that legalize recreational cannabis.<sup>53</sup> Representative Earl Blumenauer of Oregon attempted to include such an amendment in 2019, which would have taken effect in 2020,<sup>54</sup> but

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<sup>48</sup> BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., OFF. IMMIGR. STATS., ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN THE UNITED STATES AND THE SUBPOPULATION ELIGIBLE TO NATURALIZE: 2015–2019 3 (2019), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop\\_Estimate/LPR/lpr\\_population\\_estimates\\_2015\\_-\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/LPR/lpr_population_estimates_2015_-_2019.pdf).

<sup>49</sup> *Id.* Seven out of the top ten states in which lawful permanent residents (LPRs) reside have legalized recreational adult-use cannabis (California, New York, New Jersey, Illinois, Massachusetts, Virginia, and Washington). *Id.* Only three have not (Texas, Florida, and Pennsylvania); however, Florida and Pennsylvania have comprehensive medical cannabis programs in place. Hartman, *supra* note 5.

<sup>50</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2015).

<sup>51</sup> *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116–93, § 531, 133 Stat. 2317, 2431 (2020).

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> H.R. REP. NO. 116–119, pt. A, at 10 (2019).

it found no support in the Senate and was not included. This is not a surprise, as the Trump Administration at the time opposed the inclusion of the rider that protected medicinal cannabis; in a signing statement, President Trump wrote “[m]y Administration will treat [the Rohrabacher-Farr Amendment] consistent with the President’s constitutional responsibility to faithfully execute the laws of the United States[,]” signaling his belief that his Administration could still enforce federal drug laws against medicinal cannabis patients and providers in spite of the will of Congress.<sup>55</sup> While the statement resulted in no meaningful action, it shows just how reluctant the federal government is when it comes to the implementation of cannabis legalization.

The second issue with the Rohrabacher-Farr Amendment is that it only applies to the Department of Justice.<sup>56</sup> To illustrate this problem, consider the case of Mr. Marrufo. Mr. Marrufo, a U.S. citizen, was a legal participant in New Mexico’s Medical Cannabis Program to alleviate symptoms of post-traumatic stress disorder.<sup>57</sup> In order to reach a dispensary within New Mexico to obtain medical cannabis, Mr. Marrufo had to drive through a border patrol checkpoint.<sup>58</sup> At this checkpoint, Mr. Marrufo was stopped and asked whether he was in possession of illegal drugs.<sup>59</sup> Mr. Marrufo argued that the Border Patrol agents acted in violation of the Rohrabacher-Farr Amendment when they questioned him because New Mexico had legalized the use of medicinal cannabis, and their questions forced him to either admit to the possession of illegal drugs or lie.<sup>60</sup> The court dismissed Mr. Marrufo’s claim on the basis that he had insufficiently established a waiver of sovereign immunity.<sup>61</sup> The court went out of its way to emphasize that even if he had successfully established such a waiver, his claim would have nevertheless been dismissed because the Border Patrol operates under the Department of Homeland Security, and the Rohrabacher-Farr Amendment exclusively applies to the

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<sup>55</sup> Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress*, FORBES (Dec. 21, 2019, 10:40 AM), <https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/?sh=1435ff194256>.

<sup>56</sup> Consolidated Appropriations Act, 2020, Pub. L. No. 116–93, § 531, 133 Stat. 2317, 2431 (2020).

<sup>57</sup> *Marrufo v. U.S. Border Patrol*, No. CV 15–01086, 2016 U.S. Dist. LEXIS 49109, at \*1 (D.N.M. Apr. 11, 2016).

<sup>58</sup> *Id.* at \*2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*2–3.

<sup>61</sup> *Id.* at \*8.

Department of Justice.<sup>62</sup> Although the Rohrabacher-Farr Amendment is a step in the right direction, its effectiveness is curtailed by its narrow scope. Because it only protects against interference with the implementation of medicinal marijuana policies by the Department of Justice, it fails to ameliorate the existing federal regime's harshness outside of those limited circumstances.

D. *The Federal Government's Response to Legalization in Relation to Noncitizens*

Despite the growing number of states that allow for recreational cannabis use, the federal government has explicitly articulated that state legalization will not give lawful permanent residents who use cannabis a pass when evaluating their good moral character. On April 19, 2019, the USCIS issued policy guidance to clarify the interaction between federal controlled substance law and the good moral character test.<sup>63</sup> It states that: "violation of federal controlled substance law, including for marijuana, remains a conditional bar to establishing good moral character for naturalization *even where that conduct would not be an offense under state law.*"<sup>64</sup> The guidance reiterated that cannabis consumption is also a bar to establishing good moral character even if the activity took place in a foreign jurisdiction where the activity was legalized.<sup>65</sup>

This policy guidance was issued under the Trump Administration and remains in place today.<sup>66</sup> The explicit language of the guidance shows that not only is the federal government aware of the problems that state-level legalization is causing in relation to the good moral character test, but that they are also unwilling to rectify this obvious discrepancy and its harmful impacts on lawful permanent residents. The implications of this reluctance are further discussed in Part V.

III. BUZZKILL: THE OBSTACLES NONCITIZENS FACE PRIOR TO NATURALIZING

Becoming a citizen of the United States is not easy, but the legalization of adult-use recreational cannabis has unintentionally complicated the hurdles that applicants must overcome before

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<sup>62</sup> *Id.* at \*7.

<sup>63</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., PA-2019-02, CONTROLLED SUBSTANCE-RELATED ACTIVITY AND GOOD MORAL CHARACTER DETERMINATIONS (2019).

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*

naturalizing. Section A examines how language barriers can prevent applicants from discovering the consequences of interacting with cannabis. Section B analyzes the lack of notice provided to applicants regarding the consequences of cannabis-related activities. Section C discusses the unwritten employment restrictions that applicants must carefully avoid in the hopes of establishing good moral character.

