

HIGH TIME FOR CHANGE: HOW FEDERAL CANNABIS PROHIBITION DOOMS THE LEGAL CANNABIS INDUSTRY

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INTRODUCTION

Cannabis¹ prohibition is a failed approach. As of 2023, the vast majority of state governments have reformed their cannabis laws.² Today, 38 states, three territories, and DC allow medical cannabis in some capacity.³ Meanwhile, 24 states, two territories, and DC have legalized cannabis for recreational (i.e., nonmedical) use.⁴ All told, a vast majority of Americans live in a state where cannabis is legal for medical use, and approximately half of Americans live in a state where it is legal for recreational use.⁵

Despite these widespread state legalization efforts, cannabis remains federally prohibited and criminalized under Schedule I of the Controlled Substances Act (“CSA”), which is the most restrictive schedule, reserved for drugs deemed to have “no currently accepted medical use.”⁶ Due to federal prohibition, the cannabis industry faces challenges that no other state-legal industry has to contend with: cannabis businesses cannot access traditional financial services,⁷ deduct business expenses on their

* © J.D. Candidate 2024, University of Maryland Francis King Carey School of Law. The author would like to thank the editors of the Journal of Business & Technology Law and Professor William Moon for their feedback and support.

1. Cannabis is known by many names. This comment will use the term “cannabis,” as that is the term chosen by Maryland legislators and many in the industry for the drug. This comment will use terms such as “marijuana” and “marihuana” only when quoting or referring to other sources that use those terms.

2. *State Medical Cannabis Laws*, NAT’L CONF. OF STATE LEGISLATURES (June 22, 2023), <https://www.ncsl.org/health/state-medical-cannabis-laws>.

3. *Id.*

4. *Id.*

5. Katharina Buchholz, *Half of Americans Live in States Where Weed Is Legal*, STATISTA (Aug. 30, 2023), <https://www.statista.com/chart/30710/people-living-in-legal-weed-states>.

6. *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> (last visited Oct. 7, 2023).

7. *See infra* Section III.A.

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federal taxes,⁸ engage in interstate commerce,⁹ or utilize the bankruptcy system.¹⁰ Moreover, the gulf between state and federal law creates inherent risk and uncertainty that has a chilling effect on the industry and consumers.¹¹ In this way, continued federal prohibition in the face of state legalizations produces a two-tiered legal landscape that prevents the cannabis industry from achieving long-term viability and makes it more difficult for the minority groups who suffered the most under prohibition to enter the industry.¹²

In 2022, approximately 100 years after cannabis prohibitions began and 52 years after the passage of the CSA, the federal government signaled that it may be receptive to reform.¹³ This reform will likely manifest in the rescheduling of cannabis to Schedule III of the CSA.¹⁴ While this may solve some problems facing the industry, it will not end prohibition because cannabis would remain illegal for recreational use.¹⁵ Nor will it create a combined federal and state regulatory framework that is compatible with current state law.¹⁶ Federal prohibition and the negative externalities that accompany it can only be ended by the removal of cannabis from the CSA and the passage of a federal regulatory system that recognizes the legitimacy of medical and recreational cannabis use.¹⁷

Part I of this comment explores the history of cannabis prohibition and its disproportionate impact on minority groups.¹⁸ Part II examines the history of legalization efforts nationwide,¹⁹ and Part II.C. presents a case study of Maryland's journey to medical and recreational cannabis legalization.²⁰ Part III outlines the business challenges the cannabis industry faces as a result of federal prohibition.²¹ It further explores why these challenges prevent cannabis businesses from achieving profitability and

8. *See infra* Section III.B.

9. *See infra* Section III.C.

10. *See infra* Section III.D.

11. *See infra* Sections III, IV.

12. *See infra* Section III.

13. Joseph R. Biden, *Statement from President Biden on Marijuana Reform*, WHITE HOUSE (Oct. 6, 2022) [hereinafter *Statement on Marijuana Reform*], <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform>.

14. *See infra* Section IV.A.

15. *See infra* Section IV.A.

16. *See infra* Section IV.B.

17. *See infra* Section IV.B.

18. *See infra* Section I.

19. *See infra* Section II.

20. *See infra* Section II.C.

21. *See infra* Section III.

minority groups from entering the industry.²² Finally, Part IV analyzes federal reform efforts and argues that descheduling cannabis is the most pragmatic way to reconcile state and federal law and end prohibition.²³

I. CANNABIS PROHIBITION

The history of cannabis prohibition in the United States is inextricably linked with racism.²⁴ In the United States, cannabis was used as a medicine during the 19th century without restriction.²⁵ Cannabis prohibitions did not begin until the 1910s when the drug began to be associated with Mexican immigrants fleeing the Mexican Revolution.²⁶ Panic over the arrival of immigrants spurred some states and localities to ban cannabis, with El Paso becoming the first city to do so.²⁷ Throughout the 1920s cannabis use began to be associated with Black people, jazz culture, and bohemians.²⁸ The association of cannabis with minority groups on the fringes of society led to mainstream campaigns against the drug.²⁹ By 1931, twenty-nine states had banned cannabis regardless of whether or not it contained tetrahydrocannabinol (THC), the main psychoactive component of cannabis.³⁰

The trend continued in the 1930s when Harry J. Anslinger, head of the Federal Bureau of Narcotics, began campaigning against cannabis, publicly associating its use with racial minorities and promoting unscientific claims as to the danger of the drug.³¹ Anslinger once stated that “the primary reason to outlaw marijuana is its effect on degenerate races.”³² Subsequently, in 1937, Anslinger successfully lobbied Congress to pass the Marihuana Tax Act, which aimed to effectively ban cannabis

22. See *infra* Section III.

23. See *infra* Section IV.

24. Barney Warf, *High Points: An Historical Geography of Cannabis*, 104 GEOGRAPHICAL REV. 414, 429-30 (2014); Amy Tikkanen, *Why Is Marijuana Illegal in the U.S.?*, ENCYCLOPEDIA BRITANNICA (Apr. 15, 2019), <https://www.britannica.com/story/why-is-marijuana-illegal-in-the-us>.

25. Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, And Implications for the Acute Care Setting*, 42 PHARMACY & THERAPEUTICS 180, 180 (2017).

26. Warf, *supra* note 24, at 429; Tikkanen, *supra* note 24.

27. Warf, *supra* note 24, at 429; Tikkanen, *supra* note 24.

28. Warf, *supra* note 24, at 429.

29. Tikkanen, *supra* note 24.

30. Warf, *supra* note 24, at 429.

31. Tikkanen, *supra* note 24.

32. Michelle H. Walton, *Book Review: Marijuana Law, Policy, and Authority by Robert A. Mikos*, *Professor Of Law, Vanderbilt University School of Law*, 11 ALB. GOV'T L. REV. 82, 89 (2017).

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nationwide.³³ Thirty-two years later, in 1969, the Act was declared unconstitutional because it required self-incrimination in violation of the Fifth Amendment.³⁴ However, this was not the end of cannabis prohibition. The War on Drugs, which was primarily focused on cannabis,³⁵ was just beginning.

In 1970, amidst active civil rights and anti-war movements, President Nixon signed the Controlled Substances Act (“CSA”) into law.³⁶ This move was part of a deliberate strategy by the Nixon Administration to criminalize their perceived political opponents, in particular, racial minorities.³⁷ The Nixon Administration knew that cannabis was not as problematic as it claimed.³⁸ Nixon’s own National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission after its leader, Pennsylvania Governor Raymond Shafer, released a report in 1972, which recommended that cannabis be decriminalized.³⁹ But, in keeping with his Administration’s political strategy,⁴⁰ Nixon ignored this recommendation, instead doubling down on prohibition by creating the Drug Enforcement Agency (“DEA”) in 1973.⁴¹ Years later, Reagan adopted Nixon’s racist strategy and made drug enforcement “a cornerstone of his domestic policy.”⁴² Reagan ensured that the War on Drugs escalated by enacting harsher penalties and increasing federal anti-drug spending.⁴³ The result was a war “played out nearly singularly on the streets of black and brown

33. Tikkanen, *supra* note 24; Marihuana Tax Act, 26 U.S.C. § 4741 et seq., *invalidated by* Leary v. United States, 395 U.S. 6 (1969).

34. Leary v. United States, 395 U.S. 6, 12 (1969).

35. Between 1982 and 2007, with the exception of the eight years between 1987 to 1995, cannabis was the drug for which the most people were arrested. *Arrests by Drug Type*, BUREAU OF JUST. STAT. (June 2, 2021), <https://bjs.ojp.gov/drugs-and-crime-facts/enforcement/drugtype-table>. In 2018, even with legalization movements in full swing, cannabis arrests still made up 40% of drug arrests. John Gramlich, *Four-in-Ten U.S. Drug Arrests in 2018 Were for Marijuana Offenses – Mostly Possession*, PEW RSCH. CTR. (Jan. 22, 2020), <https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/>.

