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STATE MEDICAL MARIJUANA IMPLEMENTATION AND FEDERAL POLICY

KAREN O'KEEFE*

Since 1996, eighteen states and the District of Columbia have enacted laws removing their own criminal sanctions for qualifying patients possessing marijuana for medical purposes and for cultivation of marijuana by qualifying patients, dispensaries, or both.¹ Polling shows that more than seventy percent of Americans support allowing the use of medical marijuana with doctors' approval, so it is expected that the number of medical marijuana states will continue to grow.² Meanwhile, with the exception of approved research, the medical use of marijuana remains illegal under federal law.³

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1. Alaska, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, Rhode Island, Vermont, and Washington have enacted such laws. ALASKA STAT. § 17.37 (2010); ARIZ. REV. STAT. ANN. §§ 36-2801-19 (Supp. 2012); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007), § 11362.7-.9; COLO. CONST. art. XVIII, § 14; COLO. REV. STAT. ANN. §§ 12-43.3-101-106 (West 2012), § 18-18-406.3 (West 2012), § 25-1.5-106 (West 2012); 2012 Conn. Acts 55 (Reg Sess.); DEL. CODE ANN. tit. 16, §§ 4901a-4926a (2011); D.C. CODE §§ 7-1671 (Supp. 2012); HAW. REV. STAT. ANN. §§ 329-121-128 (LexisNexis 2008 & Supp. 2011); ME. REV. STAT. ANN. tit. 22, §§ 2421-2430-B (Supp. 2011); 2012 Mass. Legis. Serv. 369 (West); MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West Supp. 2012); MONT. CODE ANN. §§ 50-46-301-344 (2011); NEV. CONST. art IV, § 38; NEV. REV. STAT. ANN. §§ 453A.010-.810 (LexisNexis Supp. 2011); N.J. STAT. ANN. §§ 24:6I-1-16 (West Supp. 2012); N.M. STAT. ANN. §§ 26-2B-1-7 (LexisNexis Supp. 2011); OR. REV. STAT. ANN. §§ 475.300-.346 (2011); R.I. GEN. LAWS §§ 21-28.6-1-12 (2011); VT. STAT. ANN. tit. 18, §§ 4472-74I (LexisNexis Supp. 2012); WASH. REV. CODE ANN. §§ 69.51A.005-.903 (West 2012). In addition, Maryland has a law that does not include home cultivation or dispensary access to medical marijuana, but that does include a defense for simple possession. MD. CODE ANN., CRIM. LAW § 5-601(c)(3)(iii) (West Supp. 2012). The Maryland General Assembly also recently passed legislation allowing for some medical centers to distribute medical marijuana. H.B. 1101, 433rd Leg., 1st Sess. (Md. 2013).

2. PEW RESEARCH CTR., BROAD PUBLIC SUPPORT FOR LEGALIZING MEDICAL MARIJUANA 1 (2010), available at <http://www.people-press.org/files/legacy-pdf/602.pdf>.

3. Compare 21 U.S.C. §§ 812(b), (c) (2011) (defining Schedule 1 controlled substances and classifying marijuana as such), 21 U.S.C. § 841(a)(1) (prohibiting the manufacture, distribution, dispensing, and possession of controlled substances), and 21 U.S.C. § 844(a) (2011) (imposing civil sanctions for possession of small amounts of controlled substances), with 21 U.S.C. § 823(f) (2011) (providing that health care practitioners who wish to conduct research on Schedule 1 controlled substances shall apply to the Secretary of Health and Human Services for such registration), and United

This paper will review efforts to reschedule marijuana under federal law, and explore the development and evolution of state medical marijuana laws and how federal law and policy has affected states' medical marijuana policies over the years. In Part I, this paper explores how federal policy generally hinders research and advancement in the field of medical marijuana. Part II reviews states' efforts in the 1970s and 1980s to allow the medical use of marijuana and how federal policies led to most of those efforts failing to provide legal protections or access to patients who could benefit from medical marijuana. Finally, Part III examines medical marijuana laws that have passed since 1996, including how those state laws have handled the question of medical marijuana access and how those efforts have been affected by shifting federal policies. The conclusion examines ways federal policy can be changed to better protect patients and providers, while ensuring states are comfortable moving forward with regulatory regimes.

I. FEDERAL POLICY GENERALLY PROHIBITS MEDICAL MARIJUANA AND HINDERS RESEARCH

Although marijuana has been used for medical purposes for millennia,⁴ Congress classified it in the most restrictive category under the Controlled Substances Act (CSA)—Schedule I—meaning marijuana is classified as having “no currently accepted medical use in treatment in the United States,” a high potential for abuse, and “a lack of accepted safety for use . . . under medical supervision.”⁵

The CSA gives the United States Attorney General the power to reclassify marijuana, which would pave the way for it to be prescribed, if the Attorney General finds it does not meet the requirements for inclusion as a Schedule I drug.⁶ The Attorney General subsequently delegated this power to the Drug Enforcement Administration (DEA) Administrator.⁷ In 1988, DEA Administrative Law Judge Francis Young issued a recommended decision in favor of a petition to reschedule marijuana, finding:

The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue

States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (noting that only government-approved research projects are exempt from the federal prohibition against use of marijuana).

4. Sunil K. Aggarwal et al., *Medicinal Use of Cannabis in the United States: Historical Perspectives, Current Trends, and Future Directions*, 5 J. OPIOID MGMT. 153, 157 (2009) (noting that the medicinal use of marijuana was first recorded by the Chinese in 2737 BCE and introduced to Western medicine in 1839).

5. 21 U.S.C. § 812(b)(1), (c) (2011).

6. 21 U.S.C. § 811(a) (2011).

7. *Id.* See also *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

to stand between those sufferers and the benefits of this substance in light of the evidence in this record.⁸

DEA Administrator Robert Bonner rejected Judge Young's recommended decision, leaving marijuana classified under Schedule I.⁹ In 1994, the D.C. Circuit Court of Appeals upheld Bonner's decision, finding that his interpretation of the CSA was reasonable.¹⁰ Bonner created a new five-part analysis for determining whether a substance has currently accepted medical use and cited witnesses' purported heavy reliance on anecdotal reports rather than scientific studies.¹¹

The Coalition for Rescheduling Cannabis filed a new petition in October 2002 requesting rulemaking to reschedule marijuana.¹² On June 21, 2011, the DEA rejected that petition, basing the decision on a 2006 review by the Food and Drug Administration (FDA) and Department of Health and Human Services (HHS), which found that "[m]arijuana continues to meet the three criteria for placing a substance in Schedule I of the CSA," because the drug, "has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted level of safety for use under medical supervision."¹³ Since 1994, additional studies have been conducted on the medical efficacy of marijuana, including several that were published after the 2006 review by researchers at the Center for Medicinal Cannabis Research.¹⁴ The D.C. Court of Appeals upheld the DEA's decision on January 22, 2012.¹⁵

8. ALJ's Opinion and Recommended Ruling, In re Marijuana Rescheduling Petition, Docket No. 86-22 (Drug Enforcement Admin. Sept. 6, 1988).

9. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10503 (Mar. 26, 1992). After reviewing the evidence which formed the basis for Young's decision, the DEA Administrator concluded that, "[b]eyond doubt, the claims that marijuana is medicine are false, dangerous and cruel." *Id.*

10. *Alliance for Cannabis Therapeutics*, 15 F.3d at 1137 (reasoning that the Administrator's decision was explicitly supported by "the testimony of numerous experts that marijuana's medicinal value has never been proven in sound scientific studies" and that the Administrator correctly gave more weight to the expert testimony in light of the CSA's demand for "rigorous scientific proof").

11. Marijuana Scheduling Petition, 57 Fed. Reg. at 10506 (determining whether a substance has a currently accepted medical use by analyzing whether a drug's medical use possesses all five necessary elements: 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").

12. Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 76 Fed. Reg. 40552 (Jul. 8, 2011).

