

MARIJUANA LEGALIZATION AND NOSY NEIGHBOR STATES

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Abstract: As more states proceed with marijuana legalization laws, questions have arisen about how to accommodate those states that wish to retain prohibition. For instance, in 2014, Oklahoma and Nebraska unsuccessfully sued Colorado based on the spillover effects that Colorado's marijuana legalization law had on its neighboring states. This article asserts that there are several reasons why state marijuana legalization laws are unlikely to have a large effect on neighboring states. First, marijuana is not a previously unobtainable good being introduced into the stream of commerce, as it is already available through the black market inexpensively. Second, legalization laws have a number of restrictions that make it very difficult for sellers to profit from exporting legally produced marijuana across state lines. Prohibition states may have reason to worry, however, that illegal marijuana growers will be better able to hide their operations in legalization states that allow residents to grow small amounts of marijuana for personal use, which in turn may increase illegal marijuana exports to neighboring prohibition states. Prohibition states can minimize this risk of increased marijuana flow by lobbying the federal government to establish rules that protect their interests.

INTRODUCTION

For the better part of the past two decades, the prospect of federal interference has been a pressing concern for state marijuana legalization laws. After Californians approved the first modern medical marijuana legalization ballot measure in 1996,¹ the federal government did all that it could to stop the law in its tracks. Drug Enforcement Administration (DEA) agents conducted armed raids of medical marijuana collectives² and federal prosecutors sent some of the operators to prison with lengthy mandatory minimum

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¹ CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

² AMS. FOR SAFE ACCESS, WHAT'S THE COST? THE FEDERAL WAR ON PATIENTS 37 (2013) (“Over the past 17 years, the Justice Department has carried out over 500 aggressive SWAT-style raids on medical cannabis patients and providers, arrested nearly 400 people, and prosecuted more than 160 cases.”).

sentences.³ The Department of Justice (DOJ) successfully litigated two medical marijuana cases all the way to the Supreme Court. In *United States v. Oakland Cannabis Buyers' Cooperative* in 2001, the Court held that federal anti-marijuana laws do not recognize a medical necessity defense.⁴ In *Gonzales v. Raich* in 2005, the Court held it was within the commerce power for Congress to criminalize intrastate possession and cultivation of small amounts of marijuana.⁵ Federal officials even threatened to yank the DEA-prescribing license of any doctor that recommended medical marijuana, though the Ninth Circuit blocked that plan on free speech grounds.⁶

Despite its best efforts, however, the federal government was not able to stop the trend. Throughout the 2000s, more and more states passed medical marijuana laws and marijuana stores started opening faster than the federal government could shut them down.⁷ By the time Colorado and Washington passed the first laws legalizing marijuana for all adult use in 2012, it was clear to most observers that the federal government was fighting a losing battle.⁸ It had the legal authority and resources to be a thorn in the side of the states, but it did not have the manpower to prevent states from implementing medical and recreational legalization laws. In recognition of this dynamic, the DOJ announced a cease-fire in its war on state-legal marijuana in late 2013, in the form of a memorandum advising federal law enforcement officials not to use scarce resources to go after people in compliance with state marijuana laws.⁹

Just as the threat of federal interference began to subside, however, a new problem presented itself: nosy neighbors. In late 2014, Oklahoma and Nebraska sued Colorado in the United States Supreme Court, invoking the Court's original jurisdiction over lawsuits between states.¹⁰ In their lawsuit, Nebraska and Oklahoma described the impact of Colorado's marijuana le-

³ See *id.* at 31 (discussing the case of Bryan Epis, a California medical marijuana patient who received a ten-year mandatory minimum federal sentence).

⁴ See 532 U.S. 483, 498–99 (2001).

⁵ See 545 U.S. 1, 22 (2005).

⁶ See *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (holding that revoking a physician's license to prescribe controlled substances based on the physician's professional recommendation of marijuana would violate the First Amendment).

⁷ See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463–67 (2009) (arguing that the federal government did not succeed in blocking state medical marijuana laws because of its limited law enforcement resources).

⁸ See *id.* (arguing that the federal government does not have sufficient enforcement powers to make its federal ban on marijuana effective when states legalize marijuana).

⁹ See Memorandum from James M. Cole, U.S. Dep't of Justice, to All U.S. Attorneys, *Guidance Regarding Marijuana Enforcement 3* (2013) [hereinafter *Cole Memo*].

¹⁰ See Complaint at 1, 4, *Nebraska v. Colorado*, 136 S. Ct. 1034 (Dec. 18, 2014) (No. 144), 2014 WL 7474136 [hereinafter *Complaint of Nebraska & Oklahoma*].

galization law in dire terms, claiming it was a “direct assault on the health and welfare of Plaintiff States’ citizenry.”¹¹ Oklahoma and Nebraska claimed that they had experienced “a significant influx of Colorado-sourced marijuana” following legalization and asked the Court to strike Colorado’s law down under the Supremacy Clause.¹² The Supreme Court declined to hear the case but its publicity has helped shine a light on an issue that has gone under-examined: the horizontal federalism implications of marijuana legalization.¹³

As more states move forward with marijuana legalization,¹⁴ how should the law accommodate states that want to retain prohibition? Undeterred by Nebraska and Oklahoma’s unsuccessful lawsuit, a group of sheriffs from Nebraska, Kansas, and Colorado have taken up the cause of trying to completely shut down Colorado’s law on preemption grounds.¹⁵ Their case against the Governor of Colorado is currently before the Tenth Circuit Court of Appeals, after being dismissed by the District Court.¹⁶ Those who oppose marijuana legalization in their own states, however, are not limited

¹¹ Brief in Support of Motion for Leave to File Complaint at 12, *Nebraska v. Colorado*, 136 S. Ct. 1034 (Dec. 18, 2014) (No. 144), 2014 WL 7474136 [hereinafter Brief of Nebraska & Oklahoma].

¹² Complaint of Nebraska & Oklahoma, *supra* note 10, at 4, 25.

¹³ *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (mem.). In addition to the other contributions to this symposium, on the topic of horizontal federalism and marijuana legalization, see generally Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015) (discussing the effect that the Dormant Commerce Clause may have on state attempts to reduce spillover effects from marijuana legalization); Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court’s State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829 (2015) (discussing the fact that a market-based theory may apply to states calling on the Supreme Court’s original jurisdiction to challenge state marijuana legalization legislation); Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016) (discussing the importance of the way states go about mediating policy disputes and the role of the courts in remedying those disagreements).

¹⁴ To date, eight states have legalized marijuana. In 2012, Colorado and Washington were the first states to pass legalization laws, with Oregon and Alaska following suit in 2014. See COLO. CONST. art. XVIII, §16; ALASKA STAT. § 17.38.060 (2015) (codifying Ballot Measure No. 2); Control and Regulation of Marijuana Act, OR. REV. STAT. §§ 475B.010–475B.395 (2015); Initiative Measure No. 502, 63rd Leg., Reg. Sess. (Wash. 2013) (codified as amended in scattered chapters of Wash. Rev. Code § 69). California, Maine, Massachusetts, and Nevada all passed ballot measures legalizing marijuana in November 2016. See Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST: WONKBLOG (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/> [<https://perma.cc/UMN3-EDDB>] (reporting on the election results). In addition to these states, Washington, D.C. has legalized the possession and personal cultivation, although not the commercial distribution, of marijuana. See D.C. CODE § 48-904.01 (2015).

¹⁵ See *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1288 (D. Colo. 2016), *appeal filed*, No. 16-1095 (10th Cir. 2016).

¹⁶ See *id.* at 1294.

to attempting to block them in others. Scholars have argued, for example, that courts should “award damages to prevailing sister states, compensating them for the injuries inflicted by the incursion of [state-legal] marijuana into their territory.”¹⁷ Like the Oklahoma and Nebraska lawsuit, this proposal rests on the premise that marijuana legalization will cause a noticeable impact in neighboring states.¹⁸ But is that really so?