36. Controlled Substances Act, 21 U.S.C. §§ 801-904.

37. André Douglas Pond Cummings & Stephen A. Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 461 (2022).

38. Walton, *supra* note 32, at 94.

39. *Id.*

40. Cummings & Ramirez, *supra* note 37, at 461-62, 465.

41. Walton, *supra* note 32, at 94.

42. Cummings & Ramirez, *supra* note 37, at 468.

43. *Id.* at 466; Walton, *supra* note 32, at 95.

Americans.”⁴⁴ At this point, it was clear that “the [War on Drugs] never addressed public health problems in a defensible manner ..., instead it intentionally sought the demonization, disempowerment, and destruction of political enemies and people of color ..., just as senior political advisors to both Presidents Nixon and Reagan admitted.”⁴⁵

One of the principal intended effects of the War on Drugs—a pronounced and disproportionate impact on racial minorities—is apparent.⁴⁶ Today, while Black and white people consume cannabis at roughly the same rates, Black people are 3.64 times more likely to be arrested for possession.⁴⁷ Moreover, according to a 2015 report by the Bureau of Justice Statistics, 76% of people in federal prison for drug offenses are either Black or Hispanic.⁴⁸ Additionally, 59% of federal inmates charged with a cannabis-related offense are Hispanic or Latino.⁴⁹ At the state level, the statistics are no better: the ACLU found that “[i]n every single state, Black people were more likely to be arrested for marijuana possession, and in some states, Black people were up to six, eight, or almost 10 times more likely to be arrested.”⁵⁰ Because of the disenfranchisement that often accompanies a drug offense, the ACLU aptly characterized the War on Drugs as “a new Jim Crow.”⁵¹

44. Cummings & Ramirez, *supra* note 37, at 472.

45. *Id.* at 470.

46. *Id.* at 478-82.

47. AM. C.L. UNION, A TALE OF TWO COUNTRIES 7 (2018), <https://www.aclu.org/report/tale-two-countries-rationally-targeted-arrests-era-marijuana-reform>.

48. BUREAU OF JUST. STAT., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015), <https://bjs.ojp.gov/content/pub/pdf/dofp12.pdf>.

49. *Id.*

50. A TALE OF TWO COUNTRIES, *supra* note 47, at 8.

51. Graham Boyd, *The Drug War Is the New Jim Crow*, AM. C.L. UNION (July 31, 2001), <https://www.aclu.org/other/drug-war-new-jim-crow>.

II. CANNABIS LEGALIZATION

A. State Legalization Efforts

After the 1972 release of the Shafer Commission report (which Nixon did not act upon), cannabis advocacy groups used it as a rallying cry to support the relaxation of state cannabis prohibitions.⁵² California became the first state to attempt to decriminalize personal cannabis use since prohibitions began.⁵³ In 1972, California Proposition 19, which would have decriminalized cannabis for personal use, gained enough signatures to appear on the ballot statewide.⁵⁴ Nevertheless, nearly two-thirds of voters rejected the initiative.⁵⁵ Oregon became the first state to successfully decriminalize cannabis when the state legislature passed a bill in 1973 that made the possession of cannabis a civil violation.⁵⁶ By 1978, 10 more states joined Oregon in decriminalizing cannabis possession.⁵⁷ However, the public perception of drugs changed and cannabis reform efforts stalled or regressed in the 1980s.⁵⁸

A resurgence of reform efforts began in 1996 with California Proposition 215.⁵⁹ The ballot initiative, which allowed the use of cannabis for certain medicinal purposes, passed with 55.58% of the vote.⁶⁰ In 2001, Nevada became “the first state in 24 years to” decriminalize the possession of small amounts of recreational cannabis and the ninth to legalize

52. Thomas Heddleston, *From the Frontlines to the Bottom Line: Medical Marijuana, the War on Drugs, and the Drug Policy Reform Movement* 112 (June 2012) (Ph.D. dissertation, University of California, Santa Cruz), <https://escholarship.org/content/qt1t7220hj/qt1t7220hj.pdf>.

53. *Marijuana Laws and Ballot Measures in the United States*, BALLOTPEDIA, https://ballotpedia.org/Marijuana_laws_and_ballot_measures_in_the_United_States (last visited Oct. 7, 2023).

54. *California Proposition 19, Personal Use of Marijuana Initiative (1972)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_19,_Personal_Use_of_Marijuana_Initiative_\(1972\)](https://ballotpedia.org/California_Proposition_19,_Personal_Use_of_Marijuana_Initiative_(1972)) (last visited Oct. 7, 2023).

55. *Id.*

56. Heddleston, *supra* note 52, at 115.

57. *Id.*

58. See Cummings & Ramirez, *supra* note 37, at 468, 470 (stating that over the course of the 1980s the Reagan Administration’s public focus on the War of Drugs led to a drastic uptick in the percentage of Americans who thought that drug use was a major problem); Heddleston, *supra* note 52, at 61.

59. *California Proposition 215, Medical Marijuana Initiative (1996)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_215,_Medical_Marijuana_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_215,_Medical_Marijuana_Initiative_(1996)) (last visited Oct. 10, 2023).

60. *Id.*

medicinal cannabis.⁶¹ These legal successes started a wave of reforms in the 21st century. Washington and Colorado became the first states to legalize recreational cannabis in 2012.⁶² Since then, cannabis legalization has moved from a fringe position to the mainstream. By 2023, states of varying political identities and makeups had reformed their cannabis laws.⁶³ In total, 24 have legalized recreational cannabis and 38 have legalized medical cannabis.⁶⁴

B. Federal Legalization Efforts

The federal government has been slower to reform. To this day, despite a majority of states allowing medical cannabis, the drug remains classified under Schedule I of the CSA, which is the most restrictive category, reserved for drugs deemed to have no accepted medical use.⁶⁵ In 2005, as many states were legalizing cannabis for medical use, the Supreme Court held that the Commerce Clause gives the federal government the ability to prosecute individuals in possession of cannabis even if they are abiding by their state's laws.⁶⁶

While the federal government may have this ability, actual enforcement has been tempered by several Department of Justice ("DOJ") memos.⁶⁷ The Ogden Memo, which was issued in 2009, advised U.S. Attorneys not to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁶⁸ After Colorado and Washington legalized recreational cannabis, the DOJ issued the Cole Memorandum, which stated that the DOJ would focus its limited resources on acts such as cannabis distribution across state lines, rather than on individual possession and use in

61. *Nevada Defelonizes Pot Possession State Eliminates Jail, Criminal Record for Minor Offenders; Legalizes Medical Marijuana for Seriously Ill*, NORML (June 7, 2001), <https://norml.org/news/2001/06/07/nevada-defelonizes-pot-possessionstate-eliminates-jail-criminal-record-for-minor-offenders-legalizes-medical-marijuana-for-seriously-ill>.

62. *Marijuana Laws and Ballot Measures in the United States*, *supra* note 53.

63. *Id.*

64. *Id.*

65. *Drug Scheduling*, *supra* note 6.

66. *See generally* *Gonzales v. Raich*, 545 U.S. 1 (2005).

67. Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 245-48 (2020).

68. U.S. DEP'T. OF JUST., MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA 2 (2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

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states where such acts are legal.⁶⁹ In 2018, Attorney General Jeff Sessions rescinded the Cole Memorandum.⁷⁰ This action alarmed the cannabis industry, but ultimately little changed in how the DOJ approached cannabis enforcement.⁷¹

In October 2022, President Biden took a historic step towards cannabis reform by instructing the Secretary of Health and Human Services and the Attorney General to review how cannabis is scheduled under the CSA.⁷² Biden also directed the Attorney General to develop a process for the pardon of federal inmates who have been convicted of simple possession of marijuana under federal law.⁷³ The pardon extends to thousands more who were convicted under the laws of the District of Columbia.⁷⁴ Since it is estimated that most people in prison for simple marijuana possession are in state prison,⁷⁵ Biden further urged state governors to issue pardons.⁷⁶ Biden's proclamation represented a huge shift in federal cannabis policy, though it is still unclear which reforms may follow.⁷⁷

C. Cannabis Legalization in Maryland

During cannabis prohibition, Maryland spent significantly more resources on criminalizing cannabis than other states. In 2010, Maryland spent the third most per capita on enforcing cannabis possession laws.⁷⁸ In that same year, Maryland had the fourth-highest arrest rate for cannabis possession at 409 arrests per 100,000 people, while the national average was 256 arrests per 100,000 people.⁷⁹ Between 2001 and 2010, as many states relaxed their cannabis laws, Maryland's cannabis possession

69. U.S. DEP'T. OF JUST., MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1-2 (2013) [hereinafter COLE MEMORANDUM], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

70. OFF. OF THE ATT'Y GEN., U.S. DEP'T. OF JUSTICE, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS: MARIJUANA ENFORCEMENT 1-2 (2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

71. Swinburne & Hoke, *supra* note 67, at 247-48.

72. *Statement on Marijuana Reform*, *supra* note 13.

