

LEGAL STRATEGY DURING LEGAL UNCERTAINTY: THE CASE OF CANNABIS REGULATION

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Abstract

Overcoming its checkered past and stringent regulation, cannabis is quickly becoming a highly lucrative consumer product. Accompanying this rapid decriminalization is crippling legal uncertainty, as vague statutory language, sporadic backsliding, presidential indecision, and inconsistent enforcement have introduced substantial and unnecessary legal and compliance risks. This combination of a novel industry and its ambiguous legal environment is not only ripe for reform, but also illuminates how firms can respond strategically to high levels of legal uncertainty.

After a review of the controversial history of cannabis and the legal uncertainty that pervades the industry, the manuscript shows how uncertainty drives firms to pursue risky legal strategies. This manuscript shows that firms under the stress of uncertainty respond by either aggressively leveraging their legal knowledge to capture value or attempting to circumvent the legal environment altogether. Both pathways of legal strategy impose unnecessary volatility on cannabis firms.

The manuscript then highlights how legal uncertainty drives legal strategy in a discrete legal environment – the federal government’s refusal to register marks for goods that are illegal under federal law—including most cannabis goods. We uncover five distinct legal strategies used by cannabis firms, with each strategy responding to a different combination of legal uncertainties. Finally, eschewing an unrealistic proposal for immediate uniformity, we propose pragmatic and achievable reforms that would significantly reduce legal uncertainty for firms while not upsetting further the already chaotic legal environment of cannabis regulation.

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INTRODUCTION

In 1937, the commissioner of the U.S. Federal Bureau of Narcotics proclaimed: “The sprawled body of a young girl lay crushed on the sidewalk the other day after a plunge from the fifth story of a Chicago apartment house. Everyone called it suicide, but actually it was murder. The killer was a narcotic known to America as marijuana”¹ Cannabis was blamed for: “slaughterings, cruel mutilations, maimings, done in cold blood, as if some hideous monster was amok in the land”² The now-cult classic 1936 film “Reefer Madness” claimed that cannabis was “turning our children into hooligans and whores.”³ The filmmaker declared cannabis as “dangerous as a coiled rattlesnake.”⁴ Users of marijuana, according to one newspaper, became “bestial maniacs, filled with a mad lust to kill.”⁵ American public opinion was so strongly behind this construction of cannabis that the drug remained fully criminalized for decades.

How times have changed. Today, nine in ten Americans believe cannabis should be legalized in some form.⁶ This support crosses political boundaries, with a majority of Democrats, Independents, and Republicans showing support for some form of legal use.⁷ Both federal and state policymakers are now seriously considering full legalization of cannabis for both recreational and medical uses. A legalized cannabis marketplace could reach \$73.6 billion in value by 2027.⁸

This valuable future market, however, is not simply laid bare for the taking. Cannabis has a disturbingly ambiguous legal status in the United States and is experiencing a chaotic and fitful path toward legalization.⁹ Firms that enter the market too early risk sanction from the remaining anti-cannabis regulations still in place. Firms that enter the market too late, and cautiously wait for complete legalization, risk ceding important first-mover advantages to rivals. This presents a difficult conundrum, with the wrong decision meaning the difference between millions of dollars in new revenues and being punished or jailed for daring to grow and sell cannabis as a legal crop.

¹ Harry J. Anslinger & Courtney Ryley Cooper, *Marijuana: Assassin of Youth*, *American Magazine* (July 1937) reprinted in *THE AMERICAN DRUG SCENE* 64 (James A. Inciardi & Karen McElrath eds., 2d ed. 1998).

² MARTIN BOOTH, CANNABIS: A HISTORY 151 (2003) (emphasis omitted; quoting a 1936 Universal News Service story).

³ Dusty Lavoie, *Marijuanatopia?—Placing Pot Media in the U.S. Social Imaginary: Surveillance, Consumption, and Pleasure* 264 (Aug. 2011) (unpublished Ph.D. dissertation, University of Maine) (on file with author). See also REEFER MADNESS (G & H Films 1936).

⁴ Richard J. Stringer & Scott R. Maggard, *Reefer Madness to Marijuana Legalization: Media Exposure and American Attitudes Toward Marijuana (1975-2012)*, 46 *J. DRUG ISSUES* 428, 429 (2016).

⁵ Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 *ALB. GOV'T L. REV.* 359, 363 (2013).

⁶ Hannah Grabenstein, *Marijuana Laws Changing, Following Public Opinion*, *Legal Examiner* (Aug. 20, 2020), <https://www.legalexaminer.news/health/marijuana-laws-changing-following-public-opinion/>

⁷ *Id.*

⁸ Rajesh Varma, *Legal Marijuana Markets Size Worth \$73. Billion by 2027 | CAGR 18.1%*, MEDIUM (July 23, 2020), <https://medium.com/healthcare-market-research/legal-marijuana-market-size-worth-73-6-billion-by-2027-cagr-18-1-4a0dd964dcb3>. For a more conservative estimate, see Michael Sheetz, *Barclays Estimates US Weed Market Would be \$28 Billion if Legalized Today, Growing to \$41 Billion by 2028*, CNBC (May 1, 2019), <https://www.cnbc.com/2019/05/01/barclays-us-cannabis-market-28-billion-if-legalized-today.html>.

⁹ Karen A. Parker et al., *Risk Management within the Cannabis Industry: Building a Framework for the Cannabis Industry*, 28 *FIN. MKTS INST. & INSTRUMENTS* 3, 3 (2019).

Unraveling this legal conundrum is the driving purpose of this manuscript. While recent articles focus primarily on civil and criminal reforms,¹⁰ this manuscript focuses on those forced to comply with an erratic legal environment: cannabis-growing companies and their supply chains. These companies are forced to navigate their legal environments with little guidance and great risk. These firms are also forced to think strategically about the law with an immediacy and firm-killing jeopardy that established industries can easily avoid. As a result, the legal environment of cannabis offers a unique and illuminating opportunity to better understand how legal uncertainty influences firm behavior, with implications for future theory and policy.

Our roadmap is as follows. Part I explores the controversial legal and cultural history of cannabis regulation. This Part traces historical cannabis regulation from its racist and hysteria-fueled origins to a modern and conflicting duality between federal and state regulatory goals. Part II examines cannabis policy today. What is particularly noteworthy about cannabis policy is the profound legal uncertainty that it creates, and this Part explores how cannabis regulation generates high levels of the three types of uncertainty – systemic, substantive, and enforcement – that can plague a collection of interlinked legal mandates.

Where the law generates great uncertainty, there is also the chance for great opportunity. Part III explores that opportunity through the lens of legal strategy—the notion that firms can use laws to not only avoid liability, but to capture a competitive advantage over rivals. This part theorizes that high legal uncertainty can have a profound effect on a firm’s legal strategy. Instead of modest steps to utilize the law, high legal uncertainty can compel cannabis firms to radicalize their legal strategies by either evading the impact of the law today, gambling on the future of the law tomorrow, or a hybrid strategy of both.