This article argues that as currently constituted, state marijuana legalization laws are unlikely to have anything more than a negligible effect on neighboring states. There are two main reasons for this. First, marijuana is already relatively inexpensive and easy to find in prohibition states. This is not a case of a previously unobtainable good being introduced into the stream of commerce. With the exception of people who live near the state border, most marijuana consumers in Nebraska will continue to get their marijuana where they always have: from the Nebraska black market. Second, state marijuana legalization laws all share a number of features that make it difficult for people to profit from exporting the product across state lines. Because of exacting regulatory oversight measures like seed-to-sale tracking, there is a very low risk that wholesale quantities of legally produced marijuana will leak into the black market. At the retail level, states strictly limit the amount of marijuana a person can buy to one ounce, with the exception of Maine where the limit is 2.5 ounces.¹⁹ In fact, the state of Colorado originally applied a lower limit for out-of-staters of one quarter of an ounce, but this provision was repealed in 2016.²⁰ Given these retail limits, it would be very difficult for sellers to compete with black market prices by buying retail amounts of marijuana an ounce at a time in Denver and

¹⁷ DeVeaux & Mostad-Jensen, *supra* note 13, at 1840.

¹⁸ *See id.* at 1838 (“Just as contaminants released into rivers flow across state lines, marijuana introduced into the stream of commerce from Colorado dispensaries will predictably flow into neighboring states through the simple expediency of placing lawfully purchased cannabis in vehicles which are then driven across state lines.”).

¹⁹ *See generally* NAT’L ALL. FOR MODEL STATE DRUG LAWS, MARIJUANA: COMPARISON OF STATE LAWS LEGALIZING PERSONAL, NON-MEDICAL USE (2016) [hereinafter Comparison of State Laws] (noting a 28.5 gram limit in California, which is approximately one ounce, a one ounce limit in Colorado, a 2.5 ounce limit in Maine, a one ounce limit in Massachusetts, a one ounce limit in Nevada, a one ounce limit in Oregon with a higher limit of eight ounces within a residence, and a one ounce limit in Washington state).

²⁰ *See* Ricardo Baca, *Tourists Visiting Colorado Can Now Buy a Lot More Weed Than They Ever Could Before*, THE CANNABIST (June 15, 2016), <http://www.thecannabist.co/2016/06/15/tourists-colorado-buy-weed/56244/> [<https://web.archive.org/web/20160617134013/http://www.thecannabist.co/2016/06/15/tourists-colorado-buy-weed/56244/>] (reporting on the change in Colorado’s law). For a discussion of the constitutionality of laws that treat residents and visitors differently with respect to the amount of marijuana they can buy, see Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279 (2014).

transporting it to Omaha. This is not to say the impact of current state legalization laws on marijuana use in neighboring states is zero. But there is little reason to believe it is or will be “substantial.”²¹

Part I begins by rebutting the claim that there is evidence legally produced marijuana is being diverted from legalization states for sale elsewhere.²² Part I then discusses in more detail why existing state legalization laws are unlikely to result in anything remotely approaching a significant increase in marijuana use or availability in neighboring states.²³ Finally, Part I briefly examines the conditions that *could* give prohibition states a legitimate reason to worry about being flooded with marijuana that was legally produced in other states—namely, a sharp reduction in the retail price of marijuana in legalization states in combination with a legalization law that did not strictly regulate the supply chain or cap the amount of marijuana that can be sold at retail.²⁴ Part II discusses why some states that have legalized marijuana might, counter intuitively, attract *illegal* marijuana growers.²⁵ Although a rise in illegal growers might result in an increase in illegal marijuana exports to prohibition states, this is a much different problem than that of diversion, and one that has a much smaller impact on the marijuana market in prohibition states. In the case of diversion, legalization states stand to benefit from sales destined for prohibition states, through tax revenues, legal marijuana jobs, and so forth. By contrast, illegal marijuana cultivation harms the states where the growers set up shop as much as the states where the marijuana is consumed.

I. WHY CURRENT LEGALIZATION LAWS ARE UNLIKELY TO IMPACT NEIGHBORS

A. *Claims of Widespread Smuggling, but No Evidence*

States have slowly but steadily legalized marijuana since the passage of California’s Compassionate Use Act in 1996—for medical use only at first and, beginning in 2012, for all adult use.²⁶ For the most part, state marijuana reforms have been met with a shrug from their neighbors. There have been occasional reports of police in prohibition states discovering ma-

²¹ Complaint of Nebraska & Oklahoma, *supra* note 10, at 25.

²² See *infra* notes 26–60 and accompanying text.

²³ See *infra* notes 61–88 and accompanying text.

²⁴ See *infra* notes 89–93 and accompanying text.

²⁵ See *infra* notes 95–125 and accompanying text.

²⁶ See Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 UC Davis L. Rev. 617, 620–24 (2016) (providing a brief history of state marijuana legalization efforts).

rijuana that had been legally purchased elsewhere.²⁷ Also, there have been longstanding concerns about marijuana being diverted from the gray market under California's almost completely unregulated (until recently) medical marijuana law.²⁸ But there was nothing to suggest that state legalization laws were of much concern to elected officials outside of their own borders.

This changed in December 2014, when Nebraska and Oklahoma sued Colorado over its marijuana legalization law in the United States Supreme Court, invoking the Court's original jurisdiction over cases between states.²⁹ Nebraska and Oklahoma alleged that Colorado's law was causing them "a direct and significant detrimental impact—namely the diversion of limited manpower and resources to arrest and process suspected and convicted felons involved in the increased illegal marijuana trafficking or transportation."³⁰ According to Nebraska and Oklahoma's complaint, their police officers had seen "a significant influx of Colorado-sourced marijuana."³¹ The complaint did not provide a basis for this allegation or any data about seizures of Colorado-sourced marijuana. The closest the complaint got to spelling out the nature of the threat that Colorado marijuana posed was its allegation that Nebraska and Oklahoma police "encounter[ed] marijuana on a regular basis as part of day-to-day duties," including during "routine stops of individuals who possess marijuana purchased in Colorado which, at the time of purchase, complied with [Colorado law]."³² In sum, according to the complaint, "[t]he detrimental economic impacts of Colorado Amendment 64 on the Plaintiff States, especially in regard to the increased costs for the apprehension, incarceration, and prosecution of suspected and convicted felons, are substantial."³³

The legal support for Nebraska and Oklahoma's lawsuit against Colorado was the Supremacy Clause; the pair of prohibition states argued that by legalizing marijuana, Colorado had created an obstacle to the enforcement of federal prohibition and so its law should be struck down as preempted.³⁴

²⁷ See *North Dakota v. Kuruc*, 846 N.W.2d 314, 325 (N.D. 2014) (holding that the defendants' "Washington medical marijuana prescriptions may not be used as an absolute defense" in North Dakota to possession or possession with the intent to deliver).

²⁸ See Erika Lewis, SB 1262: California Hashes Out Medical Marijuana Industry Regulation and Dispenses Greater Scrutiny of Physician Recommendations, 46 MCGEORGE L. REV. 273, 277–80 (2014) (discussing the absence of statewide medical marijuana regulations in California). California finally enacted the Medical Cannabis Regulation and Safety Act to regulate medical marijuana businesses in 2015. CAL. BUS. & PROF. CODE §§ 19300–19360 (West 2015).

²⁹ See Complaint of Nebraska & Oklahoma, *supra* note 10, at 1.

³⁰ *Id.* at 27.

³¹ *Id.* at 25.

³² *Id.* at 26.

³³ *Id.*

³⁴ Brief of Nebraska & Oklahoma, *supra* note 11, at 22–27.

The preemption question has been litigated in a handful of state courts, with most agreeing that the federal Controlled Substances Act does not preempt state medical and adult use marijuana legalization laws.³⁵ Without digressing too far beyond the focus of this article, very briefly, the reasoning behind these rulings has been that nothing about state legalization laws prevents the federal government from enforcing its own ban on marijuana.³⁶ Removing state penalties for marijuana possession and sale may make it harder to enforce prohibition, but only because the federal government can no longer rely on state resources to help it with the task. And refusing to help the federal government accomplish its goals cannot constitute an obstacle for preemption purposes because the anti-commandeering principle makes it unconstitutional for the federal government to conscript states into enforcing federal law.³⁷ Nebraska and Oklahoma disagree with this position, of course, but their lawsuit against Colorado came to an end before it even truly began when the Supreme Court declined to grant review.³⁸

That the Supreme Court declined to hear Nebraska and Oklahoma's lawsuit does not mean there is no merit to their claims of harm. Indeed, the idea that legalizing marijuana in one state would result in an influx of the substance into other states would seem to be a matter of common sense.

