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## 26 USC SECTION 280E: WILL THE DRAGON NOW BE SLAYED?

*Bill Greenberg & Rebecca Greenberg\**

### INTRODUCTION

26 USC Section 280E of the Internal Revenue Code (“Section 280E”) prohibits the deduction of ordinary business expenses<sup>1</sup> for businesses deemed by the federal government to be drug traffickers as defined by the Controlled Substances Act (“CSA”).<sup>2</sup> The tax enactment, which references legislative classifications set forth in the CSA,<sup>3</sup> is specifically designed to serve as a disincentive to so-called drug traffickers—including traffickers in cannabis—who might otherwise deduct “ordinary and necessary business expenses”<sup>4</sup> from their taxes.<sup>5</sup> But this dragon of the tax code breathes fire on legitimate cannabis businesses—operating in full compliance with applicable state law—by promoting unintended consequences. To wit, cannabis businesses are incentivized to under-report income to offset the impact of being precluded from

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<sup>1</sup> I.R.C. § 280E (1982) (Ordinary business expenses are expenses incurred during the ordinary course of business and are categorized under I.R.C. § 162.).

<sup>2</sup> 21 U.S.C. § 801 (1970) (The Controlled Substances Act was designed to curtail the unlawful manufacture, distribution, and abuse of controlled substances).

<sup>3</sup> 21 U.S.C. § 812 (2012) (defining legislative classifications for Schedule I and Schedule II Controlled Substances).

<sup>4</sup> “Ordinary and necessary business expenses” are categorized under I.R.C. § 162.

<sup>5</sup> S. REP. NO 97-494, at 309 (1982).

deducting their otherwise legitimate business expenses due to overbroad classifications.<sup>6</sup>

Ever since California legalized medical cannabis in 1996—followed by twenty-eight other states—there has been a patent incongruity between Section 280E’s congressional purpose and the expansion of state-legalized cannabis businesses in the United States.<sup>7</sup> Consequentially, federal tax policy penalizes businesses, such as “compliant dispensaries,” that operate legally under applicable state law to provide cannabis and cannabis-based products for medical purposes, by taxing businesses at a rate of 70 percent or more, compared to an average business’s tax rate of 30 percent.<sup>8</sup>

Using the history of cannabis legal enforcement in the United States, the development of the CSA, and the constitutional implications of both the CSA and Section 280E as a backdrop, this article serves to illustrate the unintended and abusive use of Section 280E, which like many legislative pronouncements, came about from good intentions, but has morphed into a dragon of a tax provision that torments compliant cannabis businesses, and has long since strayed from its original objective. Despite Section 280E’s link to the CSA, a recent decision by the Ninth Circuit Court of Appeals may have laid the groundwork for a constitutional challenge to the

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<sup>6</sup> See, e.g., *Olive v Comm’r.*, 792 F.3d 1146, 1149 (9th Cir 2015) (Court ruled that state compliant cannabis business was precluded from deducting their ordinary and necessary business expenses pursuant to Section 280E on grounds that the “trade or business” at issue “consisted of trafficking in controlled substances.”).

<sup>7</sup> The Federal Tax Code prohibits deductions or credits for any amount paid or incurred during the taxable year in carrying on any trade or business that consists of trafficking in controlled substances prohibited by Federal Law. See I.R.C. § 280E (1982). California’s Compassionate Use Act of 1996, “encourage[s] the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.” CAL. HEALTH & SAFETY CODE § 11362.5 (1996). “Trafficking in controlled substances” has been found to include distribution of medical marijuana in states where activity was lawful under state statute. See *Californians Helping to Alleviate Med. Problems, Inc. v Comm’r.*, 128 T.C. 173, 182 (2007).

<sup>8</sup> Jack Healy, “Legal Marijuana Faces Another Federal Hurdle: Taxes,” N.Y. TIMES (May 9, 2015), <https://www.nytimes.com/2015/05/10/us/politics/legal-marijuana-faces-another-federal-hurdle-taxes.html>.

CSA's applicability to cannabis dispensaries,<sup>9</sup> allowing a compliant dispensary to avoid the tax burden imposed by Section 280E.

This Article proceeds in three parts. Part I provides the relevant history of federal drug enforcement of cannabis in the United States. This analysis includes a history of drug enforcement prior to the CSA's enactment, a review of the CSA House Report and Shafer Commission Report, two legislative materials significant to the development of cannabis policy under the CSA, and an analysis of the gradual development of the cannabis industry in the face of the CSA, which has occurred in large part as a consequence of the awareness of cannabis' medical capabilities in combination with the onset of a billion-dollar developing cannabis industry. Part II explores the rise of state laws recognizing the legality of medical cannabis in certain circumstances and the impact on federal prosecutions of cannabis as a result of state legislation. Part III identifies the CSA's constitutional issues of due process and equal protection as they relate to the states' emergent assessment of cannabis' therapeutic potential. Finally, Part IV assesses Section 280E in light of those constitutional implications as well as the fresh significant legal developments resulting most recently from the Ninth Circuit's opinion in *United States v. McIntosh*.<sup>10</sup>

## I. HISTORY OF CANNABIS POLICY

Federal drug enforcement policy has had a remarkable and complicated history, which has progressed over time and has resulted in the strict control over cannabis that exists today. A review of the federal government's history of drug enforcement policies is helpful to illustrate a greater understanding of the current federal cannabis policy.

### *A. History of Federal and State Drug Enforcement of Cannabis Before the CSA*

The history of United States criminalization of drugs in general originated in 1887, when Congress restricted opiate importation

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<sup>9</sup> See *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016).

<sup>10</sup> *Id.*

from China.<sup>11</sup> Then in 1914, the Harrison Narcotics Tax Act (“HNTA”) became the federal government’s first extensive foray into drug enforcement policy when it imposed rules for control of the sale and distribution of various drugs, such as cocaine and opiates.<sup>12</sup> The Commissioner of Internal Revenue and the Secretary of Treasury were originally responsible for appointing agents to enforce the HNTA;<sup>13</sup> but in 1930, federal enforcement of the HNTA became the sole authority of the Federal Bureau of Narcotics,<sup>14</sup> a 1930 bureaucratic outgrowth of the preexisting Bureau of Prohibition.<sup>15</sup>

The Bureau of Narcotics lent its knowledge and opinions to the states as to the dangers of addictive drugs in general and cannabis in

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<sup>11</sup> See 21 USC §§ 191–93 (repealed 1970). Historian commentators suggest that the 1887 legislation was promoted by anti-Asian racism then prevalent in American society, and that the prohibition promoted and underground use of the drug opium resulting in an unintended consequence—the shift of drug use from opium smoking to the more nefarious morphine. See Matthew B. Robinson & Renee G. Scherlen, LIES, DAMNED LIES, AND DRUG WAR STATISTICS 20 (2007); John Henry Merryman, STANFORD LEGAL ESSAYS 280 (1975).

<sup>12</sup> See Harrison Narcotics Tax Act Pub. L. No. 63–223, 38 Stat. 785 (1914) (“The Harrison Act”). The United States Supreme Court reversed a physician’s conviction under the Harrison Act ruling that the legislation could only be enforced as a taxing provision stating, “[o]bviously, direct control of medical practice in the states is beyond the power of the federal government.” *Linder v. United States*, 268 U.S. 5, 18 (1925). Though the Tenth Amendment is never expressly mentioned in the *Linder* decision, the Court’s motivation seems clearly influenced by “states rights.” *Linder*, commonly perceived as a “*Lochner* era” decision (in reference to a series of Supreme Court decisions that relied on substantive due process grounds in striking down laws seen to limit the free market and infringe on economic liberties), has been largely ignored and disregarded, except for similar reasoning expressed by the Supreme Court in the 2006 decision *Gonzales v. Oregon*. See *Gonzalez v. Oregon*, 546 U.S. 243 (2006); *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>13</sup> James F. Albrecht, *Drug Enforcement Administration*, ENCYCLOPEDIA OF LAW, <http://enforcement.lawin.org/drug-enforcement-administration/> (last visited July 6, 2017).

<sup>14</sup> Thomas M. Quinn & Gerald T. McLaughlin, The Evolution of Federal Drug Control Legislation, 22 CATH. U. L. REV. 586, 599 (1972–1973).

<sup>15</sup> The Bureau of Prohibition was the federal enforcement agency created to police the Volstead Act, following enactment of the Eighteenth Amendment. See Michael A. Lerner, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 72 (2007).

particular.<sup>16</sup> Spurred on by the Bureau of Narcotic's stream of information, each state enacted its own form of drug enforcement legislation directed toward marijuana.<sup>17</sup> Ultimately, in 1922, the federal government passed the Uniform State Narcotic Drug Import and Export Act ("Uniform Act"),<sup>18</sup> which was the culmination of twenty years of disparate state laws and periodic and inconsistent analysis of cannabis and its medical and social consequences.<sup>19</sup> By 1937, every state had some form of legal proscription as to cannabis, yet thirty-five states had adopted the Uniform Act.<sup>20</sup>

1937 was also the year that Congress first enacted legislation directed specifically towards cannabis.<sup>21</sup> That statute—the Marijuana Tax Act of 1937—did not expressly prohibit cannabis.<sup>22</sup> Rather, it imposed severe regulatory proscriptions along with a tax which reduced trade in the drug.<sup>23</sup> Thirty-two years elapsed before the federal government again turned its attention to marijuana, when

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<sup>16</sup> Support for the condemnation and regulation of cannabis was found to have its roots in police reports and newspaper articles, claiming that cannabis smoking "made the smoker vicious, was a desire to fight and kill, and that marijuana smokers are key suspects in horrible crime and perversion." See Richard Isralowitz, *DRUG USE, POLICY AND MANAGEMENT* 133–35 (Greenwood Publishing Group, 2d ed. 2002). These claims were openly contracted by the medical community, and in particular the Chief psychiatrist at New York City's Bellevue Hospital who stated that the probable cause for assaults was alcohol, not marijuana. *Id.*

<sup>17</sup> *Busted: America's War on Marijuana: Marijuana Timeline*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited July 6, 2017).