13. *Id.*

14. CTR. FOR MED. CANNABIS RESEARCH, REPORT TO THE LEGISLATURE AND GOVERNOR OF THE STATE OF CALIFORNIA 2-3 (2010), available at http://www.cmcrc.ucsd.edu/images/pdfs/CMCR_REPORT_FEB17.pdf. The results of some of the studies conducted suggest that marijuana may benefit patients who do not respond to other therapies. *Id.*

15. *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438, 442 (D.C. Cir. Jan. 22, 2013) (upholding the determination by DHHS that there were not enough "adequate and well-controlled studies demonstrating efficacy"). Despite 200 peer-reviewed studies, the Court found the evidence

On November 30, 2011, Washington's then-Governor, Christine Gregoire, and Rhode Island Governor Lincoln Chafee filed a petition requesting that the DEA open rule-making to reschedule marijuana to Schedule II, which is still pending.¹⁶ Their petition argued that "it is clear that the long-standing classification of medical use of cannabis in the United States as an illegal Schedule I substance is fundamentally wrong and should be changed."¹⁷

While there is a significant body of research on marijuana's efficacy and safety profile, federal policies, including a federal monopoly on marijuana available for research, have interfered with some research that could support rescheduling. The American College of Physicians noted in a 2008 position paper, "research expansion has been hindered by a complicated federal approval process [and] limited availability of research-grade marijuana."¹⁸ The federal government only allows marijuana to be acquired for research from the University of Mississippi, which produces marijuana pursuant to an exclusive contract for the National Institute on Drug Abuse (NIDA).¹⁹ NIDA has refused to provide marijuana to some studies that received approval from the FDA, resulting in some researchers with DEA registrations who are unable to conduct their research.²⁰

Since 2001, Professor Lyle Craker of the University of Massachusetts-Amherst Medicinal Plant Program has sought a registration to produce marijuana for federally approved research.²¹ In 2007, DEA Administrative Law Judge Mary Ellen Bittner issued a recommended decision that the DEA grant Professor Craker a registration, finding that doing so was in the public interest and that the current supply of marijuana was inadequate for research needs.²² On January 14, 2009 then-deputy administrator of the DEA, Michele Leonhart, rejected the

supporting marijuana's efficacy insufficient because the studies cited were not Phase II or III clinical trials with hundreds or thousands of participants). *Id.* at 450-51.

16. Letter from Lincoln D. Chafee, Governor of R.I. & Christine O. Gregoire, Governor of Wash., to Michele Leonhart, Administrator of the Drug Enforcement Admin. (Nov. 30, 2011) (on file with the Journal of Health Care Law & Policy) (arguing for the acceptance of medical use of cannabis based on the following factors: "(1) actual and potential for abuse; (2) pharmacology; (3) other current scientific knowledge; (4) history and current pattern of abuse; (5) scope, duration, and significance of abuse; (6) public health risk; (7) psychic or physiological dependence liability; and (8) whether it is an immediate precursor of a controlled substance").

17. *Id.*

18. TIA TAYLOR, AM. COLL. PHYSICIANS, SUPPORTING RESEARCH INTO THE THERAPEUTIC ROLE OF MARIJUANA 1 (2008), available at http://www.acponline.org/advocacy/where_we_stand/other_issues/medmarijuana.pdf.

19. Lyle E. Craker; Denial of Application, 74 Fed. Reg. 2101, 2104 (Jan. 14, 2009).

20. ALJ's Opinion and Recommended Ruling, *In re* Lyle E. Craker, Docket No. 05-16 at 84 (Drug Enforcement Admin. Feb. 12, 2007) ("NIDA's system for evaluating requests for marijuana for research has resulted in some researchers who hold DEA registrations and requisite approval from the Department of Health and Human Services being unable to conduct their research because NIDA has refused to provide them with marijuana.").

21. *Id.* at 3-4.

22. *Id.* at 85, 87.

recommended decision and denied Professor Craker the registration.²³ Professor Craker has appealed to the U.S. First Circuit Court of Appeals.²⁴

II. FEDERAL POLICY AND EARLY STATE ATTEMPTS TO ALLOW MEDICAL MARIJUANA

The first attempts by states to allow the medical use of marijuana despite federal law were merely symbolic, ineffective, or relied on federal cooperation to be effective. From 1978 to 1991, thirty-four states enacted laws that in some way recognized the medical value of marijuana, but that are not currently providing patients with access or legal protection.²⁵

One category of these laws provided that marijuana could be “prescribed.”²⁶ These laws were not effective because doctors could be sanctioned if they prescribed marijuana and pharmacies could not legally fill a prescription for marijuana due to federal law.²⁷

Another type of early legislation was therapeutic research laws.²⁸ Some state therapeutic research laws were operational and received the necessary federal approval for relatively small-scale programs in the 1970s and 1980s.²⁹ The physicians and patients participating in the federally approved research were therefore protected under federal law.³⁰ Other programs were never operational.³¹

Given the difficulties researchers have sometimes had obtaining marijuana even for short-term, small-scale clinical trials with placebo controls, it is unlikely that the federal government would approve a therapeutic research program

23. Lyle E. Craker; Denial of Application, 74 Fed. Reg. at 2133.

24. *Craker v. Drug Enforcement Admin.*, No. 09-1220, 2011 WL 6741952, at *1 (1st Cir. Dec. 15, 2011).

25. See RICHARD SCHMITZ & CHUCK THOMAS, MARIJUANA POL’Y PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST, app.A (Robert Kampia ed., 2001), available at <http://medicalmarijuana.procon.org/sourcefiles/state-by-state-guidelines-remove-threat-of-arrest.pdf> (illustrating the various types of enacted laws).

26. See, e.g., VA. CODE ANN. § 18.2-250.1 (2009) (providing that possession of marijuana is unlawful unless obtained through or because of “a valid prescription or order of a practitioner”).

27. See 21 U.S.C. § 841 (2011) (prohibiting the manufacture, distribution, or dispensing of controlled substances); cf. *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) (explaining that the government may not revoke a doctor’s license when she discusses the pros and cons of medical marijuana use with patients, but that a doctor does violate federal law by actually prescribing or dispensing marijuana).

28. See, e.g. N.Y. PUB. HEALTH LAW §3397-a (McKinney 2012) (establishing research programs in New York to study the therapeutic effects of marijuana use).

29. See Richard E. Musty & Rita Rossi, *Effects of Smoked Cannabis and Oral Δ9-Tetrahydrocannabinol on Nausea and Emesis After Cancer Chemotherapy: A Review of State Clinical Trials*, 1 J. CANNABIS THERAPEUTICS 29, 31–38 (2001) (reviewing clinical trials from six states where a total of 748 patients smoked marijuana before and after receiving cancer treatment and documenting the results of those six programs).

30. *Id.*

31. See SCHMITZ & THOMAS, *supra* note 25.

designed for longer term, large-scale access to marijuana for medical use today.³² The only state research project on the medical value of marijuana that has been operational since 1996 is California's Center for Medicinal Cannabis Research, which was not designed to provide patients access to their medicine and which instead involved small-scale, short-term research.³³

III. MODERN MEDICAL MARIJUANA LAWS

On November 5, 1996, California voters approved a ballot initiative that took a new approach to allowing the medical use of marijuana, given that the earlier approaches had never worked or had ceased being operational.³⁴ The California initiative, the Compassionate Use Act, did not rely on any cooperation or consent from the federal government. Instead, it removed California's own criminal sanctions from cultivation and possession of marijuana under certain circumstances.³⁵

This was not the first time a state refused to use its resources to implement a federal law it did not agree with or to criminalize conduct that violated federal law. Maryland never enacted a state enforcement code for the federal prohibition on alcohol, while other states, including New York, repealed their enforcement acts before federal prohibition was repealed.³⁶ Going back further in history, several northern states resisted the odious Fugitive Slave Laws.³⁷ In *Prigg v. Pennsylvania*, the United States Supreme Court ruled that Pennsylvania's attempt to criminalize a Marylander for kidnapping an escaped slave and her children was preempted by the federal Fugitive Slave Law of 1793 and by Article IV, Section 2 of the Constitution.³⁸ However, *Prigg* signaled approval for other aspects of northern states' personal liberty laws, which refused to use state workers or facilities to enforce the Fugitive Slave Act, by noting that "it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are

32. See, e.g., Brian Vastag, *Marijuana Study for Veterans with Trauma Faces Hurdle*, WASH. POST, Oct. 2, 2011, at A8 (discussing the difficulties that researchers face in obtaining marijuana to study its therapeutic effects on veterans with post-traumatic stress disorder).