A. *The Language Barrier*

It is easy for confusion to arise throughout the naturalization process, as fluency in the English language is not a requirement for a lawful permanent resident seeking citizenship; while there is an English test that applicants must pass, it only requires an applicant to demonstrate a basic ability to read, write, speak, and understand English words in their ordinary usage.<sup>67</sup> Applicants are considered to have sufficient reading comprehension when they can read one of three sentences without extended pauses, and the applicant will not be penalized for omitting short words or making errors in pronunciation.<sup>68</sup> Sufficient writing is demonstrated if the applicant can write out one of three sentences; errors in grammar, spelling, and capitalization are allowed.<sup>69</sup> Sufficient speaking only requires that the applicant responds meaningfully to questions that relate to his or her naturalization eligibility.<sup>70</sup>

Furthermore, the English requirement may be completely waived.<sup>71</sup> Applicants are exempt from the English requirement if they are over the age of fifty and have been living in the United States for at least twenty years,<sup>72</sup> or if they are over the age of fifty-five and have been living in the United States for at least fifteen years.<sup>73</sup> If the applicant is over the age of sixty-five and has been living in the United States for at least twenty years, the applicant is allowed to take a substantially modified version of the civics examination in addition to

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<sup>67</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., POLICY MANUAL: CITIZENSHIP AND NATURALIZATION—ENGLISH AND CIVICS TESTING (2023) [hereinafter 12 USCIS-PM E.2(A)–(G)], <https://www.uscis.gov/policy-manual/volume-12-part-e-chapter-2>.

<sup>68</sup> *Id.*

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

<sup>70</sup> *Id.*

<sup>71</sup> Immigration and Nationality Act § 312(b), 8 U.S.C. § 1423(b).

<sup>72</sup> § 1423(b)(2)(A).

<sup>73</sup> § 1423(b)(2)(B).

having the English language requirement waived.<sup>74</sup> Regardless of whether or not an applicant is required to take the English examination, any applicant may use an interpreter for the naturalization interview.<sup>75</sup> This language barrier exacerbates an already confusing naturalization process, thereby lessening the chances that an applicant will understand the implications of their legal cannabis use. This amplifies the problem discussed in the next section: that applicants are not sufficiently notified that their legal cannabis use will impact their chances at naturalizing.

### B. *Lack of Notice*

The average lawful permanent resident seeking to naturalize would not expect interactions with legalized cannabis to be an issue that could potentially bar them from becoming a full-fledged citizen. The first step of the process an applicant must take is to fill out an application for naturalization, known as Form N-400.<sup>76</sup> The form is twenty pages long, but at no point does it mention “cannabis” or “marijuana.”<sup>77</sup> In fact, there are few sections where an applicant could even infer that the use of legalized cannabis is relevant. Part Twelve of the form asks whether the applicant has ever committed or attempted to commit a crime for which they were not arrested, whether the applicant has ever been arrested or convicted of a crime, or whether they were even placed in an alternative sentencing or rehabilitation program.<sup>78</sup> The form also asks questions such as whether the applicant has ever been a “habitual drunkard,” or whether the applicant has ever “[s]old or smuggled controlled substances, *illegal* drugs, or narcotics.”<sup>79</sup> The legalization of cannabis has played a direct role in complicating the answers to all of these questions; an applicant in 2010 would clearly

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<sup>74</sup> § 1423(b)(3). Lawful permanent residents who fall into this category are also allowed to take a modified version of the civics examination, which reduces the pool of questions from either 100 or 128 (depending on the version of the test) down to 20. 12 USCIS-PM E.2(A)–(G), *supra* note 67. All categories of applicants who can waive the English requirement are allowed to take the civics examination in the language of their choice with the assistance of an interpreter. *Id.*

<sup>75</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL: CITIZENSHIP AND NATURALIZATION–NATURALIZATION INTERVIEW (2023) [hereinafter 12 USCIS-PM B.3(A)–(E)], <https://www.uscis.gov/policy-manual/volume-12-part-b-chapter-3>.

<sup>76</sup> See APPLICATION FOR NATURALIZATION, *supra* note 2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 14.

<sup>79</sup> *Id.* at 15 (emphasis added.)

understand what Form N-400 is asking for, yet an applicant in 2023 is left guessing with their future as a U.S. citizen on the line.

The questions mentioned above are the only ones even tangentially related to *illegal* substances, and an applicant's expectations for their naturalization interview are likely based primarily on these questions. An applicant can easily be misguided by the questions relating to their criminal history because the form does not address the distinction between crimes at the state and federal levels.<sup>80</sup> If an applicant is under the impression that the recreational use of cannabis is non-criminal activity, then references to the commission of "crimes" would lead them to believe that no disclosure of past cannabis use is even necessary. Additionally, the questions relating to controlled substances only include the sale or smuggling of such substances, so an applicant will not likely consider potential federal violations relating to possession or cultivation.<sup>81</sup> If an applicant panics during the interview and ends up lying about their interactions with cannabis, a knowing and willful omission of such information can have substantial consequences, including a denial of naturalization, a denial of any other immigration benefit, and criminal prosecution.<sup>82</sup>

Aside from what the applicant can infer from Form N-400, USCIS provides a large amount of information to lawful permanent residents seeking naturalization online; however, there is no reference as to what is specifically discussed during their naturalization interview.<sup>83</sup> Applicants will only learn that the officer's questions may refer to "[m]oral character and any criminal history," requiring applicants to rely on secondary resources to prepare.<sup>84</sup> The legalization of cannabis at the state level has obscured the criminal nature of possessing or cultivating cannabis and whether such content will be covered at the naturalization interview is entirely unclear. An applicant's understanding of what is being asked of them does not improve once they begin their naturalization interview, as it is not the duty of the immigration officer to explain the purpose of their questioning at any point throughout the interview.<sup>85</sup>

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<sup>80</sup> *See id.* at 14–15.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> APPLICATION FOR NATURALIZATION, *supra* note 2, at 17.

<sup>83</sup> 12 USCIS-PM B.3(A)–(E), *supra* note 75.