Part IV examines marijuana firms in action through their strategic responses to a specific legal challenge: the acquisition and retention of valuable cannabis-related trademarks. This Part confirms that cannabis companies operating under legal uncertainty focus on higher-risk legal strategies. This uncertainty both encourages firms to take unnecessary risks as well as imposes deadweight losses by encouraging firms to be inefficiently conservative in response to legal mandates. The result is a legal environment that is not only ambiguous, but also generates self-reinforcing effects that diminish the efficiency of a firm’s interaction with the market.¹¹

In light of the effect that legal uncertainty has on firm behavior, Part V articulates pragmatic and business-focused proposals for reform. Shunning broad and unrealistic mandates, this Part highlights how three proposals – encouraging state legislative laboratories, implementing reasonable grace periods for new regulations, and developing good faith public-private partnerships – can simultaneously alleviate the costs of legal uncertainty for firms while not upsetting further the already unstable state and federal legal environment of cannabis regulation. Part VI concludes.

¹⁰ See, e.g., Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379 (2020); Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where we are and Where We’re Going*, 43 SEATTLE U. L. REV. 883 (2020); Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1 (2020).

¹¹ Justin Evans & Anthony L. Gabel, *Legal Entrepreneurship and the Strategic Values of Legal Uncertainty*, 57 AM. BUS. L.J. ____, *8 (forthcoming 2020).

I. THE LEGAL AND CULTURAL HISTORY OF CANNABIS REGULATION

This part introduces the changing legal, cultural, and business landscapes surrounding cannabis. We begin with the historical treatment of cannabis as an illegal drug under state and federal law and then evaluate trends towards increased acceptance in recent years. Particular attention is given to legal ambiguities that developed as deregulation proceeded in the past quarter century.

The drug known as cannabis or marijuana is harvested from the *Cannabis sativa* plant.¹² When ingested, cannabis can bring about euphoria and distorted perception¹³ with tetrahydrocannabinol (THC) being the primary psychoactive agent.¹⁴ Beyond recreational uses, the drug is used to relieve nausea, anorexia, and neuropathic pain.¹⁵

Since the early twentieth century, cannabis was considered an “unspeakable scourge” and a “national monster” that plagued American society.¹⁶ Recreational cannabis use began in the United States in the early 1900s,¹⁷ and early state-level prohibitions were enacted starting in 1915.¹⁸ In 1937, the federal government began taxing cannabis to discourage use.¹⁹ By 1940, sale and possession was regulated in most states.²⁰

The history of cannabis regulation is tainted by racism and xenophobia. The first modern attempts at criminalization coincided with an influx of Mexican immigrants to the United States.²¹ The public began to associate the increase in cannabis consumption with this immigration, and the stereotypes that Mexicans are lazy and dangerous was tied to cannabis use.²² Opponents also argued that cannabis made white women vulnerable to black men’s lust and encouraged blacks and Mexicans

¹² Itai Danovitch, *Sorting Through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV. 91, 93 (2012).

¹³ *Groves v. Comm’r of Soc. Sec.*, No. 1:09-cv-00537, 2010 WL 3154343, at *4 n.19 (E.D. Cal. Aug. 6, 2010) (citing *Marijuana*, NATIONAL INSTITUTE ON DRUG ABUSE, www.drugabuse.gov/DrugPages/Marijuana.html).

¹⁴ Danovitch, *supra* note 12, at 93 (citing Raphael Mechoulam et al., *Chemical Basis of Hashish Activity*, 169 SCI. 611, 611-12 (1970)).

¹⁵ Danovitch, *supra* note 12, at 94.

¹⁶ Carole Shapiro, *Law v. Laughter: The War Against the Evil Weed and Big Screen Reefer Sanity*, 29 OKLA. CITY U. L. REV. 795, 823 (2004); RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 92 (The Lindesmith Ctr. ed., 1999) (1974).

¹⁷ Allison E. Don, *Lighten Up: Amending the Single Convention on Narcotic Drugs*, 23 MINN. J. INT’L L. 213, 216 (2014); Laura M. Rojas, *California’s Compassionate Use Act and the Federal Government’s Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?*, 30 MCGEORGE L. REV. 1373, 1378 n.40 (1999); Allison M. Busby, *Seeking A Second Opinion: How to Cure Maryland’s Medical Marijuana Law*, 40 U. BALT. L. REV. 139, 143 (2010).

¹⁸ Daniel J. Pfeifer, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 361 (2011); Richard Jay Moller, *MARIJUANA: YOUR LEGAL RIGHTS* 8 (1981).

¹⁹ *United States v. Truelove*, 527 F.2d 980, 983 (4th Cir. 1975) (citing *Leary v. United States*, 395 U.S. 6, 23 (1969); H.R. Rep. No. 792, 75th Cong., 1st Sess. 1 and 2 (1937)); RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1053 (1970)).

²⁰ Busby, *supra* note 17, at 144.

²¹ Joëlle Anne Moreno, *Half-Baked: The Science and Politics of Legal Pot*, 123 PENN. ST. L. REV. 401, 418 (2019) (citing Alex Halperin, *Marijuana: Is It Time to Stop Using a Word With Racist Roots?*, THE GUARDIAN (Jan. 29, 2018, 5:00 AM)).

²² Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY’S J. LEGAL MAL. & ETHICS 2, 12 (2018).

to perpetrate violent crimes.²³ Cannabis's alternative name—marijuana—was used specifically to stoke fear and foreignness in American citizens about the otherwise banal-sounding cannabis plant.²⁴ As a mid-century commissioner of the Federal Bureau of Narcotics famously opined: “There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”²⁵ Cannabis prohibition was as much an invidious cultural expression of white fear as it was a legal prohibition of a supposedly dangerous drug.

The current set of federal regulations was enacted in 1970 with the passage of the Comprehensive Drug Abuse Prevention and Control Act (CSA).²⁶ The CSA breaks drugs into 5 categories (called “schedules”) as a function of their medical value and potential for abuse.²⁷ Drugs allocated to Schedule I have no medical value and a high potential for abuse.²⁸ They include cannabis (called marijuana in the regulation), LSD, and heroin.²⁹ Sanctions associated with Schedule 1 are the most severe,³⁰ with violations including manufacturing or distributing the prohibited drugs.³¹ These regulations are equally applicable to medical uses.³²

As of 1973, the power to assign drugs to particular schedules rests with the Drug Enforcement Agency (the “DEA”).³³ This authority was delegated to it by the Attorney General, who has the statutory power to schedule drugs.³⁴ Since the inception of the CSA, advocates have repeatedly attempted to have cannabis removed from Schedule I, but none have succeeded.³⁵

Beyond federal regulation, there has been a recent state-level trend towards deregulation of cannabis.³⁶ Examples of this movement include decriminalization, availability for medical use,³⁷ and full

²³ *Id.* at 13.

²⁴ Halperin, *supra* note 21; Moreno, *supra* note 21, at 418.

²⁵ WILLIAM T. HOSTON, RACE AND THE BLACK MALE SUBCULTURE 104 (2016); Mootz, *supra* note 22, at 14.

²⁶ 21 U.S.C. § 801 (2018), et al.