33. CTR. FOR MED. CANNABIS RESEARCH, *supra* note 14, at 5, 15.

34. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007) (approved by California voters Nov. 5, 1996).

35. *Id.*

36. Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. & POL'Y 385, 389 n.5. (2011).

37. THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH* 5, 185, 196–99 (1974) (describing various initiatives that many northern states, such as Massachusetts, New York, Ohio, Pennsylvania, and Wisconsin undertook to resist Fugitive Slave Laws).

38. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625–26 (1842). "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." U.S. CONST. art. IV, § 2.

bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution.”³⁹

More recently, in the context of the Brady Act’s requirements that state and local law enforcement conduct background checks on gun purchasers,⁴⁰ the Supreme Court ruled that:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . Such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁴¹

Similarly, appellate courts in California have indicated or found that states may decriminalize marijuana for medical use under state law, and the federal government cannot force them to do otherwise.⁴² What California did not do by passing the Compassionate Use Act was give patients legal protection from federal arrests or prosecutions.⁴³ However, the most recent available data indicates that about ninety-nine percent of all marijuana arrests occur at the state or local—not federal—level, so the change in policy dramatically reduces the chances of a patient being prosecuted.⁴⁴

39. *Prigg*, 41 U.S. at 616.

40. Brady Handgun Violence Prevention Act, 18 U.S.C. §921–22 (2011) (effective Feb. 28, 1994).

41. *Printz v. United States*, 521 U.S. 898, 935 (1997).

42. *See, e.g., County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 827 (Cal. Ct. App. 2008), *cert. denied*, 129 S. Ct. 2380 (2009) (noting that the argument that issuing state medical marijuana identification cards is preempted by the Controlled Substances Act, a federal law, “falters on its own predicate because Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws”). *See also City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 385 (Cal. Ct. App. 2007) (“[T]here is no conflict based on the fact that Congress has chosen to prohibit the possession of medical marijuana, while California has chosen not to.”).

43. *See, e.g., United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998) (“[California’s Compassionate Use Act] does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws.”).

44. *Cf. Crime in the United States: FBI Uniform Crime Reports 2004*, US Government Printing Office, 1, 278–80 (2005), available at http://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf (indicating, by using the calculations derived from Table 4.1 and Table 29 of the FBI Uniform Crime Reports, that in 2004 a total of 773,731 marijuana arrests occurred nationwide; with *Compendium of Federal Justice Statistics, 2004*, Bureau of Justice Statistics 2006, 1, 13, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=564> (noting in Figure 1.1 of the Compendium of Federal Justice Statistics states that there were 8,117 arrests for federal marijuana offenses in the twelve-month period ending on September 30, 2004). Thus, the arrests for federal marijuana charges were approximately one percent of the total marijuana arrests. *Id.*

In order to qualify under California's Compassionate Use Act, a patient must have a written or oral recommendation from a physician.⁴⁵ With the physician's recommendation, the patient and his or her primary caregiver can cultivate and possess marijuana for the "personal medical purposes of the patient" without being subject to state criminal penalties.⁴⁶ The law does not specify what amounts qualify as personal use amounts, and it includes both specifically listed qualifying conditions, such as AIDS, migraines, and cancer, along with "any other illness for which marijuana provides relief."⁴⁷ A primary caregiver must be designated by the patient and must have "consistently assumed responsibility for the housing, health, or safety of that person."⁴⁸

After California voters' enactment of the Compassionate Use Act, the federal government announced a policy threatening physicians in California and Arizona—whose voters had approved a 1996 initiative allowing marijuana and other Schedule I drugs to be prescribed—with revocation of their DEA licenses if they recommended or prescribed marijuana.⁴⁹ Physicians filed suit, and the Federal District Court for the Northern District of California granted an injunction against the federal government sanctioning physicians or initiating any investigation solely based on their good faith recommendations for medical marijuana.⁵⁰ Plaintiffs conceded that the federal government could punish those who prescribe marijuana.⁵¹ The Ninth Circuit Court of Appeals upheld the injunction, holding that recommending medical marijuana was protected First Amendment activity.⁵² However, the court found that physicians would be aiding and abetting a federal crime if they issued a recommendation with the specific intent that patients use the recommendation to obtain marijuana.⁵³

Had the courts ruled in favor of the federal government in this suit, medical marijuana laws would not have been able to be contingent on a physician's approval, or they would have faltered as Arizona's 1996 law did.⁵⁴

Between 1996 and 2008, several states enacted laws that were similar to, but more restrictive than, California's law. Alaska, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, Oregon, Rhode Island, Vermont, and Washington all

45. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A), (d) (West 2007).

46. §11362.5(d).

47. §11362.5(b)(1)(A).

48. §11362.5(e).

49. Barry R. McCaffrey, Director, Office of Nat'l Drug Pol'y, The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200 (Dec. 30, 1996), available at <https://www.ncjrs.gov/txtfiles/215rel.txt>.

50. *Conant v. McCaffrey*, No. C 97-00139 WHA, 2000 WL 1281174, at *6, *16 (N.D. Cal. 2000).

51. *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002).

52. *Id.* at 639.

53. *Id.* at 636.

54. *Cf. Vonn Christenson, Courts Protect Ninth Circuit Doctors Who Recommend Medical Marijuana Use*, 32 J.L. MED. & ETHICS 174, 177 (2004) (explaining that *Conant v. Walters* preserved a physician's right to discuss medical marijuana use with patients for states located in the Ninth Circuit).

enacted medical marijuana laws between those years that provided protections from state criminal penalties for patients and their caregivers who possess and cultivate a limited amount of marijuana.⁵⁵

Unlike California's law, these laws all include a specific list of qualifying conditions or symptoms that a patient must have for full protection of the laws.⁵⁶ Most require patients to register with a state agency, generally the health department, every year or two to receive the law's full protections.⁵⁷ The laws also include specific limits on how much marijuana can be possessed or grown for full protections under the laws.⁵⁸ Initially, none of these twelve states' programs included state-regulated, larger-scale producers.⁵⁹

55. ALASKA STAT. § 17.37 (2010) (placing restrictions on the use of medical marijuana, including prohibiting its use in plain view of the general public); COLO. CONST. art. XVIII, § 14 (revoking the registry identification card of any patient who violates any of the enumerated provisions that restrict medical marijuana use); HAW. REV. STAT. ANN. §§ 329-122-25 (LexisNexis 2008 & Supp. 2011) (permitting use of medical marijuana only by patients with specific debilitating diseases); MICH. COMP. LAWS ANN. §§ 333.26424 (West Supp. 2012) (specifying that the quantity of medical marijuana in a qualifying patient or caregiver's possession shall not exceed two and one-half ounces); MONT. CODE ANN. §§ 50-46-301-344 (2011) (listing restrictions on use of medical marijuana on qualifying patients, caregivers and providers); NEV. CONST. art. IV, § 38 (enumerating qualifying debilitating conditions); NEV. REV. STAT. ANN. §§ 453A.200 (LexisNexis Supp. 2011) (providing that holders of registry identification cards are exempt from state prosecution for acts involving marijuana); OR. REV. STAT. ANN. §§ 475.320 (2011) (establishing that a patient cardholder may possess up to six plants and twenty-four ounces of marijuana); R.I. GEN. LAWS §§ 21-28.6-4 (2011) (prohibiting the prosecution of qualifying patients for possession of less than two and one-half ounces of medical marijuana); VT. STAT. ANN. tit. 18, §§ 4473-74b (LexisNexis Supp. 2012) (enumerating diseases that qualify for medical use of marijuana and providing an exemption from criminal and civil penalties for individuals with such conditions); WASH. REV. CODE ANN. §§ 69.51A.040 (West 2012) (stating that compliance with the state's medical marijuana law acts is an affirmative defense for individuals charged with violations of state law relating to marijuana).

