# CHRONIC FAILURE: HOW AND WHY ENACTMENT OF INITIATIVE 502 IS DEMONSTRATIVE OF THE CONTINUED SHORTCOMINGS OF MARIJUANA LEGALIZATION

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*This Comment expounds upon two issues within Initiative 502 ("I-502") that coalesce to reveal that this is another failed attempt to legalize personal marijuana consumption. The bill also creates an impossible situation for a legalized market to exist, with the whims of the current president determining the efficacy of its goals. The first issue to be waded through is the "government – business" relationship. As I-502 stands now, marijuana growth and distribution businesses in Washington state open themselves up to federal government interference and prosecution. This creates a failed business model that will serve as nothing more than an experiment; incentivizing pre-enactment marijuana producers to continue operating within the illegal black market, which reduces the tax income that the state will realize, and stymies attempts to properly fix the price of marijuana throughout the state. Issue number two revolves around the "employer – employee" relationship, and how I-502 gives employees no protection from termination for off-site use. Employers will continue to be able to regulate on-site and off-site use of marijuana under federal authority, and this creates issue for employees that wish to use the drug recreationally off-site without repercussions.*



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## I. INTRODUCTION

Marijuana legislation is a constantly evolving process. As a hot-button issue for some time now, current case law and statutory authority will be shaped and construed to meet the whims of the various states over the course of the next decade. This comment is a preemptory analysis of the issues that will arise as a result of the recently approved Washington state legislative measure Initiative 502 (I-502).[1] I-502 decriminalizes simple possession and recreational use of marijuana in Washington,[2] while also creating a comprehensive regulatory system that will oversee a sustainable and profitable state-sponsored growth and distribution mechanism.[3] Prior to the passing of I-502, various states universally took the approach that the first step in marijuana decriminalization was to legalize medicinal use.[4] Both forms of marijuana legalization – recreational and medicinal – directly conflict with federal law, and Section II of this Comment gives a comparative background analysis of how state and federal enforcement agencies have dealt with this confrontation over the

[1] 2013 Wash. Legis. Serv. Ch. 3 (I.M. 502) (West).

[2] *See* I-502, Part III.20.3 ("The possession . . . of useable marijuana . . . is not a violation of . . . Washington state law").

[3] *See generally id.* Part III.4-19 (listing each amendment in I-502 that, when combined together, creates the state-sanctioned marijuana business).

[4] As of 2008, twelve states had enacted some form of marijuana legalization for medicinal purposes. *See generally* ALASKA STAT. § 17.37.10 (2007); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006); COLO. REV. STAT. § 0-4-287 (2003); HAW. REV. STAT. § 329-121 (2008); MICH. COMP. LAWS § 333.26421 (2008); MONT. CODE ANN. § 50-46-1 (2007); NEV. REV. STAT. § 453A.010 (2008); N.M. STAT. § 30-31C-1 (2007); OR. REV. STAT. § 475.300 (2007); R.I. GEN. LAWS § 1-21-28.6 (2006); VT. STAT. ANN. tit. 18, § 4471 (2003); WASH. REV. CODE ANN. § 69.51A.005 (West 2011).

past twenty years as states move to legalize marijuana.

I-502 puts in place a state-regulated but privately operated supply chain. Private individuals and corporations will have to actually build the business from the ground up, whether it is the growth, distribution, or direct sale of marijuana. Sections III(A) and (B) look at the failed business model that I-502 purports to create. For the model to work, incentives must exist beyond the driving factor of money for private individuals and companies to invest in this supply chain. However, the taxes levied upon the businesses, the inability to deduct expenses, and the state-regulated potency levels will collectively diminish profits and encourage black-market producers and distributors to remain in the market.[5] When money is the driving factor, these additional problems serve to curb that incentive. More importantly, entities attempting to take advantage of this business opportunity face significant issues such as the continuous threat of federal crackdown. Simply put, there is little incentive for a current producer[6] to enter this structure, and even less incentive for the everyday citizen or company to enter.

Furthermore, I-502 provides no protection to employees against adverse employment actions. Employees will remain subject to the current federal drug-free workplace standards, and employers will retain the right to fire them for violations. What is troubling is that a "violation" can result from on-site *or* off-site usage because an employer need only point to a failed drug test and not actual impairment. Currently, impairment testing is based off of Driving Under the Influence ("DUI") standards, which merely look for traces of the substance rather than actual impairment. This ultimately becomes a problem since marijuana stays in a user's system for approximately one month. Section III(C) elaborates on the misguided parallels between alcohol and marijuana and how laws implemented to combat marijuana-related DUIs are misguidedly based upon current understanding and application of alcohol standards.[7] Impairment tests are an inexact science, and current testing methodology does not accurately reflect marijuana impairment. By incorporating an inherently biased

[5] *E.g.*, Steve Hargreaves, *Marijuana dealers get slammed by taxes*, CNNMONEY (Feb. 25, 2013, 3:17 PM), http://money.cnn.com/2013/02/25/smallbusiness/marijuana-tax/index.html (noting the tax burden that plagues legal marijuana businesses, while black market businesses pay no tax).

[6] A "current producer" is essentially what the layperson knows as a drug dealer in some form. It is a person that was growing, distributing, or selling marijuana illegally prior to the passage and implementation of I-502.

[7] *Cf.* Paul Davenport, *Ariz. court ruling upholds DUI test for marijuana*, THE DENVER POST (Feb. 13, 2013, 1:49 PM), http://www.denverpost.com/news/marijuana/ci_22582743/ariz-court-ruling-upholds-dui-test-marijuana (noting that courts have decided that legal marijuana users driving with marijuana metabolites in their system can be prosecuted for driving under the influence even when there is zero evidence of actual impairment).

threshold level into current law to deal with DUI violators, this flawed methodology will become the accepted test. This test will be put in place to the extreme detriment of employees that engage in off-site use. Employees that use the drug at home may still be fired if the drug is in their blood when they are tested on-site.[8] Employers are rightly concerned with on-site use and impairment, but under I-502 and current common law, an employer can use these flawed testing methods to demonstrate that an employee is "impaired" at work even when he or she is not. State-level legalization does not combat this injustice. In its current form, I-502 is not so much a step in the right direction as it is applying a Band-Aid to a severed hand. For I-502 to operate properly, it is paramount that it includes language that protects employees' off-site use. The system should not be implemented until there is a scientifically sound and unbiased testing method that can discern between current marijuana use or impairment and mere presence in the bloodstream of metabolites.

This Comment concludes with the simple argument that I-502 is inadequately structured to realize its intentions. The effectiveness of the law is limited to one area: decriminalization at the state level of minor personal use. By incorporating a business model that is the polar opposite of risk-averse, and forgoing protections that would allow citizens to engage in a legal activity without fear of losing their jobs, encroachment upon the private life of the voters remains insurmountable. By fleshing out the issues within I-502, this Comment will serve as a guide for further legislative efforts in every state, including the changes necessary for I-502 to function as it was intended to.

## II. THE EVOLUTION OF MARIJUANA LEGALIZATION LEGISLATION

Over the past twenty years, multiple states have enacted legislation that chips away at the criminalization of marijuana,[9] converging to bring about a complete legalization of marijuana in Washington state on December 6, 2012.[10] Until now, other attempts at de jure legalization have

[8] *E.g.*, Sharon Salyer, *Even if I-502 passes, pot use could cost your job*, HERALDNET (Oct. 31, 2012, 12:01 AM), http://www.heraldnet.com/article/20121031/NEWS01/710319903?page=single (exploring how employers are not distinguishing between actual impairment, and presence of inactive metabolites in the blood, leading one to believe people will be fired for "on-site" use even when there has been none).

[9] *See generally,* Medical Use of Marijuana Act (MUMA), WASH. REV. CODE § 69.51A (2011) (legalizing medical marijuana in Washington State); Compassionate Use Act (CUA), CAL. HEALTH & SAFETY CODE § 11362.5 (West 2011) (legalizing medical marijuana in California); OR. REV. STAT. § 475.300 (1999) (legalizing medical marijuana in Oregon).

[10] I-502 (decriminalizing personal possession, and purporting to create a state-sanctioned

failed,[11] and incremental measures have been met with staunch resistance by federal agencies.[12] The judiciary has been forced to sift through each legislative measure as it is challenged before determining its applicability in light of existing federal law.[13] Challenges to federal enforcement have largely been disregarded, and I-502 is no different.

### *A. Categorization of Marijuana as a Schedule I Narcotic Under the Controlled Substances Act of 1970*

Marijuana has been federally banned as a Schedule I narcotic since the inception of the Controlled Substances Act (CSA) in 1970.[14] Schedule I narcotics are the most restricted of all federal substances, and marijuana lies within the group that includes heroin, LSD, and MDMA (ecstasy).[15] The CSA is a federal statute regulating the manufacture, importation, possession, use, and distribution of narcotic substances.[16] It is within the purview of the CSA for the federal government to conduct raids and

marijuana business).

[11] *E.g.*, Join Together Staff, *Ballot Questions: Marijuana Legalization Fails in Colorado, Nevada; Ohio Passes Comprehensive Smoking Ban*, THE PARTNERSHIP AT DRUGFREE.ORG (Nov. 8, 2006), http://www.drugfree.org/join-together/alcohol/ballot-questions-marijuana (reporting on the failed marijuana legalization efforts in both Colorado and Nevada during the 2006 elections); David Crary & Lisa Leff, *California voters reject marijuana legalization*, ASSOCIATED PRESS (Nov. 3, 2010), http://www.washingtontimes.com/news/2010/nov/3/california-voters-reject-marijuana-legalization/ (noting that California voters rejected a ballot proposition to legalize marijuana in 2010).

[12] Drug Enforcement Agency, *The DEA Position on Marijuana*, DEPARTMENT OF JUSTICE 1, 54 (Apr. 2013), http://www.justice.gov/dea/docs/marijuana_position_2011.pdf ("During 2009, the DEA's Domestic Cannabis Eradication/Suppression Program supported the eradication of 9,474,867 plants in the top seven marijuana producing states (California, Kentucky, Oregon, Tennessee, Utah, Washington, and West Virginia).") (citing http://www.albany.edu/sourcebook/pdf//t4382009.pdf).

[13] *Compare* United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001) (asserting that no medical necessity exception existed to protect against federal enforcement of the CSA, even when one existed at the state level), *and* Gonzales v. Raich, 545 U.S. 1 (2005) (concluding that Commerce Clause authority coupled with the CSA allows for federal enforcement against otherwise legal intrastate marijuana production), *with* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200 (Cal. 2008) (stating that employers were not required to accommodate medical marijuana users and no public policy was frustrated by a refusal to do so), *and* Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC, 257 P.3d 586 (Wash. 2011) (en banc) (holding that the Washington medical marijuana law did not regulate the conduct of a private employer, or protect an employee from being discharged for off-site use).