73. *Proclamation* No. 10,467, 87 Fed. Reg. 61441 (Oct. 6, 2022).

74. *Id.*

75. *Exactly How Many People Are Locked Up for Weed?*, LAST PRISONER PROJECT, <https://www.lastprisonerproject.org/cannabis-prisoner-scale> (last visited Nov. 21, 2022).

76. *Statement on Marijuana Reform*, *supra* note 13.

77. *See infra* Section IV.

78. AM. C.L. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 23 (2013) [hereinafter WAR ON MARIJUANA], https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

79. *Id.* at 15.

arrest rate increased by almost 25%.⁸⁰ Considering the initial political justifications for the War on Drugs, it should not be surprising that while Black people made up 30% of Maryland’s population, 57.9% of those arrested for cannabis possession in 2010 were Black.⁸¹ Black people were therefore 2.86 times as likely as white people to be arrested for cannabis possession.⁸² Even after decriminalization, a 2018 report found that Black Marylanders were 2.1 times more likely than white Marylanders to be arrested for cannabis possession.⁸³ And in 2022, “even though Black people and white people use marijuana at the same rates, 70% of people charged with cannabis related charges in MD are Black.”⁸⁴ Reform was desperately needed.

1. Medical Cannabis Legalization in Maryland

Maryland took its first step towards reform in 2003 when Governor Robert Ehrlich Jr. signed a bill into law that made cannabis possession for people suffering from an illness punishable by a fine rather than jail-time.⁸⁵ This first act of decriminalization began Maryland’s troubled path to legalizing medical cannabis. A decade later in 2013, a year before recreational cannabis was decriminalized, Governor Martin O’Malley signed legislation that allowed medical cannabis to be distributed to patients at “academic medical centers” where the patients could be monitored, and the findings documented.⁸⁶ The program failed because no institutions signed up.⁸⁷ Changing tack, Governor O’Malley signed House Bill 881 in 2014, which provided for a state licensing framework for the production

80. *Id.* at 42.

81. *Id.* at 54.

82. *Id.* at 130.

83. *Marijuana Arrest Report: Maryland*, AM. C.L. UNION, <https://graphics.aclu.org/marijuana-arrest-report/MD> (last visited Oct. 9, 2023).

84. *Wrap Up: More Work Must Be Done to Center Racial Justice in Marijuana Legalization*, AM. C.L. UNION OF MD. (Apr. 7, 2022) [hereinafter *Racial Justice in Marijuana Legalization*], <https://www.aclu-md.org/en/press-releases/wrap-more-work-must-be-done-center-racial-justice-marijuana-legalization>.

85. Craig Whitlock & Lori Montgomery, *Ehrlich Signs Marijuana Bill*, WASH. POST (May 23, 2003), <https://www.washingtonpost.com/archive/politics/2003/05/23/ehrllich-signs-marijuana-bill/2f9a470c-b7da-4450-91b2-6293ec5a8664/>.

86. *Academic Medical Centers Can Give Out Marijuana Under New Legislation*, CBS NEWS BALT. (May 2, 2023, 6:07 PM), <https://www.cbsnews.com/baltimore/news/academic-medical-centers-can-give-out-marijuana-under-new-legislation/>.

87. Brian Witte, *Maryland, After Delays, Begins the Sale of Medical Marijuana*, ASSOCIATED PRESS (Dec. 1, 2017, 9:37 PM), <https://apnews.com/article/fda24f32af7d430c8f6a10ce2cd064f2>.

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and distribution of medical cannabis to patients who have a prescription from a physician.⁸⁸

The Maryland Medical Cannabis Commission (“MMCC”)’s rollout of the program under the did not go smoothly.⁸⁹ It was not until late 2017 that patients were able to legally purchase medical cannabis from a licensed dispensary.⁹⁰ The first round of licensing was very restrictive; only 15 cultivation licenses out of 150 applicants and 15 processing licenses out of 124 applicants were granted.⁹¹ By the time the first round of licensing closed, “not a single Black-owned business landed one of the limited licenses in a state where Black residents make up nearly a third of the population.”⁹² Moreover, despite the MMCC redacting the identities of the applicants, many of those who did win licenses were well-connected politically and financially.⁹³ “[A]t least eight [approved applicants] have ties to marijuana industries in other states,” and “[s]ome of the cultivation and processing winners [had] high-ranking law enforcement officials on their teams, including two previous heads of the state Natural Resources Police” and “[t]he head of the state police union.”⁹⁴ In an apparent attempt to correct this inequity, the General Assembly passed a law that required the MMCC to issue a further seven growing and 13 processing licenses while taking race into account.⁹⁵ But today, “despite these measures, the state hasn’t fully closed those wide gaps created years ago.”⁹⁶ Those whose communities were most affected by criminalization received few of the initial opportunities to enter the medical market. This resulted in an inequitable state of affairs where the same groups who were comparatively under-policed during prohibition reaped the benefits of legalization. Maryland directly addresses this in its recreational legal framework.⁹⁷

88. *Maryland: Marijuana Law Reform Measures Signed Into Law*, NORML (Apr. 17, 2014), <https://norml.org/news/2014/04/17/maryland-marijuana-law-reform-measures-signed-into-law>.

89. Colleen Grablick, *Legalizing Marijuana Is on Maryland’s Ballot this Fall. Here’s What You Need to Know*, WAMU (Sept. 16, 2022), <https://wamu.org/story/22/09/16/marijuana-legalization-is-on-the-ballot-in-md-this-fall>.

90. *Id.*

91. Aaron Gregg & Fenit Nirappil, *The First Players in Maryland’s Medical Marijuana Industry Have Political Ties*, WASH. POST (Aug 31, 2016, 3:06 PM), https://www.washingtonpost.com/local/md-politics/select-companies-will-be-first-in-md-to-legally-grow-process-marijuana-for-medicine/2016/08/15/f944c4cc-61b9-11e6-af8e-54aa2e849447_story.html.

92. Grablick, *supra* note 89.

93. Gregg & Nirappil, *supra* note 91.

94. *Id.*

95. Grablick, *supra* note 89.

96. *Id.*

97. *See infra* Section II.C.2.

2. Recreational Cannabis Legalization in Maryland

The first part of Maryland General Assembly’s strategy for recreational (also called “adult-use”) cannabis legalization was comprised of two bills.⁹⁸ The first, House Bill 1 (“HB1”), passed on April 9, 2022, put the question of legalization to the qualified voters of Maryland in a referendum that was conducted as part of the November 2022 general election.⁹⁹ The bill provided that if voters approved the referendum, the legalization of cannabis would be enshrined in the Maryland Constitution as Article XX and the Maryland General Assembly would be authorized to “provide for the use, distribution, possession, regulation, and taxation of cannabis within the State.”¹⁰⁰ The referendum asked voters to approve (or reject) the constitutional amendment in HB1, and by extension, enact most of the provisions contained within House Bill 837 (“HB837”).¹⁰¹ On November 8, 2022, Maryland voters overwhelmingly voted to legalize recreational cannabis in the State; out of nearly two million votes, 67.20% voted in favor of legalization and 32.80% voted against.¹⁰²

The second piece of legislation, HB837, was mostly contingent upon the success of the referendum established by HB1.¹⁰³ HB837 sets out the laws regarding personal possession and use, but not the commercialization or regulatory aspects of recreational cannabis sales.¹⁰⁴ HB837 also addressed some social concerns that come with legalization. It established the Cannabis Business Assistance Fund (“CBAF”), which is intended to “assist small, minority-owned, and women-owned businesses entering the adult-use cannabis industry.”¹⁰⁵ The CBAF aims to assist these groups through grants and loans.¹⁰⁶ Businesses are eligible to receive assistance with the licensing process, operating expenses, and training.¹⁰⁷ Further,

98. H.D. 837, 2022 Leg., 444th Sess. (Md. 2022) [hereinafter HB837], https://mgaleg.maryland.gov/2022RS/chapters_noln/Ch_26_hb0837E.pdf; H.D. 1, 2022 Leg., 444th Sess. (Md. 2022) [hereinafter HB1], https://mgaleg.maryland.gov/2022RS/chapters_noln/Ch_45_hb0001E.pdf.

99. HB1, *supra* note 98, at 1.

100. *Id.*

101. *Id.*; HB837, *supra* note 98, at 54.

102. *Official 2022 Gubernatorial General Election Results for Question 4*, MD. STATE BD. OF ELECTIONS (Dec. 7, 2022, 3:05 PM), https://elections.maryland.gov/elections/2022/general_results/gen_detail_qresults_2022_4_1.html.

103. HB837, *supra* note 98 at 54.

104. *Summary of Maryland’s HB 837 and SB 833: Cannabis Reform*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/maryland/maryland-hb-837-cannabis-reform> (last visited Sept. 21, 2023).