56. Such states have passed statutory provisions that specify which medical conditions qualify for usage of medical marijuana. *See* ALASKA STAT. § 17.37.070(4) (LexisNexis 2010); COLO. CONST. art. XVIII, § 14, cl. 1(a); HAW. REV. STAT. § 329-121 (LexisNexis 2011); Michigan Medical Marihuana Act, MICH. COMP. LAWS § 333.26423 (West 2012); Montana Marijuana Act, MONT. CODE ANN. § 50-46-302(2) (2011); NEV. CONST. art. IV, § 38, cl. 1(a); Oregon Medical Marijuana Act, OR. REV. STAT. § 475.302(3) (2011); The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS § 21-28.6-3(3) (LexisNexis 2011); VT. STAT. ANN. tit. 18, § 4472(4) (LexisNexis 2012); WASH. REV. CODE § 69.51A.010 (6)(West 2012).

57. ALASKA STAT. § 17.37.010 (2010); COLO. CONST. art. XVIII, § 14, cl. 3; HAW. REV. STAT. ANN. § 329-123 (LexisNexis 2008 & Supp. 2011); MICH. COMP. LAWS ANN. § 333.26424(a) (West Supp. 2012); MONT. CODE ANN. § 50-46-303 (2011); NEV. REV. STAT. ANN. § 453A.210 (LexisNexis 2011); OR. REV. STAT. § 475.306 (2011); R.I. GEN. LAWS § 21-28.6-4 (2011); VT. STAT. ANN. tit. 18, § 4474 (LexisNexis Supp. 2012).

58. ALASKA STAT. § 17.37.040 (2010); COLO. CONST. art. XVIII, § 14, cl. 4; HAW. REV. STAT. ANN. § 329-121 (LexisNexis 2008 & Supp. 2011); MICH. COMP. LAWS ANN. § 333.26424 (West Supp. 2012); MONT. CODE ANN. § 50-46-319 (2011); NEV. REV. STAT. ANN. § 453A.200(3) (LexisNexis Supp. 2011); OR. REV. STAT. ANN. § 475.320 (2011); R.I. GEN. LAWS § 21-28.6-4 (a), (d), (e), (n) (2011); VT. STAT. ANN. tit. 18, § 4472(10) (LexisNexis Supp. 2012); WASH. REV. CODE ANN. § 69.51A.040 (West 2012).

59. *See generally* MARIJUANA POL'Y PROJECT, THE SEVENTEEN STATES AND ONE FEDERAL DISTRICT WITH EFFECTIVE MEDICAL MARIJUANA LAWS (2012), *available at*

A. Retail Dispensing in Early Medical Marijuana States

Individual, small-scale cultivation by patients or caregivers is not an effective means of obtaining marijuana for many patients. It takes months for a planted seed to produce usable marijuana.⁶⁰ In addition, some patients lack the necessary space, time, or resources,⁶¹ or their landlord may forbid marijuana cultivation.⁶² Some patients in states without dispensaries reported obtaining marijuana on the criminal market and even facing violence or mugging.⁶³

Even before California's landmark medical marijuana initiative in 1996, larger-scale distribution of medical marijuana had begun to patients with AIDS and other medical conditions through what were then called cannabis buyers clubs.⁶⁴ The federal government sometimes raided, prosecuted, or enjoined dispensaries, which are not allowed under federal law.⁶⁵ In contrast, several cities welcomed them—Oakland and the County of Santa Cruz even attempted to deputize medical marijuana distributors as city agents in an unsuccessful attempt to protect them from federal criminal laws.⁶⁶

In December 2003, California Governor Gray Davis signed the Medical Marijuana Program Act (MMPA), which allows the collective and cooperative

<http://www.mpp.org/assets/pdfs/library/17LawsSummary.pdf> (showing that of the original seventeen states with medical marijuana provisions, only Maine provides for regulated dispensaries). Since the laws were originally passed, Colorado has also passed a law providing for medical marijuana dispensary licensing. *Id.* at 6.

60. See CHRIS CONRAD, CANNABIS YIELDS AND DOSAGE 3, 6 (2004), available at <http://davidbearmanmd.com/docs/sanhandbook04.pdf> (noting that the maturation process for cannabis plants typically takes several months and that federal data shows an average yield of 0.38 ounces of usable marijuana per square foot of planted plants grown indoors and outdoors).

61. See *id.* at 5 (discussing the challenges of cultivation outside of ideal laboratory conditions by non-experts).

62. In Montana, for example, tenants are required to obtain a landlord's written permission before cultivating marijuana plants on their premises. See *Montana – Medical Marijuana Laws*, UNITED PATIENTS GRP., <http://www.unitedpatientsgroup.com/legal-states-Montana> (last visited Mar. 14, 2013). Voters approved this new requirement on November 6, 2012. *Id.*

63. Cynthia Needham, *Bill Would License Dispensaries to Sell Medical Marijuana*, PROVIDENCE J., Mar. 5, 2009, at B1 (discussing how one patient in Rhode Island was robbed during his attempt to purchase medical marijuana because the state lacks safe, state-regulated places for patients to obtain medicine).

64. Carey Goldberg, *Marijuana Club Helps Those in Pain*, N.Y. TIMES, Feb. 25, 1996, at A16.

65. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 499 (2001) (holding that medical necessity is not available as an affirmative defense in the context of medical marijuana distribution despite a state law granting seriously ill patients the right to obtain and use medical marijuana for treatment purposes).

66. *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006) (rejecting a distributor's argument that he was immune from federal liability because he had been deputized by the City of Oakland officials to function as a distributor); *County of Santa Cruz v. Gonzales*, No. C 03-01802 JF, 2007 WL 2502351, at *9 (N.D. Cal. Aug. 30, 2007) (dismissing plaintiff's claim that he was immune from federal prosecution because he was deputized by the Santa Cruz City Counsel to assist in administering the City's medical marijuana laws).

cultivation of marijuana under California state law.⁶⁷ The MMPA is now the legal basis for dispensaries under state law, but it does not include regulations or licenses for dispensaries, though it did direct the California Attorney General to create guidelines to prevent diversion of marijuana.⁶⁸ The MMPA does, however, explicitly allow cities to pass ordinances regulating the operation and establishment of collectives and cooperatives.⁶⁹ Dozens of California cities have done so, with some ordinances regulating and registering dispensaries dating back to 2005.⁷⁰

However, fear of federal interference derailed some cities' efforts to regulate dispensaries.⁷¹ Shortly before he was appointed United States Attorney for the Central District of California in 2007, then-Assistant U.S. Attorney Tom O'Brien claimed that city officials could be prosecuted for aiding and abetting a crime if they issued permits to dispensaries.⁷² It is far from established that the mere act of issuing a permit would violate federal law. Since O'Brien's statement, a court has ruled that issuing a dispensary a business license would not violate the Controlled Substances Act.⁷³ However, concerns about federal intervention had a chilling effect. Many cities chose not to regulate the conduct that their state had decriminalized.⁷⁴

Federal enforcement actions also complicate city and state efforts to regulate because the more openly a medical marijuana provider operates, the more vulnerable it is to federal law enforcement. In addition to dispensaries being raided

67. CAL. HEALTH & SAFETY CODE § 11362.775 (West 2007).

68. §11362.81(d).

69. §11362.83.