<sup>18</sup> Narcotic Drugs Import and Export Act, 21 U.S.C. § 176 (1922) (repealed 1970).

<sup>19</sup> Robert L. Swain, *The Status of Exempt Narcotics Under the Uniform State Narcotic Act*, 26 J. AM. PHARMACEUTICAL ASS'N 835, 835–39 (Sept. 1937).

<sup>20</sup> *Id.* at 835.

<sup>21</sup> The Marihuana Tax Act of 1937, Pub. L. No. 74–238, 50 Stat. 551 (repealed 1970).

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

<sup>23</sup> See *id.* ("There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 6 to be carried out in pursuance of written order forms taxes at the following rates . . .").

in 1969, the Supreme Court found the Marijuana Tax Act of 1937 to be unconstitutional in *Leary v. United States*.<sup>24</sup>

### *B. Cannabis and the CSA*

Less than a year after *Leary*, as part of a formal declaration of its “War on Drugs,” Congress enacted the Controlled Substances Act (“CSA”), which was Title II of the Comprehensive Drug Abuse Prevention and Control Act.<sup>25</sup> Predictably, there were multiple constitutional challenges to the CSA,<sup>26</sup> however all were unsuccessful.<sup>27</sup>

The CSA federally criminalized marijuana as a “Schedule I” controlled substance, meaning that it was illegal to sell, manufacture, distribute or dispense the drug in any form.<sup>28</sup> Congress defined “marijuana” as:

[A]ll parts of the Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted

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<sup>24</sup> *Leary v. United States*, 395 U.S. 6, 12 (1969) (holding that the Marijuana Tax Act of 1937 was unconstitutional because it violated the petitioner’s Fifth Amendment privilege against self-incrimination and denied the petitioner due process by placing the burden on defendant to explain that defendant did not have knowledge of the illegal importation of marijuana).

<sup>25</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801–971 (1970, 2006).

<sup>26</sup> *See, e.g.*, *United States v. Rosenberg*, 515 F.2d 190, 198 (9th Cir. 1975) (upholding physician’s conviction for dispensing Dexedrine prescription against Tenth Amendment claim); *United States v. Castro*, 401 F. Supp. 120, 125 (N.D. Ill. 1975) (finding a rational basis for classification of cocaine as a narcotic drug for penalty purposes under the CSA); *NORML v. Bell*, 488 F.Supp. 123, 143 (D.C. 1980) (rejecting claim that the CSA’s prohibition on private possession and use of marijuana violates the Constitution’s guarantees of privacy and equal protection and the prohibition against cruel and unusual punishment).

<sup>27</sup> *See, e.g.*, *United States v. Rogers*, 549 F.2d 107, 108 (9th Cir. 1976) (holding that marijuana laws had been determined in prior cases to be constitutional); *United States v. Kiffer*, 477 F.2d 349, 356–357 (2d Cir. 1973) (holding that the current statutory arrangement of cannabis as a Schedule I drug “was not so unreasonable or arbitrary” as to be deemed unconstitutional). *See also* *United States v. Scales*, 464 F.2d 371, 375 (6th Cir. 1972) (concluding that Congress has authority for the CSA under the Commerce Clause of the U.S. Constitution).

<sup>28</sup> 21 U.S.C. § 841(a)(1) (2010).

from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.<sup>29</sup>

Also, the CSA determined that, as a “Schedule I” drug, cannabis had: (1) “high potential for abuse,” (2) “no currently accepted medical use in treatment in the United States,” and (3) “a lack of accepted safety for use of the drug . . . under medical supervision.”<sup>30</sup> The enactment of the CSA has given rise to subsequent legislation involving the tax code to further the CSA’s goal of preventing the sale, use, and distribution of marijuana.<sup>31</sup>

### *C. CSA House Report and the Shafer Commission*

With passage of the CSA, the Interstate and Foreign Commerce Committee (“Commerce Committee”) drafted a House Report for the bill.<sup>32</sup> The House Report identified several cannabis “fables:” “that marijuana is a narcotic;” “that marijuana is addictive;” “that marijuana causes violence and crime;” “that marijuana leads to increase in sexual activity;” “that marijuana use leads to heroin;” and “that more severe penalties will solve the marijuana problem.”<sup>33</sup>

The House Report also specified that existing medical research had not yet determined whether marijuana was harmless, including whether it might cause “panic depression or other psychotic states,” or whether “occasional use of marijuana is less harmful than occasional use of alcohol.”<sup>34</sup> And so, the CSA was enacted with a specific requirement for a bipartisan “National Commission on Marihuana and Drug Abuse” (now known as “The Shafer Commission”)<sup>35</sup> to “conduct a study of marihuana” in the following areas:

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<sup>29</sup> 21 U.S.C. § 802(16) (2016).

<sup>30</sup> 21 U.S.C. § 812(b)(1) (2012).

<sup>31</sup> See I.R.C. § 280E (1982).

<sup>32</sup> See H.R. REP. NO. 91-1603 (1970) (Conf. Rep.).

<sup>33</sup> U.S. Congress, Conference Committees, Comprehensive Drug Abuse Prevention and Control Act of 1970, conference report to accompany H.R. 18583, 91st Cong., 2nd sess., H.Rept. 91-1603 (Washington: GPO, 1970).

<sup>34</sup> See *id.*

<sup>35</sup> The Commission on Marihuana and Drug Abuse was established under the Controlled Substances Act (“CSA”) passed as part of the Comprehensive Drug



- (A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marijuana seized, type of user, nature of use;
- (B) an evaluation of the efficacy of existing marihuana laws;
- (C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;
- (D) the relationship of marihuana use to aggressive behavior and crime;
- (E) the relationship between marihuana and the use of other drugs; and
- (F) the international control of marihuana.<sup>36</sup>

The Shafer Commission was further tasked with conducting “a comprehensive study and investigation of the causes of drug abuse and their relative significance.”<sup>37</sup> Because the Shafer Commission was expected to evaluate cannabis, the Commerce Committee accepted the Department of Health, Education and Welfare’s recommendation that cannabis be “provisionally” categorized as a Schedule I drug under the CSA, pending completion of certain studies that were underway at the time the CSA was originally passed in 1970.<sup>38</sup>

The public position taken by the Shafer Commission in its official report announced that many publicly held beliefs about

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Abuse Prevention and Control Act of 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §601, 84 Stat. 1236, 1280 (1970). The Commission was chaired by Raymond P. Shafer (“The Shafer Commission”), the former governor of Pennsylvania. *See* NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING iii (Mar. 1972). Per the CSA, he was appointed by the President of the United States. *Id.* The Shafer Commission released a provisional report in 1972, calling for decriminalization of marijuana possession in the United States. *Id.*

<sup>36</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, §601(d)(1)(A-F).

<sup>37</sup> *Id.* at § 601(e).

<sup>38</sup> H.R. REP. NO. 91-1444 (1970), as reprinted in 1970 U.S.C.C.A.N. 4556, 4629-30 (quoting opinion letter by Roger O. Egeberg, M.D., to Hon. Harley O. Staggers (Aug. 14, 2970)).

marijuana were myths and were not supported by the facts.<sup>39</sup> The Commission generally observed that marijuana users were submissive, that criminal law was likely not the best mechanism for dealing with marijuana usage, and that laws pertaining to marijuana usage should be harmonized with existing law regulating noncriminalized substances such as alcohol.<sup>40</sup> Ultimately, the Shafer Commission's conclusions did nothing to amend the CSA's "Schedule I" designation of marijuana, in large part due to hearings held in 1974 by the Senate Judiciary's Subcommittee to Investigate the Administration of the Internal Security Act, also known as the Subversive Activities Control Act of 1950.<sup>41</sup> The hearings, titled "Marihuana-Hashish Epidemic and its Impact On United States Security," which consisted largely of outdated stereotypes of cannabis use, served to substantiate Congress's continued designation of marijuana as a Schedule I substance.<sup>42</sup> Congress's approach to marijuana regulation has since also expanded to other avenues of control, particularly the use of taxation as a means of discouraging businesses from distributing cannabis.<sup>43</sup>

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<sup>39</sup> NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* FN 35, at 67–102.

<sup>40</sup> *See id.* at 103–25.

<sup>41</sup> *See Marihuana-Hashish Epidemic and Its Impact on United States Security: Hearings Before the Subcomm. to Investigate the Admin. of the Internal Security Act and Other Internal Security Laws of the S. Comm. on the Judiciary*, 93rd Cong. 916 (1974).