105. HB837, *supra* note 98, at 7.

106. *Id.* at 8.

107. *Id.*

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“historically Black colleges and universities” are slated to receive grants “for cannabis–related programs and business development organizations, including incubators, to train and assist small, minority, and women business owners and entrepreneurs seeking to become licensed to participate in the adult-use cannabis industry.”¹⁰⁸ In an effort to rectify the failures of the medical cannabis rollout, Section 2 instructs the CBAF to prioritize “populations that have been historically disproportionately impacted by [cannabis prohibition]” and “individuals who have been convicted of a violation of a law criminalizing the use of cannabis.”¹⁰⁹ Prioritizing these groups is intended to ensure some degree of equity and minimize the negative impact of past criminal convictions for acts that are now legal.

HB837 addresses equity concerns from another angle by establishing a Community Reinvestment and Repair Fund (“CRRF”).¹¹⁰ The goal of the fund is to use revenue from the legal sale of recreational cannabis to support the communities most harmed by prohibition and criminalization.¹¹¹ “At least 30% of the revenues from adult-use cannabis” and “licensing fees paid by dual-licensed cannabis establishments” will be distributed to the CRRF.¹¹² The CRRF is charged with distributing funds to “community-based initiatives intended to benefit low-income communities” and, importantly, “community-based initiatives that serve communities disproportionately harmed by the cannabis prohibition and enforcement[.]”¹¹³ The exact mechanism of distribution attempts to ensure equity by allotting funds to counties in proportion “to the total number of marijuana arrests in the county compared to the total number of marijuana arrests in the state” “for the period from July 1, 2002, to June 30, 2022.”¹¹⁴ This provision is designed to ensure that there is a hard metric to determine the extent of cannabis criminalization, but it will be up to individual counties to ensure the funds go to the groups that suffered the most under prohibition.¹¹⁵ In July 2023 alone, consumers bought \$51 million worth of recreational cannabis, meaning that CRRF funding could reach at least \$183 million a year.¹¹⁶

108. *Id.*

109. *Id.*

110. *Id.* at 48.

111. *Id.*

112. *Id.* at 49.

113. *Id.*

114. *Id.* at 50.

115. *Id.*

116. See Dan Belson, *Maryland Dispensaries Sold Over \$87 Million of Cannabis Products in First Month of Legalization, Regulators Say*, *BALT. SUN* (Aug. 3, 2023, 3:29 PM),

After voters approved HB1 and HB837 via the referendum, the General Assembly worked quickly to enact the legal framework that would regulate cannabis and allow for commercial sales. On May 4, 2023, Governor Wes Moore signed House Bill 556 (“HB556”) into law.¹¹⁷ HB556 appears to take into account many of the lessons learned from Maryland’s troubled medical cannabis rollout and the challenges faced by other states.

Under HB556, Maryland established a dedicated Maryland Cannabis Administration to oversee the regulation of cannabis.¹¹⁸ Existing medical cannabis businesses were required to either pay a fee based on their 2022 revenue and convert to selling to both medical and recreational customers, cease operations, or transfer their license to operators willing to pay and convert.¹¹⁹ This was a prudent move, as it allowed recreational sales to begin as soon as cannabis became legal, thereby diminishing demand in the illicit market. The state was also able to begin collecting tax revenue, some of which is used to fund the various programs set out in HB837 and the newly formed Maryland Cannabis Administration. This can be contrasted with the legalization of cannabis in the District of Columbia, which, due to Congressional restrictions that prevented it from implementing commercial sales and licensing, continues to struggle with a thriving illicit market.¹²⁰

Maryland will start issuing licenses to new cannabis business applicants on January 1, 2024.¹²¹ In contrast to the medical cannabis rollout, all businesses in the first round of licensing were required to be social

<https://www.baltimoresun.com/marijuana/bs-md-cannabis-sales-first-month-20230802-lwwtobukrbglx76sygblazca-story.html>.

117. *Maryland Cannabis Regulation Laws: HB 556 and SB 516 Detailed Summary*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/maryland/maryland-cannabis-regulation-laws-hb-556-and-sb-516-detailed-summary> (last visited Oct. 15, 2023).

118. *Id.*

119. *Id.*

120. D.C.’s cannabis laws provide a cautionary tale. In 2014, D.C. voters approved Initiative 71 which legalized the possession and private use of cannabis, but did not legalize the sale of cannabis, much like Maryland’s HB837. *The Facts on DC Marijuana Laws*, METRO. POLICE DEPT, <https://mpdc.dc.gov/marijuana> (last visited Oct. 12, 2023). After the passage of the initiative, D.C. officials intended to provide for the legal commercial sale of cannabis, however Congress banned D.C. from implementing the legal sale of cannabis. Martin Austermuhle, *Congress Maintains Ban on D.C. Legalizing Sales of Recreational Marijuana*, DCIST (Mar. 9, 2022, 9:42 AM), <https://dcist.com/story/22/03/09/congress-budget-blocks-dc-marijuana-sales>. With legal possession and use, but not legal sales, D.C. developed a significant illicit market. *Id.* If Maryland legislators had not acted quickly in implementing recreational sales, Maryland may have suffered the same fate as D.C.

121. *Maryland Cannabis Regulation Laws: HB 556 and SB 516 Detailed Summary*, *supra* note 117.

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equity applicants.¹²² The second round, which will come in May 2024, will be open to a broader pool of applicants, while still reserving micro licenses¹²³ for social equity applicants only.¹²⁴ During the licensing rounds, the state is required to examine whether the distribution of licenses is fair to social equity applicants.¹²⁵ The large focus on social equity by the General Assembly is likely a response to the criticism of the medical cannabis rollout and an acknowledgment that racial minorities were “disproportionately impacted by the War on Drugs.”¹²⁶

HB556 also tackles a controversial issue that has posed a problem for other states that have legalized cannabis: local government control.¹²⁷ Under HB556, localities may “establish reasonable zoning requirements for cannabis businesses.”¹²⁸ They may not, however, establish zoning requirements that “unduly burden” cannabis licensees or “impose licensing, operating, or other fees or requirements on a cannabis licensee that are disproportionately greater or more burdensome than those imposed on other businesses with a similar impact on the area.”¹²⁹ With these provisions, Maryland attempts to balance local control with the need for statewide uniformity. In so doing, it appears that the General Assembly has learned a lesson from the struggling legal cannabis market in California.¹³⁰

California has notoriously struggled to prop up its legal market while tamping down illicit sales.¹³¹ This is due in large part to the overregulation of the industry in the form of a dual licensing system that allows local governments to impose strict requirements on cannabis businesses.¹³² California is a patchwork of different laws and regulations that make it

122. *Id.*

123. A micro license is a license for growing less than 10,000 square feet of cannabis, processing less than 1,000 pounds of cannabis per year, or selling cannabis via a delivery service, rather than a physical storefront. *Maryland Cannabis Regulation Laws: HB 556 and SB 516 Detailed Summary*, *supra* note 117.

124. *Id.*

125. *Id.*

126. H.D. 556, 2023 Leg., 445th Sess. (Md. 2023) at 11 [hereinafter HB556], <https://mgaleg.maryland.gov/2023RS/bills/hb/hb0556E.pdf>.

127. John Schroyer, *How California’s Legal Marijuana Market Wound Up in Crisis Mode After Two Years*, MJBIZDAILY (Dec. 17, 2021), <https://mjbizdaily.com/california-recreational-marijuana-in-crisis-after-two-years>.

128. HB556, *supra* note 126, at 62.

129. HB556, *supra* note 126, at 62-3.

130. Schroyer, *supra* note 127.

131. *Id.*

132. *Id.*

expensive or impossible for businesses to operate legally.¹³³ As a result, many cannabis businesses in California operate illegally, the state misses out on tax revenue, and consumers receive an inferior product that does not benefit from testing or proper oversight.¹³⁴ By limiting the control that local governments have over the industry, Maryland seeks a more uniform and manageable state of affairs. A predictable set of regulations allows cannabis businesses to operate more efficiently and will hopefully eliminate or significantly curtail the illicit market, which steps in to fill any demand where legal businesses cannot.

III. BUSINESS CHALLENGES IN THE CANNABIS INDUSTRY

The primary business challenge experienced by cannabis entrepreneurs is the continued federal prohibition of cannabis. Despite generating a significant amount of revenue, many cannabis businesses struggle to achieve profitability in the current two-tiered legal landscape.¹³⁵ This is principally because, even in states where cannabis is fully legalized, federal prohibition prevents cannabis businesses from accessing traditional financing and banking systems, deducting business expenses on federal taxes, engaging in interstate commerce, and accessing the bankruptcy system. These challenges prevent the realization of the full potential of the cannabis industry and present a unique legal problem for which the only common-sense remedy is complete federal legalization.¹³⁶ This section explores each of these challenges and their potential impact on cannabis businesses, focusing on Maryland and equity efforts in particular.