[14] Controlled Substances Act (CSA) 21 U.S.C.A. §§ 801-971 (West 2012).

[15] *Id.* § 812 (listing every narcotic that has been placed onto Schedule I, the most restrictive schedule under the CSA).

[16] *Id.* §§ 841–44.

prosecute violators of the CSA.[17] The Drug Enforcement Administration ("DEA") operates as the enforcement authority of the CSA, conducting the raids and arresting violators of the CSA.[18] As long as marijuana retains its classification as a Schedule I narcotic, a state cannot guarantee its citizens any safety in dissemination or use.[19] The DEA, using its power under the CSA, has ensured that the majority of marijuana legalization efforts have been nipped in the bud. By understanding how the CSA classifies narcotics and encourages enforcement, legislators can write laws to force the issue and insist that if the federal government seeks to stop marijuana legalization at the state-level, it must go directly against the state.

### *B. Limiting Employment Opportunities for Drug Users under The Drug-Free Workplace Act of 1988*

In 1988, the Drug-Free Workplace Act (DFWA) was enacted to limit the employment opportunities for those who engaged in illegal drug use. It requires federal contractors and federal grantees to ensure that they will provide a drug-free workplace prior to being awarded a contract or grant from a federal agency.[20] The DFWA is not directly challenged by I-502, but the DFWA highlights the evolution of employment restrictions implemented against users of federally prohibited narcotics. Many states have incorporated language from the DFWA into their own local laws, with businesses then following suit.[21] Citing the DFWA and the CSA allows non-union employers to drug test employees and either fire them or refuse to hire them.[22] The DFWA is important because its language is repeated in state-level drug-free workplace acts, limiting employment opportunities for legal marijuana users.[23]

#### 1. California's Compassionate Use Act does not Provide Employment Protection for Off-site Marijuana Users as Determined by Ross v.

[17] *Id.*
[18] *Id.* §§ 812, 878-80 (laying out the enforcement powers of the DEA, including but not limited to, executing and serving search warrants, making seizures of property, and performing other enforcement duties as designated by the Attorney General).
[19] *Id.* §§ 841–44.
[20] Drug-Free Workplace Act (DFWA), 41 U.S.C.A. §§ 8102, 03 (West 2011).
[21] *Compare* DFWA §§ 8101-04, *with 50 State Survey: Drug-Free Workplace Programs*, LEXISNEXIS (Sept. 1, 2009), http://www.lexisnexis.com/documents/pdf/20090930094905_large.pdf (citing a U.S. Dept. of Labor survey that analyzes how each state has implemented their respective drug-free workplace laws).
[22] *See RagingWire*, 174 P.3d at 213 (holding that the employer had no obligation to tolerate any on-site or off-site marijuana usage by employees or prospective employees, and was in no violation for firing the employee or refusing to hire him or her at all).
[23] *Supra* note 21.

### RagingWire

The *Ross v. RagingWire* decision in 2008 solidified the notion that employers can fire or refuse employment to users of marijuana, even when that use is legal under state law.[24] The plaintiff argued for protection from termination under the California Fair Employment and Housing Act on account of using medical marijuana to treat a disability.[25] Rejecting this argument, the court found no reason why employers had to accommodate off-site use.[26] The court also rejected a public policy contention that an employer should be barred from firing a medical marijuana user if they do not use on site.[27] This decision generated misinformation surrounding metabolites in the blood and actual use and impairment. It was a significant blow to the burgeoning marijuana legislation movement.

### 2. Washington's Medical Use of Marijuana Act does not Provide Employment Protection for Off-site Marijuana Users as Determined by Roe v. TeleTech

Washington followed California's lead in 2011 with the *Roe v. TeleTech* decision.[28] The minute difference in this case is that the court determined that no private cause of action existed against an employer for enforcing a zero-tolerance drug policy, and no public policy interest existed to protect users under MUMA.[29] This decision put to rest any assertion that legal off-site use of marijuana was a protected act. Importantly, the court pointed to specific amendments in MUMA that said that no employer is required to accommodate on-site usage by medical marijuana users.[30] Construing this amendment, the court determined that the only purpose of this language was actually to protect employers, and not to confer an implied right upon medical marijuana users to use off-site.[31] The public policy argument once again was disregarded.[32] I-502 does not confer an express right to marijuana users, but merely expands the application of this

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[24] *RagingWire*, 174 P.3d at 200.
[25] *Id.* at 204.
[26] *Id.* at 207.
[27] *Id.* at 208.
[28] *TeleTech*, 257 P.3d at 588 (holding that no public policy exception exists that protects marijuana users from an employer that wishes to fire him or her for on-site or off-site use).
[29] *Id.* at 597 (concluding that MUMA does not prohibit an employer from discharging an employee for his or her medical marijuana use, and does not provide a civil remedy against the employer).
[30] *Id.* at 593.
[31] *See id.* at 596 ("MUMA's only reference to employment is an explicit statement *against* requiring employers to accommodate medical marijuana use") (emphasis added).
[32] *See id.* at 597 ("MUMA does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana").

doctrine to a larger group of Washington citizens.

### *C. California Moves Towards Partial Legalization by enacting the Compassion Use Act in 1996*

The west coast of the United States has been among the most progressive areas in the country regarding marijuana legalization efforts. But since any attempt to remove marijuana from Schedule I has failed, the states have chosen to serve as incubators of new and innovative approaches to this problem, with the predominant initial maneuver being to legalize medical marijuana at the state level.[33] Through carefully crafted laws and appeals to the federal government not to interfere, incremental changes to marijuana legalization have been taken, with the caveat that any direct conflicts with federal law might be met with formidable federal action.

#### 1. Legalization of Medical Marijuana through Enactment of California Proposition 215

The Compassionate Use Act (CUA) of 1996[34] allowed Californians to use medical marijuana under certain conditions laid out in the Act.[35] It provides for protections against criminal prosecution for doctors who prescribed marijuana[36] and for the patients who use marijuana pursuant to a doctor's prescription.[37] President Obama, in conjunction with his appointed Attorney General, initially chose not to actively pursue CSA violations against those in compliance with the CUA.[38] However, the mere assertion of non-interference has manifested itself as an empty promise, and the CUA provides no tangible protection to citizens when the federal government chooses to crack down on dispensaries and patients.[39]

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[33] *See supra* note 4 (citing each initial foray into marijuana legalization in twelve states, all beginning with medical legalization).

[34] Compassionate Use Act (CUA), CAL. HEALTH & SAFETY CODE § 11362.5 (West 2011).

[35] *See id.* at § 11362.5(b)(1)(A) ("Californians have the right to obtain and use marijuana for medical purposes . . . .").

[36] *Id.* at § 11362.5(b)(1)(B).

[37] *Id.*

[38] *E.g.*, Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011) [hereinafter Mikos, *Critical Appraisal*] (noting that the Attorney General has wide authority to compel state district attorneys to comply with non-enforcement policies, even in states that have legalized the use of marijuana).

[39] *See* Mike Riggs, *One Day After DEA Raids 71 Medical Marijuana Dispensaries, CNN Declares Drug War Is Over*, REASON.COM (Sept. 28, 2012, 3:41 PM), http://reason.com/blog/2012/09/28/one-day-after-dea-raids-71-medical-marij ("[T]he [DEA] launched a coordinated crackdown of 71 medical marijuana dispensaries in and around Los Angeles, bringing the total number of California dispensaries closed this year to over 800").

### 2. Federal Interference of Production and Distribution of Medical Marijuana Upheld in United States v. Oakland Cannabis Buyers' Co-op

After five years under the CUA, the Supreme Court finally addressed the issue of federal interference. The Court upheld the DEA's broad authority to raid and shut down operations that were in direct contravention with established federal law, even when all applicable California laws were followed.[40] What was unique about *Oakland Cannabis* is that the defendant argued for a medical necessity exception, believing that the medical condition of marijuana users was an exception under the CSA.[41] However, marijuana's status as a Schedule I narcotic forbids any medical exception to be present in the CSA.[42] If marijuana were a Schedule II narcotic, there is a de facto acceptance of its medical use,[43] and a medical necessity defense might have carried more weight. Tip-toeing around federal preemption power, the Court instead chose to focus on the fact that no medical necessity defense existed to shield defendants from prosecution for violations of the CSA, even in light of state decisions to the contrary.[44] The only positive that resulted from this case for medical marijuana advocates was when Justice Stevens urged federal courts in his concurrence to "minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country.'"[45]

### 3. The Supreme Court Sets a Clear Delineation Between State Laissez-Faire Attitudes Towards Marijuana, and Federal Power to Apply the CSA through Commerce Clause Power in the Gonzales v. Raich Ruling of 2005

The *Gonzales v. Raich* ruling[46] is the most decisive victory for the federal government to date and is currently the final word on states' ability to disregard federal prohibition of marijuana. The Court held that federal

[40] *Oakland Cannabis*, 532 U.S. 483.
[41] *See id.* at 490 ("For marijuana . . . there is but one express exception, and it is available only for Government-approved research projects").
[42] *See id.* at 491 ("[A] medical necessity exception is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable").
[43] CSA § 812 (noting that Schedule II drugs have medical uses).
[44] *See, e.g.*, Cathryn L. Blaine, *Supreme Court "Just Says No" to Medical Marijuana: A Look at* United States v. Oakland Cannabis Buyers' Cooperative, 39 HOUS. L. REV. 1195, 1200-01 (2002) (noting cases where medical necessity defenses were allowed).
[45] *Oakland Cannabis*, 532 U.S. at 502 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
[46] Gonzales v. Raich, 545 U.S. 1 (2005).

enforcement of the CSA was a federal right under the Commerce Clause of the Constitution, cementing the ability of the DEA to prosecute entities for violations while gagging the mouths of the voters that approved of these laws.[47] The *Raich* decision denied the constitutional challenge by users and growers of marijuana that federal enforcement of the CSA was improper if they were complying with the CUA.[48] The Supreme Court affirmed the constitutionality of the CSA under Commerce Clause reasoning, but left for debate whether the theory of preemption was present in their decision.[49] *Gonzales v. Raich* is often looked at as guaranteeing that the CSA will supersede state-level legalization statutes, even though there is no express mention of it doing so.[50] At the very least, *Raich* serves as an endorsement of the stance currently taken by the federal government--that the DEA retains the right to pursue violations of the CSA within states that have enacted legislation contrary to its provisions. Any future conflict involving I-502 and similar measures will likely be dealt with using *Raich* and *Oakland Cannabis* as guidelines.[51]

### *D. Washington Takes Its First Steps Towards Legalization of Marijuana, Modeling the Medical Use of Marijuana Act After California's Compassionate Use Act*

Similar to the CUA, Washington's Medical Use of Marijuana Act

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[47] *See* Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 714 (2000) ("unless medical marijuana defendants are entitled to assert a legal defense to prosecution under federal law, . . . the will of the people in those states legalizing medical marijuana will be frustrated").