²⁷ Elizabeth Chiarello, *The War on Drugs Comes to the Pharmacy Counter: Frontline Work in the Shadow of Discrepant Institutional Logics*, 40 LAW & SOC. INQUIRY 86, 89 (2015).

²⁸ Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 331 (2011).

²⁹ Drug Enforcement Agency, *DEA Issues Final Rules On Cannabis Products*, Mar. 21, 2003, 2003 WL 1477753; James v. City of Costa Mesa, No. SACV 10-0402 AG MLGX, 2010 WL 1848157, at *3 (C.D. Cal. Apr. 30, 2010), *aff'd*, 684 F.3d 825 (9th Cir. 2012), and *aff'd*, 700 F.3d 394 (9th Cir. 2012).

³⁰ United States v. Reece, 956 F. Supp. 2d 736, 741 (W.D. La. 2013); *see also* 42 U.S.C. § 12111 (2018).

³¹ 21 U.S.C. § 841 (2018).

³² Katharine McCarthy, *Conant v. Walters: A Misapplication of Free Speech Rights in the Doctor-Patient Relationship*, 56 ME. L. REV. 447, 450 (2004).

³³ Reece, 956 F. Supp. at 741 (citing Caudle, 828 F.2d at 1112 n.1).

³⁴ United States v. Caudle, 828 F.2d 1111, 1111-12 (5th Cir. 1987).

³⁵ *See, e.g.*, Americans for Safe Access v. Drug Enf't Admin., 706 F.3d 438, 440 & 442 (D.C. Cir. 2013). Judicial review of the DEA's determination has likewise been unsuccessful. *See* Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005); United States v. Springer, 354 F.3d 772, 775 (8th Cir. 2004) (citing 21 U.S.C. § 877 (2018)).

³⁶ Males, *supra* note 16, at 192; John T. Holden et. al., *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 167 (2020) (“[S]tates and the federal government remain at odds over the sale of both medical and recreational marijuana.”) (citation omitted).

³⁷ There is some evidence that cannabis can treat “nausea and vomiting, anorexia and wasting, neuropathic pain and muscle spasticity.” Danovitch, *supra* note 12, at 94 (citing Stanley J. Watson et al., *Marijuana and Medicine: Assessing the Science Base: a Summary of the 1999 Institute of Medicine Report*, 57 ARCH GEN PSYCHIATRY 547 (2000); Mohamed

legalization.³⁸ Since California legalized medical use of cannabis in 1996,³⁹ at least 20 states have adopted medical-use regimes and many others now allow recreational use.⁴⁰

Regardless of the recent state-level movement towards deregulation, cannabis remains illegal under federal law,⁴¹ and state law cannot supersede federal regulation.⁴² Accordingly, cannabis businesses are still subject to federal prosecution—even if located in a state with permissive cannabis regulation.⁴³ This duality cultivates substantial legal uncertainty for businesses in this space.⁴⁴ Indeed, the ambiguity is exasperated by federal executive discretion regarding the enforcement of cannabis regulations.⁴⁵ President Obama took a largely hands off position regarding enforcement in states with marijuana regulations in place.⁴⁶ In contrast, President Trump continues to raise the possibility of significant enforcement of federal cannabis regulation.⁴⁷ Further, there is nothing stopping future

Ben Amar, *Cannabinoids in Medicine: A Review of Their Therapeutic Potential*, 105 J. ETHNOPHARMACOLOGY 1, 2 (2006)). This lack of information is partially caused by research focusing on cannabis' "dangerous" effects. Gregory L. Gerdeman, *The Science is in: Pot is Medicine*, TAMPA BAY TIMES, April 9, 2014, at 9A.

³⁸ See, e.g., *Love v. Pennsylvania Bd. of Prob. & Parole*, No. 149 C.D. 2015, 2015 WL 8145191, at *3 (Pa. Commw. Ct. Dec. 3, 2015); Males, *supra* note 16, at 186.

³⁹ Cal. Health & Safety Code Ann. § 11362.5.

⁴⁰ *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 9, 2016), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>; *In Re Hinton*, 85663019, 2015 WL 6166641, at *3 (Sept. 28, 2015); *United States v. French*, No. 1:12-CR-00160-JAW, 2015 WL 1925592, at *2 (D. Me. Apr. 28, 2015); *Raich v. Gonzales*, 500 F.3d 850, 865 (9th Cir. 2007). Many jurisdictions have decriminalization cannabis to some extent. See, e.g., MASS. GEN. LAWS ANN. ch. 94C, § 32L; *State v. Gradt*, 192 Wash. App. 230, 232 (2016), *as amended* (Feb. 11, 2016). "[In] January 2014, Colorado became the first state to legalize recreational marijuana." Kathryn Kisska-Schulze & Adam Epstein, "Show Me the Money!"—*Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 28 (2014).

⁴¹ *United States v. Filippi*, 622 F. App'x 25, 26 (2d Cir. 2015).

⁴² *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) (citing *Gonzales v. Raich*, 545 U.S. 1, 29 (2005)).

⁴³ See, e.g., *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 682 (9th Cir. 2014) (denying requested injunctive relief to prohibit federal prosecution of marijuana dispensaries.).

⁴⁴ Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L. & POL'Y 39, 49 (2013) ("Federal enforcement actions also complicate city and state efforts to regulate because the more openly a medical marijuana provider operates, the more vulnerable it is to federal law enforcement."); Todd Garvey, Cong. Research Serv., R42398, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws* 11 (2012); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 37 (2013) (discussing difficulties associated with federal preemption of state marijuana laws).

⁴⁵ Remarks by the President in a Youth Town Hall, at *11, Oct. 14, 2010, 2010 WL 4019651 (President Obama discussing discretion in application of the CSA to marijuana offenses). The Obama administration did still enforce these laws to prevent minors from accessing cannabis, to prevent the growth of organized crime, and the avoid trafficking to states where cannabis remains illegal. Memorandum from James M. Cole, Deputy Attorney General to United States Attorneys (Aug. 29, 2013), available at: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. This memo does not change marijuana's status as a Schedule I drug under the CSA. *In Re Jj206, LLC, DBA Juju Joints*, 86236122, 2016 WL 7010624, at *4 (Oct. 27, 2016).

⁴⁶ Kevin J. Fandl, *Presidential Power to Protect Dreamers: Abusive or Proper?*, 36 YALE L. & POL'Y REV. INTER ALIA 1, 10 (2018).

⁴⁷ See, e.g., Brandon Soderberg, *Quick Hit: Trump Administration's Anti-Cannabis Stance Goes Public with Hemp Rule*, OUTLAW REPORT (Aug 25, 2020) (stating that "[i]t has seemed, for quite some time, that President Donald Trump's administration is out to get cannabis.").

presidents from returning to President George W. Bush-era policies of strong enforcement of cannabis regulations,⁴⁸ absent statutory change or re-scheduling of cannabis.