A. *Financing & Banking Restrictions*

Financing, banking, and financial transactions are notoriously difficult in the cannabis industry.¹³⁷ Due to federal prohibition, cannabis businesses cannot rely on the standard financial mechanisms common to other burgeoning industries, such as checking accounts, loans, credit card services,

133. *Id.*

134. *See id.*

135. *See Marijuana Industry Overpaid \$1.8 Billion In Federal Taxes in 2022, Analysis Shows*, MJBIZDAILY (May 8, 2023) [hereinafter *Marijuana Industry Overpaid*], <https://mjbizdaily.com/marijuana-industry-overpaid-1-8-billion-in-federal-taxes-in-2022-analysis-shows>.

136. *See infra* Section IV.

137. Kate Robertson, *Is SAFE Banking A Threat to Cannabis-Specific Finance Companies?*, MJBIZDAILY (Nov. 15, 2022), <https://mjbizdaily.com/is-safe-banking-a-threat-to-cannabis-specific-finance-companies>.

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and insurance.¹³⁸ Such financial limitations mean that the industry has “a dangerous overreliance on cash” that leads not just to inefficiencies, but also to burglary and theft.¹³⁹ Moreover, the difficulty of obtaining loans means that only those with significant capital can afford to start a cannabis business.¹⁴⁰ Cova Software, a Denver-based company that provides software for the cannabis industry, estimates that startup costs for a cannabis dispensary range from \$150,000 to \$2,000,000.¹⁴¹ The costs for processors and cultivators are likely higher due to the need for more land and specialized equipment.

Efforts at the federal level to simplify financing for cannabis businesses have been unsuccessful.¹⁴² The SAFE Banking Act, which has passed in the House seven times, has not been able to pass in the Senate despite bipartisan support.¹⁴³ The SAFE Banking Act would allow banks to serve cannabis businesses without fear of federal reprisal.¹⁴⁴ Key figures in the cannabis industry were disappointed that the Act did not pass because it would solve many of the financial problems that cannabis businesses are facing.¹⁴⁵ The Act would have allowed the industry to move away from its reliance on cash and the inefficiencies and risks associated with it.¹⁴⁶ Not only would this allow cannabis businesses to operate more efficiently and safely, but it would also allow cannabis entrepreneurs who lack the capital to start a cannabis business access traditional financing.

With such high startup costs, Maryland’s CBAF may be instrumental in allowing those without capital to obtain loans and enter the market while federal prohibition remains in effect.¹⁴⁷ Unfortunately, similar

138. Robert L. Johnson, Cannabis Is Legal in Most of America. But Federal Laws Still Block Businesses from Banks., USA TODAY (Dec. 20, 2022, 1:52 PM), <https://www.usatoday.com/story/opinion/2022/12/20/cannabis-banking-helps-marijuana-businesses-grow/10896278002>; Robertson, *supra* note 137.

139. Robertson, *supra* note 137.

140. Johnson, *supra* note 138.

141. Gary Cohen, *How Much Does It Cost to Open a Cannabis Dispensary?*, COVA SOFTWARE (Nov. 2, 2022), <https://www.covasoftware.com/blog/the-true-cost-of-opening-a-cannabis-dispensary>.

142. Chris Roberts, *Marijuana Banking Reform Dead in Congress as Industry Stakeholders Seethe*, MJBIZDAILY (Dec. 19, 2022), <https://mjbizdaily.com/marijuana-banking-reform-dead-in-congress-industry-stakeholders-concede>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* Robertson, *supra* note 137.

147. *See* HB 837, *supra* note 99, at 7.

equity initiatives have had mixed results.¹⁴⁸ In 2018, Oakland, California developed its own equity initiative that set out to issue loans to those who could demonstrate that they had been negatively impacted by the War on Drugs and could not otherwise start a cannabis business without assistance.¹⁴⁹ By December 2021, Oakland had issued \$3,700,000 in loans to 59 businesses.¹⁵⁰ At that time, 7% of those businesses had defaulted on their loans and another 34% had fallen out of compliance.¹⁵¹ Critics noted that issuing loans to a group that is more likely to struggle to repay them (due in large part to the challenges described herein) is risky and potentially detrimental to the borrower and the lender.¹⁵² Maryland may face similar issues with its CBAF program. Without federal action on cannabis banking reform or an end to federal prohibition, state efforts like the CBAF will likely not be enough, especially if the issues faced by the Oakland equity program manifest elsewhere.

B. The Excessive Federal Tax Burden

Unlike nearly every other business in the country, cannabis businesses are not permitted to take deductions for business expenses when filing their federal taxes.¹⁵³ Section 280E of the tax code states that “[n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business ... consists of trafficking in controlled substances (within the meaning of Schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”¹⁵⁴ Therefore, even when a state legalizes the commercial sale of cannabis, businesses within said state that sell, grow, or process cannabis cannot take standard business expense deductions because cannabis is currently a Schedule I drug. This is effectively a tax on revenue instead of net income.

Congressman Earl Blumenauer noted in a press release that the consequences of Section 280E go beyond simple deductions for operating

148. John Schroyer, *Oakland Sends Social Equity Marijuana Licensees to Collections Over Unpaid Loans*, MJBIZDAILY (Dec. 17, 2021), <https://mjbizdaily.com/oakland-sends-social-equity-marijuana-licensees-to-collections-over-unpaid-loans>.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Kate Robertson, *More States Reduce 280E Tax Burden on Cannabis Industry*, MJBIZDAILY (June 21, 2023), <https://mjbizdaily.com/more-states-reduce-280e-tax-burden-on-marijuana-industry>.

154. 26 U.S.C. § 280E.

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expenses, stating that cannabis businesses “cannot claim the Work Opportunity Tax Credit if they hire a veteran; they cannot depreciate their American made irrigation equipment; and they cannot take any credit or deduction relating to construction or operation costs if they want to revitalize a building for their operations.”¹⁵⁵ Whitney Economics, a cannabis industry research firm, estimated that in 2022 alone, Section 280E caused cannabis businesses to pay 1.8 billion dollars more in taxes than they otherwise would have.¹⁵⁶

One solution is for the DEA to reschedule cannabis as schedule III or lower (Section 280E only applies to schedule I and II) or to deschedule the drug entirely.¹⁵⁷ Another solution, proposed in April 2023 by Congressman Blumenauer, is the Small Business Tax Equity Act which would, if passed, “allow marijuana businesses operating in compliance with state law to take deductions associated with the sale of marijuana like any other legal business.”¹⁵⁸ This bill would be more of a stopgap measure because it does not address the broader problems posed by federal prohibition. In the meantime, 16 states, including Maryland, have moved to allow cannabis business to deduct expenses on their state tax returns.¹⁵⁹ While this is certainly a step in the right direction, it by no means solves the problem of over taxation as state tax bills are typically smaller than federal ones and the excess federal taxes must be paid regardless.¹⁶⁰

As a result of Section 280E, it is extremely difficult for any cannabis business to be profitable. Only 24.4% of cannabis businesses surveyed by Whitney Economics were profitable.¹⁶¹ This fact has massive ramifications for the industry. For one, this makes it difficult for cannabis businesses, especially less well funded ones, to survive long-term. Moreover, a long-term lack of profitability may eventually have a chilling effect on investment in the industry.¹⁶² Due to federal prohibition, the cannabis

155. Press Release, Earl Blumenauer, Representative, 3rd District of Oregon, Blumenauer Introduces Commonsense Tax Reform to Remedy “grotesquely unfair treatment” of State-legal Cannabis Businesses (April 17, 2023) [hereinafter Blumenauer Press Release], <https://blumenauer.house.gov/media-center/press-releases/blumenauer-introduces-commonsense-tax-reform-to-remedy-grotesquely-unfair-treatment-of-state-legal-cannabis-businesses>.

156. *Marijuana Industry Overpaid*, *supra* note 135.

157. Robertson, *supra* note 153. *See infra* Section IV.

158. Blumenauer Press Release, *supra* note 155.

159. Robertson, *supra* note 153.

160. *See id.*

161. *Marijuana Industry Overpaid*, *supra* note 135.

162. *See* Charles Aloviseetti et al., *Raising Private Capital in the Cannabis Industry*, BLOOMBERG L. (Sept. 2022), <https://www.bloomberglaw.com/external/document/XAQ1PGN4000000> (describing the challenges faced by cannabis investors).

industry already has a difficult time raising capital.¹⁶³ Section 280E compounds this problem because, even if it were easy to raise capital via traditional means, fewer investors would be interested in cannabis businesses simply due to the low chances of achieving profitability.