[48] *Raich*, 545 U.S. at 2 ("Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana *in compliance with California law*") (emphasis added).

[49] *See* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1759 n.61 (2005) ("The [*Raich*] Court found that the Controlled Substances Act . . . preempted California's Compassionate Use Act of 1996."); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 286-93 (2001) (arguing that state laws allowing medical marijuana could be preempted by Congress, but suggesting that Congress had not yet expressed an intent to do so); Michael Greenberger, *Did the Founding Fathers Do "a Heckuva Job"? Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 419-20 (2007) ("[Congress can preempt state laws allowing] intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes"); Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Unconstitutional?*, 78 U. COLO. L. REV. 375, 459 (2007) ("[The *Raich* decision allows] Congress to preempt state regulation of medical marijuana"); Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT. REP. 295, n.16 (2008) ("[The *Raich* decision held that] federal Controlled Substances Act (CSA) preempted California's so-called medical marijuana law").

[50] *Id.*

[51] *Raich*, 545 U.S. at 74 (quoting *Oakland Cannabis*, 532 U.S. at 502 (Stevens, J., concurring) ("The majority's rush to embrace federal power 'is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union'")).

(MUMA) allows for patients to receive prescriptions for medicinal marijuana, protecting them from state-level prosecution.[52] However, this statute provides no protection for medical marijuana producers, facilities, or users from raids and prosecutions conducted by the federal government.[53]

### *E. Initiative 502 as the Kickstarter for Efforts to Legalize Nationally and Remove Marijuana from Schedule I Narcotic Classification*

Essential to this Comment is I-502, the recently passed bill legalizing marijuana in Washington. Encompassed within I-502 are numerous changes to Washington's existing criminal and civil law, all of which are aimed at legalizing marijuana and creating a state-sanctioned sustainable infrastructure for the production, distribution, and retail sale of the drug.[54]

#### 1. Initiative 502's Provisions Implement a Structured Supply Chain Mechanism for the Growth, Distribution, and Retail Sale of Marijuana to the General Public

I-502 outlines a comprehensive scheme for the entire marijuana business. There are strict licensing requirements for each entity that wishes to engage in the production, distribution, or retail sale of marijuana. Four distinct sub-issues follow from these provisions. First, due to the fact that each prospective entrant into the marijuana business must apply for a license with the Washington State Liquor Control Board ("WSLCB"), he or she is ostensibly entrapped at the outset. Applicants for a license are required to provide registration information that can be passed along to the Federal Bureau of Investigation ("FBI") under the guise of a background check.[55] In actuality, this provides federal agencies with all the information they would need in order to raid a facility. Second, I-502 requires the complete separation of each field within the supply chain ensuring that no

[52] *See* WASH. REV. CODE § 69.51A (giving medical marijuana users an affirmative defense when being charged with state-level criminal offenses).

[53] *See Raich*, 545 U.S. at 29, 33 (noting that state laws legalizing marijuana in any capacity create no shields against federal action).

[54] *See* I-502 (encompassing changes to Washington law, including but not limited to: decriminalizing marijuana; creation of a supply chain for the marijuana business; new impairment tests that amend current DUI law; and creating a system for collecting taxes on all marijuana transactions).

[55] *See id.* at Part III.6.1-3 ("For the purpose of considering any application for a license to produce, process, or sell marijuana . . . [the state] may submit the criminal history record information to . . . the identification division of the FBI . . . [and] shall require fingerprinting of any applicant . . . .").

producer, distributor, or retailer can be affiliated with any other portion of the supply chain.[56] This limits the incentive to enter the business because any larger entity will be unable to create its own supply chain; rather, it will be forced to operate one portion and rely on others to complete the chain. Third, a twenty-five percent excise tax is enacted on each transaction in the supply chain, which means there is a twenty-five percent tax between the producer and the distributor, the distributor and the retailer, and the retailer and the consumer.[57] Finally, the WSLCB is the sole entity with the authority to issue licenses[58] and sanction the federally-illegal marijuana trade within Washington state. They effectively issue licenses to facilities to be raided and arrested by federal enforcement agencies. Ironically, the WSLCB insists that licensees not be "under the influence" at work, which, as I have touched upon, is a nearly impossible standard if the licensee ever wants to use marijuana.

### 2. Marijuana Impairment Amendments to Current Washington Driving Under the Influence ("DUI") Law

I-502 is aimed at legalizing marijuana by decriminalizing the possession and use of a personal supply of marijuana in private settings. Creating palatable legalization legislation was contingent upon amendments to the DUI law, which indirectly created a serious issue. I-502 incorporates a blood testing method to be used in DUI stops, where the threshold level of 5.00 nanograms of Tetrahydrocannabinol ("THC") per milliliter of a person's blood triggers a positive test.[59] There is an attenuated connection between this threshold level and its application to existing employment law as a mechanism for regulating off-site marijuana usage of employees. In many ways, alcohol and marijuana go hand-in-hand, and the DUI amendments for marijuana are placed in the same section as current alcohol DUI language.[60] These new testing levels for marijuana DUI arrests can and will be applied to drug testing in the employment setting.

Granted, marijuana impairment while driving or at work should not be condoned by society, but that does not mean that marijuana and alcohol

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[56] *See id.* at Part III.5 ("Neither a licensed marijuana producer nor a licensed marijuana processor shall have a direct or indirect financial interest in a licensed marijuana retailer").
[57] *See id.* at Part IV.27.1-3 (levying a twenty-five percent tax between each portion of the supply chain maximizes revenue collection without burdening one entity more so than the others).
[58] *Id.* at Part III.4.1-3 ("There shall be a marijuana producer's . . . processor's . . . [and] retailer's license . . . regulated by the state liquor control board and subject to annual renewal").
[59] *See* WASH. REV. CODE ANN. § 46.61.502(1)(b) (West 2012) (amending Washington DUI legislation to include a marijuana impairment level of 5.00 nanograms of THC per milliliter of blood).
[60] *Id.* at § 46.61.502(1).

should be treated identically. Employers are well within their rights to incorporate drug-free workplace laws as a way of eliminating impairment and use of drugs and/or alcohol by employees on-site.[61] However, the new testing methods used for marijuana DUIs will become standard in the workplace, which is to the severe disadvantage of legal marijuana users. Alcohol is a substance that dissipates in the blood extremely quickly, and DUI laws are modeled to take this into account.[62] Limitations on alcohol use do little to infringe on personal freedoms and are directly related to the immediacy of alcohol impairment.[63] Employers that are testing for alcohol impairment could very well give an employee a breathalyzer, and if it registers that the employee is drunk, he or she should rightfully be terminated. By allowing employers to test for marijuana impairment as they would for alcohol, legal marijuana smokers will be adversely labeled as on-site users due to the far greater time period that marijuana remains in the body, even at negligible levels.[64] Allowing for zero-tolerance drug policies that conflict with state law, while modeling that stance after alcohol impairment law is a severely flawed approach. Scientific research is sorely needed in this area to develop better testing methodology that can accurately reflect actual impairment at the workplace instead of residual indicators in the bloodstream.

## III. HOLES IN INITIATIVE 502 CREATE AN UNSUSTAINABLE BUSINESS MODEL AND LEAVE EMPLOYEES VULNERABLE TO ADVERSE ACTIONS

Issues that have plagued the marijuana legalization effort over the years seem insurmountable when faced with the roadblock of federal illegality. Should the federal government choose to adopt a permanent

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[61] *Compare* DFWA §§ 8101-04 *with 50 State Survey: Drug-Free Workplace Programs*, LEXISNEXIS (Sept. 1, 2009), http://www.lexisnexis.com/documents/pdf/20090930094905_large.pdf (citing a U.S. Dept. of Labor survey that analyzes how each state has implemented their respective drug-free workplace laws).

[62] *See* § 46.61.502(1)(a) (West 2012) (noting that any test for a DUI must be done within two hours after driving to be able to determine if the driver was impaired while driving).

[63] *E.g.*, Missouri v. McNeely, 358 S.W.3d 65 (2012) (determining that nonconsensual and warrantless blood draws are allowed due to the exigent circumstance of immediate blood-alcohol dissipation).

[64] *See* Joseph Rose, *Washington's new 'driving high' DUI law for marijuana users stirs fears*, THE OREGONIAN (Dec. 5, 2012, 8:35 PM), http://blog.oregonlive.com/commuting/2012/12/washingtons_new_driving_high_d.html ("[T]he DUI provision ignores both the basics and the complexities of marijuana use, such as its tendency to hang around in a user's system for a month."); *see also Understanding THC & Detection Times*, STERLING REFERENCE LABORATORIES (last visited Jan. 30, 2012), http://www.sterlingreflabs.com/understandthc.html ("Levels below 100 ng/ml are relatively low and would correlate with light use or heavier use more than 48 hours prior to urine collection. . . . [l]evels between 250 and 750 ng/ml are high and are more likely to represent current use").

policy of non-interference when it comes to states' rights to legalize marijuana,[65] an unlikely event,[66] then the issues discussed below would be moot. However, even when there are "bigger fish to fry"[67] and a presidential administration has maintained that it does not wish to interfere with the will of the voters,[68] federal agencies have continued to crack down on all efforts to subvert the CSA.[69] The greatest misconception in the marijuana debate is that there is full federal preemption of all marijuana legalization laws[70] and that each marijuana law is negated by federal law on its face.[71] When marijuana legislation is simply condoned by a state, the federal government is prevented from commandeering the state to enforce

[65] *See* Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Memo], *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf (laying out the Justice Department's policy change, purportedly lowering the federal regulatory priorities when it comes to marijuana, shifting focus from marijuana producers and users who are complying with state laws).

[66] *See* Jordan Weissman, *Will Obama Let Washington and Colorado Keep Their Legal Pot?*, ATLANTIC. (Nov. 9, 2012, 8:15 AM), http://www.theatlantic.com/business/archive/2012/11/will-obama-let-washington-and-colorado-keep-their-legal-pot/264962/ ("There's no question that Obama's the worst president on medical marijuana. He's gone from first to worst").

[67] *See* Rachel Weiner, *Obama: I've got 'bigger fish to fry' than pot smokers*, WASH. POST (Dec. 14, 2012, 8:35 AM), http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/14/obama-ive-got-bigger-fish-to-fry-than-pot-smokers/ (reporting on President Obama's remarks that he does not believe it is a top priority to go after recreational users of marijuana in states that have determined that it is legal).

[68] *See* Evan Perez, *No federal challenge to pot legalization in two states,* CNN.COM (Aug. 30, 2013, 6:36 AM), http://www.cnn.com/2013/08/29/politics/holder-marijuana-laws/index.html (reporting that the Justice Department maintains that it will not challenge the laws legalizing recreational marijuana use).