³⁵ See, e.g., *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016) (holding that “[s]tate medical marijuana laws that provide limited state-law immunity may not conflict with [the Controlled Substances Act]” but “[t]o affirmatively require [employers] to accommodate” employee’s marijuana use would be preempted); *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 426 (Ariz. Ct. App. 2016) (holding that the Controlled Substances Act did not preempt Arizona’s medical marijuana law under obstacle preemption because it “[did] not prevent the United States from enforcing federal law, but instead provide[d] a limited state-law immunity”); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014) (holding that Michigan’s medical marijuana law was not preempted because it did not “purport to alter the [federal criminalization of marijuana], or to interfere with or undermine federal enforcement of [the federal Controlled Substances Act]”). But see *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (holding that although state laws that merely exempt people from punishment for marijuana activity are not preempted, “to the extent that [the statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it ‘without effect’”) (citation omitted).

³⁶ See *supra* note 35 and accompanying text; see also Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 27–28 (2013) (“Neither do state officials somehow violate federal law when, pursuant to state law, they refuse to lift a finger against marijuana.”). But see Denning, *supra* note 13, at 580 (“At the risk of seeming obtuse, I find it self-evident that state legalization regimes permitting marijuana use for medical or recreational purposes present a substantial obstacle to the implementation of a federal law that (1) recognizes no medical use for marijuana and (2) seeks to eliminate the national market in marijuana by banning all production, possession, and transfer.”).

³⁷ See Mikos, *supra* note 36, at 15–17 (discussing the relationship between the anti-commandeering doctrine, preemption, and state marijuana legalization laws).

³⁸ For an overview of the lawsuit and the Supreme Court’s decision not to hear it, see Gorod, *supra* note 13, at 607–14.

After all, in contrast to “other state vice-legalization experiments such as gambling, prostitution, and prize-fighting,” marijuana legalization laws “authorize[] the trafficking of *goods* that can easily cross state lines”³⁹ It would seem only natural that “marijuana introduced into the stream of commerce from Colorado dispensaries will predictably flow into neighboring states”⁴⁰ Before long, a prohibition state bordering a legalization state may “find[] itself awash in marijuana purchased legally [in the legalization state] then brought back into the [prohibition] state.”⁴¹ To the extent increased marijuana use results in increases of public health and law enforcement costs,⁴² one state’s marijuana legalization law might impose a genuine burden in neighboring states, just as Nebraska and Oklahoma claimed.

Nebraska and Oklahoma’s complaint was short on details with respect to the “increased costs” they claimed they were suffering as a result of Colorado’s law.⁴³ They alleged that police in both states had seen an uptick in arrests of people in possession of marijuana that had originated in Colorado.⁴⁴ The two states, however, did not say how many of these arrests they had made or how much Colorado-sourced marijuana they had seized.

Although Nebraska and Oklahoma’s complaint provided few details, some commentators have argued that the available evidence suggests that “large quantities of Colorado cannabis are now being diverted into” other states.⁴⁵ The statistical data in support of this claim comes from the Rocky Mountain High Intensity Drug Trafficking Area (“HIDTA”) task force—an entity whose continued existence and federal funding stream is contingent in substantial part on the extent of the “drug trafficking threat” in its jurisdiction.⁴⁶

³⁹ DeVeaux & Mostad-Jensen, *supra* note 13, at 1837–38.

⁴⁰ *Id.* at 1838.

⁴¹ Denning, *supra* note 13, at 583.

⁴² See Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause’s Extraterritorial Doctrine Threatens the Marijuana Legalization Experiment*, 58 B.C. L. REV. (forthcoming 2017) (manuscript at 27–28) (arguing that increased marijuana use results in increased public health costs).

⁴³ Complaint of Nebraska & Oklahoma, *supra* note 10, at 26.

⁴⁴ *See id.*

⁴⁵ DeVeaux & Mostad-Jensen, *supra* note 13, at 1839.

⁴⁶ 21 U.S.C. § 1706(i)(2)(A) (2012) (outlining the process for HIDTA program budget submissions and requiring the submission of a budget justification that explains, among other factors, “the reasons for the proposed funding level [and] how such funding level was determined based on a current assessment of the drug trafficking threat in each high intensity drug trafficking area”); see 21 U.S.C. § 1706(d) (outlining factors that determine whether to designate an area of the United States as a high intensity drug trafficking area); DeVeaux & Mostad-Jensen, *supra* note 13, at 1857–59 (discussing Rocky Mountain HIDTA studies of Colorado’s marijuana law).

The findings in the Rocky Mountain HIDTA's most recent report on Colorado's legalization law sound pretty damning at first blush. According to the Rocky Mountain HIDTA, "[h]ighway patrol interdiction seizures of Colorado marijuana" rose thirty-seven percent between 2013 and 2015.⁴⁷ Also in 2015, officers seized "marijuana from Colorado" bound for thirty-six different states.⁴⁸ Finally, according to the report, "[i]n the three years (2013-2015) of legalized recreational marijuana in Colorado, highway patrol seizures have resulted in approximately 4.5 tons of Colorado marijuana being seized."⁴⁹ These numbers paint a picture of Colorado as "a principal gateway through which marijuana enters the black markets of other states."⁵⁰ Upon closer inspection, however, the HIDTA report findings tell us almost nothing about the impact of Colorado's legalization law on other states.

First, and most importantly, even though the figures in the Rocky Mountain HIDTA report are contained in a chapter titled "*Diversion of Colorado Marijuana*,"⁵¹ the report does not distinguish between Colorado marijuana that was legally grown but diverted and marijuana that was illegally grown. This is a critical flaw that renders HIDTA's findings effectively worthless. State legalization laws, including Colorado's, do not make it legal for any resident to grow an unlimited amount of marijuana without oversight; only state licensees who abide by detailed regulations designed to prevent diversion and ensure product safety can legally grow more than a personal use amount of the plant. Marijuana that was legally grown in Colorado but diverted can be properly attributed to Colorado's legalization law. Marijuana that was illegally grown in Colorado and shipped elsewhere cannot because it was against Colorado's legalization law to grow it. Yet, in the report, all of it is classified as "Colorado marijuana." The phrase seems designed to mislead readers into concluding that the 4.5 tons of Colorado marijuana interdicted between 2013 and 2015 was legally produced under Colorado's legalization law, then diverted, and then seized en route to other states. In reality, however, it seems likely almost all of the Colorado marijuana described in the Rocky Mountain HIDTA report was *illegally grown*, and so not a product of Colorado's legalization law.

⁴⁷ ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 109 (2016) [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO].

⁴⁸ *Id.*

⁴⁹ *Id.* at 111.

⁵⁰ DeVeaux & Mostad-Jensen, *supra* note 13, at 1858.

⁵¹ LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 109 (emphasis added).

It is impossible to tell from the data in the HIDTA report just how much, if any, of the Colorado marijuana it discusses was legally grown and then diverted. The report's anecdotal accounts suggest most of the Colorado marijuana interdicted by other states was as illegal to grow in Colorado as it would have been to grow in Nebraska or Oklahoma. None of the sixteen examples contained in a section of the report titled "A Few Examples of Interdiction," for example, claim that the interdicted marijuana was legally produced in Colorado.⁵² The report's silence on this point speaks volumes—if any of the seizures had involved marijuana that the police thought was legally grown in Colorado, surely that fact would have been noted. Also telling, in the report's examples in a separate section on investigations into Colorado marijuana, the only one to claim diversion of legally produced marijuana is of dubious quality. The report states that "an eye witness" saw a "young man walk[] happily out the front door of [a] medical marijuana dispensary with one entire pound of marijuana in his hand."⁵³ If diversion of legally produced marijuana were at all widespread, presumably HIDTA's report would include more than this single unsubstantiated example.