State and federal regulation have further intersected with regard to a cannabis derivative called cannabidiol (CBD). The chemical is not intoxicating, and in fact, has been found to mitigate the effects of some of cannabis's psychoactive agents.⁴⁹ At least one CBD-based seizure medicine has been approved by the Food and Drug Administration.⁵⁰ Beyond this, research into other uses—including the treatment of epilepsy, pain, nausea, and schizophrenia—is ongoing.⁵¹

Originally, federal CBD regulation and the laws of several states conflicted, with the chemical being legal for certain purposes in several states but considered a Schedule 1 drug under the CSA.⁵² This divergence would change with the 2018 Farm Bill.⁵³ That statute made industrial hemp (cannabis containing very low levels of its primary psychoactive agent, THC) legal, including “all derivatives” made therefrom.⁵⁴ CBD can be derived from industrial hemp, and thus, became legal to produce and distribute as of 2018.⁵⁵ This convergence of state and federal regulation would prove significant for legal, business, and strategic reasons detailed later.

Despite the legalization of CBD, some aspects of its regulatory environment remain uncertain. For instance, the federal government's treatment of the chemical as a food additive or supplement

⁴⁸ Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 316 (2015).

⁴⁹ Gregory L. Gerdeman, *The Science is in: Pot is Medicine*, TAMPA BAY TIMES, April 9, 2014, at 9A; Thomas A. Duppong, *Industrial Hemp: How the Classification of Industrial Hemp As Marijuana Under the Controlled Substances Act Has Caused the Dream of Growing Industrial Hemp in North Dakota to Go Up in Smoke*, 85 N.D. L. REV. 403, 408 (2009) (citing Joan T. Pickens, *Sedative Activity of Cannabis in Relation to its delta'-trans-Tetrahydrocannabinol and Cannabidiol Content*, 72 BR. J. PHARMAC. 649, 649 (1981)).

⁵⁰ *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA.GOV, <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> (“FDA has approved Epidiolex, which contains a purified form of the drug substance CBD for the treatment of seizures associated with Lennox-Gastaut syndrome or Dravet syndrome in patients 2 years of age and older. That means FDA has concluded that this particular drug product is safe and effective for its intended use.”).

⁵¹ Andrew L. Scherf, *The Societal and Economic Impacts of Recent Dramatic Shifts in State Marijuana Law: How Should Minnesota Proceed in the Future?*, 36 HAMLIN J. PUB. L. & POL'Y 119, 140 (2014) (citing *Conditions*, PROJECT CBD, <http://www.projectcbd.org/medicine/conditions/>).

⁵² See GA. CODE ANN. § 16-12-190-91 (effective April 16, 2015); FLA. STAT. ANN. § 381.986 (effective March 25, 2016); OKLA. STAT. ANN. tit. 63, § 2-802 (effective April 30, 2015); 1 Fed. Reg. 90194–96 (Dec. 14, 2016); DEA News Release, *DEA Eases Requirements for FDA Approved Clinical Trials on Cannabidiol* (Dec. 23, 2015) (“CBD is a Schedule I controlled substance as defined under the CSA.”); Joseph T. Rannazzisi Deputy Assistant Administrator Drug Enforcement Administration Before the Caucus on International Narcotics Control, United States Senate, at 2 (June 24, 2015) (CBD is a Schedule I drug).

⁵³ Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (the “2018 Farm Bill”).

⁵⁴ 7 U.S.C. § 1639o(1) (2018); Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30 FORDHAM ENVTL. L. REV. 49, 83 (2019).

⁵⁵ Brett Kelman & Andrew Sharp, *Trump Signs Farm Bill and Legalizes Hemp, Cannabidiol*, USA TODAY (Dec. 21, 2018), <https://www.usatoday.com/story/news/2018/12/21/hemp-cbd-farm-bill-signing-trump-delaware-agriculture/2387656002/> [<https://perma.cc/GCX8-WYYY>]. “[T]he CSA now excludes from the definition of [illegal] marijuana any part, derivative, or extract of the Cannabis sativa plant if its THC concentration falls below that threshold level [of 0.3% THC.]” *Horn v. Med. Marijuana, Inc.*, 383 F. Supp. 3d 114, 124 (W.D.N.Y. 2019), *appeal dismissed* (Oct. 25, 2019). Thus, CBD is technically only legal if derived from low-THC cannabis.

presents unclear legal hurdles. As recognized by a recent district court opinion: uncertainty exists regarding “whether the FDA will conclude that some or all CBD products are food additives, supplements or nutrients that can be safely marketed to the public and, if nutrients, whether the labelling standards and requirements for CBD products will be different or the same as for other nutrients.”⁵⁶

The cannabis market is fraught with a similar level of regulatory ambiguity. Significant issues remain about the enforceability of cannabis related patents.⁵⁷ A variety of unresolved accounting topics exist with regard to accounting for the industry.⁵⁸ Questions abound pertaining to the availability of bankruptcy protections for cannabis firms, with one judge stating that “the courts find themselves in a game of whack-a-mole; each time a case is published, another will arise with a novel issue.”⁵⁹ These uncertainties create a unique regulatory landscape for the cannabis industry, which encourage a host of novel legal strategies discussed below.

II. MODERN CANNABIS POLICY GENERATES SUBSTANTIAL LEGAL UNCERTAINTY

Not only have historical attitudes and regulatory practices created ambiguity, but the modern policy toward cannabis regulation has created a climate of legal uncertainty. For purposes of this manuscript, we define legal uncertainty to mean a regulatory system that fails to inform stakeholders whether a given choice of action satisfies or does not satisfy that regulatory system’s requirements.⁶⁰ In the presence of legal uncertainty, regulators cannot develop coherent policy without further guidance, policymakers cannot communicate rules clearly to constituents, and regulated entities cannot be sure how a court will interpret a given course of action. Legal uncertainty is not just the product of bad drafting, but the consequence of interactive and self-reinforcing effects that diminish the overall predictability and effectiveness of a regulated environment.⁶¹

⁵⁶ Snyder v. Green Roads of Fla. LLC, 430 F. Supp. 3d 1297, 1308 (S.D. Fla. 2020); Glass v. Glob. Widget, LLC, No. 219CV01906MCEKJN, 2020 WL 3174688, at *4 (E.D. Cal. June 15, 2020) (same); see also Lawrence J. Trautman, et al., *Cannabis At The Crossroads: Regulation, A Transdisciplinary Analysis and Policy Prescription*, ___ OKLAHOMA CITY UNIVERSITY L.R. (forthcoming 2021), available at <http://ssrn.com/abstract=3541229> (“[S]ignificant legal uncertainties remain when CBD products are marketed and sold in ways that conflict with the Federal Food, Drug and Cosmetic Act.”)

⁵⁷ *Intellectual Property Strategies and Limited Protection in the Wake of the Cannabis Era*, CANNABIS LAW 400:100 (“There is a great deal of uncertainty surrounding the issue of whether or not a patent that is directed to cannabis-related technologies can actually be enforced. Another equally important concern is the question of whether or not cannabis-related technologies or inventions are patent eligible.”).

⁵⁸ *Marijuana Update for Practitioners: There is a Bright Line, a Grey One*, 29 JAN. J. MULTISTATE TAX’N 12, 23, 2020 WL 17955, at *21 (“The only certainty for the future of the marijuana industry and how accountants serve that industry is uncertainty.”).