<sup>84</sup> *Id.*

<sup>85</sup> *See Reimers v. U.S. Citizenship & Immigr. Servs.*, 584 F. Supp. 3d 936, 945 (E.D. Wash. 2022). ("[S]uch a requirement exceeds the minimal procedural safeguards established by *Matter of K.*").

Despite the obscurity of the naturalization interview, applicants are not entirely left to fend for themselves. Lawful permanent residents are entitled to the same constitutional right to due process that U.S. citizens enjoy.<sup>86</sup> The Fifth Amendment of the United States Constitution states that “no person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>87</sup> In fact, the Supreme Court has recognized that the use of the word “persons” extends due process protections to all aliens within the United States, regardless of whether their presence is lawful.<sup>88</sup>

Formulating a proper procedural due process claim based on citizenship is extremely difficult and encapsulates just how watered-down constitutional “guarantees” become once applied to noncitizens. Three elements must be present for a procedural due process claim to succeed: (1) there must be a deprivation; (2) of life, liberty, or property; and (3) the government procedures currently in place are inadequate to protect from the present deprivation.<sup>89</sup> The deprivation here is obvious: the right for a lawful permanent resident to become a citizen. Characterizing this deprivation is more difficult, but it could potentially be classified as deprivation of a property interest. Naturalized citizens are immediately eligible for all means-tested and entitlement-based welfare programs.<sup>90</sup> The Supreme Court has recognized that welfare benefits are a property right and that termination without proper notice is a due process violation.<sup>91</sup>

A court considers three factors when analyzing the final element: (1) the private interest affected by the official action; (2) the risk of such interest being erroneously deprived through the procedures used; and (3) the government’s interest, specifically the function involved as well as what fiscal and administrative burdens would be created as a result of the substitute procedural requirement.<sup>92</sup> As

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<sup>86</sup> Plyer v. Doe, 457 U.S. 202, 210 (1982); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

<sup>87</sup> U.S. CONST. amend. V.

<sup>88</sup> Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

<sup>89</sup> Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 872 (2000).

<sup>90</sup> Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, CATO INST.: IMMIGR. RSCH. & POL’Y BRIEF, May 10, 2018, at 1, 1.

<sup>91</sup> *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). A major obstacle in analogizing to *Goldberg* is that the case involved welfare benefits that individuals were already in possession of, as opposed to benefits that individuals were entitled to. *Id.* at 256.

<sup>92</sup> *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).



mentioned above, the private interest affected is the right to citizenship in the United States. The risk of this interest being erroneously deprived through lack of proper notice is cognizable, and this risk increases with each state that passes legalization measures. The burdens of adding one question that asks about the applicant's activities involving cannabis to Form N-400 are extremely low. The Supreme Court has stated that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>93</sup>

If a due process claim, such as this one, succeeds, the result would be to include sufficient notice that allows the applicant to identify what is being proposed and what the applicant must do to prevent the deprivation of his or her interest.<sup>94</sup> More specifically, Form N-400 may be amended to include a section on the applicant's past interactions with cannabis, including use, possession, distribution, and manufacturing. Yet that brings us to the problem of this theoretical due process challenge; the only remedy would be receipt of proper notice before the naturalization interview and nothing more. The relevant time period for a determination of good moral character is long: three years for lawful permanent residents that are married to citizens and five years for everyone else.<sup>95</sup> That period is indefinitely longer when considering that federal regulations allow for acts that took place before the statutory period to be taken into account.<sup>96</sup> Focusing on the lack of notice will not help lawful permanent residents who have already interacted with cannabis in a state where it has been legalized. The most positive effect of requiring proper notice is that it presents potential applicants who have interacted with cannabis with an informed decision: avoid naturalization all together or risk ending up in removal proceedings. This is why comprehensive reform of the good moral character test is necessary—too many lawful permanent residents can disqualify themselves from receiving citizenship before they even show up for their naturalization interview.

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<sup>93</sup> *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

<sup>94</sup> *See Goldberg*, 397 U.S. at 267–68.

<sup>95</sup> Immigration and Nationality Act § 319(a), 8 U.S.C. § 1430(a); § 1427(a).

<sup>96</sup> 8 C.F.R. § 316.10(a)(2) (2021).

C. *The Disparate Financial Impact on Lawful Permanent Residents*

The good moral character test has an unintended economic consequence for lawful permanent residents, as they are completely precluded from participating in the cannabis industry in its entirety. To establish good moral character, a lawful permanent resident cannot have violated any law relating to a controlled substance.<sup>97</sup> This encompasses knowingly or intentionally manufacturing, distributing, or dispensing a controlled substance,<sup>98</sup> nor can they admit to the commission of any criminal act in the absence of arrest or conviction.<sup>99</sup>

The legal cannabis industry in the United States is extremely lucrative, estimated in 2019 to be worth \$13.6 billion despite cannabis's Schedule I classification.<sup>100</sup> This industry created nearly 340,000 jobs in 2019 dedicated to the handling of cannabis.<sup>101</sup> These numbers are insufficient to paint the current picture of the industry's size, as more and more states legalize cannabis and join the market with each passing year. In fact, the legal market for jobs in the cannabis industry is expected to balloon up to 743,000 by 2025.<sup>102</sup> The final nail in the coffin for immigrant job seekers is the fact that these industries are located in states that have some of the largest immigrant populations.<sup>103</sup>

Some lawful permanent residents have begun to learn the consequences of working in the cannabis industry the hard way. Maria Reimers, a lawful permanent resident from El Salvador, was barred from naturalization by a Washington district court on February 7, 2022.<sup>104</sup> Reimers, along with her husband who is a U.S. citizen, opened a cannabis business in 2014.<sup>105</sup> Ms. Reimers's duties included managing the store, ordering inventory, and acting as a "budtender"

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<sup>97</sup> § 316.10(b)(2)(iii).

<sup>98</sup> 21 U.S.C. § 841(a)(1).

<sup>99</sup> § 316.10(b)(2)(iv).