Of course, HIDTA's data still appears to show that seizures of marijuana grown in Colorado and bound for other states increased following legalization. If Colorado's legalization law is not responsible for this phenomenon, then what is? Two possible explanations that have nothing to do with Colorado's law present themselves. First, after Colorado legalized marijuana, some police officers in neighboring states have been profiling cars with Colorado license plates in order to hunt for marijuana.⁵⁴ Kansas police officers have gone so far as to argue (unsuccessfully) before the Tenth Circuit Court of Appeals that a driver's "status as a resident of Colorado" gave them cause to search his car "because Colorado is 'known to be home to medical marijuana dispensaries.'"⁵⁵ The increase in interdicted Colorado marijuana observed in the HIDTA data could simply reflect the fact that out-of-state police have been stopping and searching a larger number of drivers with Colorado license plates following passage of the state's legalization law. In other words, the thirty-seven percent increase in "[h]ighway

⁵² See *id.* at 113–15.

⁵³ *Id.* at 121.

⁵⁴ See, e.g., Michael Roberts, *Stop Pot Profiling by Colorado License Plate, Court Tells Kansas Troopers*, WESTWORD (Aug. 24, 2016), <http://www.westword.com/news/stop-pot-profiling-by-colorado-license-plate-court-tells-kansas-troopers-8239472> [<https://perma.cc/X8H4-BRNX>].

⁵⁵ *Vasquez v. Lewis*, 834 F.3d 1132, 1137 (10th Cir. 2016). The Court stated that "it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate." *Id.* at 1138.

patrol interdiction seizures of Colorado marijuana”⁵⁶ between 2013 and 2015 does not necessarily mean there was a thirty-seven percent increase in Colorado marijuana being transported into other states, or indeed any increase at all. The numbers could just as easily have resulted from changed police practices and reflect an increase in stops and searches of cars with Colorado license plates.⁵⁷

Second, the increase in reported seizures of “Colorado marijuana” might reflect an increase in the *reporting* of seizures rather than an increase in *actual* seizures. The HIDTA report states that its data is derived from “interdiction seizures [that] are reported on a *voluntary* basis.”⁵⁸ It is possible that law enforcement groups have been taking greater care to report a higher percentage of their seizures of Colorado-sourced marijuana after legalization, perhaps in part because of encouragement from the Rocky Mountain HIDTA itself. In the first Rocky Mountain HIDTA report on marijuana legalization in Colorado in 2013, the group openly acknowledged that it had “contacted some law enforcement entities and requested voluntary reporting on those instances in which Colorado marijuana was seized in their jurisdiction.”⁵⁹ With HIDTA itself actively working to encourage more reporting of Colorado marijuana seizures, there is every reason to think the purported rise in seizures is at least partially due to more reporting and not more seizing.

In sum, the data cited as evidence that Colorado’s marijuana legalization law is having a significant impact in other states does not support the claim. The Rocky Mountain HIDTA’s findings do not even establish that there has been a significant increase in the amount of marijuana being exported from Colorado to other states, let alone that there is anything more

⁵⁶ LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 109.

⁵⁷ Drug arrest rates are just as likely to reflect policing practices as offense prevalence. This is because, unlike most other offenses, drug investigations are almost always police-initiated. A typical robbery investigation begins when the victim reports the crime to the police, but “drug violations will typically lack an injured party or complaining witness, someone who can set a criminal investigation in motion and provide relevant information that furthers the police inquiry.” Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 768–69 (2002). As one text for law enforcement officers on drug enforcement techniques explains, “[f]requently . . . drug enforcement agents must initiate their own cases with few initial leads.” MICHAEL D. LYMAN, PRACTICAL DRUG ENFORCEMENT 2 (3d ed. 2006). As a result, drug arrest rates can depend as much or more on enforcement decisions—how frequently and aggressively to seek consent to search during a traffic stop, for example—than on use rates. In the 1990s, for example, marijuana possession arrests skyrocketed, a trend that was likely the result of “selective enforcement decisions” as opposed to use rates. Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 2006, at 4.

⁵⁸ LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 109 (emphasis added).

⁵⁹ ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT: A PRELIMINARY REPORT 37 (2013).

than a negligible amount of marijuana that was legally grown in Colorado being diverted elsewhere.

In fairness to the claim that state legalization laws impact neighbors, there have been credible reports of people taking personal use amounts of marijuana across state lines.⁶⁰ It is not at all surprising that some of the tourists who visit a legalization state and buy marijuana there might take leftovers back home with them. Unlike the diversion of large quantities of marijuana for distribution, however, tourists returning to their state with small amounts of marijuana have an insignificant impact on marijuana use rates and black market prices. In addition, although it is possible that illegal marijuana growing has increased in states with legalization laws, as discussed below that is a much different problem than the widespread diversion of marijuana that was grown legally under state law.

B. Black Market Marijuana: Available and Affordable

As discussed above, there is not much evidence that significant quantities of legally produced marijuana are being diverted into other states. This might seem counterintuitive, but when one considers the easy availability of black market marijuana, along with the rules that are in place to prevent diversion in marijuana legalization states, it soon becomes clear that it would be tough to build a drug empire by smuggling legally produced marijuana into other states.

Marijuana use had been widespread in the United States long before states began passing legalization laws. Indeed, the failure of marijuana prohibition to reduce marijuana purity, price, and use rates is frequently cited as an argument for legalization.⁶¹ According to the National Survey on Drug Use and Health, as of 2013, 19.8 million Americans (7.5 percent of people over the age of twelve) were current marijuana users, defined as those who

⁶⁰ See, e.g., LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 122 (reporting that in January 2016, Nebraska police had “booked 23 possession of marijuana cases coming from Colorado” and implying that at least some of these cases involved “[l]icensed dispensary products”).

⁶¹ See, e.g., INT’L CTR. FOR SCI. IN DRUG POLICY, TOOLS FOR DEBATE: US FEDERAL GOVERNMENT DATA ON CANNABIS PROHIBITION 21 (2010) [hereinafter DATA ON CANNABIS PROHIBITION] (arguing that “[g]iven that cannabis prohibition has clearly failed to achieve its stated objectives and has also resulted in a range of serious unintended harms, regulatory models should be given urgent consideration”). Indeed, a similar argument is often made against the drug war more broadly. See, e.g., Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 246 (2000) (arguing that “[t]he war on drugs has failed” in part because despite “substantial federal spending to combat drugs, the number of casual and serious drug abusers has remained constant”).

use marijuana at least once a month.⁶² Of these, 8.1 million were daily or near-daily marijuana users.⁶³

With so many marijuana users in the United States, it should come as no surprise that marijuana is both relatively inexpensive and readily available despite prohibition laws. Regarding price, “even at today’s illicit-market prices, being stoned costs an occasional user without a developed tolerance to THC less than \$1 per hour.”⁶⁴ At these prices, a relatively heavy user—someone in “the top 10 percent of monthly users”—spends about the same amount on their marijuana habit as a “pack-and-a-half-a-day cigarette smoker paying Vermont retail prices spends on tobacco.”⁶⁵ Marijuana is also widely available, even for the group that prohibition is most intended to protect: minors. This is evidenced by the fact that “over the last 30 years of cannabis prohibition the drug has remained ‘almost universally available to American 12th graders,’ with approximately 80–90% saying the drug is ‘very easy’ or ‘fairly easy’ to obtain.”⁶⁶

In sum, states that make marijuana legal are not introducing a previously unobtainable good into the stream of commerce, or even one that is especially hard to get. They are attempting to replace a vast existing illegal black market in their states with a legal market. To be sure, even though black market marijuana is already easy to get and not especially expensive, legalization could result in significantly reduced prices, depending on how it is implemented.⁶⁷ And, depending on how far prices drop, it could one day become worthwhile for black market entrepreneurs to smuggle marijuana that was legally produced in one state into a prohibition state.⁶⁸

So far, however, the retail price of legally produced marijuana is not much less than the going rate on the black market and in many places it is higher. For example, one 2016 survey of sixty-six large cities in six states found that “only four cities have less expensive legal marijuana than black

⁶² U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1 (2014).