Lowered profitability prospects are likely to have an even greater impact on participants in equity programs like Maryland's CBAF. If even well-funded cannabis operations struggle under the consequences of continued federal prohibition, then entrepreneurs without significant capital who participate in equity programs will almost certainly struggle, as evidenced by the results of Oakland's program.¹⁶⁴

C. Interstate Commerce Restrictions

Due to the federal government's authority under the Commerce Clause, cannabis businesses may not engage in interstate commerce while cannabis remains federally prohibited.¹⁶⁵ Many states where cannabis is legal have also passed protectionist laws that restrict the interstate sale of cannabis.¹⁶⁶ Until recently, many states went further by imposing residency requirements and other measures that discriminated against out-of-state entrepreneurs.¹⁶⁷ As a result, the cannabis industry is uniquely fractured and localized.¹⁶⁸ This has led to economic inefficiencies that have forced many companies out of business and left growers with massive inventory surpluses.¹⁶⁹ Some businesses have even allegedly turned to selling excess inventory to black market buyers.¹⁷⁰ No one benefits from this state of affairs in the long run. The states miss out on tax revenue, cannabis businesses are forced to close, and consumers, who might benefit from lower prices now, will eventually feel the results of a stagnating industry.

The harsh results of the compartmentalization of the industry are evident. One analysis "determined California's legal market lost nearly one-

163. *Id.*

164. *See supra* Section III.A.

165. *See* COLE MEMORANDUM, *supra* note 69, at 1.

166. Robert A. Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857, 860 (2021).

167. *Id.* at 860-61, 874-75. *See generally* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2468 (2019) (holding that a two-year residency requirement to obtain a liquor license violates the Commerce Clause).

168. Mikos, *supra* note 166, at 859 ("These state-based markets for cannabis contrast with the national markets that now exist for virtually every other consumer good.")

169. Gene Johnson et al., *Ganja Glut? With Excess Weed, Growers Seek Interstate Sales*, AP NEWS (Apr. 19, 2023, 5:52 PM), <https://apnews.com/article/cannabis-marijuana-420-legal-california-oregon-washington-ae7880387eee7dbfcfeaff563d0b211>.

170. *Id.*

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quarter of its total growing area after the start of 2022” due to producers going under.¹⁷¹ In response to harsh economic conditions (and in the hopes of federal reform) Oregon, California, and Washington have passed trigger bills to allow for the interstate trade of cannabis if and when the federal government moves to end prohibition.¹⁷² With federal reform on the horizon,¹⁷³ other states need to be prepared to relax their protectionist laws, lest they face challenges under the Dormant Commerce Clause doctrine¹⁷⁴ and see their internal market become isolated and vulnerable to illicit market exploitation.

The legalization of interstate commerce will certainly solve many problems, but it will also create new ones. Robert Mikos, a leading expert on cannabis law, predicts two major shifts in the cannabis industry upon federal legalization that are potentially problematic for (a) matters of equity in the industry and (b) states like Maryland.¹⁷⁵ First, the cannabis industry will likely consolidate, following the pattern of many other industries before it.¹⁷⁶ Larger state cannabis producers will consolidate into national producers in order to achieve economies of scale and maximize efficiency.¹⁷⁷ In the process, smaller producers will either be bought up or driven out of business. As with beer, there may still be room for “craft” or boutique producers. However, in making the comparison between the industries, Mikos notes that, out of the “6,400 operational brewers in the United States[,],” the top five account for 79% of all beer sold.¹⁷⁸ This does not leave much market share for the thousands of independent brewers. In the context of cannabis, Mikos predicts this will “further dampen minority participation in the cannabis industry” in light of how difficult it is to start and maintain a cannabis business.¹⁷⁹ Furthermore, for states like Maryland that are coming comparatively late to the legalization game, this could mean local producers will be quickly out competed upon federal legalization. Oregon, for example, already has a massive cannabis surplus it is keen to release to a national market as soon as it becomes feasible.¹⁸⁰ And while sales tax would still flow back to Maryland, the revenue and profits would not remain local, flowing instead to where the larger

171. *Id.*

172. *Id.*

173. *See infra* Section IV.

174. Mikos, *supra* note 166, at 861, 875.

175. *See id.* at 888.

176. *Id.* at 889.

177. *Id.*

178. *Id.* at 890.

179. *Id.*

180. Johnson et al., *supra* note 169.

producers are based. Later legalizing states like Maryland will, therefore, likely not see the full benefits of a flourishing cannabis economy simply because they did not legalize in time to foster larger cannabis producers.

Second, Mikos predicts that cannabis production will shift west, not just because west coast states were the first to legalize and already have larger producers, but because it is cheaper to grow cannabis in the West Coast’s climate.¹⁸¹ In fact, “the cost of outdoor cultivation [is] only about one-fourth that of indoor cultivation,” meaning regions that can support large scale outdoor cultivation will have a significant advantage.¹⁸² Once cannabis can be legally transported around the country, those regions, namely the Emerald Triangle in California, will dominate production.¹⁸³ As with grapes, oranges, maple syrup, and peaches, to name just a few similar cash crops, cannabis will be grown where it grows best and cheapest.¹⁸⁴ And just as those cash crops became tied to certain regions in the minds of consumers, cannabis will too—if it is not already.¹⁸⁵ These consequences of federal legalization will make it even more difficult than it already otherwise was for minority entrepreneurs, especially those most affected by prohibition, to get a foot in the door on the production side.¹⁸⁶ For states like Maryland, with subpar outdoor growing conditions, it will be hard to attract large producers even with incentives. And if incentives are employed, they could result in a hit to tax revenue or, if regulations are relaxed, a decline in the quality, or even the safety, of the product.

D. Bankruptcy Restrictions

Due to the challenges previously identified, cannabis businesses uniquely struggle to begin operations and achieve profitability.¹⁸⁷ Given the difficulty of success, it is no surprise that many cannabis businesses ultimately fail. But, here too, federal prohibition twists its knife into the industry.

The United States Trustee Program (“USTP”), which acts as a “watchdog of the bankruptcy system,” prohibits businesses that engage in federally illegal activity from accessing the federal bankruptcy system.¹⁸⁸ In

181. Mikos, *supra* note 166, at 891.

182. *Id.*

183. *Id.* at 891-92.

184. *Id.* at 892-93.

185. *Id.* at 892.

186. *See id.* at 890.

187. *See supra* Sections III.A, III.B, and III.C.

188. CLIFFORD J. WHITE III & JOHN SHEAHAN, WHY MARIJUANA ASSETS MAY NOT BE ADMINISTERED IN BANKRUPTCY 1 (2017),

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response to motions to dismiss by the USTP, bankruptcy courts have repeatedly ruled that they cannot administer bankruptcy proceedings for cannabis businesses due to the status of cannabis as a Schedule I drug under the CSA.¹⁸⁹ Further, because the CSA “prohibits any person from possessing or distributing ‘any equipment ... product or material which may be used to manufacture a controlled substance ... knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance,’” even businesses that provide ancillary services and equipment to cannabis business are prohibited from using the federal bankruptcy system.¹⁹⁰ This posture is based on the USTP’s view that “the bankruptcy system may not be used as an instrument in the ongoing commission of a crime and ... bankruptcy trustees ... should not be required to administer assets if doing so would cause them to violate federal criminal law.”¹⁹¹

A lack of access to the federal bankruptcy system makes cannabis businesses even riskier ventures than they already are. Without benefits provided by bankruptcy, it can be difficult to successfully restructure or wrap up a distressed business.¹⁹² Cannabis businesses are forced to resort to state and contractual remedies such as receivership, lender workouts, exchange offers, and UCC Article 9 sales.¹⁹³ While these remedies can work, they do not provide some of the key benefits that federal bankruptcy does. These benefits include the automatic stay, debtor-in-possession financing, the ability to sell assets free and clear of liens, and the predictable and well-trodden nature of bankruptcy proceedings.

Principal among these is the automatic stay, which prevents creditors from taking further action to collect from the debtor once the debtor files for bankruptcy.¹⁹⁴ The automatic stay would be particularly helpful for cannabis businesses, considering it would stop the IRS from collecting on the massive tax burdens imposed by Section 280E (which is one of the factors driving many cannabis businesses to insolvency in the first

https://www.justice.gov/ust/file/abi_201712.pdf/download; Stuart I. Gordon & Matthew V. Spero, *Marijuana Businesses in Bankruptcy: Courts Just Say No*, 15 PRATT’S J. BANKR. L. 198, 200 (2019).

189. Gordon & Spero, *supra* note 188, at 201.

190. *Id.* at 200; *In re Way to Grow, Inc.*, 597 B.R. 111, 133 (Bankr. D. Colo. 2018) (dismissing the bankruptcy petition of a business that sold indoor hydroponic equipment targeted at, but not exclusively for, cannabis growers in a legal state).