<sup>100</sup> Deborah D'Souza, *The Future of the Marijuana Industry in America*, INVESTOPEDIA (Dec. 7, 2021), <https://www.investopedia.com/articles/investing/111015/future-marijuana-industry-america.asp>.

<sup>101</sup> *Id.*

<sup>102</sup> Chris Hudock, *Potential Cannabis Market Job Growth*, NEW FRONTIER DATA (Oct. 6, 2019), <https://newfrontierdata.com/cannabis-insights/potential-cannabis-market-job-growth>.

<sup>103</sup> See BAKER, *supra* note 48.

<sup>104</sup> *Reimers v. U.S. Citizenship & Immigr. Servs.*, 584 F. Supp. 3d 936, 948 (E.D. Wash. 2022).

<sup>105</sup> *Id.* at 939.

who sold cannabis products and paraphernalia to customers over the age of twenty-one.<sup>106</sup> The business had all of the necessary licensing required to legally sell cannabis in the state of Washington.<sup>107</sup>

In 2017, Ms. Reimers filled out her Form N-400 Application for Naturalization.<sup>108</sup> Her confusion as to the naturalization implications of working in the cannabis industry was apparent from the onset as she indicated on the form that she had never “[s]old or smuggled controlled substances, illegal drugs, or narcotics,” and added that “[t]he answer to this question is somewhat of a gray area federally.”<sup>109</sup> Ms. Reimers further clarified that it was not until her second naturalization interview that she became aware that selling cannabis violated federal law.<sup>110</sup> USCIS was quick to determine that Ms. Reimers’s employment activities warranted labeling her as an “illicit drug trafficker of a controlled substance.”<sup>111</sup> Thus, Ms. Reimers failed to establish good moral character throughout the requisite statutory period and was precluded from naturalizing.<sup>112</sup> Ms. Reimers attempted to appeal this decision, but the District Court was swift in granting USCIS’s motion for summary judgment on the basis of Ms. Reimers’s admission.<sup>113</sup>

Unfortunately, the conduct of Maria Reimers is far from the minimum necessary to draw the ire of the USCIS. Aleksei Voronin, a foreign national lawfully present as an asylee, was hired as an independent contractor for a medical cannabis cultivation and distribution facility.<sup>114</sup> His job was to purchase and install surveillance equipment and to train the facility’s permanent employees as to how to use the system.<sup>115</sup> In order to work on the premises, Mr. Voronin was required to become a part of the facility’s cannabis collective, but he was never involved in the growing, selling, or manufacturing of the cannabis on site.<sup>116</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Reimers*, 584 F. Supp. 3d at 940.

<sup>111</sup> *Id.* at 941.

<sup>112</sup> *Id.* at 945–46.

<sup>113</sup> *Id.* at 948–49.

<sup>114</sup> *Voronin v. Garland*, No. 2:20-cv-07019-ODW, 2021 U.S. Dist. LEXIS 75916, at \*1–2 (C.D. Cal. 2021).

<sup>115</sup> *Id.* at \*2.

<sup>116</sup> *Id.* at \*2–3.

In 2015, Mr. Voronin attempted to adjust his status to that of a lawful permanent resident.<sup>117</sup> Mr. Voronin explained his work experience during an interview with USCIS, and his application was denied on the basis that “there [wa]s reason to believe [he has] aided, abetted, assisted, conspired[,] or colluded in the illicit trafficking of marijuana” in violation of 8 U.S.C. § 1182(a)(2)(C).<sup>118</sup> While Mr. Voronin’s case was not in the context of naturalization, his conduct amounted to an aggravated felony for the purposes of immigration and exists as a *permanent bar* precluding him from ever establishing good moral character.<sup>119</sup>

Lawful permanent residents who wish to naturalize are thus categorically barred from participating in one of the fastest growing industries in the United States. People like Maria Reimers and Aleksei Voronin learned of the grave consequences of working in the cannabis industry after the fact and will *never* be eligible to become citizens under the current rule regime. Those at the margins are forced to make a frustrating choice: do you participate in the production of cannabis products to secure an adequate standard of living, or do you value the chance of one day becoming a United States citizen?

#### IV. A HELPFUL PARALLEL: LESSONS LEARNED FROM THE LEGALIZATION OF GAY MARRIAGE

In 1975, Richard Adams, an American citizen, and Anthony Sullivan, an immigrant from Australia, went to Boulder, Colorado, and received a marriage license from the local county clerk.<sup>120</sup> A minister conducted their marriage ceremony, and their civil union began.<sup>121</sup> Adams then went to petition the Immigration and Naturalization Service (INS)<sup>122</sup> for a visa, which would classify Sullivan as his

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<sup>117</sup> *Id.* at \*3.

<sup>118</sup> *Id.* at \*4–5.

<sup>119</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., POL’Y MANUAL: CITIZENSHIP AND NATURALIZATION—PERMANENT BARS TO GOOD MORAL CHARACTER (2023), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-4>; 8 U.S.C. § 1101(a)(43)(B).

<sup>120</sup> *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); Troy Masters, *United States Government Says L.A. Gay Couple’s 1975 Marriage Is Valid*, PRIDE (June 7, 2016), <http://thepridela.com/2016/06/united-states-government-says-gay-couples-1975-marriage-is-valid>.

<sup>121</sup> *Adams*, 673 F.2d at 1038.