[69] *See* Riggs, *One Day After DEA Raids 71 Medical Marijuana Dispensaries*, *supra* note 39 (noting the constant raids in light of statements from the Obama administration that they would not raid).

[70] If all state-level legalization efforts were preempted, there would be no need for the Justice Department to file suit seeking to pre-empt the state laws. *See* Perez, *No federal challenge to pot legalization in two states*, *supra* note 68 (noting the Justice Department's stance that it "will not seek to pre-empt [Washington and Colorado's] laws, which followed voters' approval of ballot measures that legalized recreational marijuana use").

[71] *Compare* Robert A. Mikos, *On The Limits Of Supremacy: Medical Marijuana And The States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) [hereinafter Mikos, *Limits of Supremacy*] ("[T]he anti-commandeering rule constrains Congress's power to preempt state law in at least one increasingly important circumstance – namely, when state law permits private conduct to occur – because preemption of such a law would be tantamount to commandeering"), *and Raich*, 545 U.S. at 39 (holding that it is through Commerce Clause power, not basic preemption, that federal authorities may enforce the CSA against those that are following all applicable state laws), *with supra* note 47 (demonstrating that the holding of *Raich* has been widely misconstrued by the academic community to grant preemption power to the federal government in enforcing the CSA, even as it comes into conflict with state medical marijuana laws that otherwise allow the behavior).

the federal laws,[72] and the misconception results from the retained ability of the federal government to enforce federal law in the states.[73] In layman's terms, the State of Washington will never be required to disobey its own laws, but the DEA will always retain the right to enforce federal law within the state.

Federal illegality also comes into play when analyzing how I-502 will affect employees within Washington at the micro-level. While the focus of I-502 has been on the decriminalization and legalization of marijuana for personal use, there has been no change to current employment law, which places employees in jeopardy.[74] The judiciary has time and again erred on the side of caution when contemplating whether to extend employment law protection to legal off-site marijuana users.[75] Medical marijuana users have not been protected in the workplace, and the only thing that changes with I-502 is the sheer increase in the number of people using marijuana legally that will be denied protection in the workplace. This is due to the federal illegality of the drug, but it is further compounded by the application of statutorily accepted, but flawed, methods for testing for marijuana use and impairment.[76]

### *A. Implementation of I-502's Version of the Marijuana Supply Chain is Merely an Extension of the Currently Jeopardized Medical Marijuana Supply Chain*

Entering the marijuana business under I-502 is like a game of blackjack; you win some, you lose some, but ultimately, the house is always going to win. In this case, the house is the federal government, and

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[72] *See* Mikos, *supra* note 71, at 1446 (postulating that if states remain neutral in the marijuana business, there is limited federal power to coerce action, as they can only interfere when the state itself becomes an actor); *see also* New York v. United States, 505 U.S. 144, 188 (1992) (noting that anti-commandeering principles forbid Congress to force a state to legislate to a federal scheme), *and* Printz v. United States, 521 U.S. 898, 925 (1997) (holding that anti-commandeering principles forbid the federal government from compelling state employees to actively enforce a federal regulatory program).

[73] *See Raich*, 545 U.S. at 1 (asserting that although preemption is never specifically mentioned, federal agents maintain the ability to enforce federal laws *within* a state, even when the federal law conflicts directly with state laws).

[74] *E.g.* Susan Hartmus Hiser, *Disciplining Employees for Medical Marijuana Use*, 21 No. 2 MICH. EMP. L. LETTER 5 (2010) ("Just because the drug is legal, that doesn't protect an employee from the ramifications . . . caused by being under its influence").

[75] *See TeleTech*, 257 P.3d at 597, *and RagingWire*, 174 P.3d at 208-09 (negating public policy and disability arguments in declining to extend protection to off-site marijuana users).

[76] *See Deconstructing I-502*, SENSIBLEWASHINGTON.ORG, http://sensiblewashington.org/blog/i502/ (last visited Dec. 8, 2013) (noting that scientific evidence demonstrates that the testing method in I-502 poorly measures actual impairment); *see also Understanding THC & Detection Times*, *supra* note 64 (citing studies showing false positives occur at levels far above the threshold THC level of 5.00 that is put into place by I-502).

"[t]hough states may eliminate state-imposed sanctions for marijuana use and cultivation, they may not bar the federal government from levying its own."[77] State law enforcement is not obligated to combat violations of federal laws that conflict with state law—that is the preemption issue discussed above.[78] However, the DEA retains the right to raid, arrest, and pursue criminal actions against those entities that infringe upon the CSA.[79] Even when the DEA feigns a policy of non-enforcement, it has chosen to raid and arrest and is not likely to stop any time soon.[80] With that in mind, I-502 perpetuates this conflict with an unprecedented twist—by allowing for the information of licensees in any portion of the supply chain to be passed along to federal enforcement agencies,[81] it effectively sets them up for a potential raid. Entering the business is especially dangerous because there has been no consistent stance by the current administration.[82] Even when a facility complies with the laws of the state in which it operates,

[77] *See* Mikos, *supra* note 71, at 1464-65.

[78] *Cf. id.* ("Congress cannot force states to abandon their medical marijuana exemptions, nor are the states likely to abandon those exemptions voluntarily").

[79] *See* Peter Hecht, *Mendocino pot raid causes stir among California's medical marijuana advocates*, THE SACRAMENTO BEE, Oct. 30, 2011, at 1A, *available at* http://www.sacbee.com/2011/10/30/4017018/mendocino-pot-raid-causes-stir.html (reporting on raids of medical marijuana facilities that engaged in a voluntary oversight program to ensure full compliance with existing state laws).

[80] *Compare* Bill Briggs, *Weed wars: If states legalize marijuana, will feds still crack down or steer clear?*, NBCNEWS.COM (Nov. 4, 2012, 2:57 PM), http://usnews.nbcnews.com/_news/2012/11/04/14886823-weed-wars-if-states-legalize-marijuana-will-feds-still-crack-down-or-steer-clear?lite (looking at multiple times when the Obama administration cracked down on medical marijuana facilities, and whether or not this will continue in light of their stated stance to the contrary), *with* Mike Riggs, *Obama Administration Overrides 2009 Ogden Memo, Declares Open Season on Pot Shops in States Where Medical Marijuana is Legal*, REASON.COM (June 30, 2011, 9:32 PM), http://reason.com/blog/2011/06/30/white-house-overrides-2009-mem (reversing the previous Obama administration non-enforcement policy, the DEA has been directed to raid marijuana dispensaries even when they are following all applicable state laws).

[81] *See* I-502, Part III.6.1-3 ("The state liquor control board may submit the criminal history record information check to . . . the identification division of the federal bureau of investigation").

[82] *Compare* Ogden Memo, supra note 65 *and* Memorandum from James M. Cole, Deputy Attorney Gen., to all U.S. Attorneys (June 29, 2011) [hereinafter Cole Memo I], *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf (reiterating the approach outlined in the Ogden Memo, and directing federal enforcement efforts against anyone that is not clearly an *individual* caregiver), *and* Memorandum from James M. Cole, Deputy Attorney Gen., to all U.S. Attorneys (Aug. 29, 2013) [hereinafter Cole Memo II], *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (claiming that size and commercial nature of a marijuana operation should not be considered as a proxy for determining if it is a Department priority), *with* Mike Riggs, *Speak no evil: DEA, DOJ stay mum on medical marijuana raids*, THE DAILY CALLER (Sept. 13, 2010, 1:47 AM), http://dailycaller.com/2010/09/13/speak-no-evil-dea-doj-stay-mum-on-medical-marijuana-raids/ (noting the numerous DEA and DOJ raids in direct contrivance to the memos released by the Attorney General's office), *and* Mike Riggs, *Obama Administration Overrides 2009 Ogden Memo, supra* note 80 (reporting that Cole Memo I actually directs the DEA to conduct raids to assert federal compliance even when a facility is following state laws).

raids occur and its owner(s) are subjected to severe penalties.[83]

### 1. The Structure and Requirements of the Supply Chain will Limit the Possibilities of the Marijuana Business

For each portion of the supply chain under I-502, each licensee must obtain his or her license from the WSCLB.[84] As part of the application process, each licensee must stipulate where the business is located and who is/are the owner(s). Such information can then be sent to the FBI as part of a required background check.[85] This means that as part of the application, potential marijuana producers, distributors, and retailers are forced to identify themselves to a federal agency prior to entering the business.

Each link in the chain is open to federal prosecution simply by being in business, and the entrapment mechanism a licensee faces as a base requirement of registration only makes this worse.[86] The supply chain under I-502 consists of three links: the producers who grow the marijuana, the distributors who take the wholesale product and turn it into retail products, and the retail outlets that sell directly to the consumers.[87] Each link in the supply chain must be operated by a separate entity,[88] but it remains to be seen if this will foster any good will from the federal government.[89] Even when the supply chain complies with state laws, it

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[83] *See* Steve Gorman, *Attorney General Eric Holder says federal authorities will continue to prosecute individuals for possession of marijuana in California even if voters approve a ballot measure legalizing recreational use of the drug*, REUTERS (Oct. 16, 2010, 12:45 AM), http://www.reuters.com/article/2010/10/16/us-usa-marijuana-california-idUSTRE69F03V20101016 ("[W]e will vigorously enforce the (Controlled Substances Act) against those individuals and organizations that possess, manufacture, or distribute marijuana for recreational use, even if such activities are permitted under state law.") (quoting Attorney General Eric Holder); *see also* CSA §§ 841-48, 881 (listing the penalties for violations of the CSA, including jail time, increasing fines dependent on amount sold, repossession of property, and forfeiture of assets).

[84] *See* I-502, Part III.4.1-3 ("There shall be a marijuana producer's . . . processor's . . . [and] retailer's license . . . regulated by the state liquor control board and subject to annual renewal").

[85] *See id.* (noting that each licensee must specify the location at which they intend to operate); *id.* Part III.6.1-3 (alerting licensees to the fact that they agree to have their information sent to the FBI for a background check).

[86] *See Deconstructing I-502, Part 1: Sorry, Folks, It's Not Legalization*, SENSIBLEWASHINGTON.ORG (Mar. 4, 2012), http://sensiblewashington.org/blog/2012/deconstructing-i-502-sorry-folks-it%E2%80%99s-not-legalization/ (noting that I-502 only creates small exceptions for certain activities at the state level, but provides absolutely no protection against federal law).

[87] I-502, Part III.4.1-3.

[88] *See id.* Part III.5 (asserting that no portion of the supply chain shall have a direct or indirect interest in another portion).