⁶³ *Id.*

⁶⁴ JONATHAN P. CAULKINS ET AL., RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 99 (2015) [hereinafter Rand Report].

⁶⁵ *Id.*

⁶⁶ DATA ON CANNABIS PROHIBITION, *supra* note 61, at 5.

⁶⁷ See Rand Report, *supra* note 64, at 139–40 (reporting that “if greenhouse farmers can grow marijuana like other crops, farm gate prices could fall precipitously, perhaps by 90 percent even relative to the lowest current wholesale prices” and that marijuana could be grown outdoors at an even lower cost). Moreover, the supply architecture, tax regime, and regulatory regime primarily determine marijuana retail prices. *Id.* at 110.

⁶⁸ Jonathan P. Caulkins & Brittany M. Bond, *Marijuana Price Gradients: Implications for Exports and Export-Generated Tax Revenue for California After Legalization*, 42 J. DRUG ISSUES 28, 28–41 (2012).

market marijuana” and in 52 of the cities surveyed, black market marijuana was at least 10% cheaper than legal marijuana.⁶⁹ This fact might seem strange because one of the goals of legalization is to eliminate the black market. There are a number of reasons marijuana prices have remained relatively high under current legalization laws, however, including the cost of complying with extensive regulations,⁷⁰ the difficulty in achieving economies of scale quickly and in a single-state market,⁷¹ and a federal tax penalty that applies to marijuana businesses because of its status as a Schedule I controlled substance.⁷² By contrast, the black market has “virtually no overhead costs other than the product itself.”⁷³ Of course, black market operators face the threat of arrest and prosecution that also makes it hard for them to enforce contractual agreements, achieve the benefits of large-scale manufacturing processes, and so on. Over time, this should allow the legal market to undercut the black market even with heavy regulation and high taxes. For now at least, legally sold marijuana is priced similarly to the black market stuff. Until that changes, smuggling it into other states for sale would be a money loser, not a moneymaker.

Very recently, it appears legal marijuana prices have finally begun to fall, at least in both Colorado and Washington.⁷⁴ As discussed below, however, even if the price of legally produced marijuana were much lower than it is today, the structure of existing state legalization laws would still make it very difficult to run a profitable smuggling business.

⁶⁹ Sean Williams, *The Great Marijuana Mystery That’s Likely to Leave Investors Disappointed*, THE MOTLEY FOOL (Apr. 17, 2016), <https://www.fool.com/investing/general/2016/04/17/the-great-marijuana-mystery-thats-likely-to-leave.aspx> [<https://perma.cc/E2SW-VEEV>]; see also Angela Dills, Sietse Goffard, & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalizations*, CATO INST.: POL’Y ANALYSIS, Sept. 2016, at 11 (discussing marijuana prices in Colorado, Oregon, and Washington and concluding that “[o]verall, these data suggest no major drop in marijuana prices after legalization”).

⁷⁰ Rand Report, *supra* note 64, at 123 (observing that “complying with all of the various and sundry costs of operating a legal enterprise” may make it difficult for legal marijuana businesses to compete with the black market).

⁷¹ *Id.* at 78 (“[A]s time goes on, as legal operators learn and become efficient, and as they expand and achieve economies of scale, their costs can drop dramatically.”).

⁷² I.R.C. § 280E (2012); see Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 530–34 (2014) (discussing this tax penalty and the problems it poses for marijuana businesses).

⁷³ Williams, *supra* note 69.

⁷⁴ Keith Humphreys, *The Mistake Most States Made When Legalizing Marijuana*, WASH. POST: WONKBLOG (Jan. 18, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/18/the-mistake-most-states-made-when-legalizing-marijuana/?utm_term=.c835fb9fae81 [<https://perma.cc/6P65-79EV>] (“The arrival of 2017 will bring many changes to the country, including falling marijuana prices in states that have legalized a recreational market.”).

C. How Current Legalization Laws Make Diversion Unlikely

With marijuana already available and relatively affordable in the black market, it is not possible to make easy money simply by driving to Seattle, buying marijuana at a retail store, and bringing it back to Missoula. Instead, would-be smugglers would need to be able to undercut the black market rate to make a business out of diverting legally produced marijuana to other states. The way state legalization laws have been set up so far, however, makes this very tough to do.

The most obvious possibility for undercutting the black market by smuggling legally produced marijuana out-of-state would be to buy it in bulk. If the wholesale price of legally produced marijuana were to fall substantially below the wholesale price of black market marijuana, smuggling could become rampant—that is, if smugglers could get their hands on legally produced marijuana at wholesale prices. Thus far, the states that have passed legalization laws make this difficult to impossible. State legalization laws tightly regulate and control the marijuana production and distribution process. This may be due in part to the fact that the DOJ’s non-enforcement guidelines suggest that “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states” is one of the actions that states must do to avoid federal interference.⁷⁵

Whatever the impetus, state legalization laws provide a great deal of protection against the diversion of wholesale amounts of marijuana. Most notably, the four states that have already implemented marijuana legalization—Alaska, Colorado, Oregon, and Washington—all require “seed-to-sale” tracking of the product.⁷⁶ The legalization laws in California, Maine, Massachusetts, and Nevada, which were passed by voters in 2016, have not yet been implemented with respect to marijuana manufacture and retail sale.

The system in Colorado provides an example. Colorado Department of Revenue regulations require seed-to-sale tracking, “formally called Marijuana Inventory Tracking Solution (‘MITS’).”⁷⁷ In the MITS system,

⁷⁵ Cole Memo, *supra* note 9, at 1.

⁷⁶ See Margaret Chon, *Tracemarks: A Proposed Information Intervention*, 53 HOUS. L. REV. 421, 451–52 (2015) (discussing the seed-to-sale tracking system in Washington); John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 678–79 (2015) (discussing Colorado’s tracking system); Ken Helm & Logan Leichtman, *Implementation of Oregon’s Measure 91 in the State Legislature*, 52 WILLAMETTE L. REV. 1, 26–27 (2015) (discussing Oregon’s seed-to-sale tracking system); Laurel Andrews, *Alaska Signs 5-year Contract with Marijuana Seed-to-Sale Tracking Company*, ALASKA DISPATCH NEWS (Mar. 11, 2016), <https://www.adn.com/cannabis-north/article/alaska-signs-5-year-contract-marijuana-seed-sale-tracking-system-company/2016/03/11/> [<https://perma.cc/5TPY-Z4CB>].

⁷⁷ Hudak, *supra* note 76, at 678.

Every plant in the market must be individually tagged and tracked as it moves through the commercial growth and distribution chain As each plant moves through the cultivation process, the tag stays with it from stage to stage. Eventually, flower is harvested and plants are combined to make batches. Cultivation facilities batch product by combining MITS tag numbers so that the product in any container or retail product can be traced by the batch number to see which plants are included.⁷⁸

Through this process, the “system offers the state the ability to track product in ways that far surpass product tracking in most other commodity markets in the U.S.”⁷⁹ As a result, the chances that legally grown marijuana will be diverted out of state before it reaches the consumer are incredibly low.⁸⁰ In addition to seed-to-sale tracking, the prospect of stiff federal penalties for a licensed producer caught diverting marijuana adds to the safeguards against wholesale diversion.⁸¹

The regulations to monitor the supply chain of legal marijuana compare very favorably to another product where diversion is a concern: guns. As one scholar recently observed, “[w]hile the federal government and forty states (including Colorado) have declined to mandate security measures for retail gun dealers, the Colorado constitution and regulations adopted pursuant thereto require security measures for recreational marijuana retailers.”⁸²

Of course, diverting marijuana from the grower or wholesaler is not the only way for legally produced marijuana to make its way into other states. After marijuana is sold at retail, the state is unable to track its movements. What is there to stop an enterprising Nebraskan from driving to Colorado and buying a large amount of retail marijuana to sell back home?

States that have legalized marijuana have limited the amount consumers can purchase and possess to one ounce, with the exception of Maine where the limit is two and a half ounces.⁸³ A one-ounce limit on marijuana

⁷⁸ *Id.*

⁷⁹ *Id.* at 679.