<sup>42</sup> Stereotypes of cannabis use perpetuated during the hearings included marijuana being "a far more potent carcinogen than tobacco," "marijuana users being afflicted by 'amotivational syndrome'" that could lead to a "total loss [of users] own will," making "a large population of cannabis users a serious political danger" because cannabis "makes them susceptible to manipulation by extremists." *Id.* at 924. The testimony provided during the hearings depicted an epidemic of a "semi-zombie" population, filled with "young people acutely afflicted by the amotivational syndrome," a "partial generation of young people" who would suffer from "irreversible brain damage" as a result of cannabis use. *Id.*; *See* MARTIN A. LEE, *SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA – MEDICAL, RECREATIONAL, AND SCIENTIFIC* 509 (1982).

<sup>43</sup> *See* I.R.C. § 280E (2012).

*D. Internal Revenue Code Section 280E*

Ever since income taxation in the United States became viable with the passage of the Sixteenth Amendment in 1913,<sup>44</sup> the federal government has used its taxing power as a means of implementing economic regulation as well as social policy.<sup>45</sup> One of those social policies has been the goal of shielding the public from narcotic and other dangerous drugs. Congress drafted Internal Revenue Code provision 26 USC Section 280E for that purpose—to impose a handicap and barrier to criminal enterprises involved in illegal drug trafficking,<sup>46</sup> including marijuana.<sup>47</sup>

26 USC Section 280E came about in an unusual way. Prior to its enactment, a bizarre tax court decision in *Edmonson v. Commissioner* ruled that an admitted criminal drug trafficker could deduct business expenses in calculating federal income tax, just as if drug trafficking were any other legitimate business.<sup>48</sup> In fact, the taxpayer in *Edmonson* successfully deducted over seventy thousand

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<sup>44</sup> U.S. CONST. amend. XVI.

<sup>45</sup> See Jason Furman, *If You're Going to Do Social Policy Through the Tax Code, Do it Right*, CTR. ON BUDGET AND POLICY PRIORITIES (Jan. 24, 2007), <http://www.cbpp.org/sites/default/files/atoms/files/1-24-07tax.pdf>.

<sup>46</sup> See S. REP. NO. 97-494, at 309.

<sup>47</sup> See generally *Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r*, 128 T.C. 173, 181–82 (2007) (discussing the policy behind § 280E).

<sup>48</sup> In *Edmondson v. Comm'r*, 42 T.C.M. (CCH) 1533 (1981), the U.S. Tax Court ruled that a tax payer, whose trade or business was illegally selling amphetamines, cocaine, and marijuana, was legally permitted to deduct his ordinary and necessary business expenses. The court stated:

From the record as a whole we find that the appropriate portion of business use of the petitioner's apartment was one-half of the two-thirds asserted by petitioner. This is because the allocation must exclude personal use, both in space and time. We hold that one-third of petitioner's rental expense of \$2,360, or \$787, constitutes an ordinary and necessary expense of petitioner's trade or business and is to be allowed as a deduction . . . Petitioner's remaining claimed business expenses consist of the purchase of a small scale, packaging expenses, telephone expenses, and automobile expenses. We hold that these expenses were made in connection with petitioner's trade or business and were both ordinary and necessary. *Id.*

dollars of business expenses—notwithstanding that the taxpayer’s gross income<sup>49</sup> was admittedly derived from the felonious sale of cocaine, methamphetamine, and marijuana.<sup>50</sup>

Recognizing the inequity in *Edmondson*, Congress enacted Section 280E, which states in pertinent part 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 (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the CSA) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”<sup>51</sup>

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<sup>49</sup> See Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Business*, 66 TAX LAW. 429, 437 (2013) (quoting *Edmondson*, 42 T.C.M. (CCH) at 1534–35). What further complicates the inquiry as to the constitutional propriety of Section 280E, is the perplexing distinction it drew between “ordinary and necessary business expenses” and “cost of goods sold.” The bill jacket, already acknowledging a potential constitutional deficiency in 1981 at the time of enactment stated: “[a]ll deductions and credits for amounts paid or incurred in the illegal trafficking in drugs listed in the [CSA] are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this portion of the bill.” S. REP. NO. 97–494 at 309. For example, the fictional character “Walter White” from the acclaimed television series “Breaking Bad” would be entitled to deduct the expense of any chemicals he purchased at the local hardware store in order to manufacture the methamphetamine he produce, notwithstanding the proscription of §280 E—quite an unusual outcome from a Congressional policy seeking to inhibit criminals dealing illegal drugs. *See id.*

<sup>50</sup> This seemingly bizarre outcome arose out of a long recognized axiom—the federal tax code does not penalize criminal behavior. *Comm’r. v. Tellier*, 383 U.S. 687, 691 (1966). This guiding principle originated in 1966 when the U.S. Supreme Court ruled “the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources.” *Id.*

<sup>51</sup> I.R.C. § 280E (1982).

Congress promulgated Section 280E in furtherance of its “sharply defined public policy against drug dealing.”<sup>52</sup> The policy behind the provision was that, “[t]o allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other legal enterprises.”<sup>53</sup> In short, Section 280E was designed to deter profit from drug related businesses which has, by virtue of the CSA, included cannabis related enterprises.

## II. THE STATES, MEDICAL CANNABIS, AND CONTINUING CSA PROSECUTIONS

Medical research on the medicinal benefits of cannabis has influenced a changing attitude towards cannabis regulation and CSA prosecutions, and has opened the door to states legalizing cannabis for medical use. Yet state laws that permit the distribution and use of cannabis have no control over regulating federal tax policy or federal criminal law.

### *A. California 1996 Prop 215*

Since the enactment of the CSA, perceptions of cannabis among the majority of states have clearly reversed course. This cultural and societal change can be traced back to California’s 1996 ballot measure Proposition 215 (“Prop 215”), which sought the legalization of medical cannabis in California.<sup>54</sup> Prop 215 passed by 56 percent of the vote,<sup>55</sup> legitimizing<sup>56</sup> the use of marijuana in the

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<sup>52</sup> S. REP. NO. 97–494 at 309.

<sup>53</sup> *Id.*

<sup>54</sup> Cal. Proposition 215 (1996) (codified as The Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2000)).

<sup>55</sup> See *id.*; *Proposition 215*, SAFE ACCESS NOW, <http://safeaccessnow.net/blog/california-law/proposition-215/> (last visited July 6, 2017).

<sup>56</sup> Also, arguably the CSA in any event may explicitly allow such use where recommended by a duly licensed physician. 21 USC §844(a) reads, “[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his

modern era for medical purposes where recommended by a physician for treatment of a number of specific illnesses and conditions.<sup>57</sup> Prop 215 acknowledged medical research which had found cannabis to be an effective palliative treatment for a host of medical ailments such as AIDS, anorexia, arthritis, cancer, chronic pain, glaucoma, and migraines.<sup>58</sup>

In the wake of Prop 215, other states have adopted their own “medical marijuana” legislation, including Alaska, Oregon, Washington, Maine, Hawaii, Nevada, Vermont, Rhode Island, Montana, New Mexico, Washington D.C., Delaware, Michigan and New Jersey.<sup>59</sup> In the 2016 election, three more states also legitimized cannabis.<sup>60</sup> In short, so far twenty-nine states have found cannabis legal in some form or another, four additional states have ballot measures for legalization of medical cannabis, and five states had ballot measures for the legalization of recreational cannabis use

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professional practice.” *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007). However, incomprehensibly, federal law under the CSA is generally interpreted to preclude a physician *prescribing* marijuana. Rather, a physician can *recommend* marijuana under the First Amendment. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

<sup>57</sup> *See* Cal. Health & Safety Code § 11362.5(b)(1)(A) (Deering 1996).

<sup>58</sup> *See id.*

<sup>59</sup> Ala. Ballot Measure 8 (1998) (codified as the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, AS § 17.37.010 et seq. (West 1998)); D.C. Amendment Act B18-622 (codified as D.C. ST. § 7-1671.01 et seq. (West 2009)); S. 17, 146th Gen. Assemb. (Del. 2011); S. 862, 20th Leg. (Haw. 1999); Me. Ballot Question 2 (1999) (codified as the Main Medical Use of Marijuana Act, 22 M.R.S.A. § 2421 et seq. (West 2010)); Mich. Proposal 1 (2008) (codified as Michigan Medical Marihuana Act, M.C.L.A. 333.26421 et seq. (West 2008)); Mon. Initiative 148 (2011) (codified as Montana Medical Marijuana Act, M.C.A. 50-46-301 et seq. (West 2015)); Or. Ballot Measure 67 (codified as Oregon Medical Marijuana Act, O.R.S. § 475B.400 et seq. (1998)); S. 0710, 2015 Gen. Assemb. (R.I. 2015); S. 76, 2014 Gen. Assem. (V.T. 2014); Wash. Initiative 692 (2015) (codified as West’s R.C.W.A. § 69.51A.005 et seq. (2015)).