⁵⁹ In re Malul, 614 B.R. 699, 701 (Bankr. D. Colo. 2020); see also In re CWNevada LLC, 602 B.R. 717, 737 (Bankr. D. Nev. 2019)

⁶⁰ Robert C. Bird, *VUCA*, 12 VA. L. & BUS. REV. 367, 383 (2018). Definitions of legal uncertainty vary according to context. See, e.g., Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 1, 6 (defining legal uncertainty in the judicial context as “variance of the expected judgment of the court.”); Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 HOUSTON L. REV. 1321, 1338 (2016) (stating simply that “[l]egal uncertainty is uncertainty about the content of the law.”).

⁶¹ Justin Evans & Anthony L. Gabel, *Legal Entrepreneurship and the Strategic Virtues of Legal Uncertainty*, 57 AM. BUS. L.J. ___, *8 (forthcoming 2020).

This Part will show that modern cannabis policy is fraught with fundamental uncertainty quite unlike most other regulatory regimes. Three types of uncertainty can infect legal regimes: systemic uncertainty (opacity caused by interactions with law's stakeholders), substantive uncertainty (ambiguities in the legal text), and enforcement uncertainty (variance in giving laws legal effect or execution).⁶² This Part examines each type of uncertainty and shows how legal and extra-legal forces enabled all three types of uncertainty to thrive at both the state and federal level with no immediate hope of resolution. A summary of the conclusions of this Part is available as Exhibit A.

A. Systemic Uncertainty – Ambivalence from Policymakers and the Public

Systemic uncertainty arises when extra-legal forces interact with or influence a legal rule in a manner that undermines a rule's specific directive, policy, or goal.⁶³ Systemic uncertainty is not as directly observable as the other types of uncertainties, and can easily be discounted as a viable force influencing a legal regime. However, systemic uncertainty cannot be substantially mitigated through careful drafting of a rule's text. A rule can be written with high precision and still not eliminate the possibility of systemic uncertainty appearing subsequent to its enactment.

Furthermore, systemic uncertainty is the type of uncertainty most susceptible to outside influence, as it has the capacity to arise from virtually any stakeholder with an interest in influencing public policy. Such stakeholders include policymakers who emphasize or deemphasize a rule's importance, the public who demands legal rules be applied only a certain way, or influencers of legal culture such as judges and attorneys who develop informal patterns or practices that shift the impact an interpretation of a written rule without a formal written decision or change in policy. Systemic uncertainty is arguably the least visible of the three types of uncertainties, but is also one that is the most difficult to control through careful legal drafting.

The modern regulation of cannabis has been beset by at least two forces that encourage systemic uncertainty of legal rules. The first, and perhaps most powerful, force driving systemic uncertainty in cannabis regulation is a continuous but ambivalent shift away from criminalization of cannabis consumption and sale. While pro-legalization opinions have changed from 12% favoring legalization in 1971 to 64% favoring legalization in 2019,⁶⁴ the beliefs underlying those opinions remain indecisive and ambivalent. Support for legalization wanes as young people enter child-bearing years, intensity of opinions varies between advocates and opponents, and support remains divided on whether decriminalization or legalization is the most preferred regulatory outcome.⁶⁵ Such ambivalence generates systemic uncertainty about the legitimacy of prevailing cannabis regulation. Firms cannot plan that the law today will necessarily be the law tomorrow. Indecisive public opinion at odds with legal rules undermines the support such legal rules need to sustain their legitimacy. If a rule is perceived as

⁶² For our classifications of uncertainty, we leverage thoughtful work by Justin Evans and Anthony Gabel that emphasize legal flexibilities in the entrepreneurial context. Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N.C. J. INT'L L. & COMM. REG. 333, 371-82 (2014).

⁶³ See *Id.* at 381. Systemic uncertainty has also been conceptually expressed in other disciplines. See, e.g., Paul J. Thambar et al., *Managing Systemic Uncertainty: The Role of Industry-Level Management Controls and Hybrids*, 77 ACCT. ORG. & SOC'Y 1, 7 (2019) (defining systemic uncertainty in the organizational context as an "externality that indiscriminately impacts all firms in an industry.").

⁶⁴ *Illegal Drugs*, GALLUP (n.d.), <https://news.gallup.com/poll/1657/illegal-drugs.aspx>.

⁶⁵ William A. Galston & E.J. Dionne Jr., *The New Politics of Marijuana Legalization: Why Opinion is Changing 4* (May 2013), https://www.brookings.edu/wp-content/uploads/2016/06/Dionne-Galston_NewPoliticsofMJLeg_Final.pdf.

the product of a vocal minority or entrenched interests,⁶⁶ citizens may wonder what the law's purpose really is and ignore such rules accordingly.

The second factor driving systemic uncertainty in cannabis regulation is opacity of direction for future regulation in political networks. Legal rules made by democratic governments are at least implicitly backed by the citizens who elect officials that create them. When a tension exists between public opinion and public policy, elected representatives change rules to realign them. However, when that tension is either indeterminate or in continuous evolution, elected officials cannot rely on direct network effects to develop a response. Business advocates favoring legalization for commercial purposes may not yet have developed sufficient power to bring reform. Polls and other tools may not capture a clear political zeitgeist upon which officials can rely for action. A legislator wanting to liberalize cannabis policy may encounter unexpectedly stiff resistance from a vocal and politically active minority. A legislator who wants to reinforce current prohibitions risks backlash from otherwise dormant constituents who now voice their disagreement with current regulatory policy. This opacity from political networks discourages policymakers from enacting reforms that would signal clearly where government stands on cannabis regulation, resulting in systemic uncertainty that leaves both regulators and the regulated without clear direction regarding what current cannabis policy actually prohibits.

B. *Substantive Uncertainty—Opacity in Regulatory Language*

Substantive uncertainty consists of gaps, uncertainties, or other weaknesses in the language of regulatory policy.⁶⁷ Such uncertainty can be linguistic and arise from the mechanics of the statute or be jurisprudential and be open to multiple interpretations.⁶⁸ Substantive uncertainty is inherent in virtually every piece of statutory language, as it is impossible to capture every possible scenario to which a written mandate may apply.⁶⁹ Specific terms may be too vague for definite applications, definitions of terms may provide insufficient guidance, statutory mandates may be so broad as to be unworkable, or different sections of a larger piece of legislation may appear to contradict one another. Substantive uncertainty can even be deliberately embedded in regulatory policy, as opposing interests negotiate language that leaves open the resolution of a divisive question for another time, thus enabling passage of the policy at the moment.

Two forces drive substantive uncertainty in cannabis policy. The first, and perhaps most obvious, is a suite of unstable and poorly drafted cannabis-related rules and policies.⁷⁰ The very nature of cannabis is difficult to regulate, as for example even the basic distinction between synthetic and natural cannabis is chemically elusive and thus difficult to legislatively distinguish.⁷¹ A variety of state laws

⁶⁶ See Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1148 (1997) (concluding in part that politicians and interest groups can coordinate to enact or sustain illegitimate legal rules).