70. See, e.g., *Local California Dispensary Regulations*, AMS. FOR SAFE ACCESS <http://americansforsafeaccess.org/downloads/Moratoria-Ban-Ordinance.pdf> (last updated Mar. 1, 2013) (listing cities and counties in California that have enacted ordinances regulating dispensaries, including West Hollywood and San Francisco).

71. See Norimitsu Onishi, *Cities Balk as Federal Law on Marijuana is Enforced*, N.Y. TIMES, July 1, 2012, at A14 (describing a recent federal government crack down on medical marijuana dispensaries in California and how it led to the cessation of dispensation programs in fifty California cities).

72. David Olson, *Pot-Dispensary Crackdown Activates Search for Options*, AMS. FOR SAFE ACCESS (July 27, 2007), <http://www.safeaccessnow.org/article.php?id=4891> (explaining that as the federal government is cracking down on medical marijuana dispensaries, patients are seeking other options).

73. See *Qualified Patients Ass'n v. Anaheim*, 187 Cal. App. 4th 734, 759–60 (Cal. Ct. App. 2010). See also *White Mountain v. County of Maricopa*, CV 2012-053585 (Sup. Ct. Ariz. December 3, 2012).

74. California appellate courts are split on whether or not cities are allowed to ban dispensaries, and the California Supreme Court has taken up the issue. Compare *Los Angeles v. Alt. Medicinal Cannabis Collective*, 143 Cal. Rptr. 3d 716, 730 (Ca. Ct. App. 2012) (finding that California state's medical marijuana law preempts Los Angeles County's complete ban on all medical marijuana dispensaries), with *People v. G3 Holistic*, No. E051663, 2011 WL 5416335, *11 (Cal. Ct. App. Nov. 9, 2011) (finding that one California city's prohibition on medical marijuana dispensaries through local zoning and business licensing ordinances was valid).

and their operators sometimes being prosecuted, landlords of dispensaries are sometimes threatened with property forfeiture.⁷⁵

B. States Regulate Dispensing

In April 2007, New Mexico became the first state with a modern law that includes state regulated, larger-scale distribution of marijuana.⁷⁶ Despite the law's provisions for larger-scale licensed producers, the health department initially simply licensed individual patients to cultivate.⁷⁷ In 2008, then-candidate Barack Obama signaled that federal enforcement would not circumvent state medical marijuana laws if he were elected president.⁷⁸ After President Obama was elected, similar statements followed from other members of his administration,⁷⁹ and New Mexico moved forward with licensing producers in 2009.⁸⁰

In October 2009, U.S. Attorney General Eric Holder issued an announcement about federal policy towards states that passed provisions for medical marijuana use.⁸¹ Regarding the prosecution of medical marijuana dispensers, he stated that “[f]or those organizations that are doing so sanctioned by state law and do it in a way that is consistent with state law, and given the limited resources that we have, that will not be an emphasis for this administration.”⁸²

75. Eric Bailey, *DEA Targets Landlords of Pot Outlets*, L.A. TIMES, July 17, 2007, at B3 (describing a letter sent by the U.S. Drug Enforcement Administration to Los Angeles landlords informing them that renting property space to medical marijuana dispensaries could result in their arrest as well as forfeiture of their property).

76. Lynn and Erin Compassionate Use Act, N.M. STAT. ANN. §§ 26-2B-1-7 (LexisNexis Supp. 2011) (effective July 1, 2007).

77. Associated Press, *Marijuana Law Requires New Mexico to 'Grow Its Own'*, FOX NEWS (July, 1, 2007), <http://www.foxnews.com/story/0,2933,287617,00.html> (explaining that when New Mexico first passed its medical marijuana law, approved patients could grow their own supply).

78. Tim Dickinson, *Obama's War on Pot*, ROLLING STONE POLITICS (Feb. 16, 2012, 9:55 AM), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> (quoting President Obama as saying, “I’m not going to be using Justice Department Resources to try to circumvent state laws on this issue.”).

79. Stephen Dinan & Ben Conery, *Bush Holdovers at DEA Continue Pot Raids; Obama Vowed to End Policy*, WASH. TIMES, Feb. 5, 2009, at A1 (maintaining that President Obama does not support medical marijuana raids and insinuating reevaluation of such policies once a new DEA director was appointed).

80. See Sue Major Holmes, *Bummer: New Mexico Faces Medical Marijuana Shortage*, NBCNEWS (July 16, 2010, 8:11 PM), available at http://www.msnbc.msn.com/id/38286047/ns/health-alternative_medicine/t/bummer-new-mexico-faces-medical-marijuana-shortage/#.UQQwtBx7spI (noting that the New Mexico health department approved its first medical marijuana dispensary in March 2009).

81. Carrie Johnson, *U.S. Eases Stance on Medical Marijuana*, WASH. POST, Oct. 20, 2009, at A1 (citing the Attorney General’s announcement to federal prosecutors that they should focus building cases against drug traffickers and individuals who use firearms rather than medical marijuana patients).

82. *Federal Enforcement Policy De-Prioritizing Medical Marijuana*, MARIJUANA POL’Y PROJECT 2 (May 2012), <http://www.mpp.org/assets/pdfs/library/Federal-Enforcement-Policy-De-Prioritizing-Medical-Marijuana.pdf>.

On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum memorializing the new federal policy.⁸³ The memo said, in part, that law enforcement efforts targeting drug trafficking should “not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁸⁴ This memo was widely interpreted as meaning that the federal government would not be targeting medical marijuana providers.⁸⁵ Some state laws—particularly California’s—are not clear and unambiguous, making it more challenging for providers to meet this standard of compliance.⁸⁶

In contrast, New Mexico’s licensing system and regulations made it easy to determine who was allowed to operate under state law and what rules they must follow. When determining whether to issue a license, the New Mexico Department of Health considers “the overall health needs of qualified patients and the safety of the public,” including specific factors, such as the applicant’s level of knowledge, the quality of the security plan, and the experience of the non-profit board members.⁸⁷ Applicants must submit detailed application materials and cannot locate within 300 feet of a school, church, or daycare center and must have security alarm systems.⁸⁸

Every state that enacted a new medical marijuana program since 2009 included some form of regulated distribution, and several states with existing medical marijuana laws added provisions to allow for dispensaries.⁸⁹ In 2009, Maine and Rhode Island expanded their existing medical marijuana laws by

83. Memorandum from David W. Ogden, Deputy Att’y Gen. to Selected U.S. Att’ys (Oct. 19, 2009) (on file with the Journal of Health Care Law & Policy).

84. *Id.*

85. Jack Cafferty, *Federal Gov’t OKs Medical Marijuana. First step Toward Legalization?*, CNN CAFFERTY FILE (Oct. 20, 2009), <http://caffertyfile.blogs.cnn.com/2009/10/20/govt-s-latest-action-on-medical-marijuana-first-step-in-legalizing-pot/> (“[C]oincidentally, the Obama administration is easing up on the use of medical marijuana. The Justice Department now says pot-smoking patients and their authorized suppliers shouldn’t be targeted for federal prosecution in states that allow the drug for medicinal purposes.”); David Stout & Solomon Moore, *U.S. Won’t Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, at A1 (“People who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications.”).

86. See, e.g., Editorial, *Medical Marijuana Raises too Many Unanswered Issues*, BOS. GLOBE, Oct. 30, 2012, <http://bostonglobe.com/opinion/editorials/2012/10/30/vote-question-medical-marijuana-raises-too-many-unanswered-issues/MBcpjWccYowOdh56JD90GL/story.html> (arguing that “loosely written laws” permitting medical marijuana clinics in California and Colorado have created ambiguous results by making medical marijuana too widely available).

87. N.M. CODE R. § 7.34.4.8 (LexisNexis 2010).

88. §7.34.4.11.