⁸⁰ *See id.*

⁸¹ *See* David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46 J. LEGAL STUD. 93, 97 (2017) (providing an overview of federal mandatory minimum penalties for drug crimes).

⁸² Andrew Jay McClurg, *In Search of the Golden Mean in the Gun Debate*, 58 HOW. L.J. 779, 803 (2015).

⁸³ *See supra* note 19 and accompanying text. To help prevent against diversion, Colorado initially adopted an even lower limit for non-residents—a quarter of an ounce—but the state repealed the lower limit in 2016. *See* Sam Kamin, *Lessons Learned from the Governor’s Task Force to Implement Amendment 64*, 91 OR. L. REV. 1337, 1344 (2013) (noting that the lower limit for

purchases makes it very hard for someone to turn a profit smuggling legally produced marijuana out of state. Consumers are unable to buy in large enough quantities to get a significant discount.⁸⁴ And, with the retail price of marijuana in legalization states similar to the retail price on the black market, smuggling non-discounted retail marijuana elsewhere for sale does not make much sense.⁸⁵ Even if the retail price of legal marijuana begins to drop, however, it would likely need to fall significantly for this sort of smuggling to become a viable business. This is because the cost of travel makes it impossible for sellers to profit from transporting smaller quantities of marijuana long distances, even if the substance is bought at a substantial discount relative to the black market. Two scholars explain this dynamic:

Suppose two people took 3 days to drive to California from 1,000 miles away, purchase a wholesale quantity of marijuana, and return. The direct cost of such a trip might be roughly US \$2,000 to US \$2,500. If the trip involved purchasing and reselling only 5 pounds, those tangible costs would explain the entire price gradient. That sets a rough floor on the minimum viable shipment size If the trip involved transporting 50 pounds, then these tangible costs would amount to only US \$40 to US \$50 per pound per 1,000 miles.⁸⁶

With marijuana sold in only one-ounce increments, acquiring enough marijuana to make smuggling trips worthwhile adds an additional cost and additional risk. To acquire five pounds of marijuana (eighty ounces), a person would need to buy from eighty different stores. Groups of smugglers working together could make the process more efficient. Still, the one-ounce limit poses a real barrier to undercutting the black market by smuggling retail marijuana, even if and when the retail price drops well below the black market price. Making serial purchases of marijuana from multiple stores not only adds to the cost in terms of manpower, but it also increases the risk of arrest.⁸⁷ And, of course, for a smuggler of legal marijuana bought

non-residents was intended to “make prohibitively difficult the accumulation of an amount of marijuana worth smuggling out of state”); *supra* note 20 and accompanying text.

⁸⁴ Rand Report, *supra* note 64, at 118 (noting that “vendors of both legal and illegal marijuana offer quantity discounts for bulk purchases” with the price per unit weight per pound approximately thirty-eight percent below the price per unit weight per ounce).

⁸⁵ See *supra* notes 68–73 and accompanying text.

⁸⁶ Caulkins & Bond, *supra* note 68, at 34–35 (citation omitted).

⁸⁷ See *id.* at 40 (concluding that the smuggling of legally-produced marijuana out of state would be profitable if purchased at wholesale prices but noting that “if suppliers were held accountable for documenting that all the marijuana leaving their premises was sold by legitimate retailers . . . diversion might be riskier and more difficult than straight up illegal production”).

at retail to compete with the black market, the cost of the legal retail marijuana would need to be competitive with the cost of wholesale black market marijuana.

This brings us, finally, to the case of end-user diversion. It would be naïve to think that none of the tourists who visit a legal marijuana state will take a little marijuana home with them. Inevitably, some visitors to marijuana states will purchase a little extra to take home. This sort of diversion of marijuana for personal use, however, will have a negligible effect on public health or the black market in other states. As with other intoxicants, the isolated or occasional use of marijuana does not present a public health problem.⁸⁸ Likewise, a person who legally buys marijuana in one state to consume back home does not thereby fuel the black market in her home state. Indeed, if anything, end-user diversion is likely to reduce the black market in the user's home state. If the buyer is already a marijuana user, the marijuana she bought legally in Colorado may substitute for marijuana she would have otherwise purchased on the black market at home.

D. What Would Make Smuggling Legal Marijuana Profitable?

As currently constituted, state legalization laws make it very difficult to profit by smuggling legally produced marijuana. If state marijuana legalization laws looked more like state liquor laws, however, smuggling could become a very lucrative business.

First, as two scholars explained in a paper written after California's first marijuana legalization ballot measure narrowly failed in 2010, without sufficient checks on diversion at the manufacturer or wholesale level, "[m]arijuana that is diverted from legal production—even after taxes are collected—would undercut current marijuana prices throughout most of the United States."⁸⁹ If it were possible for producers easily "to sell to brokers who claim to be supplying legitimate retail operations inside [a legalization state] when in reality they are diverting some to smugglers who (illegally) take the marijuana out of state," then marijuana smuggling would almost surely become widespread.⁹⁰ No system is foolproof and surely there are opportunities for diversion at the producer or wholesale level, even with seed-to-sale tracking. But so long as strict anti-diversion measures are in place, smuggling should be rare. If, however, legalization states decide to

⁸⁸ Beau Kilmer, *Recreational Cannabis—Minimizing the Health Risks from Legalization*, 378 NEW ENG. J. MED. 705, 705 (2017) ("Most adults who occasionally use cannabis find it pleasurable and don't experience substantial problems.").

⁸⁹ *Id.*

⁹⁰ *See id.*

begin loosening oversight of the supply chain, that one shift could make diversion widespread.

Second, even if legalization states maintain tight controls on the production and distribution of marijuana, widespread diversion could also become a problem if they eliminate or significantly relax the cap on retail purchases and if they do not adopt measures to keep retail prices relatively high. Treating marijuana like alcohol is a popular slogan for legalization campaigns. If marijuana legalization laws were true to that model, however, there would be no limit to how much marijuana a person could buy at retail. If legalization states were to move in that direction, consumers might be able to get bulk discounts from retailers.⁹¹ In addition, being able to buy in bulk would dramatically reduce the transaction costs for a would-be smuggler. If it were possible to buy five pounds of marijuana at once, instead of having to make eighty separate one-ounce purchases, smugglers could obtain marijuana efficiently with little risk. Of course, the price of marijuana would also be a significant factor. The retail price of marijuana would likely need to fall to around the price of wholesale black market marijuana for smuggling large amounts to make sense. Legalization states, however, also have a number of tools to keep marijuana prices high.⁹²

Even if people do begin to smuggle wholesale quantities of legally produced marijuana into prohibition states, that fact alone does not necessarily mean prohibition states will suffer much in the way of negative public health consequences. There are plenty of marijuana users in prohibition states already. It is certainly possible that marijuana smuggling could lower prices in a prohibition state without increasing, or at least without significantly increasing, use. If use remains steady but users just pay a little bit less than they did before, has a prohibition state suffered any damage? This is not to say that prohibition states do not have reason to be concerned about the possibility that smuggling from a legalization state could lead to a dramatic rise in use by its residents, but it is surely not a foregone conclusion. Indeed, the jury remains out on the extent to which marijuana use will increase even in states that have adopted legalization laws.⁹³

⁹¹ See *id.* at 29.

⁹² See generally Rand Report, *supra* note 64, at 98–101 (analyzing different options for regulating marijuana, including a discussion of how different regulatory and tax choices could be employed to help keep the price of legal marijuana relatively high).

⁹³ To date, it appears “that state marijuana legalizations have had a minimal effect on marijuana use and related outcomes.” ANGELA DILLS ET AL., DOSE OF REALITY: THE EFFECT OF STATE MARIJUANA LEGALIZATIONS 1 (2016), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf>. These early results may not reflect the impact of marijuana legalization laws on use rates over the long term, however.