<sup>122</sup> The INS oversaw the entirety of the immigration process until March 1, 2003, when the USCIS assumed those responsibilities. *Our History*, U.S. CITIZENSHIP &

immediate relative pursuant to his status as Adams's spouse.<sup>123</sup> Their petition was denied, and Adams's appeal made its way before the Ninth Circuit.<sup>124</sup> The Ninth Circuit held that preferential status for the purposes of immigration does not extend to spouses in same-sex marriages.<sup>125</sup> The court considered the plain meaning of the INA, its legislative history, and the construction of the statute as used by the INS<sup>126</sup> and concluded that spousal status can only be conferred to the parties of a heterosexual marriage and that such interpretation comported with the Equal Protection Clause.<sup>127</sup>

Forty long years later, the Supreme Court delivered its landmark decision in *Obergefell v. Hodges* that recognized that same-sex couples have the fundamental right to marry, that state laws excluding same-sex couples from marrying were invalid, and that states could not refuse to recognize the right of same-sex couples to marry in another state.<sup>128</sup> The decision impacted the lives of millions of United States citizens, but it also had a profound effect on immigrants; on January 5, 2016, the USCIS approved the immigrant visa petition that Adams had filed on Sullivan's behalf four decades earlier.<sup>129</sup> Yet it was too little too late; Adams had passed away in 2012, and the consequences of USCIS's reluctance toward reform were once again on display.<sup>130</sup>

The legalization of gay marriage provides a useful parallel that can help estimate how long federal legalization of recreational adult-use cannabis will take. Both are practices that the general public has historically struggled to accept due to prevailing societal norms. Gay marriage started with a patchwork of legalization at the state level, with Vermont being the first to recognize civil unions between same-sex couples in 2000.<sup>131</sup> In total, it took fifteen years since the first state recognized same-sex marriage for it to be legalized throughout the

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IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history> (last updated Nov. 18, 2022).

<sup>123</sup> *Adams*, 673 F.2d at 1038.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1043.

<sup>126</sup> *Id.* at 1040.

<sup>127</sup> *Id.* at 1042.

<sup>128</sup> *Obergefell v. Hodges*, 576 U.S. 644, 674–76, 680–81 (2015).

<sup>129</sup> *Masters*, *supra* note 120.

<sup>130</sup> *Id.*

<sup>131</sup> Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES (Apr. 26, 2000), <https://www.nytimes.com/2000/04/26/us/vermont-gives-final-approval-to-same-sex-unions.html>.

entire country.<sup>132</sup> The successful implementation of gay marriage nation-wide is the result of hard-fought normalization over time, and the legalization of cannabis will have to undergo a similar struggle. Using gay marriage's timeline as a comparison, it is conceivable that the earliest year we can expect the federal legalization of cannabis is 2028, which is a very generous estimate.

Yet this estimation of federal initiative is paradoxically contingent on the actions of the states. Justice Brandeis once eloquently stated: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>133</sup> This sentiment has survived within the mind of the Supreme Court for decades, and the echoes of Justice Brandeis can be heard throughout a plethora of opinions. Justice Stevens reiterated this point, stating "we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern."<sup>134</sup>

The appropriate catalyst for change is within the state legislatures—bodies filled with representatives who are more keenly aware of the problems faced by their constituencies and who can craft responses better aimed at addressing a narrower class of people. Congress cannot pass a law that a national majority has not approved. And that national majority will not exist until enough states have served as laboratories where they can conduct legislative experiments. It is only until their conclusions have been published in the form of reports on tax revenues, crime statistics, and the like, that Congress can embrace the social change experienced by the states and enact it at a national level.

Despite this comparison, the legalization of recreational adult-use cannabis will impact immigration laws in very different ways. The first is that homosexuals, such as Sullivan, who sought a visa, had other avenues to pursue; an immigrant could obtain a visa through employment,<sup>135</sup> other familial relationships,<sup>136</sup> or the diversity process based on their current citizenship.<sup>137</sup> Users of cannabis have no such

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<sup>132</sup> See *Obergefell*, 576 U.S. at 675–76.

<sup>133</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>134</sup> *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

<sup>135</sup> Immigration and Nationality Act § 203(b), 8 U.S.C. § 1153(b).

<sup>136</sup> § 1153(a).

<sup>137</sup> § 1153(c).

alternative recourse, as cannabis use is a categorical bar under the good moral character test.<sup>138</sup>

In addition, same-sex marriage had a much different interaction with immigration law in the context of naturalization, specifically with the good moral character test. In 1976, Horst Nemetz, an immigrant from West Germany, applied to become a United States citizen.<sup>139</sup> His petition was initially denied because during his naturalization interview it was discovered that Nemetz was a homosexual.<sup>140</sup> The interviewing agent determined through the interview that Nemetz had committed sodomy and thus violated Virginia law.<sup>141</sup> This precluded a finding of good moral character due to Nemetz's admission that he had committed a crime of moral turpitude.<sup>142</sup> The Fourth Circuit reversed because "good moral character for purposes of naturalization is a question of federal law."<sup>143</sup> The court reasoned that while states have an interest in regulating the private acts of their citizens, the federal government has no interest in regulating such private acts for the purposes of naturalization.<sup>144</sup> The court continued to state that while Nemetz may have been in violation of a state law, there was no analogous federal law that he had violated in tandem, and a determination of moral character solely informed by state law would create inconsistent results informed purely by geography.<sup>145</sup>

Unlike the nonexistent federal sodomy statute in *Nemetz*, cannabis is federally regulated and classified as a Schedule I drug.<sup>146</sup> This federal classification eliminates the possibility of geographic inconsistency feared in the *Nemetz* decision.<sup>147</sup> It also precludes any arguments, analogous to those made in *Nemetz*, suggesting that the federal government has no interest in regulating the private act of consuming cannabis.<sup>148</sup> It is no secret that the legalization of gay marriage is not a perfect comparison, yet it serves as the closest template for those seeking to reform cannabis laws to follow. The final

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<sup>138</sup> 8 C.F.R. § 316.10(b)(2)(iii) (2021).

<sup>139</sup> *Nemetz v. Immigr. & Naturalization Serv.*, 647 F.2d 432, 433 (4th Cir. 1981).

<sup>140</sup> *Id.* at 435.

<sup>141</sup> *Id.* at 434–35.

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

<sup>143</sup> *Id.* at 435.

<sup>144</sup> *Id.* at 436.

<sup>145</sup> *Nemetz*, 647 F.2d at 435–36.

<sup>146</sup> 21 U.S.C. § 812(c)(10).

<sup>147</sup> *See Nemetz*, 647 F.2d at 435–36.