89. *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Nov. 2012), <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx>.

allowing a limited number of non-profit dispensaries.⁹⁰ Rhode Island's law allows three compassion centers, and Maine allows at least eight non-profit dispensaries.⁹¹ Both states selected applicants following a competitive application process where the states' health departments considered factors like experience of the applicants and security plans.⁹² Both states' health departments also developed rules the dispensaries must abide by, including rules for security and record keeping.⁹³

In 2010, Colorado, which already had a medical marijuana law, added a law providing for strict regulation and licensing requirements for three types of medical marijuana businesses: medical marijuana centers (dispensaries), infused product manufacturers, and producers, which are required to associate with centers.⁹⁴ As is the case in California, dispensaries were already operating in Colorado prior to the regulatory law; they just were not regulated or licensed by the state.⁹⁵ A Medical Marijuana Enforcement Division was created under the Department of Revenue to license and regulate dispensaries, and it drafted regulations that went into effect on July 1, 2011.⁹⁶ In fiscal year 2012, there were 532 operating dispensaries that either already had licenses or that were on track to receive them.⁹⁷ Unlike New Mexico, Rhode Island, and Maine, Colorado allows dispensaries to operate for profit.⁹⁸

In addition to Colorado expanding its law, New Jersey and Washington, D.C. enacted new medical marijuana laws in 2010, which allow medical marijuana dispensing, but include no home cultivation.⁹⁹ Both programs require the health department to develop regulations, and both allow only a limited number of

90. ME. REV. STAT. ANN. tit. 22, §§ 2421–2430-B (Supp. 2011); R.I. GEN. LAWS §21-28.6-12 (2011).

91. *Id.*

92. *Id.*

93. *Id.*

94. COLO. REV. STAT. ANN. § 12-43.3-301(1)(a)–(c) (West Supp. 2011) (effective July 1, 2010).

95. See John Ingold, *Colorado Medical Marijuana Dispensers Consider Alliance*, DENVER POST, Oct. 4, 2009, http://www.denverpost.com/ci_13480638 (explaining that medical marijuana dispensaries in Colorado were already growing prior to the state's enactment of the 2010 law).

96. COLO. REV. STAT. 12-43.3-202(2)(a)(1) (2010) (creating the Medical Marijuana Enforcement Division); COLO. CODE REGS. § 212-1 (2011) (stating that all MMED regulations became effective on July 1, 2011).

97. Colo. Dep't of Revenue. Annual Report 38 (2012), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251847873230&ssbinary=true>.

98. COLO. REV. STAT. ANN. § 12-43.3-402 (West Supp. 2011) (setting forth the terms and conditions for receiving a license to sell medical marijuana).

99. See D.C. CODE § 7-1671.01(8)–(9) (defining “dispense” and “distribute”), § 7-1671.13(7) (Supp. 2012) (providing that the D.C. Mayor will determine the forms of medical marijuana that dispensaries and cultivation centers may dispense or distribute); N.J. STAT. ANN. § 24:6I-7 (West Supp. 2012) (noting that authorized alternative treatment centers may dispense marijuana to qualifying patients or their primary care givers).

licensed dispensaries.¹⁰⁰ In November 2010, Arizona voters approved a medical marijuana initiative allowing one dispensary for every ten pharmacies in the state.¹⁰¹ Patients living more than twenty-five miles from a dispensary, or their caregivers, may cultivate.¹⁰² In 2011, Delaware enacted a new medical marijuana law that includes a limited number of non-profit dispensaries to be selected via a competitive application process, but no home cultivation, and Vermont added regulated dispensaries to its existing law.¹⁰³

C. Shifting Federal Policy And States' Dispensary Regulation Efforts

In early 2011, states and cities were continuing to move toward having more regulated, controlled, and “clear and unambiguous” distribution programs, instead of having mere decriminalization without regulated access. Oakland’s city attorney asked the Department of Justice for advice on an ordinance enacted in 2010 that involved the city accepting fees from and issuing permits to large-scale commercial medical marijuana producers.¹⁰⁴ U.S. Attorney Melinda Haag sent a reply that said growing, distributing, and possessing marijuana violates federal law, unless it is done as part of a federally approved research project. She continued, “while the Department does not focus its limited resources on seriously ill individuals who use marijuana . . . in compliance with state law . . . we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacture and distribution activity involving marijuana, even if such activities are permitted under state law.”¹⁰⁵ Councilmember Desley Brooks, the ordinance’s sponsor, explained Oakland’s need for regulated large-scale cultivation—which federal intimidation has thwarted—saying, “[t]here are unregulated grow operations in the city, and we’re having fires, home invasions and crime as a result.”¹⁰⁶

In Washington state, Governor Christine Gregoire asked the Department of Justice for its opinion on legislation to regulate dispensaries in the state.¹⁰⁷ The two

100. § 7-1671.06(d)(2) (allowing for no more than five dispensaries and as many as eight if the Mayor increases the allotted amount through legislation); § 24:6I-7 (noting that at least two alternative treatment centers must be located in the northern, central, and southern regions of the state).

101. ARIZ. REV. STAT. ANN. § 36-2804(C) (Supp. 2012) (establishing that no more than one nonprofit dispensary for every ten pharmacies will receive a registration certificate to dispense medical marijuana).

102. § 36-2804.02(A)(3)(f).

103. DEL. CODE ANN. tit. 16, § 4914A(b)(1)–(8) (2011) (describing the application process that compassion centers must undergo in order to receive a certificate of registration from the state); VT. STAT. ANN. tit. 18, § 4474E(1)(1) (LexisNexis Supp. 2012) (stating the conditions of operation by which registered dispensaries must abide).

104. Oakland, Cal., Ordinance 13033 (Jul. 27, 2010).

105. Letter from Melinda Haag, U.S. Att’y for the N. Dist. of Cal., to John Russo, Oakland City Att’y (Feb. 1, 2011) (on file with the Journal of Health Care Law & Policy).

106. Malia Wollan, *Oakland’s Plan to Cash in on Marijuana Farms Hits Federal Roadblock*, N.Y. TIMES, Mar. 3, 2011, at A16.

107. Letter from Christine O. Gregoire, Governor of Washington, to Eric Holder, U.S. Att’y Gen. (Apr. 13, 2011) (on file with the Journal of Health Care Law & Policy).

U.S. Attorneys for Washington state responded with a letter that was similar to the Oakland letter.¹⁰⁸ They said that seriously ill individuals were not an enforcement priority, but that the department maintained the authority to enforce the CSA vigorously against medical marijuana providers, even if they followed state law.¹⁰⁹ The letter also said “state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA.”¹¹⁰

After receiving the letter, Governor Gregoire vetoed the portions of the law that would have regulated dispensing.¹¹¹ Washington state still has dispensaries,¹¹² as California has had even before the Compassionate Use Act,¹¹³ but, due to federal policy, Washington missed the opportunity to regulate and control them.¹¹⁴ Seattle alone is reported to have more than 100 dispensaries.¹¹⁵

Throughout 2011, U.S. Attorneys in other states, including Arizona, Colorado, Hawaii, Maine, Montana, Rhode Island, and Vermont, sent similar letters, generally in response to inquiries from elected officials.¹¹⁶ Most of the letters, however, did not mention state workers; Arizona’s U.S. Attorney noted only

108. Letter from Jenny A. Durkan, U.S. Att’y for the W. Dist. of Washington, and Michael C. Ormsby, U.S. Att’y for the E. Dist. of Washington, to Christine Gregoire, Governor of Washington (Apr. 14, 2011) (on file with the Journal of Health Care Law & Policy).

109. *Id.*

110. *Id.*

111. Jonathan Martin, *Gregoire Vetoes Bill But Vows to Push Feds on Medical Marijuana*, SEATTLE TIMES, Apr. 29, 2011, http://seattletimes.com/html/localnews/2014913931_marijuana30m.html.

112. *See, e.g.*, Maureen O’Hagan & Jonathan Martin, *Pot Dispensaries Clouding Medical Marijuana’s Image*, SEATTLE TIMES, Oct. 6, 2012, http://seattletimes.com/html/localnews/2019363501_medicalmarijuana07m.html (noting that it is estimated that there are at least 150 marijuana-related businesses in Seattle including dispensaries).