[89] *But cf.* Weissman, *Will Obama Let Washington and Colorado Keep Their Legal Pot?, supra* note 66 ("The federal squeeze has mostly focused on California, whose medical marijuana statute is so vague that prosecutors have much more leeway to crack down on providers under the

violates so many federal laws[90] that this model is not conducive to proper growth. The majority of articles covering this issue in the Seattle Times note that the average person is unlikely to have the necessary funds to start a business at such great risk.[91] Those interested in getting into this type of business are unlikely to take the risks that come with registering with the WSLCB, instead opting for the ancillary markets.[92] This creates a failed business model, with the only groups able to enter the marijuana business being larger entities with deep pockets that can take the hit of a DEA raid, closure, or prosecution.[93] Smaller entities that may choose to enter this business would be averse to doing so for fear of being unable to secure financing and for fear of the massive losses that come from a raid and subsequent closure of their business. The resulting loss of money, inventory, and land – not to mention the criminal penalties that might be levied[94]– remain significant obstacles to spurring investment. With the recent pivot by the justice department,[95] investors are concerned, which limits the market to larger entities that can take the hit. This also creates incentive for black market operators to remain underground, which creates additional problems for the state in projecting tax revenue from the sale of marijuana.[96]

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pretense that they're breaking state and federal law. In Colorado, the law is clearer and the crackdowns are far fewer").

[90] *E.g.*, *Deconstructing I-502, Part 2: Storefronts Aren't Happening*, SENSIBLEWASHINGTON.ORG (Mar. 6, 2012), http://sensiblewashington.org/blog/2012/deconstructing-i-502-part-2-storefronts-aint-happening/ (pointing out that depositing sales tax in a bank constitutes money laundering, so federal laws are being broken even when complying with state law).

[91] *Accord* Jonathan Martin, *Investors see profit potential in new pot law*, SEATTLE TIMES (Dec. 1, 2012, 10:30 PM), http://seattletimes.com/html/localnews/2019809614_marijuanainvestor02m.html ("The ability to keep a bank account remains one of the industry's biggest obstacles because federally insured banks view marijuana businesses as illegal").

[92] *See, e.g.*, *id.* ("There's the Mark Twain saying, 'When people are looking for gold, it's a good time to be in the pick and shovel network.' And gold wasn't federally criminally illegal. [Now] [t]here's even more reason to be in picks and shovels.") (quoting Troy Dayton, CEO of a marijuana-industry angel investor network, The ArcView Group).

[93] *Id.*

[94] *See* Rachel A. Cartier, Comment, *Federal Marijuana Laws and Their Criminal Implications On Cultivation, Distribution, and Personal Use in California*, 20 SAN JOAQUIN AGRIC. L. REV. 101, 112 (2010-2011) [hereinafter *Federal Marijuana Laws*] (discussing the different penalties for violations of the CSA as they apply to current California medical marijuana laws, noting that the costs are prohibitive and would be difficult to bear for a single entity and still remain profitable).

[95] *See* Weissman, *Will Obama Let Washington and Colorado Keep Their Legal Pot?*, *supra* note 66 ("[T]he big pivot . . . didn't come until June 2011, when [the] Justice [department] released a new memo that narrowed the definition of 'caregiver.' The new definition only applied to individuals, and excluded 'commercial operations cultivating, selling or distributing marijuana'").

[96] *See* Bob Young, *Getting in on the ground floor of the pot business*, SEATTLE TIMES (Jan. 26, 2013, 9:00 PM), http://seattletimes.com/html/localnews/2020222787_potinvestorsxml.html ("[M]arijuana hasn't

### a. Production of Marijuana

As noted above, the illegality at the federal level of marijuana production and distribution will lead many possible investors to look instead at alternative markets less susceptible to federal action. This stifles the market as a whole. As one marijuana-producing entrepreneur bluntly put it in assessing the pros and cons of entering the business, the key is to "[s]tart with lots of money."[97]

Those most eager to get into the marijuana business are bound to look first at the most profitable level – production; however, that also puts them on the road to the greatest harm, as a raid on their business would wipe out months of work and potentially millions of dollars in investment. Those most well-equipped to enter the marijuana production business do so at great risk to themselves and often for razor-thin margins due to the inability to deduct expenses and the flooding of low-risk black market product.[98]

With criminal penalties ranging from a fine, to jail time, to repossession of property, risking a violation of the CSA is an unwise option for investors.[99] This is not to mention the possible civil RICO actions that participants in the marijuana business may find themselves facing.[100] By far, the easiest way to avoid implicating oneself as a party to a criminal enterprise is to stay off the grid. This dynamic perpetuates the black market, with those already engaged in marijuana production incentivized to

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gone totally legit yet. The federal government's ban on all marijuana remains in place, and the threat of a crackdown has kept investors out of the leaves-and-buds business until the clash between state and federal laws is resolved in a way that inspires more confidence").

[97] Ana Campoy, *The Pot Business Suffers Growing Pains*, WALL ST. J. (Apr. 22, 2013, 4:12 PM), http://online.wsj.com/article/SB10001424127887324345804578426963236807452.html?mod=e2tw (quoting Elliot Klug, chief executive of Pink House Blooms, a 70-person operation that produces and sells marijuana).

[98] *See id.* (explaining that a pound of marijuana has fallen from $2,900 in April of 2011 to $2,000 in 2013, with one company producing only a 6% profit on $4.2 million in revenue during 2012); *see also* Benjamin M. Leff, *Growing the Business: How legal marijuana sellers can beat a draconian tax*, SLATE (Feb. 28, 2013, 12:02 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/02/how_legal_marijuana_sellers_can_beat_a_draconian_federal_tax.html ("[S]ellers of controlled substances—in other words, drugs, including marijuana—are not permitted to deduct *any* ordinary business expenses other than the cost of the goods they are selling").

[99] *See* Quentin Fottrell, *How to invest in legalized marijuana*, WALL ST. J. (Nov. 13, 2012, 9:24 PM), http://articles.marketwatch.com/2012-11-13/finance/35076220_1_medical-marijuana-dispensaries-medical-marijuana-medbox ("Of course, investing in drugs the federal government still outlaws poses enormous risks to investors.") (quoting Sam Kamin, a law professor at Sturm College of Law).

[100] *See* Mikos, *Critical Appraisal*, *supra* note 38, at 649-54 (reading the law to allow for civil RICO claims against marijuana dispensaries, creating broad enforcement powers of the government over the marijuana business).

stay underground if only to avoid paying taxes and subjecting oneself to criminal enforcement. The black market then undercuts the legal market and creates lower prices across the board, which is good for the consumer but bad for the producer.[101]

### b. Distribution of Marijuana

Marijuana distributors, the entities that buy from the large producers and then package and sell to the retail outlets, are required middlemen under I-502. Specific provisions in I-502 explicitly state that each entity must be entirely severable from each other.[102] This increases revenue for the state, as the supply chain structure allows for taxation on each side of a distributor's operation.[103] The trick is to limit the risks and costs of being a marijuana distributor, but at a lower profit margin, that becomes a challenge.[104] With less money coming in to these investors, the incentive is very low to enter this field. These investors, however, are necessary to make the supply chain work, and because no entity can hedge by engaging in two links within the chain, protections are necessary before the supply chain can operate as intended.

### c. Retail Sale of Marijuana

Any person that wishes to open a retail shop to sell marijuana to the public is incentivized to do so only through the legality of the business. Selling marijuana outside of this scheme will still be illegal under state law as it was prior to I-502. However, similar to the production and distribution, being able to legally sell marijuana is greatly outweighed by

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[101] *Accord* Josh Kerns, *Do Washington's new pot rules guarantee the future of the black market?*, MYNORTHWEST.COM (Sept. 5, 2013, 3:54 PM), http://mynorthwest.com/11/2347973/Do-Washingtons-new-pot-rules-guarantee-the-future-of-the-black-market (opining that production caps will not meet consumer demand, and black market producers will fill the void and keep prices low). Cf. Sam Kamin & Josh Werner, Dime Store, Slate (Jan. 16, 2014, 11:34 PM), http://www.slate.com/articles/news_and_politics/altered_state/2014/01/colorado_marijuana_legalization_how_lucrative_is_it_to_be_a_legal_weed_dealer.html (reporting that even with legal marijuana sales far outpacing projections, Colorado's legal marijuana dealers are still making far less profit than its illegal dealers)."

[102] *See* I-502, Part III.B (forcing the separation between each producer, distributor, and retailer of marijuana).

[103] *Id.* Part IV.27.1-3 (placing a twenty-five percent excise tax on transactions between a producer and distributor, and between a distributor and retailer).

[104] *Cf. Deduction Disallowed because Medical Marijuana Dispensary Engaged in "Trafficking,"* 45 FED. TAXES WKLY. ALERT Art. 12 (Aug. 9, 2012) (explaining that the Tax Court disallows deductions for expenses when engaged in a legal marijuana dispensary business, because it is simply the trafficking of a controlled substance).

the potential penalties.[105] The key issue is whether or not someone is actually foolish enough to admit to a federal crime by signing up for a marijuana retail license.[106] This is exacerbated by the reality that those most likely to enter the retail side of marijuana distribution do not have the resources to take the hit if things go wrong. This lack of financial backing would allow a single raid and/or prosecution by the federal government to permanently remove them from the business.[107] While the federal government is currently not in a position to go around shutting down every single retail shop selling marijuana, it resorts to other scare tactics to enforce federal law.[108] The federal government spends nearly $1 million on each case, determining that the best use of funds is to arrest and prosecute small-scale retailers, forcing the closure of his or her business and threatening jail time.[109] In light of all this, there is little reason to believe that the current structure of the supply chain will lead to longevity for the retailers that sell marijuana.[110]

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[105] *Compare id.* (asserting that no deductions are allowed for the business expenses of a marijuana dispensary), *with* Cartier, *Federal Marijuana Laws*, *supra* note 94 (listing the different criminal penalties as determined by the CSA), *and* Mikos, *Critical Appraisal*, *supra* note 38, at 649-54 (noting that civil RICO claims could be pursued against marijuana dispensaries by ordinary citizens).

[106] *See Deconstructing I-502, Part 2: Storefronts Aren't Happening*, *supra* note 90 ("We have previously urged people not to apply for a license under I-502; a signature would constitute an iron-clad confession to federal crimes").

[107] *See* Conor Friedersdorf, *The High Cost of Shutting Down One Medical Marijuana Operation*, ATLANTIC (Jan. 14, 2013, 7:00 AM), http://www.theatlantic.com/politics/archive/2013/01/the-cost-of-shutting-down-one-medical-marijuana-operation/267127/ (explaining the plight of a marijuana dispensary owner, and how he "paid California sales tax" and "filed for state and local business permits," but was shut down easily by a raid and is being pressured to "agree to a plea that includes a mandatory minimum of five years in prison").