<sup>148</sup> *See id.* at 436.

lesson the fight for gay marriage taught was that the fight is never truly over; on December 13, 2022, the Respect for Marriage Act was signed into law by President Biden, cementing the protections that the *Obergefell* decision created seven years earlier.<sup>149</sup> If federal cannabis legalization ever comes to pass, it must be implemented in a way to ensure that it is not undone in the years to come.

#### V. LET'S BE BLUNT, WHAT CAN BE DONE?

In the absence of federal action to legalize cannabis (which the previous Part illustrates could still be over a decade away), prompt reform can still take place at a smaller scale to directly impact the lives of immigrants seeking naturalization. This can be accomplished in a variety of ways, each with its own justifications and drawbacks. Section A sets forth the steps Congress can take to permanently reform the good moral character test. Section B considers the actions that the executive branch can take to reform how the good moral character test is conducted. Section C examines a federalism-focused approach that Congress can take as an alternative to complete reform.

##### A. *Congressional Reform of the Good Moral Character Test*

The Destigmatizing in Immigration Act (“the Act”), submitted by Representative Brendan Boyle of Pennsylvania,<sup>150</sup> is the perfect example of what complete congressional reform of the good moral character test looks like. The Act removes the consideration of cannabis from nearly every step of the naturalization process. It first creates an exception for the distribution of cannabis from what is considered the illicit trafficking of a controlled substance.<sup>151</sup> This removes cannabis distribution from the definition of what an aggravated felony means pursuant to the INA, thus eliminating the permanent bar to establishing good moral character.<sup>152</sup> The Act further expands on the exception for the simple possession of thirty grams or less of cannabis<sup>153</sup> and broadens it to include all “‘offenses involving the use, possession, or distribution of marijuana[.]’”<sup>154</sup> The

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<sup>149</sup> Michael D. Shear, *Biden Signs Bill to Protect Same-Sex Marriage Rights*, N.Y. TIMES (December 13, 2022), <https://www.nytimes.com/2022/12/13/us/politics/biden-same-sex-marriage-bill.html>.

<sup>150</sup> H.R. 1614, 117th Cong. (2021).

<sup>151</sup> *Id.* § 2(a)(1)(A).

<sup>152</sup> 8 U.S.C. § 1101(a)(43)(B).

<sup>153</sup> § 1101(f)(3).

<sup>154</sup> H.R. 1614, 117th Cong. § 2(a)(1)(B).



Act also seeks to reform the areas of inadmissibility into the country and deportation, removing any consideration of offenses that involve cannabis use, possession, or distribution.<sup>155</sup>

Support for this course of action comes in the form of institutional competence—Congress is by far the most desirable actor to accomplish this change. For over a century, courts have recognized that immigration is within nearly the sole purview of Congress.<sup>156</sup> A wide variety of justifications have been put forth to come to this conclusion, ranging from the War Powers Clause, to the Commerce Clause, to the ability of a sovereign nation to exercise jurisdiction over its borders.<sup>157</sup> Regardless of the specific source of this power, an act of Congress to alter the good moral character test creates a positive result through a channel of government that is well recognized as completely legitimate and nearly unquestionable. Reform of this nature will insulate any new immigration policy from future attacks which could only be accomplished through further lengthy congressional action.

There is a large obstacle in accomplishing such reform: the current politicization of immigration policy makes achieving reform through the legislative process a nearly impossible undertaking. The progress of the Act has been slow-moving, with the last action being a referral to the House Judiciary Subcommittee on Immigration and Citizenship on May 18, 2021.<sup>158</sup> No companion bill has been introduced in the Senate,<sup>159</sup> and because a minority of states have even recognized the right for adult-use recreational cannabis, the pool of senators who would even consider creating a companion bill is noticeably small. This Act lies at the intersection of two contentious topics of national debate: immigration and cannabis legalization. Even if an unprecedented, overwhelming wave of support for recreational cannabis gained momentum throughout the country, its implications in immigration law could make even the staunchest congressional proponent of legalization hesitant depending on the priorities of their constituency. This problem is alleviated only through an overwhelming consensus on two fronts, but it can be avoided in the next proposed channel of action.

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<sup>155</sup> *Id.* § 2(a)(2), (3).

<sup>156</sup> *Ping v. United States*, 130 U.S. 581, 581 (1889).

<sup>157</sup> *Id.* at 604.

<sup>158</sup> *Destigmatizing in Immigration Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1614> (last visited Jan. 1, 2023).

<sup>159</sup> *Id.*

### B. *Executive Action*

Acting as an alternative to congressional action, the Biden Administration (or any future administration for that matter) can withdraw the USCIS policy guidelines issued under President Trump that preclude USCIS agents from taking state-level legalization into consideration when establishing good moral character.<sup>160</sup> Thereafter, the new Administration can issue new guidelines ordering the exact opposite of current policy<sup>161</sup>—that is, violation of a federal controlled substance law for cannabis is not a bar for establishing good moral character when the conduct would not result in a violation of state law. This solution brings with it the advantage of expediency; issuing new policy guidance requires the collaboration and input from only a handful of actors before it takes immediate effect.

The downsides to this approach are unfortunately numerous. The issuance of such guidance is open to challenges from the courts, which could result in the revocation of any future policy guidance due to a perceived infringement on Congress's right to set the rules for naturalization.<sup>162</sup> Furthermore, executive support for progressive policies has historically done little to accelerate reform within immigration law. Same-sex marriage once again presents a helpful parallel: in 2012, President Obama announced his full support for same-sex couples to marry.<sup>163</sup> But it was not until 2015 when *Obergefell v. Hodges* was decided that immigration policy saw meaningful change.<sup>164</sup>

Yet the most glaring weakness with this approach is that it requires the election of a President who is *actually interested* in reforming these policy guidelines. Despite President Biden's campaign promises to decriminalize cannabis use and expunge certain drug related offenses,<sup>165</sup> no action had been taken to effectuate such change within

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<sup>160</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 63.