113. *See, e.g.*, Onishi, *supra* note 71, at A14 (providing that at least 1,400 dispensaries were located in California in October 2011, prior to passage of the Act).

114. *See generally* Jonathan Martin, *Medical-Marijuana Dispensaries Run Into Trouble at the Bank*, SEATTLE TIMES, Apr. 29, 2012, http://seattletimes.com/html/localnews/2018103547_maribanking30m.html (describing the conflict between Washington state laws and federal dispensary laws, and noting that the state left regulation of dispensaries to city governments).

115. *See* Jonathan Martin, *Seattle Pot Dispensaries Finding Business Climate No Longer Sunny*, SEATTLE TIMES, Sept. 5, 2012, http://seattletimes.com/html/localnews/2019077879_dispensaries06m.html (reporting that approximately 145 dispensaries were located in Seattle in September 2012).

116. *See* Letter from Dennis Burke, U.S. Att’y for the Dist. of Ariz., to Will Humble, Director of Ariz. Dep’t of Health Servs. (May 2, 2011) (on file with the Journal of Health Care Law & Policy); Letter from John Walsh, U.S. Att’y for the Dist. of Colo., to John Suthers, Colo. Att’y Gen. (Apr. 26, 2011) (on file with the Journal of Health Care Law & Policy); Letter from Florence Nakakuni, U.S. Att’y for the Dist. of Haw., to Jodie Maesaka-Hirata, Dir. of the Haw. Pub. Safety Dep’t (Apr. 12, 2011) (on file with the Journal of Health Care Law & Policy); Letter from U.S. Att’y for the Dist. of Mont., to Jim Peterson, Mont. State Senate President (Apr. 20, 2011) (on file with the Journal of Health Care Law & Policy); Letter from Peter Neronha, U.S. Att’y for the Dist. of R.I., to Lincoln Chafee, Governor of R.I. (Apr. 29, 2011) (on file with the Journal of Health Care Law & Policy); Letter from Tristram Coffin, U.S. Att’y for the Dist. of Vt., to Keith Flynn, Comm’r of the Vt. Dep’t of Pub. Safety (May 3, 2011) (on file with the Journal of Health Care Law & Policy).

that “the CSA may be vigorously enforced against those individuals and entities who operate large marijuana production facilities.”¹¹⁷

On June 29, 2011, Justice Department Deputy Attorney General James Cole issued a far more limited memorandum than the Ogden memorandum.¹¹⁸ It explained that it was still “likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers.”¹¹⁹ However, it defined caregivers only as those caring for the seriously ill, “not commercial operations cultivating, selling or distributing marijuana.”¹²⁰ The Cole Memorandum noted legislation to allow large-scale manufacture of marijuana with “revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants” and claimed the “Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”¹²¹

Following the U.S. Attorney’s memo, Arizona filed suit seeking a declaratory judgment that definitely held either that complying with the state’s medical marijuana act “provides a safe harbor from federal prosecution” under the CSA or that “the [Arizona Medical Marijuana Act] does not provide a safe harbor from federal prosecution” and is preempted.¹²² The District Court for Arizona dismissed the case, finding that it was not ripe, because Arizona’s complaint did not establish that state workers “are subject to a genuine threat of imminent prosecution.”¹²³

After the case was dismissed and Governor Brewer decided not to re-file it, Arizona’s Department of Health Services issued dispensary certificates to ninety-eight dispensaries, three of which opened by late December 2012.¹²⁴ Maine, New Mexico, and Colorado all continue to have operational, state-regulated and registered or licensed dispensaries, though they have different names under the

117. See Letter from Dennis Burke to Will Humble, *supra* note 116 (emphasis added).

118. Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys (June 29, 2011) (on file with the Journal of Health Care Law & Policy) (providing guidance regarding the 2009 memorandum issued by then-Deputy Attorney General David Ogden regarding state laws authorizing the use of medical marijuana).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Arizona v. United States*, No. CV 11-1072-PHX-SRB, slip op. at 2 (D. Ariz. Jan. 1, 2012).

123. *Id.* at 8.

124. ARIZONA DEP’T OF HEALTH SERVS BUREAU OF PUB. HEALTH STATISTICS, REPORT TO ARIZONA DEPARTMENT OF HEALTH SERVICES: FIRST ANNUAL MEDICAL MARIJUANA REPORT 1 (2012), available at <http://www.azdhs.gov/medicalmarijuana/documents/reports/arizona-medical-marijuana-end-of-year-report-2012.pdf>. See also Mary K. Reinhart, *Arizona Begins Selecting Medical-Marijuana Dispensaries*, ARIZ. REPUBLIC (Aug. 7, 2012, 9:45 PM), <http://www.azcentral.com/arizonarepublic/local/articles/2012/08/07/20120807arizona-begins-selecting-medical-marijuana-dispensaries.html> (discussing Arizona’s selection and approval processes of about 100 medical marijuana dispensaries).

different state laws.¹²⁵ No dispensaries are known to have been targeted by federal law enforcement in New Mexico and Maine.¹²⁶ In Colorado, several medical marijuana centers located within 1,000 feet of schools were threatened with property forfeiture if they remained in those locations.¹²⁷ However, hundreds more have continued to operate further away from schools.¹²⁸

In addition to Arizona,¹²⁹ the District of Columbia,¹³⁰ Rhode Island,¹³¹ Vermont,¹³² and New Jersey¹³³ have given preliminary approval or have issued registrations or licenses to dispensaries. Arizona¹³⁴ and New Jersey's¹³⁵ first dispensaries opened in December 2012, and the District of Columbia,¹³⁶ Rhode Island,¹³⁷ and Vermont¹³⁸ are expected to have operational dispensaries sometime

125. ME. REV. STAT. ANN. tit. 22, § 2383-B (Supp. 2011); N.M. CODE R. § 7.34.4 (2010); COLO. REV. STAT. ANN. § 12-43.3-104 (West Supp. 2012).

126. See Lucia Graves, *Lawmakers in 5 States Tell Feds to Back Off Medical Marijuana*, HUFFINGTON POST (Apr. 2, 2012, 4:26 PM), http://www.huffingtonpost.com/2012/04/02/lawmakers-in-5-states-tell-feds-medical-marijuana_n_1397811.html (posting a letter from lawmakers in five states to the federal government pointing out that the federal government has never before prosecuted any state employees involved in state sanctioned medical marijuana dispensaries).

127. See Mary Shinn, *Medical Marijuana Dispensaries Near Schools Ordered to Close*, GAZETTE (Aug. 3, 2012, 6:33 PM), <http://www.gazette.com/articles/dispensaries-142707-marijuana-schools.html>.

128. See William Breathes, *Medical Marijuana Dispensaries: 266 Licensed MMCs in Colorado, 272 Pending*, DENVER WESTWORD (Oct. 31, 2012, 4:20 PM), http://blogs.westword.com/latestword/2012/10/medical_marijuana_dispensaries_266_licensed_colorado.php (stating that as of October 2012, 266 licensed medical marijuana dispensaries were located in Colorado).

129. See Reinhart, *supra* note 124.

130. See *D.C. Announces Medical Marijuana Dispensary Locations*, NBC WASH. (June 12, 2012, 9:47 PM), <http://www.nbcwashington.com/investigations/series/medical-marijuana/DC-Announces-Medical-Marijuana-Dispensary-Locations-158566545.html>.

131. See *Marijuana Dispensaries Could Open in 6 Months*, TURN TO 10 (Aug. 13, 2012), available at <http://www2.turnto10.com/news/2012/aug/13/marijuana-dispensaries-could-open-6-months-ar-1135922/>.