[108] *See* Nina Shapiro, *DEA Orders Three More Medical Marijuana Dispensaries to Shut Down*, SEATTLE WKLY. (Oct. 12, 2012, 6:00 AM), http://blogs.seattleweekly.com/dailyweekly/2012/10/dea_sends_letters_to_three_more_medical_marijuana_dispensaries_seattle.php ("The DEA sent three more letters to medical marijuana dispensaries last week . . . direct[ing] them to shut down within 30 days. That makes 29 dispensaries the feds have so warned, including 23 facilities that got letters in late August and three a few weeks later").

[109] *See* Friedersdorf, *The High Cost of Shutting Down One Medical Marijuana Operation*, *supra* note 107 (estimating the costs of shutting down a small marijuana operation at over a million dollars, and noting that this opens the market for less savory retailers, forcing otherwise law-abiding citizens to accept plea deals of five years minimum to avoid stiffer penalties).

[110] *Cf.* Martin, *Investors see profit potential in new pot law*, *supra* note 91 ("The ripest opportunities are among cannabis-focused businesses ancillary to direct selling or growing of marijuana — from media to insurance, from hydroponic suppliers to specialty software."); Young, *Getting in on the ground floor of the pot business*, *supra* note 96 (reporting that investors are wary of entering the marijuana production business because of the uncertainty of federal crackdowns); *see also* Fottrell, *How to invest in legalized marijuana*, *supra* note 99 (listing the numerous other areas where investment would be more prudent, including ancillary products and infrastructure, if one wishes to capitalize on the marijuana business).

#### d. Possible Explanations for Demanding Separations within the Supply Chain

Even when medicinal marijuana facilities have taken every precaution, and have followed all relevant state regulations, they are still subject to severe federal crackdowns and interference.[111] This much is true, but current standards for federal raids are actually a benefit to the I-502's structure of the business.[112] The current stance is that "[t]he larger the operation, the greater the likelihood that there will be abuses of the state's medical marijuana laws."[113] Raids occur, even though all state laws are followed, taxes are paid, and certain neighborhoods are avoided at the request of the citizens.[114] Certain medicinal marijuana facilities are being shut down simply because they are generating too much revenue.[115] If Washington maintains a strict separation between the three chains of production, it is possible to envision minimal government interference.[116] Allowing for the creation of multiple smaller entities through inexpensive licensing and a separation within the supply chain is the best way to avoid federal interference.

### *B. The State Licensing Requirements Will Impair the Ability to Collect Increased State Revenue from the Taxation of the Marijuana Business*

Selling I-502 to the voters as an increased freedom, or a step in the right direction is one thing, but a main provision of the legislation is that there will be increased revenue to Washington state as a result of licensing fees and excise taxes.[117] If I-502 is not implemented correctly, the state will

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[111] *Accord* Canna Law Blog, *Model of Compliance Busted for its Size*, CANNA L. BLOG (Aug. 14, 2012), http://www.cannalawblog.com/model-of-compliance-busted-for-its-size/ (looking at the circumstances surrounding the closure of Harborside Health Centers in Oakland and San Jose, where the size of the business, including its massive revenue and customer base, made it a target for the federal government even though it was complying with all pertinent state laws and going above-and-beyond what was necessary to maintain security and stay away from children and schools).

[112] *Cf. id.* (maintaining that the Harborside dispensary was shut down because of its size, so a series of smaller entities would have a greater chance of never being raided).

[113] *See id.* (quoting Melinda Haag, the U.S. Attorney for the Northern District of California).

[114] *Id.* (pointing out that Harborside was a model marijuana dispensary in the state of California).

[115] *Id.* (noting that the greater the size of the business, the more prone they tend to be to a series of minor violations that would allow non-patients to procure medical marijuana).

[116] *Cf.* Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 566 (2010) ("Perhaps the most significant . . . lesson to be learned from fourteen years of state medical marijuana laws is that the ability of the federal government to override or interfere with state drug laws is actually quite limited"). *See also* Cole Memo II, *supra* note 82.

[117] *See* I-502, Part IV.26-28 (establishing a dedicated marijuana fund, consisting of "marijuana excise taxes, license fees, penalties, forfeitures, and all other moneys, income, or revenue received by the [WSLCB] from marijuana-related activities").

miss out on a significant source of revenue, estimated to be nearly $2 billion over the first five years.[118] While legalization is a main portion of I-502, creating an infrastructure for the business to thrive is incredibly important, and will specifically be stifled by the problems noted above. If the producers and retailers never seek licenses to create a legitimized version of their businesses, the market will be flooded with product that will be cheaper and not regulated or taxed by the state.

1. Current Success of the Black Market for Marijuana, and the Refusal of Current Producers to Open Their Businesses to Federal Interference

As the age-old adage goes, "if it ain't broke, why fix it?" With the uncertainty surrounding how the federal government will approach this very blatant disregard of the CSA, this is the likely attitude taken by current black market producers of marijuana.[119] For any growing operation already making a profit, the risks outweigh the gains.[120] The risk accompanying marijuana production is increased when you are not following state law and obviously violating federal law.[121] With this new legislation, the courtship between the state and its marijuana producer begins with a production licensee acquiescing to the registration requirements of the WSLCB.[122] There is no guarantee that the federal government will not use the information gathered from each applicant to come in and shut his or her operation down at a later date. Instead, there is only hope that this will not

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[118] *Accord* Alison Veskin, *Washington Races Colorado for Billions in Pot-Tax Revenue*, BLOOMBERG NEWS (June 24, 2013), http://www.businessweek.com/news/2013-06-24/race-for-marijuana-between-states-cast-in-doubt-by-u-dot-s-dot-taxes (citing a report estimating that Washington could gain nearly $2 billion in tax revenue over the first five years of I-502 being in place). *See also* Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 225 (2010) [hereinafter Mikos, *State Taxation of Marijuana*] (estimating that California alone could save over $156 million that is spent on criminal enforcement of marijuana laws, and additionally stand to gain somewhere in the neighborhood of $1.38 billion in new tax revenue from the $14 billion per year marijuana business).

[119] *Cf.* Hargreaves, *supra* note 5 (noting that illegal drug businesses get absolutely slammed in their effective federal tax rate).

[120] *See id.*; *but cf.* Leff, *Growing the Business*, *supra* note 98 (arguing that a business providing marijuana might avoid the tax pitfall by reclassifying as a tax-exempt 501(c)(3)).

[121] *Cf.* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1564 (2002) (pointing to the lack of resources that the federal government currently has for handling marijuana cases); Marijuana Policy Project, *State-by-State Medical Marijuana Laws* (2011), http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2011.pdf (last visited Dec. 8, 2013) (noting how most cases are dealt with at the state level, and are focused on violations of state, rather than federal, regulations and laws).

[122] *See* I-502, Part III.4.1-3 ("There shall be a marijuana producer's . . . processor's . . . [and] retailer's license . . . regulated by the state liquor control board and subject to annual renewal").

become the status quo.[123]

2. Potential Federal Criminal Penalties that will Encourage Suppliers at all Levels to Avoid the State-Sanctioned Marijuana Business

Federal power to enforce federal laws will always trump the ability of a state to fully sanction violations of those laws. The preemption analysis from the beginning of Section (II)(C)(3)[124] of this note elaborates on whether the federal government can compel the states themselves to enforce these federal laws.[125] With no clear answer,[126] the harsh penalties that can be levied for violations of the CSA are not worth the risk. With the worst individual offenders subjecting themselves to possible life imprisonment and/or a $20 million fine,[127] there is no reason to put oneself in harm's way. Even larger corporations that might hope to limit their potential liability—or at least hedge themselves with hefty profits from selling marijuana if the market takes off—face crippling fines reaching a maximum of $75 million.[128] The incentive to profit from the marijuana business is dramatically counterbalanced by the potential criminal penalties. For a new business to thrive in Washington, there is an absolute requirement that outsiders have an incentive to invest in it, and right now, that incentive does not exist.[129]

## *C. Lack of Employment Law Language Within Initiative 502 Negates Its Effectiveness as an Additional Freedom for the General Populous*

While the structure of the supply chain is the macro issue, the lack of language in I-502 protecting the average employee wishing to use a legal drug while in his or her own home is an equally important micro issue. This freedom was one of the main selling points of the legislation, and I-502

[123] *Cf.* Weissman, *Will Obama Let Washington and Colorado Keep Their Legal Pot?*, *supra* note 66 ("The hope is that, if Washington and Colorado set up smart laws with well defined bounds, federal prosecutors will decide to leave legal recreational marijuana alone, just like they mostly have with medical marijuana").

[124] *See generally* discussion Part II.C.3 (reviewing the different schools of thought when it comes to whether or not the CSA preempts state laws that attempt to legalize and regulate the production and sale of marijuana).

[125] *See supra* note 47 (covering the various opinions of whether or not federal law preempts marijuana legalization legislation).

[126] *Id.* (noting that no clear answer exists, and any definitive answer is mere postulation).

[127] CSA § 841(b)(1)(A)(viii).

[128] *Id.*

[129] *See, e.g.*, Young, *Getting in on the ground floor of the pot business*, *supra* note 96 ("[T]he threat of a crackdown has kept investors out of the leaves-and-buds business . . . ArcView is investing only in ancillary products and services").

will ultimately prove to be a failure in the long run without it. Employers have consistently retained the right to enforce a zero-tolerance drug policy and either refuse employment or fire current employees who use marijuana, even when that usage is off-site.[130] Until now, the only real challenge to that position has been from medical marijuana users who have either claimed disability discrimination or wrongful termination.[131] With a much greater proportion of the work force now in danger of being denied employment as a result of what is now legal off-site use of marijuana, Washington would benefit from using the simple and effective solution offered by Maine's statute.[132] However, even if I-502 were amended to mirror Maine's statute, which does not allow employers to test for marijuana, the placement of marijuana on Schedule I of the CSA would still provide only limited protections against employers that choose to maintain a completely zero-tolerance drug policy.[133]

### 1. Employers' Stances on Medical Marijuana Users as a Precedential Analysis for Applying I-502

As demonstrated by the California and Washington cases of *Ross v. RagingWire* and *Roe v. TeleTech* respectively, legally using medical marijuana off-site does not protect a person from an adverse employment action.[134] Medicinal marijuana users long ago became a distinct class, outside the purview of federal employment law protection due to the continued classification of marijuana as a Schedule I narcotic under the CSA.[135] That stance coincides with how the DFWA has been able to dictate employment law to employers holding federal grants and federal

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[130] *E.g.*, David G. Evans, *Medical marijuana in the workplace – Employer guidelines*, 1 DRUG TESTING LAW TECH. & PRAC. § 1:35 (2012) (concluding that employers have numerous ways to insist that employees do not use drugs at all, even off-site).