191. WHITE & SHEAHAN, *supra* note 188, at 2.

192. Daniel J. Garfield, *Distressed Issues and Alternatives to Bankruptcy for Cannabis Businesses*, FAIRFIELD AND WOODS P.C. (Apr. 11, 2023), <https://www.fwlaw.com/insights/distressed-issues-and-alternatives-to-bankruptcy-for-cannabis-businesses>.

193. *Id.*

194. 11 U.S.C. § 362.

place).¹⁹⁵ Moreover, given that many cannabis businesses are forced to take out private loans to pay for these inflated tax bills, a cannabis business might have two or more creditors in relation to its taxes, the IRS and private lenders.¹⁹⁶ The automatic stay would therefore have a compounded importance for cannabis businesses if they were able to access the bankruptcy system.

Once again, federal prohibition creates a host of difficulties not faced by any other industry. And once again, it is the least well-funded of entrepreneurs who will experience the associated hardships. Where federal prohibition is both the chief cause of insolvency and the inability to properly handle it, the most comprehensive solution is an end to federal prohibition through the descheduling of cannabis and the passage of complementary regulatory legislation.¹⁹⁷

IV. ENDING FEDERAL PROHIBITION: RESCHEDULING V. DESCHEMULING

Ten months after President Biden's October 2022 proclamation, which directed the HHS via the Food and Drug Administration ("FDA") to review how cannabis is scheduled under the CSA, the HHS issued a recommendation to the DEA that cannabis be rescheduled from Schedule I to Schedule III of the CSA.¹⁹⁸ As of the publication of this comment, the DEA has not yet acted on this recommendation.¹⁹⁹ However, in the past, the DEA has never rejected an FDA recommendation to reschedule.²⁰⁰ For example, "in September 1998 FDA recommended to DEA that Marinol be rescheduled to Schedule III, and in July 1999 DEA rescheduled Marinol to Schedule III."²⁰¹ Therefore, it is very likely that the DEA will move to reschedule to Schedule III per the HHS's recommendation. While the rescheduling of cannabis would "mark a major shift in the federal government's policy,"²⁰² it would not mark the end of federal prohibition.

195. See *supra* Section III.B.

196. Robertson, *supra* note 153.

197. See *infra* Section IV.B.

198. LISA N. SACCO & HASSAN Z. SHEIKH, CONG. RSCH. SERV., IN12240, DEPARTMENT OF HEALTH AND HUMAN SERVICES RECOMMENDATION TO RESCHEDULE MARIJUANA: IMPLICATIONS FOR FEDERAL POLICY 1 (2023).

199. *Drug Scheduling*, *supra* note 6.

200. SACCO & SHEIKH, *supra* note 198, at 2.

201. *Id.*

202. *Id.*

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A. Rescheduling Cannabis Will Not End Prohibition

Rescheduling cannabis to Schedule III will not end prohibition because cannabis will remain a controlled substance under the CSA.²⁰³ While it will be federally legal for medical uses, it will remain federally illegal to possess or sell cannabis for recreational use.²⁰⁴ This state of affairs would be reminiscent of Prohibition, where alcohol was legal for medical use with a prescription while remaining illegal for recreational use.²⁰⁵

For the past 50 years, cannabis has been categorized under Schedule I, which is the most restrictive schedule, reserved for drugs deemed to have “no currently accepted medical use and a high potential for abuse.”²⁰⁶ Schedule I drugs include heroin, LSD, and ecstasy, while the less restrictive Schedule II includes fentanyl and other opiates.²⁰⁷ Schedule III, on the other hand, is reserved for “drugs with a moderate to low potential for physical and psychological dependence.”²⁰⁸ Drugs in this category include ketamine, Tylenol with codeine (an opiate), and testosterone.²⁰⁹ For context, drugs in Schedule IV include Xanax, Valium, and Tramadol.²¹⁰ Drugs scheduled in Schedules II through V can only be obtained via a doctor’s prescription and may not be used non-medicinally.²¹¹ Notably, alcohol and tobacco are not scheduled as controlled substances under the CSA.²¹²

To be sure, rescheduling cannabis is a step in the right direction, but it leaves many of the major problems plaguing the cannabis industry and consumers unsolved. First and foremost, state and federal law will continue to be at odds.²¹³ Even if cannabis is moved to Schedule III, businesses that sell recreational cannabis in legal states will still be engaging

203. *Id.*

204. *Id.*

205. Aniel D. Russo & David Baker, *Remembering Pharmacy’s Past: Prohibition Era Medicinal Liquors*, AIHP (Mar. 10, 2023), <https://aihp.org/remembering-pharmacys-past-prohibition-era-medicinal-liquors>.

206. *Drug Scheduling*, *supra* note 6.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *How to End Marijuana Prohibition with Regard to the Controlled Substances Act*, NORML [hereinafter *End Marijuana Prohibition*], <https://norml.org/marijuana/fact-sheets/how-to-end-marijuana-prohibition-with-regard-to-the-controlled-substances-act> (last visited Oct. 9, 2023).

212. *Id.*

213. Megan Feenan & William Wolfe, *Federal Regulators May Loosen Marijuana Restrictions and Boost Cannabis Industry*, JDSUPRA (Sept. 6, 2023), <https://www.jdsupra.com/legalnews/federal-regulators-may-loosen-marijuana-9425929>.

in federally illegal conduct.²¹⁴ Further, while rescheduling will federally legalize medical cannabis, it could also subject medical cannabis businesses to a whole new regulatory framework that may be incompatible with the state-level frameworks that have been in place for, in some cases, decades.²¹⁵

For many years, the medical cannabis industry has been shielded from federal regulation by a combination of preemption,²¹⁶ the anti-commandeering doctrine,²¹⁷ enforcement discretion,²¹⁸ and appropriations riders (which must be renewed each year).²¹⁹ However, rescheduling cannabis to Schedule III could alter the delicate balance that exists between state and federal cannabis policies. For example, Congress could view the change in Schedule as a signal that the federal government is prepared to regulate medical cannabis and choose not to renew the appropriations rider that prevents the DOJ from enforcing federal cannabis laws.²²⁰ This could be a disaster for the industry, as byzantine FDA guidelines collide with a substance they are unprepared and ill-equipped to regulate.²²¹

The Congressional Research Service noted that if cannabis is rescheduled, the “FDA may need to generate or update a substantial amount of technical information to clarify its regulatory approach to marijuana for relevant stakeholders.”²²² Further, because “marijuana is a complex substance containing various pharmaceutical components and is available to consumers in numerous formats,” it is different from most other drugs already regulated by the FDA and, thus poses a potential challenge to regulate.²²³ Additionally, a Schedule change accompanied by an expiration of the appropriations rider could result in the application of “federal public health laws such as the Federal Food, Drug, and Cosmetic Act, and agricultural laws such as the Agricultural Marketing Act of 1946.”²²⁴ In

214. *Id.*

215. SACCO & SHEIKH, *supra* note 198, at 2.

216. Swinburne & Hoke, *supra* note 67, at 241-43.

217. “Courts have interpreted [the 10th Amendment] to provide states protection from federal efforts to commandeer state legislative and executive function.” *Id.* at 243.

218. *Id.* at 245. *See* COLE MEMORANDUM, *supra* note 69 (describing DOJ’s discretionary policy towards cannabis).

219. Swinburne & Hoke, *supra* note 67, at 248 (“Since 2014, Congress has passed an appropriations rider that prevents the DOJ from using any of their funding to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” (internal quotations omitted)).

220. *See* SACCO & SHEIKH, *supra* note 198, at 2-3.

221. *See End Marijuana Prohibition*, *supra* note 211.

222. SACCO & SHEIKH, *supra* note 198, at 2.

223. *Id.*

224. *Id.*

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this way, rescheduling cannabis could upend “[t]he uneasy truce between federal and state cannabis laws,” especially in terms of medical cannabis.²²⁵

That said, it is possible for the principles that have shielded the cannabis industry to remain in place. In other words, rescheduling cannabis may not change the way in which federal cannabis laws are enforced. But, if that is the case, cannabis may as well be de-scheduled entirely.²²⁶

The second major problem with rescheduling cannabis is that traditional banking and bankruptcy options will likely remain unavailable, at least with regard to recreational cannabis. It is not known how financial institutions will react if cannabis is rescheduled.²²⁷ However, even if cannabis is moved to Schedule III, “financial institutions would still be required to do their due diligence to ensure that products are compliant with laws and regulations.”²²⁸ Financial institutions are required to ensure the compliance of clients engaged in the sale of controlled substances because they can be held “liable for violations of federal anti-money laundering laws for non-compliant transactions.”²²⁹ Financial institutions may, therefore, remain hesitant to engage with cannabis businesses due to conflicting regulations, the increased due diligence required, and the heightened legal risk. This is especially likely if cannabis laws remain in uncertain territory, which they likely will, given the incompatibility of state and federal cannabis law.²³⁰

In terms of bankruptcy, cannabis businesses, especially those that cater to recreational clients, will almost certainly remain *persona non grata*. The reasoning of the USTP is unlikely to change because cannabis will remain federally illegal for nonmedical uses and the legal framework for medical cannabis is uncertain.²³¹ Moreover, even if medical cannabis regulations were reconciled, many cannabis businesses, including all Maryland dispensaries, cater to both medical and recreational clients.²³²

225. Swinburne & Hoke, *supra* note 67, at 241.

226. *See infra* Section IV.B.