<sup>60</sup> Ark. Ballot Issue 6 (2016) (codified as The Arkansas Medical Marijuana Amendment of 2016, A.R. ST. Amend. 98 §1 (2016)); Fla. Ballot Amendment 2 (2016) (codified as West’s F.S.A. Const. Art. 10 §29 (West 2016)); N.D. Statutory Measure 5 (2016) (codified as North Dakota Compassionate Care Act, N.D.C.C. §19-24-01 (West 2016)).

in the November 2016 election.<sup>61</sup> In addition, with more medical research taking place, there has been increasing support in state and federal governments for the use of marijuana in treating a variety of conditions.<sup>62</sup>

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<sup>61</sup> The twenty-five states that have legalized medical marijuana do not include those additional sixteen states that have legalized the limited use of nonpsychoactive cannabinoid compound cannabidiol (CBD). *16 States with Laws Specifically about Legal Cannabidoil (CBD)*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=006473> (last visited July 6, 2017). The five State Ballot Initiatives for recreational use cannabis are the Arizona Marijuana Legalization Proposition 205; the California Marijuana Legalization Initiative Proposition 64; the Main Marijuana Legalization Question 1; the Massachusetts Marijuana Legalization Question 4; and the Nevada Marijuana Legalization Question 2. Az. Proposition 205 (2016); Cal. Proposition 64 (2016) (codified as Cal. Bus. & Prof. Code §26000 (West (2016))); Me. Ballot Question 1 (2016) (codified as The Marijuana Legalization Act, 7 M.R.S.A. §2241 (West 2017)); Mass. Ballot Question 4 (2016) (codified as M.G.L.A. 94G §1 et al (2016)); Nev. Ballot Question 2 (2016) (codified as The Regulation and Taxation of Marijuana Act, N.R.S. I.P. Question 2 §1 (West 2017)). The four State Ballot Initiatives for 2016 were the Arkansas Medical Cannabis Act Ballot Proposal of 2016; the Florida Amendment 2 Ballot Initiative of 2016; the Montana Medical Marijuana Initiative I-182; and the North Dakota Compassionate Care Act Initiated Statutory Measure No. 5 of 2016. Ark. Ballot Issue 6 (2016) (codified as The Arkansas Medical Marijuana Amendment of 2016, A.R. ST. Amend. 98 §1 (2016)); Fla. Ballot Amendment 2 (2016) (codified as West's F.S.A. Const. Art. 10 §29 (West 2016)); Mon. Medical Marijuana Initiative I-182 (codified as Montana Medical Marijuana Act, M.C.A. §50-46-301 (2016)); N.D. Statutory Measure (2016) (codified as North Dakota Compassionate Care Act, N.D.C.C. §19-24-01 (West 2016)).

<sup>62</sup> Currently before the U.S. Senate is the Compassionate Access, Research Expansion, and Respect States Act of 2015 (“CARERS Act”), which would, among other things, amend the CSA to “provide that control and enforcement provisions of such Act relating to marijuana shall not apply to any person acting in compliance with state law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marijuana.” Compassionate Access, Research, Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015-2016). The CARERS Act would also reschedule cannabis from a Schedule I substance to a Schedule II substance which would “[p]rohibit a federal banking regulator from: (1) terminating or limiting the deposit insurance of a depository institution solely because it provides or has provided financial services to a marijuana-related legitimate business; or (2) prohibiting, penalizing, or otherwise discouraging a depository institution from providing financial services to a marijuana-related legitimate business.” *Id.*

*B. Medical Cannabis and the Developing Cannabis Industry*

In the 45 years since the CSA's enactment, extensive research evidence has emerged demonstrating that cannabis has demonstrably beneficial palliative effects for the treatment of a myriad group of medical pathologies, including neuropathic pain, diabetic neuropathy,<sup>63</sup> peripheral neuropathic pain,<sup>64</sup> reduction in pain intensity,<sup>65</sup> and HIV/AIDS neuropathic pain.<sup>66</sup> Moreover, clinical studies have demonstrated the potential beneficial effects of medical cannabis use, including: reducing breast cancer

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<sup>63</sup> See Mark S. Wallace et al., *Efficacy of Inhaled Cannabis on Painful Diabetic Neuropathy*, 16 J PAIN. 616, 616–627 (2015).

<sup>64</sup> See Barth Wilsey et al., *Low-dose vaporized cannabis significantly improves neuropathic pain*, 14 J PAIN. 136, 136–118 (2013); see also M. Serpell et al., *A double-blind, randomized, placebo-controlled, parallel group study of THC/CBD spray in peripheral neuropathic pain treatment*, 18 EUR. J. PAIN 999, 999–1012 (2014) (demonstrating statistically significant treatment differences in [favor] for THC/CBD spray treatment).

<sup>65</sup> See Mark Ware et al., *Smoked cannabis for chronic neuropathic pain: a randomized controlled trial*, 182 CANADIAN MED. ASS'N. J. E694, E694–701 (Oct. 2010); see also M. Lynch et al., *A double-blind, placebo-controlled, crossover pilot trial with extension using an oral mucosal cannabinoid extract for treatment of chemotherapy-induced neuropathic pain*, 47 J. PAIN SYMPTOM MGMT. 166 (2014) (suggesting “nabiximols (oral mucosal spray containing cannabinoids)” may aid “in the treatment of chemotherapy-induced neuropathic pain”).

<sup>66</sup> See Ronald Ellis et al., *Smoked medicinal cannabis for neuropathic pain in HIV: a randomized crossover clinical trial*, 34 NEUROPSYCHOPHARMACOLOGY 672–80 (2009); see also Barth Wilsey et al., *A Randomized, Placebo-Controlled, Crossover Trial of Cannabis Cigarettes in Neuropathic Pain*. 9 J. PAIN 506, 506–21 (2008) (suggesting effectiveness of cannabis as an analgesic for neuropathic pain).



metastasis;<sup>67</sup> reducing tumor size in brain cancer;<sup>68</sup> inducing useful cell death of pancreatic tumors;<sup>69</sup> reducing cancer cell viability in Leukemia;<sup>70</sup> reducing clinical symptoms in autoimmune diseases;<sup>71</sup> giving positive effect for the treatment of symptoms in multiple

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<sup>67</sup> See Sean D. McAllister, *Pathways mediating the effects of cannabidiol on the reduction of breast cancer cell proliferation, invasion, and metastasis*, 129 BREAST CANCER RES. AND TREATMENT 37, 37–47 (2011); Ryuichi Murase et al., *Targeting multiple cannabinoid anti-tumour pathways with a resorcinol derivative leads to inhibition of advanced stages of breast cancer* 171 BRIT. J. PHARMACOLOGY 4464, 4464–77 (2014); see also María M. Caffarel et al., *Cannabinoids reduce ErbB2-driven breast cancer progression through Akt inhibition* 196 MOLECULAR CANCER 1 (2010) (finding “strong preclinical evidence for the use of cannabinoid-based therapies for the management of ErbB2-positive breast cancer”).

<sup>68</sup> Various studies have been performed to test the potential of cannabis to combat cancerous brain tumors. See Christina Blázquez et al., *Cannabinoids Inhibit Glioma Cell Invasion by Down-regulating Matrix Metalloproteinase-2 Expressio*, CANCER RES. 1945, 1945–52 (2008); Jahan P. Marcu et al., *Cannabidiol Enhances the Inhibitory Effects of  $\Delta^9$ -Tetrahydrocannabinol on Human Glioblastoma Cell Proliferation and Survival*, 9 MOLECULAR CANCER THERAPY 180, 180–89 (2010); Maria Salazar et al., *Cannabinoid action induces autophagy-mediated cell death through stimulation of ER stress in human glioma cells*, 119 J. CLINICAL INVESTIGATION 359, 359–72 (2009); Angelo Vaccani et al., *Cannabidiol inhibits human glioma cell migration through a cannabinoid receptor-independent mechanism*, BRIT. J. PHARMACOLOGY 1032–36 (2005).

<sup>69</sup> See Arkaitz Carracedo et al., *Cannabinoids Induce Apoptosis of Pancreatic Tumor Cells via Endoplasmic Reticulum Stress-Related Genes*, 66 CANCER RES. 6748, 6748–55 (2006).

<sup>70</sup> See RJ McKallip et al., *Cannabidiol-Induced Apoptosis in Human Leukemia Cells: A Novel Role of Cannabidiol in the Regulation of p22phox and Nox4 Expression*, 70 MOLECULAR PHARMACOLOGY 897, 897–908 (2006).