<sup>161</sup> *Id.*

<sup>162</sup> See *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) (“Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States.”).

<sup>163</sup> Sam Stein, *Obama Backs Gay Marriage*, HUFFPOST (May 9, 2012), [https://www.huffpost.com/entry/obama-gay-marriage\\_n\\_1503245](https://www.huffpost.com/entry/obama-gay-marriage_n_1503245).

<sup>164</sup> See 576 U.S. 644 (2015).

<sup>165</sup> Kyle Jaeger, *Biden Talks Marijuana Decriminalization While Trump Promotes Criminal Justice Record at Dueling Town Halls*, MARIJUANA MOMENT (Oct. 16, 2020), <https://www.marijuanamoment.net/biden-talks-marijuana-decriminalization-while-trump-promotes-criminal-justice-record-at-dueling-town-halls>.

the first year of his presidency.<sup>166</sup> In fact, some of President Biden's major cannabis policies have been detrimental to the legalization movement: in early 2021, the Biden Administration admitted to firing multiple White House staffers due to their cannabis use,<sup>167</sup> and in the 2022 budget proposal for the District of Columbia, President Biden decided to preserve a federal rider that prohibits the city from taxing and regulating the recreational sale of cannabis despite its legal status in the district.<sup>168</sup>

Multiple members of Congress have encouraged President Biden to use his executive powers to effectuate change regarding the criminalization of cannabis, but their pleas seem to have fallen on deaf ears. On February 18, 2021, thirty-seven members of Congress urged the President to grant clemency to all non-violent cannabis offenders, a promise that he had made during his campaign.<sup>169</sup> After ten months of inaction, three members of Congress wrote a follow-up to the letter on December 2, 2021, asking once again for the President to grant such clemency,<sup>170</sup> however, no executive action has been taken. On December 16, 2021, Representatives David P. Joyce and Don Young wrote to the President criticizing his lack of action regarding cannabis reform and urged the President to remove cannabis from its Schedule

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<sup>166</sup> Kyle Jaeger, *After One Year as President, Biden's Marijuana Promises Remain Unfulfilled*, MARIJUANA MOMENT (Jan. 20, 2022), <https://www.marijuanamoment.net/after-one-year-as-president-bidens-marijuana-promises-remain-unfulfilled>.

<sup>167</sup> Chris Roberts, *Biden White House Admits Firing Staffers for Marijuana, but Still Employs Some Past Pot Users*, FORBES (Mar. 19, 2021, 1:28 PM), <https://www.forbes.com/sites/chrisroberts/2021/03/19/biden-white-house-blasted-for-punishing-staffers-for-using-marijuana/?sh=4c160e6131a8>.

<sup>168</sup> Megan Flynn, *Biden Budget Lifts Restriction on D.C. Using Local Funds for Abortions, Keeps Ban on Marijuana Sales*, WASH. POST (May 29, 2021, 12:03 PM), [https://www.washingtonpost.com/local/dc-politics/dc-abortion-marijuana-biden/2021/05/28/fe4218c0-bfd4-11eb-83e3-0ca705a96ba4\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-abortion-marijuana-biden/2021/05/28/fe4218c0-bfd4-11eb-83e3-0ca705a96ba4_story.html).

<sup>169</sup> Press Release, Earl Blumenauer, Blumenauer and Lee Urge President Biden to Pardon Federal Cannabis Offenses (Feb. 18, 2021), <https://blumenauer.house.gov/media-center/press-releases/blumenauer-and-lee-urge-president-biden-to-pardon-federal-cannabis-offenses>.

<sup>170</sup> Press Release, Jamaal Bowman, NEWS: Bowman, Blumenauer, and Lee Again Urge Biden to Pardon All Federal Non-Violent Cannabis Convictions (Dec. 7, 2021), <https://bowman.house.gov/press-releases?ID=C03D7BDF-1C78-44F3-8C8F-C047F85E7A57>.

I classification,<sup>171</sup> after having originally made the request back in July.<sup>172</sup>

On October 6, 2022, President Biden appeared to finally be ready to deliver on his campaign promises when he released a statement outlining his plan for cannabis reform.<sup>173</sup> The plan consisted of three parts: (1) pardoning all prior *federal* offenses for the simple possession of cannabis; (2) urging all Governors to do the same, and; (3) initiating a joint review of the classification of cannabis as a Schedule I drug by the Secretary of Health and Human Services and the Attorney General.<sup>174</sup>

While this seems to be a step in the right direction, the reform is rather toothless and far narrower than one might think. The pardon only applies to federal offenses, with President Biden merely suggesting that the Governors should do the same regarding offenses at the state level. The text of the pardon also specifies that the pardon only applies to current United States citizens and lawful permanent residents.<sup>175</sup> The Department of Justice has further clarified that the pardon does not apply to persons who were convicted of possessing cannabis along with another controlled substance in the same offense, and it does not apply to cannabis possession offenses that occur after October 6, 2022.<sup>176</sup>

There is no obvious reason as to why President Biden has dragged his feet on fulfilling his cannabis-related campaign promises, but he has demonstrated a consistent pattern of favoring half-measures to appease his base as opposed to meaningfully reforming the laws surrounding cannabis. President Biden's immigration policies have been equally as regressive as his cannabis policies. Since taking office, the Biden Administration has expanded upon the "Remain in Mexico"

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<sup>171</sup> Dave Joyce (@RepDaveJoyce), TWITTER (Dec. 16, 2021, 4:00 PM), <https://twitter.com/RepDaveJoyce/status/1471586121645764608>.

<sup>172</sup> Dave Joyce (@RepDaveJoyce), TWITTER (July 20, 2021, 2:46 PM), <https://twitter.com/RepDaveJoyce/status/1417556455247450114>.

<sup>173</sup> Press Release, White House, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform>.

<sup>174</sup> *Id.*

<sup>175</sup> Presidential Action, White House, A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana>.