132. See Kirk Carapezza, *As Vt. Approves Marijuana Dispensaries, Towns Prepare to Host Them*, VT. PUB. RADIO (Sept. 16, 2012, 7:34 AM), http://www.vpr.net/news_detail/95913/as-vt-approves-marijuana-dispensaries-towns-prepar/.

133. See CBS News Staff, *N.J. Issues State's First Medical Marijuana Permit*, CBS NEWS (Apr. 17, 2012, 12:57 PM), http://www.cbsnews.com/8301-504763_162-57415274-10391704/nj-issues-states-first-medical-marijuana-permit/.

134. Associated Press, *Arizona's First Medical Marijuana Dispensary Opens*, EAST VALLEY TRIBUNE (Dec. 6, 2012), http://www.eastvalleytribune.com/local/health/article_005e8b62-3ffe-11e2-b2af-001a4bcf887a.html.

135. Anemona Hartocollis, *First Ounces of Marijuana Leave a New Jersey Dispensary*, N.Y. TIMES, Dec. 7, 2012, at A32.

136. Greta Kreuz, *D.C.'s First Medical Marijuana Dispensary Hopes for April Opening*, WJLA.COM (Feb. 14, 2013, 11:53 PM), <http://www.wjla.com/articles/2013/02/d-c-s-first-medical-marijuana-dispensary-hopes-for-april-opening--85240.html>.

137. Kevin P. O'Connor, *Medical Marijuana Dispensary in R.I. Ready To Go, Awaits Certification*, THE HERALD NEWS (Mar. 2, 2013, 10:20 PM), <http://www.tauntongazette.com/news/x1551259449/Medical-marijuana-dispensary-in-R-I-ready-to-go-awaits-certification#ixzz2NYIkWSsB>.

in spring 2013. Connecticut passed a law that included dispensaries in 2012, and dispensary rules should be drafted by July 1, 2013.¹³⁹ Massachusetts is also implementing a new medical marijuana law that includes dispensary provisions.¹⁴⁰ The Maryland General Assembly has also enacted a bill allowing certain hospitals to run medical marijuana programs approved and regulated by an independent commission.¹⁴¹ No state workers in any state licensing dispensaries have faced prosecution.¹⁴²

In those states without state-licensed or state-registered dispensaries, dispensaries have been occasionally targeted with federal raids,¹⁴³ others have been threatened with federal property forfeiture,¹⁴⁴ and some dispensary operators and staffers have been federally prosecuted.¹⁴⁵ Nonetheless, as has been the case since even before California voters allowed medical marijuana, hundreds of dispensaries continue to operate.¹⁴⁶

IV. CONCLUSION

After other state attempts to allow the medical use of marijuana failed due to federal policy or ceased being operational, eighteen states and Washington, D.C. decriminalized the use of marijuana under state or district law. Hundreds of

138. See Michael Brindley, *As N.H. Weighs Medical Marijuana, Neighboring States Say Their Programs Are Working*, New Hampshire News (Mar. 12, 2013), <http://www.nhpr.org/post/nh-weighs-medical-marijuana-neighboring-states-say-their-programs-are-working>.

139. 2012 Conn. Acts 12-55 (Reg. Sess.).

140. 2012 Mass. Legis. Serv. 369 (West); MICH. COMP. LAWS ANN. §§ 333.26421–26430 (West Supp. 2012)

141. See Erin Cox, *BALT. SUN* (Apr. 8, 2013), http://articles.baltimoresun.com/2013-04-08/news/bal-medical-marijuana-approved-20130408_1_medical-marijuana-program-maryland-senate-martin-o-malley. H.B. 1101 allows “academic medical centers”—hospitals that conduct research and have medical residency programs—to apply to an independent commission under the Department of Health and Mental Hygiene to run medical marijuana programs. H.B. 1101, 433rd Leg., 1st Sess. (Md. 2013). The marijuana would be produced by the federal government or in-state growers licensed by the commission. *Id.*

142. *Arizona v. United States*, No. CV 11-1072-PHX-SRB, slip op. at 8 (D. Ariz. Jan. 1, 2012) (noting the lack of history on prosecution of state employees for participation in state-sanctioned medical marijuana schemes).

143. See, e.g., Andrew Blankstein, *Feds Target 71 Medical Marijuana Dispensaries in L.A. County*, L.A. TIMES, Sept. 25, 2012, <http://latimesblogs.latimes.com/lanow/2012/09/feds-target-71-medical-marijuana-dispensaries-in-la-county.html> (describing federal raids on seventy-one medical marijuana dispensaries in Los Angeles County).

144. See, e.g., Malia Wollan, *Oakland Files Suit Against U.S. to Prevent Closing of Marijuana Dispensary*, N.Y. TIMES, Oct. 12, 2012, at A18 (discussing a lawsuit filed by the Department of Justice seeking property seizure of a medical marijuana dispensary in Oakland, California).

145. See, e.g., Eve Byron, *Trial Starts in Medical Marijuana Case*, INDEP. REC., Sept. 25, 2012, http://helenair.com/news/local/crime-and-courts/trial-starts-in-medical-marijuana-case/article_cbfa2b32-06d8-11e2-8fb8-001a4bcf887a.html (detailing the federal government’s prosecution of owners of a medical marijuana dispensary in Montana).

146. See *supra* notes 64, 95 and accompanying text.

thousands of patients are participating in those state programs.¹⁴⁷ Beginning in 2009, states moved toward recognizing and controlling distribution of medical marijuana, rather than simply decriminalizing it.¹⁴⁸ This allows for a better outcome for patients—who do not have to go to the criminal market or obtain an untested, unregulated product—and communities.¹⁴⁹ However, federal intervention can undermine these attempts at control and regulation.¹⁵⁰

There are several options available to bring federal policy more in line with states' policies. The Department of Justice can choose or be directed not to use its limited resources on those complying with state medical marijuana laws.¹⁵¹ Another option would be for the Attorney General or DEA to approve Gov. Gregoire and Chafee's petition to reschedule marijuana.¹⁵² The best, most comprehensive way to harmonize federal and state medical marijuana policies would be for Congress to enact H.R. 689,¹⁵³ resulting in marijuana being scheduled as III or lower and allowing marijuana to be prescribed, recommended, dispensed from pharmacies, and possessed or manufactured by those authorized to do so under state medical marijuana laws.¹⁵⁴

H.R. 689 would finally end the untenable situation where the federal government criminalizes the use of a natural medicine that DEA Administrative Law Judge Francis Young found to be "one of the safest therapeutic substances known to man" nearly twenty-five years ago.¹⁵⁵ It would harmonize federal law with the laws of eighteen states and the District of Columbia, allowing states to confidently regulate this important industry and would conform to the wishes of the vast majority of voters. Most important of all, H.R. 689 would improve the lives of patients battling serious illness by allowing them to have safe, regulated access to medical marijuana.

147. As of March 14, 2013, Colorado had 108,656 registered patients and Michigan had 131,861. *Medical Marijuana Statistics*, COL. DEP'T PUB. HEALTH & ENV'T, <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (last updated Jan. 31, 2013); *Michigan Medical Marijuana Program*, MICH. DEP'T LICENSING & REG. AFFAIRS, http://www.michigan.gov/lara/0,4601,7-154-35299_28150_51869---,00.html (last updated Feb. 28, 2013).

148. See *supra* note 89 and accompanying text.

149. See *supra* note 63 and accompanying text.

150. See *supra* Part III.

151. See *supra* notes 83, 105 and accompanying text (discussing the Department of Justice's stance on enforcement of the Controlled Substances Act).

152. See *supra* notes 15–17 and accompanying text.

153. H.R. 689 would change federal law by rescheduling marijuana under the Controlled Substances Act and by exempting people complying with state medical marijuana laws from federal arrest and prosecution. H.R. 689, 113th Cong. (1st Sess. 2013).

154. *Id.*

155. ALJ's Opinion and Recommended Ruling, In re Marijuana Rescheduling Petition, Docket No. 86-22 (Drug Enforcement Admin. Sept. 6, 1988).