227. Agustin Rodriguez et al., *HHS Proposes Rescheduling Cannabis to Schedule III – What It Means for the Industry*, TROUTMANPEPPER (Sept. 11, 2023), <https://www.regulatoryoversight.com/2023/09/hhs-proposes-rescheduling-cannabis-to-schedule-iii-what-it-means-for-the-industry-2>.

228. *Id.*

229. *Id.*

230. *See End Marijuana Prohibition*, *supra* note 211.

231. *See supra* Section III.D.

232. *Maryland Cannabis Regulation Laws: HB 556 and SB 516 Detailed Summary*, *supra* note 117.

Accordingly, bankruptcy trustees would still have to “violate federal criminal law” in order to administer the assets of a cannabis business.²³³

Finally, it is important to acknowledge that rescheduling cannabis to Schedule III will solve a major problem for businesses: the federal taxation of cannabis under Section 280E.²³⁴ Since Section 280E only applies to Schedule I and II drugs, cannabis businesses would finally be able to deduct expenses on their taxes.²³⁵ Being taxed just like a normal business would be a huge win for the industry, as excessive taxation is a major contributing factor to the widespread unprofitability of cannabis businesses.²³⁶

Overall, if cannabis is rescheduled to Schedule III, it will symbolize major progress in terms of federal cannabis law. It will be an acknowledgment by the federal government that cannabis has medical applications and could lead to a shift in how the public views and uses the drug.²³⁷ Further, the removal of cannabis from Section 280E will provide a much-needed path to profitability for cannabis businesses. In practice, however, rescheduling might not lead to any real progress towards ending prohibition and the uncertainties that come with it may even be detrimental to the industry.

B. Ending Prohibition by Descheduling Cannabis

To truly end prohibition, the United States must remove cannabis from the purview of the CSA by descheduling it. This is the most straightforward way to resolve the discrepancies between federal and state law and promote the development of the legal cannabis industry.²³⁸

The CSA is incompatible with widespread state laws that allow for recreational use because it is designed to criminalize the nonmedical use of scheduled substances.²³⁹ Therefore, including cannabis in any schedule ignores the reality that almost half of states allow for legal, nonmedical use.²⁴⁰ Descheduling, either through an act of Congress or the DEA, would provide Congress with an opportunity to craft a legal framework

233. WHITE & SHEAHAN, *supra* note 188, at 2.

234. *See supra* Section III.B.

235. 26 U.S.C. § 280E.

236. *Marijuana Industry Overpaid*, *supra* note 135.

237. *See* Book Note, *Professor McAdams Publishes Book on Information and Coordination Functions of Legal Expression*, 129 HARV. L. REV. 1160, 1161 (2016) (reviewing RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015)).

238. *End Marijuana Prohibition*, *supra* note 211.

239. *Id.*

240. *State Medical Cannabis Laws*, *supra* note 2.

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compatible with that of the states and that recognizes the legitimacy of recreational use.²⁴¹ Such a legal framework ought to look more like that of federally legal drugs like tobacco or alcohol.²⁴²

A regulatory approach like that of tobacco and alcohol makes more sense given that cannabis is used in a similar recreational manner.²⁴³ Such a framework would recognize that cannabis does not easily fit into the CSA Schedules or the FDA drug approval process as it currently stands.²⁴⁴ This is partly because cannabis is a botanical plant that contains many active substances within it beyond THC.²⁴⁵ Moreover, treating cannabis like alcohol and tobacco respects state autonomy, while allowing the states and federal government to share regulatory power.²⁴⁶

A bill to this effect, the Cannabis Administration and Opportunity Act (“CAOA”), has already been proposed by influential senators Chuck Schumer, Cory Booker, and Ron Wyden.²⁴⁷ The CAO A would “[implement] a regulatory regime similar to alcohol and tobacco” by “transferring federal jurisdiction over cannabis from the Drug Enforcement Agency to the FDA and the Alcohol and Tobacco Tax and Trade Bureau (TTB).”²⁴⁸ It would also institute “an excise tax on cannabis products.”²⁴⁹ Like Maryland’s equity programs, the bill would attempt to “[break] down barriers to the cannabis industry and [expand] access to loans and capital for entrepreneurs harmed by the failed War on Drugs.”²⁵⁰ Importantly, the bill would establish “health and safety standards” tailored to cannabis that would allow the FDA to competently regulate the drug, without forcing it into incompatible preexisting frameworks like the CSA.²⁵¹

A regulatory framework such as the one proposed in the CAO A would solve nearly all the major business challenges that exclusively plague the cannabis industry. As to access to financial services, the bill would

241. See *End Marijuana Prohibition*, *supra* note 211.

242. See *id.* (describing how the federal government and states share regulatory authority over alcohol and tobacco).

243. See *id.* (arguing that marijuana is more analogous to substances not included in the CSA, such as alcohol).

244. *Id.*; SACCO & SHEIKH, *supra* note 198, at 2.

245. SACCO & SHEIKH, *supra* note 198, at 2.

246. *End Marijuana Prohibition*, *supra* note 211.

247. Booker, Schumer, Wyden Introduce Cannabis Administration and Opportunity Act, CORY BOOKER (July 21, 2022), <https://www.booker.senate.gov/news/press/booker-schumer-wyden-introduce-cannabis-administration-and-opportunity-act>.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

“[require] the Financial Crimes Enforcement Network ... to update its guidance or issue new regulations that ... [do] not inhibit financial services to a cannabis-related legitimate business.”²⁵² The bill would solve the issues of over taxation and interstate commerce by removing it from under Section 280E and allowing it to be transported across state lines.²⁵³ Finally, the CAO would allow cannabis businesses access to the federal bankruptcy systems, as bankruptcy trustees would no longer violate federal law by administering the assets of a cannabis business.²⁵⁴

Descheduling cannabis and instituting a combined state and federal legal framework, such as that proposed in the CAO, solves the major business challenges and provides a path to long-term viability and profitability for the cannabis industry. Further, a comprehensive regulatory scheme that is tailored to cannabis reduces uncertainty, thereby allowing businesses to better plan for the future and obtain funding via investment.²⁵⁵

As it stands now, the only viable players in the cannabis industry are those who can afford to take on debt and incur significant losses in the hopes that federal reform comes soon.²⁵⁶ This excludes the people who suffered the most under prohibition²⁵⁷ from participating in the industry and benefiting from legalization. Solving the problems that make the cannabis industry so capital-intensive, exclusive, and speculative provides an opportunity for minority entrepreneurs to enter the market and finally reap the benefits of legalization. Accordingly, ending federal prohibition will increase the efficacy of equity and business assistance programs, such as Maryland’s CBAF.²⁵⁸ After decades of criminalization, justice for the victims of prohibition and prosperity within the cannabis industry is best achieved through descheduling cannabis from the CSA.

252. SENATE DEMOCRATS, SUMMARY OF REVISIONS TO THE CANNABIS ADMINISTRATION AND OPPORTUNITY ACT DISCUSSION DRAFT 10 (2022), https://www.democrats.senate.gov/imo/media/doc/capa_revisions_summary.pdf.

253. *Id.*

254. See WHITE & SHEAHAN, *supra* note 188, at 2 (stating that bankruptcy trustees are not required to administer assets if doing so would cause them to violate federal criminal law).

255. See Paul Demko, *Why Weed Companies Can’t Make Any Money*, POLITICO (Sept. 4, 2022, 7:00 AM), <https://www.politico.com/news/2022/09/04/weed-companies-cant-make-money-00054541> (showing that marijuana businesses are currently forced to rely on inconsistent state-by-state regulations).

256. See Robertson, *supra* note 153 (showing that cannabis businesses often take on considerable debt in order to operate); Cohen, *supra* note 141 (describing the high costs required to open a marijuana business).

257. See *supra* Section I.

258. See *supra* Section II.C.2.

CONCLUSION

Even as many states legalize recreational cannabis, the legacy of cannabis prohibition still casts a shadow over the industry. Under federal prohibition the cannabis industry languishes in a compartmentalized geographic and legal landscape that produces uncertainty and risk, making it difficult for businesses to survive, let alone achieve profitability. Moreover, the lack of access to capital, increased costs of doing business, and difficulty attracting investors means that the groups most affected by cannabis prohibition are the groups that struggle the most to enter the legal cannabis market. The full potential of the cannabis industry will not be realized until the states and the federal government work in tandem to deschedule cannabis and produce a regulatory framework that respects state autonomy, while creating certainty and uniformity conducive to business growth and investment.