<sup>176</sup> Press Release, Department of Justice, Presidential Proclamation on Marijuana Possession (Nov. 2, 2022), <https://perma.cc/GU53-4WVK>.

policy that was started under President Trump, where thousands of migrants are forced to wait for decisions on their immigration cases in Mexico.<sup>177</sup> This is directly contradictory to the promises President Biden made during his campaign, where he promised to end the program entirely.<sup>178</sup> In order for the executive reform approach to actually succeed, it is clear that a President legitimately committed to cannabis and immigration reform is needed; how long it will take for such a President to emerge is nothing more than fanciful speculation at this point in time.

### C. *A Federalist Approach*

A less ambitious route that Congress can take is to amend the Code of Federal Regulations as they relate to cannabis. An exception for the simple possession of thirty grams or less of cannabis when determining good moral character already exists.<sup>179</sup> Clearly this implies that Congress has recognized one's ability to possess good moral character in light of a conviction relating to cannabis. Thus, 8 C.F.R. § 316.10(b)(2)(iii) could be amended to read as follows:

Admissions to any criminal act that is in relation to possession, consumption, distribution, manufacturing, or dispensing of marijuana, and is punishable under federal law, but not punishable under the laws of the state in which the act occurred, does not preclude a showing of good moral character on behalf of the applicant.

The regulation that follows relating to admissions of acts that constitute violations of federal or state law absent any arrest or conviction would also be amended in a similar fashion.<sup>180</sup>

This approach leaves it entirely up to the states to determine whether an individual who has a history with cannabis can possess good moral character. The test would comport with each state's concept of right and wrong and would reflect the societal values of each state. Beyond comporting with each state's definition of morality, this approach is also one of great social utility. Penalizing lawful permanent residents for using a substance that is legal within the state does nothing to improve public safety or national security because

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<sup>177</sup> Nicole Narea, *Biden's Bewildering Decision to Expand a Trump-era Immigration Policy*, Vox (Dec. 4, 2021, 8:30 AM), <https://www.vox.com/policy-and-politics/2021/12/4/22815657/biden-remain-in-mexico-mpp-border-migrant>.

<sup>178</sup> *Id.*

<sup>179</sup> 8 C.F.R. § 316.10(b)(2)(iii) (2021).

<sup>180</sup> § 316.10(b)(2)(iv).

such acts would have never been penalized within that jurisdiction in the first place.

This change would also allow for lawful permanent residents to better participate in their state's economy by eliminating the bar on working in the legal cannabis industry. Increased participation in local industries would not only improve local economies but would alleviate concerns of lawful permanent residents meeting the recently updated poverty guidelines when applying to bring in family members from other countries.<sup>181</sup> Family members that would otherwise be considered a public charge would be able to immigrate and immediately integrate into their local economy, benefitting both the individual and the state.

This course of action is not without its share of problems. To start, such congressional action would be subject to all the same problems experienced with the solution proposed in Section A, yet even more would be created. Under the current regulations, the exception for the simple possession of cannabis of thirty grams or less applies to all states, regardless of their stance on legalization.<sup>182</sup> A lawful permanent resident's cannabis use would preclude them from showing good moral character "but for an 'accident of geography,'" which courts have described as an affront "to any principle of uniformity . . . incongruous with common sense."<sup>183</sup> This also allows for states who have not yet legalized adult-use recreational cannabis to indefinitely avoid legalization due to their aversion of immigrants. These complex issues would only be politicized further.

The worst result of this approach is that it would negate any efforts of legalization at the federal level. Under the present rule regime, a declassification of cannabis as a Schedule I drug would completely alleviate the present conundrum, as it would no longer be considered a controlled substance.<sup>184</sup> This proposed solution would circumvent such federal efforts, as the states would ultimately be in charge of making determinations of good moral character. This would "permit[] state law to govern the creation of a relationship in which the state has no legitimate interest and over which Congress has

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<sup>181</sup> See Ilona Bray, *USCIS Issues 2022 Poverty Guidelines: Raises Required Income Level for Family Sponsors of Immigrants*, NOLO (Mar. 1, 2021), <https://www.nolo.com/legal-updates/uscis-issues-2018-poverty-guidelines-raises-the-income-level-family-sponsors-of-immigrants-must-prove.html>.

<sup>182</sup> § 316.10 (b)(2)(iii).

<sup>183</sup> *Nemetz*, 647 F.2d at 435.

<sup>184</sup> § 316.10 (b)(2)(iii).

exclusive authority, a result that is directly contrary to the one intended by the framers of the naturalization clause.”<sup>185</sup> Finally, this proposed solution would create odd interactions between states: a lawful permanent resident could engage with cannabis in a state where it is illegal, move to a state where recreational use has been legalized, and then be precluded from a finding of good moral character due to their past illegal use in the previous state. Such an outcome could only be referred to as highly undesirable, further illustrating the need for reform analogous to what is contained in the Destigmatizing in Immigration Act.

## VI. CONCLUSION

The United States is currently in the midst of a wave of reform regarding the legalization of recreational cannabis, reflective of the change in public consciousness that has begun to reject the draconian treatment of the plant and the accompanying laws that have wreaked havoc throughout communities for decades. While this change should be celebrated as an act of vindication for those who had spent years of their life in prison due to cannabis-related offenses, it has exposed a fatal flaw in the immigration system’s archaic ways. A new class of victims has emerged that has been deceived by the national reform efforts and punished by the good moral character test.

Congressional action must be taken to reform the Immigration and Naturalization Act, such as passing the Destigmatizing in Immigration Act. This will be a slow and painful process, and many lawful permanent residents will fail to naturalize in the interim as a result. Executive action may be taken in the meantime, but it will be subject to scrutiny from the judiciary and the highly politicized media. Federalist-centered approaches may seem enticing but come with a high risk if states decide to postpone or indefinitely ignore legalization efforts. The only way to fully cement the right of lawful permanent residents to legally engage in activities related to recreational cannabis is for Congress to take decisive and concentrated action.

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<sup>185</sup> Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1025 (1976).