⁶⁷ See Evans & Gabel, *supra* note 62, at 372.

⁶⁸ *Id.* at 373.

⁶⁹ Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 14 (2008); Liaquat Ali Khan, *The Paradoxical Evolution of Law*, 16 LEWIS & CLARK L. REV. 337, 344 (2012) (explaining how laws present finite rules tasked with governing an infinite number of possibilities).

⁷⁰ See, e.g., James E. Swauger et al., *The Changing Face of Marijuana Regulation: Current Federal Status*, FOOD & DRUG L. INST. (Oct. 2017) (noting that “regulatory stability has proven elusive”), <https://www.fdpi.org/2017/10/changing-face-marijuana-regulation-current-federal-status/>.

⁷¹ Sophia House, *Tailoring Regimes for a Designer Drug: Developing Civil Liability for Retailers of Synthetic Marijuana*, 127 YALE L.J. 764, 767 (2018). The author explains:

related to cannabis have been criticized for their unclear language and guidance.⁷² Initiatives have also been frustratingly vague. A 2010 California initiative known as the Regulate, Control and Tax Cannabis Act was widely criticized as being poorly drafted, overbroad in its empowerment of local governments, and would create “regulatory chaos” as agencies struggle to interpret its mandates.⁷³ One early proposition was so badly written that U.S. Senator Diane Feinstein concluded, “you’ll be able to drive a truckload of cannabis through the holes in it.”⁷⁴ Local governments recognizing the muddled condition of state laws might be encouraged to act on their own, further increasing substantive uncertainty in the legal environment.⁷⁵ The potential impact of substantive uncertainty on cannabis firms is significant: increased litigation, unnecessarily conservative and costly interpretation of legal mandates, accidental noncompliance, and heightened transaction costs from employing attorneys needed to unravel an ambiguous set of regulations.

The second factor encouraging substantive uncertainty is the halting and incremental attempts by legislators toward some form of deregulation. Laws associated with cultural trends, such as evolving public opinion on cannabis, can change relatively quickly, but changes based on culture can also generate inefficient and unfair consequences.⁷⁶ When cannabis laws are poorly written, legislators are forced to go “back to the drawing board” to revise current legislation.⁷⁷ Incremental changes to

In the ensuing game of legal “whack-a-mole,” the rapid introduction of new compounds makes regulation of synthetic marijuana entirely reactive to creative manufacturers. These swift and frequent changes--coupled with variations in the product's packaging and labeling--have made it difficult for legislators and law enforcement to determine whether a particular substance can be treated as synthetic marijuana when its labeling and chemical composition do not offer clear identifying markers.

Id.

⁷² See, e.g., Eric Schlimgen, “What’s in a Name Anyway?”: *Reevaluating South Dakota’s Cannabis Statutory Scheme*, 63 S.D. L. REV. 44, 71 (2018) (concluding that “South Dakota’s collective cannabis statutes severely haze the judicial process, hinder prosecution, and make a plain reading of the statutes a headache-inducing endeavor.”); JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 16 (2016) (criticizing regulation on medical-marijuana recommendation writing as “vague and poorly enforced.”); Jeffrey Miron & Erin Partin, *Hemp Bull Leaves Texas Prosecutors in the Smoke*, CATO INST. (Aug. 26, 2019) (criticizing Texas law decriminalizing marijuana as “poorly written” and confusing for law enforcement and prosecutors).

⁷³ Martin D. Carcieri, *California’s Proposition 19: Selective Prohibition and Equal Basic Liberties*, 46 U.S.F. L. REV. 689, 715-16 (2012) (citing various sources). See also PETER HECHT, *INSIDE AMERICA’S EPICENTER AND HOW POT WENT LEGIT* 140 (2014).

⁷⁴ DAVID G. LAWRENCE & JEFF CUMMINS, *CALIFORNIA: THE POLITICS OF DIVERSITY* 63 (2015) (quoting Sen. Diane Feinstein of California).

⁷⁵ See, e.g., Graydon Megan, *Elmhurst Committee Members Recommend City Ban on Recreational Marijuana Sales*, CHI. TRIB. (Sep. 24, 2019), <https://www.chicagotribune.com/suburbs/elmhurst/ct-dob-elmhurst-recreational-marijuana-tl-0926-20190924-xj5xzhy625c3fiedofxpniv6wi-story.html>.

⁷⁶ Emily Plakon, *Reactionary Legislation: The Marjory Stoneman Douglas High School Public Safety Act*, 49 STETSON L. REV. 679, 681-82 (2020).

⁷⁷ Stephanie Till, *The Future of Cannabis in the U.S. & Emerging States and Markets in the Industry*, HIGHER YIELDS CONSULTING (July 7, 2020) (“Moneyed opposition, voter ambivalence, and poorly written laws often send legislators back to the drawing board when it comes to legalization.”), <https://higheryieldsconsulting.com/the-future-of-cannabis-in-the-u-s-emerging-states-and-markets-in-the-industry/>. Citizen ballots are an alternative option for change, but available in fewer than half of U.S. states. *2020 Marijuana Policy Reform Legislation*, MARIJUANA POL’Y PROJECT (June 25, 2020) (noting that only twenty-three states permit citizen-initiated ballots), <https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/>. In spite of this limited number, popular

regulation can address past problems,⁷⁸ but each change can also create new interpretive challenges. Regulated cannabis firms bear the burden of switching costs associated with identifying, interpreting, and adapting the practices to new mandates.⁷⁹ These switching costs are amplified by the number of state entities making regulatory changes, rendering any sort of consistent legislation across states increasingly untenable. Statutory regimes can specify, for example, the minimum age of use, a residency requirement, permissibility of home cultivation, retail transaction limit, and quantity of personal possession.⁸⁰ Multiply each of these specifications by fifty and amplify that variance through frequent incremental change, and cannabis policy can be seen by a commercial producer to be fundamentally impenetrable.

C. Enforcement Uncertainty—Unpredictable Application of Laws in Place

Enforcement uncertainty occurs when a state actor exercises its discretion to administer regulatory mandates in a fashion that is not fully predictable to regulated entities.⁸¹ In uncertain environments, firms do not receive sufficient regulatory information to guide their decisions.⁸² This in turn clouds vital projections that organizations can make about their future legal exposure, which in turn forces firms to deviate from profit-maximizing conditions.⁸³ Enforcement uncertainty is nearly impossible to eliminate entirely, as a variety of factors such as state resources, regulatory agendas, and political factors are invisible to regulated entities and yet may still motivate a regulatory entity to vary its enforcement practices.⁸⁴

Enforcement uncertainty, at least initially, can have a beneficial enforcement effect as firms deploy a conservative approach to regulation that assumes the harshest interpretation possible. This results in deviations from profit-maximizing decisions.⁸⁵ However, unless penalties are sufficiently

referendums have been influential in regulatory changes to marijuana. NAT'L ACADS. OF SCI., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 74 (2017), ("Cannabis policy change has occurred at the state level in large part due to changing public sentiment. Many states have reformed their cannabis laws, not from a deliberative legislative process but through popular referendums."), available at https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf [hereinafter HEALTH EFFECTS OF CANNABIS]

⁷⁸ See Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 812-13 (2012).