<sup>71</sup> See Ana Juknat et al., *Anti-inflammatory effects of the cannabidiol derivative dimethylheptyl-cannabidiol—studies in BV-2 microglia and encephalitogenic T cells*, 27 J. BASIC AND CLINICAL PHYSIOLOGY AND PHARMACOLOGY 289, 289–296 (2016); Ewa Kozela et al., *Cannabidiol, a non-psychoactive cannabinoid, leads to EHR2-dependent energy in activated encephalitogenic T cells*, 12 J. NEUROINFLAMMATION 52 (2015); Ewa Kozela et al., *HU-446 and HU-465, Derivatives of the Non-psychoactive Cannabinoid Cannabidiol, Decrease the Activation of Encephalitogenic T Cells*, 87 CHEMICAL BIOLOGY & DRUG DESIGN 143, 143–153 (2016); Ewa Kozela et al., *Cannabinoids Decrease the Th17 Inflammatory Autoimmune Phenotype*, 8 J. NEUROIMMUNE PHARMACOLOGY 1265, 1265–1276 (2013).

sclerosis;<sup>72</sup> decreasing spasticity in those affected by spinal cord injury;<sup>73</sup> improving survival rates for those affected by traumatic brain injury;<sup>74</sup> having a potential positive effect in treatment of Alzheimer's disease;<sup>75</sup> showing observable statistical clinical benefits for those with active irritable bowel syndrome<sup>76</sup> and Crohn's disease;<sup>77</sup> having antidepressant effects;<sup>78</sup> and showing

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<sup>72</sup> See Jody Corey-Bloom et al., *Smoked cannabis for spasticity in multiple sclerosis: a randomized, placebo-controlled trial*, 10 CAN. MED. ASS'N. J. 1143, 1143–1150 (2012); see also Jörg Wissel et al., *Low dose treatment with the synthetic cannabinoid Nabilone significantly reduces spasticity-related pain: A double-blind placebo-controlled cross-over trial*, 253 J. NEUROLOGY 1137, 1137–1341 (2006) (finding the cannabinoid Nabilone “to be safe and easily applicable option in the care of patients with chronic UMNS (upper motor neuron syndrome) and spasticity-related pain otherwise not controllable”).

<sup>73</sup> See Sepideh Pooyania et al., *A randomized, double-blinded, crossover pilot study assessing the effect of nabilone on spasticity in persons with spinal cord injury*, 91 ARCHIVES OF PHYSICAL MED. AND REHABILITATION 703, 703–07 (2010).

<sup>74</sup> See Miriam Fishbein et al., *Long-term behavioral and biochemical effects of an ultra-low dose of D<sup>9</sup>-tetrahydrocannabinol (THC): neuroprotection and ERK signaling*, 221 EXPERIMENTAL BRAIN RES. 437, 437–48 (2012); see also Raimund Firsching et al., *Early Survival of Comatose Patients after Severe Traumatic Brain Injury with the Dual Cannabinoid CB1/CB2 Receptor Agonist KN38-7271: A Randomized, Double-Blind, Placebo-Controlled Phase II Trial*, 73 J. NEUROLOGICAL SURGERY 204, 204–16 (2012) (suggesting improved survival rates among subjects treated with cannabinoid receptor agonist).

<sup>75</sup> See Antonio Currais et al., *Amyloid proteotoxicity initiates an inflammatory response blocked by cannabinoids*, AGING AND MECHANISMS OF DISEASE, June 2016, at 1, 1–8.

<sup>76</sup> See Simon Lal S et al., *Cannabis use amongst patients with inflammatory bowel disease*, 23 EUR. J. GASTROENTEROLOGY & HEPATOLOGY 891, 891–96 (2011); see also Adi Lahat et al., *Impact of cannabis treatment on the quality of life, weight and clinical disease activity in inflammatory bowel disease patients: a pilot prospective study*, 85 DIGESTION 1, 1–8 (2012) (“[T]reatment with inhaled cannabis improves quality of life in patients with long-standing CD (Chron's Disease) and UC (Ulcerative Colitis)).

<sup>77</sup> See Timna Naftali et al., *Cannabis Induces a Clinical Response in Patients With Crohn's Disease: A Prospective Placebo-Controlled Study*, 11 CLINICAL GASTROENTEROLOGY AND HEPATOLOGY 1276, 1276–1280 (2013).

<sup>78</sup> See Abir T. El-Alfy et al., *Antidepressant-like effect of Δ<sup>9</sup>-tetrahydrocannabinol and other cannabinoids isolated from Cannabis sativa L.*, 95 PHARMACOLOGY BIOCHEMISTRY AND BEHAVIOR 434, 434–42 (2010).

promise in treatment for opiate dependence that specifically target cannabinoid-opioid system interactions.<sup>79</sup>

Also, as an increasing number of states have begun to recognize that cannabis should not be treated as wholly illegitimate, multiple businesses have arisen in those states supplying varied products and medical treatments derived from cannabis and a number of its constituent chemical components known as Cannabinoids:<sup>80</sup> Delta-9-tetrahydrocannabinol (“THC”),<sup>81</sup> Cannabidiol (“CBD”),<sup>82</sup> Cannabinol (“CBN”),<sup>83</sup> Cannabichromene (“CBC”),<sup>84</sup>

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<sup>79</sup> See Jillian L. Scavone et al., *Impact of Cannabis Use During Stabilization on Methadone Maintenance Treatment*, 22 AM. J. ON ADDICTIONS 344, 344–349 (2013).

<sup>80</sup> See *State Marijuana Laws in 2017 Map*, GOVERNING MAGAZINE (Jan. 30, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>; see also Oier Aizpurua-Olaizola et al., *Evolution of the Cannabinoid and Terpene Content during the Growth of Cannabis sativa Plants from Different Chemotypes*, 79 J. NAT. PRODUCTS, 324, 324 (2016) (stating that there are known to be at least “113 phytocannabinoids” in *Cannabis sativa* plants).

<sup>81</sup> See Janet E. Joy et al., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 59 (1st ed. 1999) (“Cannabinoids, especially THC, can modulate the function of immune cells in various ways—in some cases enhancing and in others diminishing the immune response.”).

<sup>82</sup> Cannabidiol (CBD) is currently the leading non-psychoactive phytocannabinoid in autoimmune and neurological studies, and has been shown to relieve convulsions, inflammation, anxiety and nausea. See Diana Kwon, *Can Cannabis Treat Epileptic Seizures?*, SCI. AM. (Jan. 22, 2016), <https://www.scientificamerican.com/article/can-cannabis-treat-epileptic-seizures/>; *Guide To Using Medical Cannabis*, AMERICANS FOR SAFE ACCESS, [http://www.safeaccessnow.org/using\\_medical\\_cannabis](http://www.safeaccessnow.org/using_medical_cannabis) (last visited July 6, 2017). The compound has received national attention in recent years in the development of “Charlotte’s Web,” a cannabis extract that has been shown to reduce epileptic seizures in children with Dravet Syndrome. See Hannah Osborne, *Charlotte Figi: The Girl Who is Changing Medical Marijuana Laws Across America*, INT’L BUS. TIMES (June 22, 2014), <http://www.ibtimes.co.uk/charlotte-figi-girl-who-changing-medical-marijuana-laws-across-america-1453547>.

<sup>83</sup> Cannabinol (CBN) “is a metabolite of tetrahydrocannabinol (THC) with potential immunosuppressive and anti-inflammatory activities.” *Cannabinol*, NAT’L CANCER INSTITUTE-NCI DRUG DICTIONARY, <https://ncit.nci.nih.gov/ncitbrowser/pages/home.jsf;jsessionid=F45AB2D815AB57F3FE62D1BEF620FED> (last visited July 6, 2017).

<sup>84</sup> Cannabichromene (CBC) is a non-psychoactive phytocannabinoid that has been found to have a variety of different uses from creating sedative calming

Cannabigerol (“CBG”),<sup>85</sup> and Tetrahydrocannabivarin (“THCV”),<sup>86</sup> to name a few. Billion-dollar enterprises have begun to create such diverse products as cannabis infused topical balms, lotions,<sup>87</sup> soaps, lubricants, and sprays; human and animal edibles in the form of capsules,<sup>88</sup> beverages, dog biscuits, and human snacks and desserts;<sup>89</sup> and cannabis concentrates such as oils, waxes, dabs,<sup>90</sup> or powders, which are generally ingested or smoked in vapor form.<sup>91</sup>

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effects to promoting the analgesic effects of THC. See *Medicinal Cannabinoid FAQ: What are THC, CBD, CBN, CBC and . . . ?*, PURE ANALYTICS (Dec. 12, 2011), <http://pureanalytics.net/blog/2011/12/12/medicinal-cannabinoid-faq-what-are-thc-cbd-cbn-cbc-and-.../>. It has been found in mice to selectively reduce inflammation-induced gastrointestinal hyper motility. See Angelo A. Izzo et al., *Inhibitory effect of cannabichromene, a major non-psychoactive cannabinoid extracted from Cannabis sativa, on inflammation-induced hypermotility in mice*, 166 BRIT. J. PHARMACOLOGY 1444 (2012). It has also been found to stimulate the growth of brain cells by stimulating neural stem progenitor cells. See Noriko Shinjyo & Vincenzo Di Marzo, *The effect of cannabichromene on adult neural stem/progenitor cells*, 63 NEUROCHEMISTRY INT’L 432, 432–37 (2013).

<sup>85</sup> Cannabigerol (CBG) has sedative effects and antimicrobial properties, and lowers intraocular pressure. See Mitchell Colbert, *Cannabinoid Profile: Cannabigerol (CBG)*, THELEAFONLINE, <http://theleafonline.com/c/science/2014/07/cannabinoid-profile-crash-course-cbg/>. It has also been shown in mice to hamper colon cancer progression in vivo and selectively inhibit tumor growth in colon carcinogenesis. See Francesca Borrelli et al., *Colon carcinogenesis is inhibited by the TRPM8 antagonist cannabigerol, a Cannabis-derived non-psychoactive cannabinoid*, 35 CARCINOGENESIS 2787 (2014).