[131] *Accord TeleTech*, 257 P.3d 586; *RagingWire*, 174 P.3d 200 (referencing plaintiff arguments that off-site medical marijuana use was sanctioned by existing employment law protections).

[132] *See* Peter Lowe, *Complying with Maine's Medical Marijuana Law*, 16 No. 5 EMP. L. LETTER 4 (2011) [hereinafter *Complying with Maine's MML*] (recommending ways for employers to protect themselves from on-site usage by employees, while conceding that off-site usage is perfectly acceptable in Maine, and should be in other states).

[133] *See* Lindsey M. Tucker, *High Stakes: How to Define "Disability" in Medical Marijuana States in Light of the Americans With Disabilities Act, Canadian Law, and the Impact on Employers*, 21 IND. INT'L & COMP. L. REV. 359 (2011) [hereinafter *High Stakes*] ("Although states are rolling in the direction of legalizing medical marijuana, federal law is clear that marijuana is still an illegal Schedule I controlled drug with no recognized medical value.") (citing the CSA § 812, where marijuana has always been listed as a Schedule I narcotic).

[134] *See RagingWire*, 174 P.3d 200 (providing no protection to California employees for off-site marijuana usage); *TeleTech*, 257 P.3d 586 (providing that no protection exists for Washington employees that engage in off-site marijuana usage).

[135] *See* Tucker, *High Stakes*, *supra* note 133, at 394 (bringing up the notion that federal disability laws are modeled around federal drug laws, and should not easily be altered by state decriminalization laws).

contracts.[136] This legislation has been challenged, but there have been no exemptions granted to medical marijuana users despite persistent efforts.[137] The result is that medical marijuana users have been barred from off-site usage, and "[t]here is no reason to find an implicit requirement that employers accommodate off-site use simply because employers are not obligated to accommodate on-site medical marijuana use."[138] Employers have had that stance upheld, but the door is still open for employers to "knowingly accept[] an employee's use of marijuana as a medical treatment at the employee's home" without sacrificing possible drug-free workplace certification.[139]

### 2. Private Employers' Right to Refuse Employment to Users of a Drug, Even when Its Use Is Legal

Private employers have not worried about marijuana, because their right to refuse employment to users has been consistently upheld. In light of both *RagingWire* and *TeleTech*, it is clear that medical marijuana users in Ninth Circuit states are not exempt from the consequences of employee drug testing.[140] Because marijuana remains a Schedule I narcotic, and most employers maintain a broad policy where no federally illegal drugs can be used, state laws legalizing a drug's use are irrelevant in these matters.[141] The jurisprudential progression has solidified employers' ability to restrict off-site use by employees or prospective employees under the auspices of federal prohibition.[142] If Washington courts interpret I-502 in a manner upholding the voters' intention to legalize marijuana, employment law

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[136] *See* Perkins Coie, *Baked but not Fired? Medical Marijuana Laws Create Uncertainty*, 15 No. ALASKA EMP. L. LETTER 1 (2010) [hereinafter *Baked but not Fired?*] (noting that court decisions tend to rule in favor of employers that enforce drug-free workplace policies).

[137] *E.g.*, *RagingWire*, 174 P.3d at 202 ("Federal law, however, continues to prohibit the drug's possession, even by medical users.") (citing CSA §§ 812, 844(a); *Raich*, 545 U.S. at 26-29; *Oakland Cannabis*, 532 U.S. at 491-95).

[138] *See,* Vitaliy Mkrtchyan, *Initiative 692, Now and Then: The Past, Present, and Future of Medical Marijuana in Washington State*, 47 GONZ. L. REV. 839, 858 (2011-2012) (citing *TeleTech*, 257 P.3d at 591) (arguing that the law should work to implicitly allow off-site use because only on-site use is mentioned for the notion that employers need not tolerate it).

[139] Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pothole for Employers?*, 5 PHOENIX L. REV. 415, 441-42 (2012).

[140] *Contra* Lowe, *Complying with Maine's MML*, *supra* note 132 ("[E]mployees [in Maine] will never have a confirmed positive test result for marijuana because their approved medical marijuana use likely will prompt a medical review officer to classify a positive marijuana test as negative").

[141] *See* Perkins Coie, *Baked but not Fired?*, *supra* note 136.

[142] *E.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518, 536 (Oregon, 2008) (holding that (1) an employee currently using illegal drugs is not entitled to an accommodation from his or her employer; (2) the Oregon Medical Marijuana Act is preempted by the CSA, which prohibits marijuana usage, even for medical purposes; and (3) the only use allowed under the CSA is specifically sanctioned by the government for research purposes).

language prohibiting use of marijuana would need to be modified to emulate other states that reasonably allow off-site use by employees.[143] States certainly have the power to provide this protection for its citizens even when it comes into conflict with federal laws, though most choose not to.[144] This argument is predicated on the belief that I-502 creates a newfound privilege or freedom not to be abrogated by the preferences of certain employers.

A major purpose of passing I-502, or any law that conflicts with federal law, is to serve as an incubator for the national discussion of marijuana legalization and, hopefully, to put pressure on the federal government to relent on its refusal to remove marijuana from Schedule I of the CSA.[145] By legalizing it at the state level for millions of people, a greater public policy argument exists, as the federal government must act against a larger subset of the population when upholding employers' right to enforce off-site prohibition. The law was passed by a majority of the state, and it is preposterous to allow employers in nearly every sector to discriminate against workers for legal off-site use of marijuana.

### 3. Marijuana Impairment is not Analogous to Alcohol Impairment, and Should be Treated as such in the Employment Setting

Analogizing marijuana with alcohol, as employers, legislators, and police often do, fails to take into account dramatic differences in actual impairment. Language from I-502 pertaining to marijuana DUI arrests is inserted directly into the same section as current alcohol DUI law, perpetuating this flawed analogy.[146] Specific to those DUI laws—but irrelevant to this Comment except for comparison—a blood-alcohol content ("BAC") level of 0.08 or higher and a THC level of 5.00 are

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[143] *See generally* ME. REV. STAT. tit. 22, § 2423(6) (2009) (protecting medical marijuana users from adverse employment action solely because they are a medical marijuana patient); R.I. GEN. LAWS § 21-28.6-4 (West 2012) (similar); ARIZ. REV. STAT. § 36-2813 (2010) (similar); MICH. COMP. LAWS ANN. § 333.26424 (West 2012) (protecting medical marijuana cardholders from being denied the right or privilege of using medical marijuana by employers).

[144] *See* Lowe, *Complying with Maine's MML*, *supra* note 132 (concluding that employers can only regulate on-site usage of marijuana by its employees in light of Maine statute); *see also* Mikos, *Limits of Supremacy*, *supra* note 71, at 1464-65 ("states [have] retain[ed] both de jure and de facto power to exempt medical marijuana from criminal sanctions, in spite of Congress' uncompromising - and clearly constitutional - ban on the drug").

[145] *See Raich*, 545 U.S. 57 ("[T]he federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case."); *see also* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 828-37 (2004) (discussing drug reform ballot initiatives in the areas of medical marijuana, mandatory treatment, forfeiture reform, and marijuana decriminalization).

[146] WASH. REV. CODE ANN. § 46.61.502(1)(a), (b).

needed to effectuate DUI arrests for alcohol and marijuana respectively.[147] With the caveat that limited reliable scientific data is available on marijuana impairment, it is generally estimated that a THC level of 5.00 is more synonymous to a BAC of 0.05,[148] considerably lower than the legal limit.[149] These threshold levels are one source of the problem, as the flaws in the current testing methods stigmatize marijuana users to a greater extent than alcohol users when measuring impairment.[150] Considerable evidence exists to also conclude that these two substances cannot be properly compared side by side because an impairment test for alcohol shows immediate impairment, while an impairment test for marijuana (among other drugs) provides no such usable evidence.[151]

a. Inherent Bias against Marijuana Users in Impairment Testing

Perhaps the most troubling aspect of the comparison between marijuana and alcohol is that the dramatically different dissipation rates of the two substances are rarely taken into account when crafting laws to control their use. Studies have established that alcohol dissipates extremely quickly in the bloodstream, faster than almost any other mind-altering substance in existence.[152] Conversely, marijuana has the slowest dissipation rate of any narcotic substance that is regulated by the federal government,

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[147] *Id.*

[148] *See* Jonathan Martin, *I-502 raises question about how much pot is too much for drivers*, SEATTLE TIMES, (Oct. 28, 2012, 12:07 AM), http://seattletimes.com/html/politics/2019541405_potdui28m.html (noting that this estimate is based on "some studies"), *and* Joseph Rose, *Washington's new 'driving high' DUI law for marijuana users stirs fears*, THE OREGONIAN, (Dec. 05, 2012, 8:35 PM), http://blog.oregonlive.com/commuting/2012/12/washingtons_new_driving_high_d.html (similar).

[149] *Id.*

[150] *See Deconstructing I-502, Part 3: Impaired Science*, SENSIBLEWASHINGTON.ORG (Mar. 11, 2012), http://sensiblewashington.org/blog/2012/deconstructing-i-502-part-3-impaired-science/ (noting a variety of reasons why the impairment tests that will be used are incredibly flawed and not indicative of current impairment); Janet E. Joy et al., *Marijuana and Medicine: Assessing the Science Base*, 137 (National Academies Press 1999), http://www.nap.edu/openbook.php?record_id=6376 (discussing the many difficulties surrounding the study of marijuana, including, but not limited to, federal prohibition).

[151] *Cf.* State v. Bealor, 902 A.2d 226, 231 (N.J. 2006) ("[I]t would be 'a leap of faith' to conclude that 'having some substance in your urine [means] being under the influence of it."); *see also* Charles R. Cordova, Jr., *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 NEV. L.J. 570, 591 (2007) (arguing that a low level of drug metabolites in the defendant does not make it more or less probable that the defendant was intoxicated at the time of driving).

[152] *Accord* Mark P. Stevens & James R. Addison, *Interface of Science & Law in Drug Testing*, 23 CHAMPION Dec. 1999, at 18, 21 (charting alcohol as detectable in urine up to 24 hours after consumption, while metabolites of marijuana are detectable in urine up to two months after ingestion; metabolites of cocaine up to a few weeks; opiates a few days; barbiturates around one month, etc.).

even after any psychoactive effects have worn off.[153] This critical and immense difference is often ignored, and laws enacted to measure use of the drug invariably lead to an inherent bias against marijuana users. For comparison's sake, a full-blown alcoholic who "blacks out" every day of a given week will not register as having any alcohol in their system if measured a week after he or she stops drinking.[154] However, an infrequent marijuana user could smoke a single joint but register as a drug user if tested a month later.[155] This may seem like classic reductio ad absurdum, but it is a sad and factual reality. Technological advancements that would lead to a more accurate and governmentally approved test are hindered by the federal stranglehold.[156] This is further evidence that it is in the best interests of all parties for marijuana to be reclassified as a Schedule II narcotic or lower, which would allow proper studies to be done.