⁷⁹ See Elizabeth Loutfi, *Cannabis Companies Must Keep Up with Constant Changes in Industry Rules and Regulation*, Chief Learning Officer (Sept. 19, 2019), <https://www.chieflearningofficer.com/2019/09/19/cannabis-companies-must-keep-up-with-constant-changes-in-industry-rules-and-regulations/>.

⁸⁰ HEALTH EFFECTS OF CANNABIS, *supra* note 77, at 70-71 (comparing regulatory differences between Alaska, Colorado, Oregon, Washington, and District of Columbia as an example).

⁸¹ See Evans & Gabel, *supra* note 62, at 377. See also Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 7 (2011) (stating that enforcement uncertainty "relates to uncertainty regarding implementation of the legal norm.").

⁸² Bird, *supra* note 60, at 383.

⁸³ Bird, *supra* note 60, at 383-84. See also Robert C. Bird, *The Power of Uncertainty in Disability Law*, 34 HAMLINE L. REV. 605, 609 (2011) (citing Michelle C. Baddeley, *Behind the Black Box: A Survey of Real-World Investment Appraisal Approaches*, 33 EMPIRICA 329, 331 (2006)).

⁸⁴ See, e.g., Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 313 (2010) (explaining how turf wars between public entities restrict the flow of information).

⁸⁵ Leandra Lederman & Ted Sichelman, *Enforcement as Substantive in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1699 (2013) (citing Jennifer F. Reinganum & Louis L. Wilde, *A Note on Enforcement Uncertainty and Taxpayer Compliance*, 4 Q.J. ECON. 793, 795 (1988)).

severe, enforcement uncertainty decreases compliance in the long-term.⁸⁶ When enforcement uncertainty varies significantly enough from the expected mean, such as when enforcement is harshly unforgiving or barely active, such uncertainty can generate an expressive power about the value of the law itself.⁸⁷ Laws that are poorly enforced signal to the public that these laws are illegitimate or otherwise do not matter, encouraging regulated entities to flout the law, perhaps establishing a disturbing precedent about the legitimacy of the legal environment overall.

Two forces breed enforcement uncertainty in modern cannabis policy. The first, and perhaps most prominent, is the widespread evisceration of statutory enforcement power by policymakers at a variety of levels. Both the federal government and the states seem comfortable with, or at least not aggressively in opposition to, a state of affairs whereby state rules stand in direct conflict with federal law.⁸⁸ Congress could formally preempt the field, which could result in state laws being struck down as unconstitutional under the Supremacy Clause, but Congress has yet to do so.⁸⁹ This leaves those tasked with enforcing the laws with inconsistent and confusing mandates, encouraging abuse, uncertainty, and selective prosecution.⁹⁰

The second factor generating enforcement uncertainty is the unexpected and convulsive backsliding that continually plagues cannabis policy. In early 2018, then Attorney General Jeff Sessions, whom it is fair to say despises cannabis,⁹¹ announced a rescission of all previous guidance issued by the Department of Justice (DOJ) regarding federal enforcement of cannabis-related laws in states that have legalized cannabis.⁹² This overturned previous DOJ guidance from Deputy Attorney James Cole, who in what is now known as the Cole Memorandum prioritized different types of cannabis-related crimes.⁹³ Attorney General William Barr, who succeeded Jeff Sessions, has in turn said at his confirmation hearing that he will not “upset settled expectations and the reliance interest that have arisen as a result of the

⁸⁶ *Id.*

⁸⁷ Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 992 & n.56 (noting that a situation where “there is no enforcement or harsh enforcement may in fact carry an expressive message.”).

⁸⁸ See Sean Williams, *The U.S. Won't Legalize Marijuana in 2019. Here's Why*, MOTLEY FOOL (Apr. 18, 2019), <https://www.fool.com/investing/2019/02/03/the-us-wont-legalize-marijuana-in-2019-heres-why.aspx>.

⁸⁹ Zachary Ford, *Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy*, 6 TEX. A&M L. REV. 671, 700-01 (2019).

⁹⁰ See, e.g., Emma Freer, *New Texas Law Legalizing Hemp Causes Local Enforcement Haze*, COMM. IMPACT NEWSLETTER (Oct. 29, 2019), <https://communityimpact.com/news/2019/10/29/new-texas-law-legalizing-hemp-causes-local-enforcement-haze/>. See also Zachary Nelson, *If it Looks Like a Duck: Equal Protection, Selective Prosecution, and Geographic Differences in the Federal Prosecution of Marijuana Crimes Under the Controlled Substances Act*, 23 LEWIS & CLARK L. REV. 1007 (2019).

⁹¹ See Paul Waldman, *Why Jeff Session's Marijuana Crackdown is Going to Make Legalization More Likely*, WASH. POST (Jan. 5, 2018) (“Jeff Sessions hates marijuana. Hates it, with a passion that has animated almost nothing else in his career.”)

⁹² Jill Beathard, *Keep Calm and Follow State Law: Marijuana Attorneys React to Sessions Memo*, 95 DENV. L. REV. ONLINE 112, 112 (2018) (citing Memorandum from Jefferson B. Sessions, Attorney General, to United States Attorneys, Marijuana Enforcement (Jan 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download>).

⁹³ Beathard, *supra* note 92, at 112 (referring to MEMORANDUM FROM JAMES M. COLE, DEPUTY ATTORNEY GENERAL, TO UNITED STATES ATTORNEYS 1 (Aug. 29, 2013)), available at www.justice.gov/iso/opa/resources/3052013829132756857467.pdf).

Cole Memorandum and investments have been made and so there has been reliance on it[.]”⁹⁴ That said, Barr has later commented that he finds the current conflict between state and federal cannabis laws “intolerable.”⁹⁵ Subsequently, after initial quiet,⁹⁶ policy under the Trump administration enforced by Barr has recently triggered a number of investigations into cannabis producers, costing companies millions of dollars, stopping evolving commercial agreements, and deterring outside investment.⁹⁷ If federal employees at the highest level are sending mixed, and perhaps even emotionally-driven,⁹⁸ messages about cannabis enforcement, there is little doubt that those tasked with implementing their commands will be similarly inconsistent. This backsliding in turn generates uncertainty about the status of state laws, raising questions once again of whether cannabis policy will become settled in the foreseeable future.

Even after years of debate, legislation, and attempted reform, modern cannabis policy is plagued with systemic, substantive, and enforcement uncertainty at multiple levels of government. This imposes significant costs on both firms who produce cannabis and consumers who consume it for medicinal or recreational purposes. This uncertainty also imposes costs on legal compliance overall. If the cumulative costs of chasing ephemeral and contradictory standards exceed the risk of penalties from violating those standards, firms may experience burnout and simply pursue their own agenda instead.⁹⁹ The next Part of the manuscript examines how this uncertainty drives their legally strategic agenda, with firms actively engaging with their regulatory environment in ways that are distinct from companies in more settled industries.