<sup>86</sup> Tetrahydrocannabivarin (THCV) has been shown in mice to ameliorate insulin sensitivity in obesity, showing THCV to be a potential treatment against obesity-associated glucose intolerance, type 2 diabetes and related metabolic disorders. See E.T. Wargent et al., *The cannabinoid Δ9-tetrahydrocannabivarin (THCV) ameliorates insulin sensitivity in two mouse models of obesity*, 3 NUTRITION & DIABETES 1 (2013).

<sup>87</sup> Such as Dixie brand Elixir’s, Muscle Relief Lotion and Muscle Relief Balm. See DIXIE, <http://dixieelixirs.com/products/topicals/> (last visited July 6, 2017).

<sup>88</sup> Such as Canna-Pet Advance hemp supplements. See CANNA-PET, <https://canna-pet.com> (last visited July 6, 2017).

<sup>89</sup> Such as Love’s Oven cookies, brownies, crackers, and gummies. See LOVE’S OVEN, <http://lovesoven.com> (last visited July 6, 2017).

<sup>90</sup> Such as Deviant Dabs Rosin. See LEAFLY, <https://www.leafly.com/products/details/deviant-dabs-deviant-dabs-rosin> (last visited July 6, 2017).

<sup>91</sup> See Lane Tr, *Powdered Cannabis: The Next Big Thing?*, HERB.CO (Jan. 21, 2016), <http://herb.co/2016/01/21/will-powdered-cannabis-next-big-thing/>.

With the influx of cannabis-related businesses and enterprises arising from the increase in medical research showing the benefits of cannabis, comes the increasing disparity in Section 280E tax implications between cannabis related businesses as opposed to other financial enterprises. Cannabis businesses are restricted from deducting basic expenses, including rent, employee salaries, utility bills, legal fees, trade association fees and independent contracting fees.<sup>92</sup>

Also, despite the medically acknowledged advances and research, and notwithstanding the findings of the Shafer Commission Report, the findings of the House Report, and that twenty-eight states now accept the legitimacy of cannabis as a medically beneficial treatment with respect to myriad diseases and challenging medical conditions, the CSA has not rescheduled cannabis; cannabis remains classified federally as a Schedule I drug, which warrants continuing federal criminal prosecutions.

### III. CONSTITUTIONAL CONCERNS OF THE CSA AND INTERNAL REVENUE CODE § 280E: DUE PROCESS AND EQUAL PROTECTION

Notwithstanding the disparity in tax treatment under Section 280E for cannabis-related enterprises compared to other taxable industries, the CSA, as well as IRC Section 280E, implicate constitutional concerns.

#### *A. Constitutional Issues*

It can be credibly argued that federal law does irrationally distinguish between cannabis and noncannabis businesses—suggesting strongly that the cannabis business may have redress on constitutional grounds.<sup>93</sup> In other words, scheduling cannabis as a Schedule I drug—making it a federal crime under the CSA to

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<sup>92</sup> Healy, *supra* note 8.

<sup>93</sup> See, e.g., Tom Huddleston, Jr., *The Marijuana Industry's Battle Against the IRS*, FORTUNE (Apr. 15, 2015), <http://fortune.com/2015/04/15/marijuana-industry-tax-problem/> (noting that some legal professions believe that Section 280E creates an “unconstitutional burden” on cannabis industries by effectively subjecting them to a different tax code than other taxed industries).

possess cannabis—may violate a compliant dispensary’s due process and equal protection rights.<sup>94</sup> Likewise, Section 280E should also be vulnerable to challenge on the same constitutional grounds, as Section 280E’s applicability to cannabis is premised upon the CSA scheduling cannabis as a Schedule I substance.

First, there is a fair question whether the CSA’s scheduling of cannabis as a Schedule I substance threatens a “fundamental right;” *to wit*, the right to choose and have available palliative health care and treatment recommended by respected, legally licensed and authoritative health professionals.<sup>95</sup> Such a “fundamental right” is akin and analogous to the “right to privacy,” underpinning the well accepted “woman’s right to choose”<sup>96</sup> and the fundamental right to refuse medical care.<sup>97</sup>

Superficially, the scheduling of any drug under the CSA scheme would seem hardly relevant to the right to terminate pregnancy. But, the Supreme Court has ruled that, where the fundamental right of a woman to terminate her pregnancy is in all practicality degraded by a state policy affecting the provider of the medical treatment,<sup>98</sup> vindication of the patient’s fundamental right requires that the state policy be reversed.<sup>99</sup> Compliant cannabis dispensaries could readily analogize disturbance of a cannabis patient’s right to medical treatment—by oppressive, unwarranted threats of criminal prosecution—to a governmental policy effectively shutting down

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<sup>94</sup> Equal protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>95</sup> *See* Diederik Lohman et al., *Access to pain treatment as a human right*, BIOMED CENT., Jan. 2010, at 1, 1–9.

<sup>96</sup> *See Roe v. Wade*, 410 US 113 (1973); ACLU, THE RIGHT TO CHOOSE: A FUNDAMENTAL LIBERTY 1–4 (Fall 2000), <https://www.aclu.org/files/FilesPDFs/ACF4E49.pdf>.

<sup>97</sup> *See Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

<sup>98</sup> Texas statute H.B.2 would have required providers at abortion clinics to have admitting privileges at a local hospital no more than thirty miles from the clinic; this requirement and other onerous requirements effectively caused closure of fifty percent of the clinics providing abortion services in Texas—effectively placing undue burden upon the fundamental right of a woman’s right to choose in that state. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300–01 (2016).

<sup>99</sup> *See id.*

abortion clinics. For example, throughout the United States, physicians are restricted from legally prescribing cannabis for patients that they believe would benefit from this treatment modality because the CSA has made cannabis a Schedule I substance, thereby making it illegal for a physician to make such a prescription.<sup>100</sup> Instead, physicians are solely permitted to “recommend” the use of cannabis to treat specific medical conditions, premised upon the right to free speech under the First Amendment.<sup>101</sup>

If a patient does have a fundamental right to medical treatment consonant with the laws of a state,<sup>102</sup> and such medical treatment is shown to be effectively precluded by a federal criminal statute, it may be difficult to draw a distinction between the constitutional rights of a cannabis dispensary and the constitutional rights of an abortion clinic. In which case, were an effective constitutional challenge to the CSA’s scheduling of cannabis as a Schedule I drug mounted by a compliant dispensary, it would be not be surprising if, applying strict scrutiny or even the less restrictive “undue burden” standard,<sup>103</sup> such classification was found unconstitutional on either or both substantive due process and equal protection grounds.<sup>104</sup>

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<sup>100</sup> See 21 U.S.C. § 812 (2012).

<sup>101</sup> See *Conant v Walters*, 309 F.3d 629, 640 [9th Cir 2002] (physicians are entitled to commercial speech protection under the First Amendment in the recommendation of cannabis use to patients).

<sup>102</sup> Is that outcome now only a matter of time? The Ninth Circuit would seem to suggest such is the case stating:

For now, federal law is blind to the wisdom the future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon the sooner than expected. *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007).

<sup>103</sup> See Michael Dorf, Symposium: *Abortion is still a fundamental right*, SCOTUSBLOG (Jan 4, 2016, 11:28 AM) <http://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/>.

<sup>104</sup> Across the street from a cannabis dispensary, a traditional pharmaceutical company could be selling non-cannabis medicine as treatment for anxiety, post-traumatic stress syndrome, etc. Yet, only the cannabis dispensary would be subject to the financial impediment imposed by Section 280E for selling cannabis based medicine prescribed by licensed physicians in the state. This inconsistency could well generate a successful equal protection claim, particularly were the

That analysis could also be used reasonably by compliant dispensaries to avoid the discriminatory tax burdens imposed by Section 280E. Certainly, a compliant dispensary, operating legally pursuant to all applicable business rules and regulations, might argue that it is being unfairly treated when its net income is radically reduced by imposition of a tax obligation not placed upon other business enterprises.

Even were strict scrutiny not applied, the government's position would appear vulnerable under rational basis review. The scheduling of cannabis as a schedule I substance under the CSA could be challenged by a cannabis dispensary operating in full compliance with applicable state law. And, any challenge to such scheduling could be supported by several relatively recent developments. In 2009,<sup>105</sup> the U.S. Attorney General's office released a formal memorandum for "selected" U.S. Attorneys ("Ogden Memo") directing these attorneys not to "focus federal resources" on the prosecution of individuals "whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."<sup>106</sup> Similarly, on August 29, 2013, the U.S. Department of Justice issued a Memorandum

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constitutionality of Section 280E subjected to strict scrutiny and the government that obligated to bear the burden of proof.

<sup>105</sup> It should be noted that the Attorney General had already been precluded by the Supreme Court from interfering with Oregon state law permitting physician assisted suicide. *See Gonzalez v. Oregon*, 546 U.S. 243, 274–75 (2006). There, the Attorney General sought to prevent Oregon physicians from using drugs regulated by the CSA for voluntary termination of life. *Id.* at 248–49. The Supreme Court held that the CSA had no applicability to use of drugs sanctioned by state law stating that:

The Government, in the end, maintains that the prescription requirement delegates to a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it. *Id.* at 275.