II. LEGALIZATION AND ILLEGAL MARIJUANA GROWERS

Part I argues that it is unlikely that legally produced marijuana is being smuggled out of legalization states for sale elsewhere.⁹⁴ Despite alarmist rhetoric from Nebraska and Oklahoma and from the Rocky Mountain HIDTA about Colorado marijuana, there is simply no evidence that wholesale quantities of legally grown marijuana are being diverted from legalization states into the black market. Moreover, with the price of legal marijuana still nearly as much as in the black market, it would be nearly impossible to run a profitable business by buying legal marijuana at retail to export to prohibition states. In light of this, Nebraska and Oklahoma's lawsuit against Colorado seems to be based more on "political opposition to what Colorado is doing within its own borders, rather than genuine concern about the out-of-state effects of its in-state activities."⁹⁵

Even if state legalization laws continue to be effective at preventing against the diversion of *legally* grown marijuana to other states, however, prohibition states might still have a valid reason to be concerned about them. This is because there is evidence to suggest *illegal* marijuana growing operations have increased following the passage of legalization laws in at least some states.⁹⁶

Why would this be? Legalization is meant to eliminate the black market. Common sense, not to mention the events following the repeal of alcohol prohibition, make clear that legalizing a widely used product will decimate the black market over time.⁹⁷ With the risk of arrest and prosecution no longer priced into the product, legalization usually allows producers to operate more efficiently and reduce prices over time. In addition, even where legal prices are slightly higher than black market prices, many consumers are willing to pay a premium to buy a legal, regulated product.⁹⁸ Even a poorly implemented version of legalization should, in theory, noticeably reduce the black market. The idea that black market production of a product might increase following its legalization is, to put it mildly, counter-

⁹⁴ See *infra* notes 26–92 and accompanying text.

⁹⁵ Gorod, *supra* note 13, at 612.

⁹⁶ See LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 115–22.

⁹⁷ To be sure, there is still occasional smuggling and illegal production of heavily taxed legal goods like alcohol and tobacco in order to evade taxes, but it is a small fraction of the market. Babak A. Rastgoufard, *Too Much Smoke and Not Enough Mirrors: The Case Against Cigarette Excise Taxes and for Gasoline Taxes*, 36 URB. LAW 411, 429–30 (2004) (discussing smuggling cigarettes to evade taxes).

⁹⁸ See Rand Report, *supra* note 64, at 117, 135 (discussing why consumers may be willing to pay a premium to buy from the legal market and reporting that one survey in Washington found that "60 percent of use is by people who would pay a premium of \$2.50 or more per gram in order to access legal marijuana").

intuitive. There is a real possibility, however, that this has happened as an unintended product of at least some state legalization laws.

The key to understanding why illegal marijuana cultivation might increase in a state following legalization is “homegrows.”⁹⁹ Some state legalization laws allow individuals to grow small amounts of marijuana for personal use. In Colorado, for example, adults can legally grow up to six marijuana plants for personal use without a license.¹⁰⁰ Although there is a requirement that the marijuana be secured “in an enclosed, locked space,” homegrows are largely unregulated.¹⁰¹ Under Oregon’s legalization law, adults may grow up to four plants per residence.¹⁰² In the medical marijuana setting, some states are even more permissive. In Colorado, medical marijuana patients can grow up to 99 plants¹⁰³ and in California patients are permitted to grow as much marijuana as is “reasonably related to meet his or her current medical needs.”¹⁰⁴ By contrast, Washington did not legalize home cultivation for non-medical users; there, the only way to legally grow marijuana for recreational use is if one has a commercial license to do so.¹⁰⁵

In comparison to letting businesses openly manufacture and sell marijuana, letting people grow small amounts of marijuana in their homes can seem like an insignificant component of state legalization laws. It would be tough to make a living out of growing six marijuana plants for export to other states, or even for sale locally. Growing marijuana “is much more difficult than most people understand,” not to mention resource intensive; “[t]he investment—in hydroponics, proper lighting, and humidity controls—can be substantial.”¹⁰⁶ It would seem, then, that home marijuana cultivation would be left mostly to hobbyists, much like home-brewing by beer enthusiasts. Indeed, some legalization skeptics have suggested that states consider making it legal to possess and grow small amounts of marijuana

⁹⁹ See Hudak, *supra* note 76, at 669.

¹⁰⁰ COLO. CONST. art. XVIII, § 16(3)(b).

¹⁰¹ *Id.*; see Hudak, *supra* note 76, at 670 (stating that “the state has done little to regulate homegrows, in large part because the amendment’s language is clear”).

¹⁰² Comparison of State Laws, *supra* note 19, at 42.

¹⁰³ See Rachel Allen, *Local Government Regulation of Personal Marijuana Grows*, 94 DENV. L. REV. ONLINE 1, 1-2 (2017), <http://www.denverlawreview.org/dlr-onlinearticle/2017/1/25/local-government-regulation-of-personal-marijuana-grows.html> [<https://perma.cc/PR5S-3HUP>] (discussing Colorado’s rules regarding medical marijuana cultivation).

¹⁰⁴ *People v. Kelly*, 47 Cal.4th 1008, 1049 (2010).

¹⁰⁵ Comparison of State Laws, *supra* note 19, at 46.

¹⁰⁶ David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL’Y REV. 359, 377 (2014).

while continuing to prohibit commercial sales as a middle ground between legalization and prohibition.¹⁰⁷

There is little evidence that small marijuana homegrows that comply with state law have become a problem in the states that permit them. There is, however, reason to “worry that homegrowers may grow *more* marijuana than they are allowed and present an opportunity to divert product to illegal markets in Colorado or markets across state lines.”¹⁰⁸ Indeed, this is one area where the Rocky Mountain HIDTA report makes a credible case. The HIDTA report includes a section with a number of examples of “investigations involving Colorado marijuana.”¹⁰⁹ Many of them involve illegal growers attempting to use Colorado’s legalization law as cover for their operations.¹¹⁰ The HIDTA report quotes a DEA agent who describes the problem of illegal marijuana growers in Colorado: “‘They can kind of hide in plain sight . . . They don’t try to abide by the law in any way. For a while, they were going into warehouses. Now they are just going into homes.’”¹¹¹ Similarly, in March 2017, Colorado prosecutors brought charges against 16 people, including some with state licenses, for operating an “alleged pot ring” that “used houses and properties in places such as Colorado Springs, Castle Rock, Elbert County and Denver to cultivate cannabis and then make high-dollar deals to sell it in Illinois, Arkansas, Minnesota and Missouri.”¹¹²

The apparent rise in illegal marijuana cultivation in states like Colorado begs the question: why should allowing people to grow small amounts of marijuana legally make it any easier to grow, say, sixty plants illegally?¹¹³ Growing marijuana in large amounts is still illegal after all. If anything, it might seem that legalizing the cultivation of small amounts would make life tougher for large-scale illegal growers. By freeing up resources that the police might have spent on arresting people for growing a plant or two, the

¹⁰⁷ Rand Report, *supra* note 64, at 57–59 (discussing allowing adults to grow their own marijuana as a middle ground option between legalization and prohibition).

¹⁰⁸ Hudak, *supra*, note 76, at 670 (emphasis added).

¹⁰⁹ LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 115.

¹¹⁰ *See id.* at 116 (claiming that “[o]rganized crime elements with out-of-state ties increasingly are using Colorado homes to grow large amounts of marijuana illegally for transport and sale across the nation”).

¹¹¹ *Id.* at 117.

¹¹² Jesse Paul, *Eight of 16 People Indicted in Colorado Marijuana Trafficking Operation Listed as Having State Pot Licenses*, DENVER POST (March 24, 2017), <http://www.denverpost.com/2017/03/24/denver-marijuana-smuggling-operation-medical-marijuana-licenses/>.

¹¹³ Although anecdotal evidence suggests this is the case, there is insufficient data to know for sure how much—if at all—illegal cultivation has increased. POLICE FOUND., COLORADO’S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY: A PRACTICAL GUIDE FOR LAW ENFORCEMENT 9 (2015) (“Law enforcement leaders in focus groups convened by the Police Foundation warned that until there is a statewide data collection system, it will not be possible to fully understand the impact of legalized marijuana and related crime in the state of Colorado[.]”).

police could put more time into investigating large-scale illegal growers.¹¹⁴ Of course, it seems just the opposite is happening.