### b. Employers' Stance on Marijuana Versus Alcohol

Unlike in the past, the employers' stance is now largely hypocritical. Demonizing marijuana use to a far greater extent than alcohol is the stance taken by employers throughout the nation, not just in Washington. Employment and labor law were untouched in I-502, and the lack of changes in that field will be the biggest setback as Washington tries to transition smoothly into full-scale legalization. While employers maintain their stance in tandem with federal law,[157] the citizens of Washington will be restricted from enjoying what should be a newfound freedom.

## IV. DOUBLING DOWN OR CUTTING LOSSES

There is no easy solution to the issues outlined in this Comment.

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[153] Lindsay Calhoun, *Michigan's Operating While Intoxicated Statute: The Possible Ramifications of the Michigan Supreme Court's Decision in* People v. Derror, 53 WAYNE L. REV. 1125, 1141 (2006). ("scientists generally agree that substances such as marijuana and cocaine are detectible in the body long after the psychoactive effects of the drug are gone").

[154] *See* Stevens & Addison, *Interface of Science & Law in Drug Testing*, *supra* note 152, at 21. (discussing the dissipation rates and detectability times of different drugs versus alcohol).

[155] *Id.* at 21.

[156] *See* Mikos, *Limits of Supremacy*, *supra* note 71, at 1433-34. ("[T]he federal government approves so few marijuana research projects – eleven since 2000 – only a small fraction of the population that currently qualifies for state exemptions could participate."); Drug Enforcement Agency, *Lyle Craker: Denial of Application*, 74 FED. REG. 2101 (Jan. 14, 2009). (noting that at any given time only about 500 persons are allowed to use marijuana in federally approved studies).

[157] *Compare* DFWA §§ 8101-04, *with 50 State Survey: Drug-Free Workplace Programs*, LEXISNEXIS, (Sept. 1, 2009), http://www.lexisnexis.com/documents/pdf/20090930094905_large.pdf. (citing a U.S. Dept. of Labor survey that analyzes how each state has implemented their drug-free workplace laws).

There will invariably be lawsuits around this issue, and the judiciary may choose to strike down portions of the law as they are challenged. Concerns over the scientific basis of THC testing, the structure and reporting requirements of the supply chain, and employment law concerns are among the more likely portions ripe for a challenge. State legislative concerns might lead to attempts to amend I-502 to include employment law protection.[158] Finally, the public as a whole could decide that further legislative measures or amendments are sorely needed after experiencing firsthand the impact that I-502 is having on employers and employees and how the implemented business model has proven to be dysfunctional.

### *A. Judicial Destruction of Initiative 502 as a Means of Forcing Washington State Citizens to Pursue Alternate Legislation*

Put simply, with the many avenues that can be taken, the most obvious solution would be for the judiciary to gut the main provisions of I-502, specifically those relating to the structure of the supply chain[159] and those relating to the threshold level for intoxication as necessary to effectuate a DUI arrest.[160] If those portions are thrown out, I-502 would go up in smoke, and there would not be substantial changes to existing law. Washington state citizens would be forced to enact amended legislation over the next few years if they still wished to legalize marijuana use. Ideally, there would also be changes to the supply chain registration provisions that require applicants to file their information with state and federal bureaus.[161] Changes to those provisions would allow for growers, distributors, and retailers to file their information only at the state level for licensing purposes, and thereby be less susceptible to DEA action. This would at least loosen the treacherous entrapment mechanism that is currently in place. The DEA would still retain the right to raid these facilities, similar to what has been done with other facilities that are in compliance with state laws. Even so, the very least that Washington could do is not force potential licensees to entrap themselves as a requirement of obtaining a license to enter the business.

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[158] *Contra* Jacob Sullum, *What Legal Pot in Washington Will Look Like*, REASON.COM (Nov. 9, 2012, 2:03 PM), http://reason.com/blog/2012/11/09/what-legal-pot-in-washington-will-look-l. (pointing out that a two-thirds majority is needed for any amendments to I-502 within the first two years).
[159] I-502, Part III. 4-19.
[160] *Id.* Part V.31-37.
[161] *Id.* Part III.6.1-3.

### *B. Removal of the DUI Threshold – Researching More Accurate and Less Biased Impairment Tests*

The currently accepted method for testing for marijuana impairment is flawed,[162] and it opens the possibility for using it as concrete evidence. Abandoning the DUI threshold for marijuana intoxication also serves to remove from Washington state law a level for employers to assert as reasonable when applying drug-testing procedures. It would tear out an essential portion of the bill that protects the citizens from impaired drivers and ensure that more comprehensive studies were undertaken to correctly identify marijuana impairment.[163] This would force the Washington State voters to enact amended legislation that applies a more accurate and unbiased impairment test. Doing so would legitimize any DUI convictions, and serve as a better model for employers to use to reasonably prevent impairment in the workplace. There is no argument being made that employers should be barred from requiring their workers to have a clear mind during working hours. The argument is that the citizens of Washington state should be free from employer interference of their off-site behavior. The basis for delineating between the two is currently flawed and unacceptable, and it will infringe upon the private lives of Washington state citizens until more accurate and reliable testing methods become commonplace.

### *C. Collective Movement to Finally Reclassify Marijuana as a Schedule II Narcotic*

If continued efforts are made to reclassify marijuana as a Schedule II narcotic, it will solve many of the identified issues. There will no longer be an incentive for the federal government to actively enforce the CSA by extra-judicially regulating the marijuana business above and beyond how various states have chosen to. The people want this,[164] and a move to

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[162] *See Understanding THC & Detection Times*, *supra* note 64. (outlining the various reasons why the currently applied marijuana testing procedures are wildly flawed).

[163] *Cf.* Matthew C. Lee, MD, RPh, MS, *Assessing Marijuana Intoxication*, EXPERTPAGES (Mar. 2, 2013), http://expertpages.com/news/Assessing_Marijuana_Intoxication.htm ("Both the National Highway Traffic Safety Administration and the National Institute on Drug Abuse have stated that marijuana impairment testing via blood sampling is unreliable. This determination is based on . . . the inability to accurately quantitatively determine marijuana impairment").

[164] *But see* Andrew Cohen, *The Long Slog to Legalizing Marijuana in the U.S. Is Just Beginning*, ATLANTIC (Jan. 24, 2013, 6:02 PM), http://www.theatlantic.com/national/archive/2013/01/the-long-slog-to-legalizing-marijuana-in-the-us-is-just-beginning/267436/. (pointing out that courts give significant deference to administrative agencies, and even in the face of overwhelming public support for legalization, there is no way to force Congress to reclassify marijuana).

Schedule II would allow for marijuana prescriptions,[165] so the DEA would no longer need to raid facilities with impunity. More studies could be conducted, furthering research into impairment testing, potency and its affects, and countless other areas. Moving to Schedule II would also give employees the ability to use marijuana off-site. The *TeleTech* and *RagingWire* cases would no longer be current law, as the basis or those decisions was the Schedule I classification of marijuana. There have been repeated efforts at reclassification, and they have all failed in one or more ways.[166] However, full legalization within the states is a new phenomenon and may be the final push needed to force the reclassification of marijuana as a Schedule II narcotic at the highest level.

### *D. Deprivatize the Marijuana Business as an Extreme Maneuver*

As a final but exceedingly risky solution to this problem, the state of Washington itself could take control of the marijuana growth and distribution industry. If Washington puts its "money where its mouth is," so to speak, there will be a direct conflict with state employees engaging in acts that are illegal at the federal level.[167] The federal government is hesitant to commandeer the actions and wills of a state when that state is not in direct contravention with federal laws, but instead merely turning a blind eye.[168] Maintaining the current climate, however, will only allow for federal interference if they choose,[169] rather than finally putting national pressure on Congress to remove marijuana from the Schedule I list of narcotics in the CSA. If the production and supply chain are being controlled and regulated specifically by state organizations, the federal government would be forced to bring suit directly against the state itself.

## V. CONCLUSION

If the sole purpose of I-502 was to decriminalize simple

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[165] *See* CSA § 829(a). (noting that Schedule II drugs can be prescribed by physicians).

[166] *See* Cohen, *The Long Slog to Legalizing Marijuana in the U.S. Is Just Beginning*, *supra* note 164. (demonstrating that reclassification is a long and arduous process, with little hope for actual substantive change to the CSA).

[167] *See, e.g.*, Mikos, *On The Limits Of Supremacy*, *supra* note 71, at 1432. ("[S]tate distribution programs are clearly preempted by federal law, and if they were ever executed, they would expose state agents to federal criminal liability").

[168] *Id.* at 1453 ("The states are doing no more than turning a blind eye to conduct Congress forbids; by exempting that conduct from state imposed punishment, they do not require or necessarily even facilitate it in the relevant sense. So understood, the exemptions cannot be preempted").

[169] *See* Riggs, *Obama Administration Overrides 2009 Ogden Memo*, *supra* note 76. (purporting to enact a non-enforcement policy in 2009, the Obama administration instead chose to raid marijuana facilities that were complying with all applicable state laws).

possession of marijuana in Washington state, then this Comment is unhelpful because I-502 achieves that. However, if there is no way for Washington to ensure that its citizens have access to or use of marijuana, then what has the law really done? When a major selling point of the legislation is that the state will support the inception and expansion of marijuana production, distribution, and retail sale, then the model is a failure in practice. It is a failure in that Washington offers no real protection from federal interference to businesses, and in fact actually puts those licensees directly in harms way.[170] It is a failure in that without a proper business model, the significant revenue bump from the taxation of marijuana will not take place.[171] Investors will shy away, black market producers will continue to produce, the revenue boost will not be as swift or fulfilling, and the market will not unfold with any lasting effect.

But the greatest failure of all is that I-502 fails to grant Washington's citizens the freedom to use marijuana without severe repercussions. The lack of employment law language deprives the citizens of Washington of a new freedom, and I-502's faults are magnified by the enactment of biased and scientifically unsound testing methods that equate leisurely off-site marijuana use to full-blown impairment.[172] States' future marijuana legalization efforts should absolutely use I-502 as a template, but substantive changes are required to the framework of the law if the legalization movement and the end of nationwide prohibition of marijuana are to come about in a reasonable and successful manner.

[170] *See* I-502, Part III.6.1-3. (forcing each licensee to file their information with the WSLCB, and thereby the FBI, puts them directly at risk of being raided by the DEA).
[171] *Cf.* Hargreaves, *supra* note 5. (highlighting that current black market producers maintain an incentive to stay out of the business because of enormous effective tax rates).
[172] *See* Rose, *supra* note 64. ("[T]he DUI provision ignores both the basics and the complexities of marijuana use, such as its tendency to hang around in a user's system for a month").