<sup>106</sup> DAVID W. OGDEN, INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA 1–3 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [hereinafter OGDEN, INVESTIGATIONS AND PROSECUTIONS].



written by James M. Cole (“2013 Cole Memo”)<sup>107</sup> outlining “priorities to be considered” as a matter of prosecutorial discretion, directing that “prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence including but not limited to whether the operation’s demonstrably in compliance strong and effective state regulatory system.”<sup>108</sup>

In December 2014, Congress enacted the Hinchey-Rohrabacher Medical Marijuana Amendment,<sup>109</sup> which prohibits federal funds from being used to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.<sup>110</sup> In the 2015 case of *United States v. Marin Alliance for Medical Marijuana*,<sup>111</sup> a federal judge in the Northern District of California interpreted the Hinchey-Rohrabacher Amendment to preclude the federal government from enforcing an injunction of a medical cannabis dispensary’s business activities unless the dispensary’s activities violated California law, stating:

as long as Congress precludes the Department of Justice from expending funds in the manner proscribed by Section 538 [The Hinchey-Rohrabacher Medical Marijuana Amendment], the permanent injunction will only be enforced against MAMM [cannabis dispensary] insofar as that

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<sup>107</sup> It should be noted that the 2013 Cole Memo is still in effect, despite Current Attorney General Jeff Sessions convening a Task Force on Crime Reduction and Public Safety (“Task Force”) to evaluate the best legal approach to enforcement of cannabis. As of the date this article went to print, the Task Force assembled by Attorney General Sessions has offered no new recommendations to cannabis policy. See Sadie Gurman, “*Marijuana Task Force Undercuts Hard Line by Attorney General Sessions*,” *INSURANCE JOURNAL* (Aug. 8, 2017), <http://www.insurancejournal.com/news/national/2017/08/08/460437.htm>

<sup>108</sup> JAMES M. COLE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT 1–3 (2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter COLE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT].

<sup>109</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014) [hereinafter the Hinchey-Rohrabacher Amendment].

<sup>110</sup> See *id.*

<sup>111</sup> *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039 (N.D. Cal. 2015).

organization is in violation of California ‘State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.’<sup>112</sup>

In short, a compliant dispensary could well succeed in avoiding a criminal prosecution under the CSA on substantive due process and/or equal protection grounds—arguing that the statute’s application to a compliant dispensary is not “rationally related to any legitimate state interest.”<sup>113</sup> After all, now all three branches of the federal government—(1) the legislative branch with the Hinchey-Rohrabacher Amendment, (2) the executive branch with the Ogden Memo and the 2013 Cole Memo, and (3) the judicial branch with the 2015 federal court decision in *Marin Alliance*—have determined that a compliant cannabis dispensary should not be sanctioned for dealing with a Class I substance under the CSA.<sup>114</sup> Once again, if the CSA is vulnerable to such a constitutional challenge, so should Section 280E have the same infirmity.

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<sup>112</sup> *Id.* at 1047–48.

<sup>113</sup> *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>114</sup> *See* Hinchey-Rohrabacher Amendment, *supra* note 109; OGDEN, INVESTIGATIONS AND PROSECUTIONS, *supra* note 106, at 1–3; COLE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT, *supra* note 108, at 1–3. The taxpayer would have the burden to establish that Section 280E serves no rational purpose. And, while historically few such challenges have successfully overcome this burden, the Supreme Court has found a number of state statutes unconstitutional on this ground. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (discussing that violation of equal protection by amendment to state constitution designed to protect solely homosexual persons from discrimination); *Quinn v. Millsap*, 491 U.S. 95, 106–07 (1989) (showing that equal protection offended irreparably by state statute requiring ownership of real property for appointment to government board); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (showing that equal protection was violated by tax distinction between in-state and out-of-state purchasers of motor vehicles); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (striking down statute directing discriminatory tax burden on out-of-state insurers on equal protection grounds); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that undocumented aliens could not be excluded from public school education by state statute).

*B. Has State Law Now Emerged to Protect a Compliant Dispensary from a CSA Prosecution?*

A compliant dispensary should be shielded from criminal prosecution under the CSA by state law, analogous to a Tenth Amendment defense. The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>115</sup> In contrast, the Supremacy Clause affirms that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>116</sup>

Resolution of the inherent conflict between the Tenth Amendment and the Supremacy Clause has always largely depended upon whether the federal government enacted legislation as to the specific issue being challenged, that is, whether federal law preempts state law—in this instance, as to matters within scope of the Commerce Clause.<sup>117</sup> Historically, Tenth Amendment challenges to the CSA met with no success; courts have routinely ruled that the regulatory scheme promulgated by the CSA was well within the scope of the Commerce Clause.<sup>118</sup> In fact, the Supreme

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<sup>115</sup> U.S. CONST. amend. X.

<sup>116</sup> U.S. CONST. art. VI, cl. 2.

<sup>117</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>118</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding scope of Tenth Amendment pursuant to the Controlled Substances Act to extend intrastate); *Montana Caregivers Ass’n, LLC v. United States*, 526 Fed. App’x. 756 (9th Cir. 2013) (rejecting claim by medical marijuana growers that the Constitution protects a fundamental right to grow medical marijuana); *Sacramento Nonprofit Collective v. Holder*, 552 Fed. App’x. 680 (9th Cir. 2014) (rejecting claim of fundamental right to distribute and use medical marijuana and claim that federal enforcement of the CSA violated Equal Protection); *Stubblefield v. Gonzales*, 150 Fed. App’x. 630 (9th Cir. 2005) (rejecting claim that CSA as applied to growers of medical marijuana under state law was unconstitutional as it fell within Congress’ power to regulate interstate commerce); *United States v. Washington*, 887 F. Supp. 2d 1077 (D. Mont. 2012) (holding that prosecution did not violate 10th Amendment in prosecuting

Court in *Gonzales v. Raich* declared that the CSA preempted any state enactment on the subject of cannabis—unless Congress expressed a manifest change of heart.<sup>119</sup> The Supreme Court’s decision in *Gonzales* was hardly surprising as it followed a long line of lower court decisions which had also rejected any constitutional challenge to the CSA.<sup>120</sup>

But now Congress seems to have had that “change of heart.” Congress’s Hinchey-Rohrabacher Amendment manifestly directs that state law controls CSA’s applicability to a compliant dispensary—as particularly demonstrated by two recent decisions in California.<sup>121</sup>

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defendant under the CSA); *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1154 (N.D. Cal. 2011) (finding plaintiffs “failed to establish likelihood of success on merits of their claim that application of the CSA to growers and users of marijuana for medical purposes, as otherwise authorized by California Compassionate Use Act, violated their right to substantive due process”); *United States v. Zhuta*, No. 09CR357A, 2010 WL 5636212, at \*1, \*5 (W.D.N.Y. Oct. 29, 2010) (rejecting defendants’ claims that classification of marijuana as Class I Substance under CSA was irrational and that CSA was unconstitutional under the 10th amendment).

<sup>119</sup> See *Gonzales*, 545 U.S. at 22.

<sup>120</sup> See, e.g., *Pearson v. McCaffrey*, 139 F. Supp. 2d 113 (D.C. 2001) (rejecting physicians’ claim that federal ban on prescribing or recommending medical marijuana was unconstitutional and violated the Administrative Procedure Act); *Kuromiya v. United States*, 37 F. Supp. 2d 717 (E.D. Pa. 1999) (finding CSA a valid exercise of power under the commerce clause, and did not violate the right to privacy, and that prohibition on marijuana did not violate the 9th or 10th Amendments).

<sup>121</sup> See *United States v. McIntosh*, 833 F.3d 1163, 1177–80 (9th Cir. 2016) (holding that if the federal government prosecutes individuals, who are authorized by state laws to distribute, possess, or cultivate medical marijuana, “it has prevented the state from giving practical effect to its law for non-prosecution of individuals who engage in the permitted conduct” and thus section 542 of the Continuing Appropriation Act of 2016 “prohibits the Department of Justice from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws”); *United States v. Marin All. For Med. Marijuana*, 139 F. Supp. 3d 1039, 1047–48 (N.D. Cal. 2015) (holding that a permanent injunction against a dispensary, which was premised upon the CSA, could only be enforced to the extent that the dispensary was “in violation of . . . [California] State laws that authorize the use, distribution, possession or cultivation of medical marijuana”).