The reason legalizing small homegrows can help illegal growers “hide in plain sight”¹¹⁵ has a lot to do with search and seizure law. Once it is legal to grow six marijuana plants, information that someone is growing marijuana in a home will not be enough for the police to get a warrant to search the house. This is because evidence that someone is growing marijuana no longer gives the police probable cause to believe a crime has been committed.¹¹⁶ Instead, to get a warrant, the police will need some evidence of an *illegal* marijuana grow—a reason to think that the grower is cultivating more than six plants. This is no easy task.¹¹⁷

A 2015 report from the Police Foundation and the Colorado Association of Chiefs of Police highlights the impact that Colorado’s legalization law has had on law enforcement investigative authority.¹¹⁸ According to the report, “Colorado police officials interviewed by the Police Foundation said one of the biggest concerns for law enforcement is attempting to establish probable cause for a search warrant under the conflicting laws regulating medical and recreational marijuana.”¹¹⁹ This dynamic makes a state that has legalized homegrows an attractive place for an illegal grower to set up shop. By making it legal for a person to grow four marijuana plants in her home, it becomes harder for the police to catch someone who is illegally growing forty plants in her home. The reduced risk of getting caught could give illegal growers in a legalization state substantial advantage over illegal growers in prohibition states.

Even if homegrow legalization has led to an increase in illegal production for export, the impact on black market prices is likely to be relatively small. It may be easier for illegal marijuana growers to evade detection in Colorado than in Nebraska and Oklahoma. They still risk arrest, however,

¹¹⁴ See Rand Report, *supra* note 64, at 42 (“Enforcement of laws against marijuana use and distribution imposes costs.”).

¹¹⁵ LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 117 (quoting DEA agent Barbra Roach).

¹¹⁶ See Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 768–70 (2016) (discussing the impact of marijuana legalization on police investigative authority). Although the scent of marijuana alone does not give the police probable cause to believe a crime has been committed where marijuana is legal, “the odor of marijuana is [still] relevant to the totality of the circumstances test and can contribute to a probable cause determination.” *People v. Zuniga*, 372 P.3d 1052, 1059 (Colo. 2016).

¹¹⁷ POLICE FOUND., *supra* note 113, at 17 (“It is difficult for Colorado law enforcement to prove when a marijuana cultivation site is producing for the gray market.”); Kreit, *supra* note 116, at 769–70.

¹¹⁸ See POLICE FOUND., *supra* note 113, at 9–16.

¹¹⁹ *Id.* at 14.

and that risk is priced into the product before they send it out for distribution. Black market prices might still decline but not by nearly as much as they would if there were widespread diversion of legally produced marijuana.

Illegal marijuana growing operations in legalization states show that the horizontal federalism implications of state marijuana legalization are not nearly as straightforward as Nebraska and Oklahoma would have it. The narrative that Colorado's legalization law has flooded neighboring states with legally produced marijuana simply does not hold up. There is no evidence that wholesale quantities of legally produced marijuana have been smuggled into prohibition states on a widespread basis. And, given the economic dynamics and the regulations in place in legalization states, there is little reason to believe legal marijuana smuggling will become a significant problem anytime soon. To be sure, Nebraska and Oklahoma might still be justified in blaming Colorado's legalization law for a rise in illegally produced Colorado marijuana coming across the border. The fact that it is harder for the police to catch someone illegally growing marijuana in Colorado than it was before is surely an unintended consequence of legalization, but it is a consequence nonetheless. If illegal growers are able to more efficiently operate in legalization states like Colorado, this should decrease black market prices somewhat in prohibition states, which in turn *could* potentially increase use in those states.

Yet that is only half of the story. When it comes to illegal marijuana growing operations in Colorado, Colorado is a victim, too. If legally produced marijuana were being diverted from a legalization state, it might have an incentive to look the other way in order to collect the additional tax revenues. By contrast, illegal marijuana grow operations harm the states where the cultivation takes place—by causing property¹²⁰ or environmental¹²¹ damage, for example—without providing much in the way of benefits. Indeed, in black markets, producer states may very well shoulder significantly more costs from illegal production than consumer states do from illegal consumption.¹²² As a result, states like Colorado have as much of an inter-

¹²⁰ See DRUG ENFORCEMENT ADMINISTRATION, RESIDENTIAL MARIJUANA GROWS IN COLORADO: THE NEW METH HOUSES?, DEA-DEN-DIR-041-16 at 3 (2016) (“Colorado homes where marijuana is grown often sustain extensive structural damage.”).

¹²¹ See Michael Vitiello, *Legalizing Marijuana and Abating Environmental Harm: An Overblown Promise?*, 50 UC DAVIS L. REV. 773, 791-96 (2016).

¹²² See Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661 (2010) (arguing that drug producer and transit countries like Mexico have experienced disproportionate costs from enforcing drug prohibition in comparison to consumer countries like the United States).

est, if not more, in combatting illegal marijuana grows within their borders as states like Nebraska and Oklahoma have in stopping exports.¹²³

Importantly, for purposes of interstate relations, any increase in illegal marijuana grows in Colorado is as much a creature of other states' prohibition laws and their inability to stifle demand for marijuana by their residents as it is of Colorado's homegrow provision. If marijuana were legal nationwide or if prohibition states were able to effectively stifle demand for marijuana, the market for illegally produced marijuana would quickly disappear. The only reason it is lucrative for people to use Colorado homes to illegally grow large amounts of marijuana for transport and sale across the nation is that other states have not yet legalized production themselves.¹²⁴ So perhaps Colorado has as much reason to be upset with Nebraska and Oklahoma as Oklahoma and Nebraska have to be upset with Colorado; if Nebraska and Oklahoma would adopt their own regulatory scheme for marijuana, Colorado might not have to worry about "[o]rganized crime elements with out-of-state ties" moving in to set up illegal growing operations.¹²⁵

CONCLUSION

States with marijuana legalization laws have begun to worry some of their neighbors. This article argues that, as currently constituted, these fears are largely misplaced. As constructed, marijuana legalization laws make it unlikely that legally produced marijuana will be diverted to other states for sale.

Still, prohibition states' concerns about marijuana legalization are not entirely misplaced. States that permit homegrowing may have, unintentionally, made it easier for illegal marijuana growers to hide in plain sight, thereby reducing the price of marijuana on the black market. Moreover, if legalization laws were not as strict as they are today, smuggling of legally produced marijuana into prohibition states could one day become widespread. Prohibition states that hope to prevent against this, however, are not well served by trying to turn back time. Barring a dramatic reversal in public opinion or a long-shot preemption ruling from the Supreme Court, state marijuana legalization laws are not going away. Prohibition states that ac-

¹²³ The Colorado legislature 's recent effort to limit the amount of marijuana medical patients can grow shows the state is taking the problem of illegal marijuana growing quite seriously. Kristen Wyatt, *Colorado House Gives Prelim OK to Lower Limit: 16 Marijuana Plants Per Residence*, ASSOCIATED PRESS (Mar. 10, 2017) (reporting on the legislatures effort to limit the amount of marijuana medical patients may grow in order to combat unlicensed marijuana growing operations).

¹²⁴ See LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 47, at 116.

¹²⁵ *Id.*

cept this fact can minimize the risk of diversion by lobbying the federal government to establish rules that protect their interests. Although it is unlikely that federal marijuana law will change in the next year or two, at some point in the future, Congress will take on the task of reconciling federal law and state marijuana legalization. If federal law were to take a completely hands-off approach to marijuana policy, as some advocates have argued, it would be very difficult for prohibition states to prevent against smuggling from states where it is legal. If, however, states were given the option of opting out of federal prohibition only so long as they followed certain ground rules,¹²⁶ prohibition states would have leverage to keep the current safeguards against diversion in place and, perhaps, even strengthen them.

¹²⁶ See Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. REV.* 74 (2015) (proposing that the federal government allow states that meet certain federal criteria to opt out of the Controlled Substances Act's provisions that relate to marijuana). For a discussion of other possible options for reconciling federal and state marijuana laws, see, e.g., Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 *CASE W. RES. L. REV.* 689 (2015).