First, in *United States v. Marin Alliance for Medical Marijuana* a federal district court in the Northern District of California expressly bowed to state law in a decision concluding the epic thirteen-year-battle between the federal government and the Marin Alliance cannabis dispensary.<sup>122</sup> The court found that a permanent injunction—premised upon the CSA—could only be enforced to the extent that the Marin Alliance dispensary was “in violation of . . . [California] State laws that authorize the use, distribution, possession or cultivation of medical marijuana.”<sup>123</sup> In short, the court in *Marin Alliance* acknowledged that, although cannabis may be scheduled as a Schedule I drug, nonetheless, California state law does control. At least as far as the *Marin Alliance* court was concerned, a compliant dispensary could rely upon state law to bar a federal enforcement action premised upon the CSA.<sup>124</sup>

The decision in *Marin Alliance* was challenged, when<sup>125</sup> in March of 2016, a California district court judge in *United States v. Chavez*<sup>126</sup> came to an entirely different conclusion, denying a motion to dismiss a criminal indictment under the CSA on Hinchey-Rohrabacher grounds.<sup>127</sup> *Chavez* arose from a cannabis possession charge, which the defendant challenged premised upon the passage of the Hinchey Rohrabacher Amendment. The *Chavez* court acknowledged that the Hinchey-Rohrabacher Amendment may have curtailed appropriations of funds for prosecution of select cases brought under the CSA, but had not “repealed or amended the Controlled Substances Act to accomplish that goal in a straightforward manner.”<sup>128</sup>

The conflict between *Marin Alliance* and *Chavez* starkly demonstrates two separate approaches to the impact of the Hinchey-Rohrabacher Amendment upon the continued efficacy of the CSA on criminal prosecutions for possession of marijuana.

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<sup>122</sup> See *Marin All.*, 139 F. Supp. 3d at 1041, 1047–48.

<sup>123</sup> *Id.* (citing Continuing Appropriation Act of 2015, Pub. L. 113-235, 128 Stat. 2217 (Dec. 14, 2014) (amended 2016)).

<sup>124</sup> *Id.* at 1045–46.

<sup>125</sup> See *United States v. Chavez*, No. 2:15-CR-210-KJN, 2016 WL 916324, at \*1, \*2 (E.D. Cal. 2016).

<sup>126</sup> *Id.* at \*1.

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

<sup>128</sup> *Id.* at \*2–3.

## IV. UNITED STATES V. MCINTOSH

In *United States v. McIntosh*, the Ninth Circuit Court of Appeals addressed the conflict between the *Marin Alliance* and *Chavez* decisions and directed lower courts to follow a procedural mechanism which is premised upon the principle that, where cannabis prosecutions are concerned, state law may override the CSA.<sup>129</sup>

*McIntosh* concerned nine consolidated criminal cases all brought by the federal government under the CSA, alleging cannabis possession and use.<sup>130</sup> The *McIntosh* court acknowledged the conflict posed by the Hinchey–Rohrabacher Amendment: on the one hand Congress has announced that compliant dispensaries could not be prosecuted with federal funds; on the other hand, cannabis remains a Schedule I substance.<sup>131</sup> The *McIntosh* court decided that each criminal defendant was entitled to “an evidentiary hearing to determine” whether the defendant’s conduct “was completely authorized by state law.”<sup>132</sup> In short, the court in *McIntosh* held that California law could trump the CSA if the compliant cannabis dispensary operated in full accord with applicable state law. A long and detailed footnote in the *McIntosh* decision reminds defendants that “Congress could restore funding tomorrow, a year from now, or four years from now . . . .”<sup>133</sup> In which case, the footnote continues, “the government could then prosecute individuals who committed offenses while the government lacked funding.”<sup>134</sup>

A. *The “McIntosh Hearing”*

What may next arise when such a *McIntosh* “evidentiary hearing” is conducted is not entirely clear; the *McIntosh* courts did not expressly rule that an indictment be dismissed if a criminal

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<sup>129</sup> *United States v. McIntosh*, 833 F.3d 1163, 1176–77 (9th Cir. 2016).

<sup>130</sup> *Id.* at 168–69.

<sup>131</sup> *Id.* at 1179.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1179 n. 5. It should be noted that the Hinchey–Rohrabacher Amendment to the federal budget has now been made effective through September, 2017.

<sup>134</sup> *Id.*

defendant's use of marijuana is found to be "completely authorized by state law."

Further, it is interesting to ponder whether the burden of proof and procedure at such an ostensible "*McIntosh* hearing" will—analogueous to the usual suppression hearing—be on the government by a preponderance of the evidence.<sup>135</sup> Or, is the allegation that a compliant dispensary was conducting its cannabis business in violation of applicable state law an element of the alleged crime requiring proof beyond a reasonable doubt?

The answers to these and other thorny questions must await further judicial clarification. But as to the Tenth Amendment, which has always been a "battle cry" for states' rights adherents, it seems apparent that the Tenth Amendment may now play a role in shielding compliant dispensaries from further federal prosecutions under the CSA.

### *B. McIntosh and Section 280E*

Compliant dispensaries will now clearly rely upon the Hinchey-Rohrabacher Amendment in avoiding tax burdens premised upon Section 280E. But, should the ruling in *McIntosh* affect enforcement of Section 280E? In other words, can the compliant dispensary also rely upon the Hinchey-Rohrabacher Amendment in avoiding tax burdens premised upon Section 280E?

The Ninth Circuit's decision has set up an undeniable hurdle which the federal government must clear before a criminal prosecution can proceed under the CSA, that is, whether a "McIntosh" hearing must occur to determine whether the cannabis

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<sup>135</sup> See *United States v. Lou Huang You*, 198 F. Supp. 2d 393, 397 (S.D.N.Y. 2002) (citing *United States v. Mendenhall*, 446 U.S. 544, (1980); *United States v. Matlock*, 415 U.S. 164, 177 (1974); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *United States v. Calvente*, 722 F.2d 1019, 1023 (2d. Cir. 1983)); see also *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (stating that "the burden of showing admissibility [of seized items or statements by a defendant] rests, of course, on the prosecution"); *Matlock*, 415 U.S. at 178–79 (stating that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence") (citing *Lego v. Twomey*, 404 U.S. 477, 488–89 (1972)); *Calvente*, 722 F.2d at 1023 (stating that "the government has the burden of proving consent voluntarily given by preponderance of the evidence" (citing *Bumper*, 391 U.S. at 548–49 (1968))).

defendant has complied with applicable state law. Under *McIntosh*, were the defendant found to be compliant, the prosecution would likely be precluded.<sup>136</sup> Rationally, the Internal Revenue Service (“IRS”) should have the same burden before requiring a compliant dispensary to lose deductions due to enforcement of Section 280E. There should be no distinction between the CSA as a basis for criminal prosecution and Section 280E as a basis for compelling payment of artificially enhanced taxes. When the IRS commences a deficiency proceeding in tax court, or defends a federal court refund action, the federal government should have the same *McIntosh* hurdle to clear. The same constitutional rules should apply.

Congress enacted IRC Section 280E in 1982,<sup>137</sup> 15 years before California’s Proposition 15 began to alter the legal landscape among the states concerning cannabis.<sup>138</sup> As such, the policy underlying Section 280E—serving to disincentive drug trafficking—is outdated.<sup>139</sup> Indeed, with the onset of uncontested medical research pointing to a myriad of therapeutic benefits of cannabis, the efficacy of the Congressional policy attendant to Section 280E’s enactment pertaining to cannabis is undoubtedly undercut.

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<sup>136</sup> *McIntosh*, 833 F.3d at 1179.

<sup>137</sup> I.R.C. § 280E (2012).

<sup>138</sup> *Id.*

<sup>139</sup> *See supra*, note 3.



The dragon 26 USC Section 280E should no longer impede<sup>140</sup> the legitimate economic development<sup>141</sup> of a medical marijuana industry devoted to those with an established need for cannabis' therapeutic and palliative capabilities. To find otherwise clashes with purposes underlying the CSA, the congressional policy in the Hinchey-Rohrabacher Amendment, constitutional principles of substantive due process, equal protection, and the Tenth Amendment, and the now undoubted clinical demonstration of cannabis as a recognized medical therapy. This dragon should be slayed when set upon compliant cannabis dispensaries.

## CONCLUSION

The Hinchey-Rohrabacher Amendment expressing congressional intent on the issue of the CSA enforcement of cannabis violations, coupled with the recent judicial ruling in the ninth circuit of McIntosh, can well be used by tax payers in the future to avoid imposition of tax liability premised upon Section 280E of the Internal Revenue Code. Yet, while the McIntosh ruling is a promising development for the cannabis industry, its legitimacy is largely premised upon the continued existence of the Hinchey-

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<sup>140</sup> Perhaps 2017 will also usher in a new regime for the banking and cannabis industry. A February 14, 2014 U.S. Department of the Treasury Financial Crimes Enforcement Network "Guidance Memo" inhibits banking institutions from servicing cannabis industry account holders by requiring complicated record-keeping—entitled "Suspicious Activity Report" ("SAR") documents—at three levels. *See* Memorandum from the United States Dep't of the Treasury Fin. Crimes Enf't Network, BSA Expectations Regarding Marijuana-Related Bus. FIN-2014-G001 (Feb. 14, 2014). ("A financial institution is required to file a SAR if . . . the financial institution knows, suspects or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.").

<sup>141</sup> One cannot ignore the sad history of Prohibition where an ill-advised federal statute and the Eighteenth Amendment drove legitimate business out of the alcohol trade leading to the development of organized crime, a scourge still with us. *See* DANIEL OKRENT, *LAST CALL, THE RISE AND FALL OF PROHIBITION*, Scribner (2010).

Rohrabacher Amendment, which requires yearly renewal by congress. Absent such annual renewal, the Drug Enforcement Administration and the Department of Justice would be free to fund prosecutions against compliant cannabis businesses, leaving those cannabis businesses who comply with state law with little basis to challenge Section 280E. Needless to say, in light of these recent developments, the timing to challenge Section 280E is ripe.