III. LEGAL UNCERTAINTY DRIVES LEGAL STRATEGIES OF CANNABIS FIRMS

Modern cannabis policy creates a unique regulatory environment in which to understand how firms respond to legal uncertainty. Policymakers that comprehend firm legal strategy can better calibrate rules to generate desired responses. Lawyers advising firms operating in legally uncertain environments can better understand the strategic implications of firms planning their strategies in the shadow of the law. This Part explores the five pathways of legal strategy that firms generally pursue in response to their legal environment. We then apply this legal strategy framework to cannabis firms operating in a value-laden and turbulent sector of cannabis regulation—the regulation and granting of federal and state trademarks to cannabis producers in order to defend their brands and market positioning. This

⁹⁴ Joanne Caceres & Michael Montgomery, *In the Weed: Are U.S. Health Care Companies Ready for a Legal Cannabis Market?*, 21 J. HEALTH CARE COMPLIANCE 17, 18 n.7 (2019).

⁹⁵ Jeff Smith, *Attorney General Barr: US Law Protecting State-Legal Marijuana Trumps Current Situation*, MARIJUANA BUS. DAILY (Apr. 10, 2019), <https://mjbizdaily.com/attorney-general-william-barr-federal-law-protecting-state-legal-marijuana-trumps-current-situation/>.

⁹⁶ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL'Y 1, 26 (2019).

⁹⁷ Greg Walters, *Trump's Justice Department is Making Life Hell for Legal Weed*, VICE NEWS (June 30, 2020), https://www.vice.com/en_us/article/akzk9b/trumps-war-on-legal-weed; Nicholas Kandos et al., *Justice Dept. Officials Outline Claims of Politicization Under Barr*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/06/24/us/politics/justice-department-politicization.html>.

⁹⁸ See Ciara Linnane, *Attorney General Barr Ordered Antitrust Probes of 10 Cannabis Mergers, Because he Dislikes the Industry, Prosecutor Says*, MARKETWATCH (June 26, 2020), <https://www.marketwatch.com/story/attorney-general-barr-ordered-antitrust-probes-of-10-cannabis-mergers-because-he-dislikes-the-industry-prosecutor-says-2020-06-24>.

⁹⁹ Coral Garnick, *Constant Changes to Marijuana Laws Have Business Owners Scrambling*, PUGET SOUND BUS. J. (Jun. 30, 2017), <https://www.bizjournals.com/seattle/news/2017/06/30/high-risk-low-reward-constant-changes-to-marijuana.html>.

Part shows how legal uncertainty can be a driving force in legally strategic behavior of regulated enterprises, with consequences for firms, regulators, and society.

A. A Primer on Legal Strategy and the Five Pathways of Legal Strategy for Firms

The value of law in commerce long has been understood by businesspeople. Leading seventeenth century merchant Gerard de Malynes explained that a businessperson could not be a “compleat merchant” without knowledge of the law.¹⁰⁰ In the previous century, early work by Louis Brown argued that it was essential to understand not just what courts do, but what people will do, in response to legal challenges.¹⁰¹ Brown emphasized how the practice of “preventive law” can help avoid legal disputes before they happen.¹⁰² That perspective matured into proactive law, a Nordic-led movement which empowers users of the law to leverage the benefits of legal rights and prevent problems with legal obligations.¹⁰³ This results in application of legal knowledge to avoid liability, solve problems, and improve the effectiveness of decision making.¹⁰⁴ Proactive law also focused on helping public bodies, particularly in Europe, construct more effective regulations that both advance social objectives and place a minimal burden on individuals and businesses tasked to comply.¹⁰⁵

In the United States, scholarship focused on using the law for competitive advantage.¹⁰⁶ One perspective emphasized the development of legal astuteness, whereby a top management team would collaborate with in-house counsel to solve problems and capture value through their knowledge of the law.¹⁰⁷ This value manifests through lower transaction costs, improved relationships, more flexible contracts, and the advancement of business goals.¹⁰⁸ In another managerial perspective, firms should look beyond a fight or flight approach to legal problems and instead “climb to the balcony” to reevaluate legal problems as business challenges.¹⁰⁹ These challenges are an opportunity, rather than a burden, for

¹⁰⁰ Nathan Isaacs, *The Merchant and His Law*, 23 J. POL. ECON. 520, 553 (1915).

¹⁰¹ George Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 Am. Bus. L.J. 641, 659 (2010) (citing LOUIS M. BROWN, *LAWYERING THROUGH LIFE—THE ORIGIN OF PREVENTIVE LAW* (1986); LOUIS M. BROWN & EDWARD A. DAUER, *PLANNING BY LAWYERS: MATERIALS ON NONADVERSARIAL LEGAL PROCESS* (1978); LOUIS M. BROWN, *PREVENTIVE LAW* (1950)).

¹⁰² Louis M. Brown, *The Law Office – A Preventive Law Laboratory*, 104 U. PENN. L. REV. 940, 941 (1956). Such a preventive perspective to law reaches back to the late nineteenth century, but may not have been attributed directly as a preventive practice. *Id.* at 940 (citing JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 302 (1950)).

¹⁰³ Siedel & Haapio, *supra* note 101, at 664. A number of articles have been written applying the principles of proactive law. *See, e.g.*, Gerlinde Berger-Walliser, Paul Shrivastava & Adam Sulkowski, *Using Proactive Legal Strategies for Corporate Environmental Sustainability*, 6 MICH. J. ENVTL. & ADMIN. L. 1 (2016); Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT’L L. 417 (2015); Soile Pohjonen, *Proactive Contracting: In Contracts between Businesses*, 12 IUS GENTIUM 147 (2006).

¹⁰⁴ Siedel & Haapio, *supra* note 101, at 666-67.

¹⁰⁵ *Id.* at 664.

¹⁰⁶ This is not to say that proactive law scholars did not consider competitive advantage important. *See* George Siedel & Helena Haapio, *PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE* (2016).

¹⁰⁷ Dan Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 487-88 (2009); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 378-82 (2008). *See also* Boualem Aliouat, *Patents and Trademarks: From Business Law to Legal Astuteness*, in *LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE* 293 (Antoine Masson & Mary J. Shariff, eds., 2010).

¹⁰⁸ Bagley, *supra* note 107, at 383-87.

¹⁰⁹ George Siedel, *USING THE LAW FOR COMPETITIVE ADVANTAGE* 24-25 (2002).

the organization.¹¹⁰ Lawyers are not threats, but strategic partners.¹¹¹ The law is not merely a cost of doing business, but a means of reducing risk and capturing value.¹¹² Adopting this perspective in business requires a culture change, and a number of attitudinal and attributive variables have been identified that enable managers to conduct legally strategic thinking.¹¹³

Firms generally pursue five pathways of legal strategy in their business operations.¹¹⁴ The first pathway is known as avoidance. An avoidance legal strategy typically occurs when firms choose to ignore or remain blind to the legal consequences of their decisions.¹¹⁵ Those pursuing an avoidance approach typically view regulations as merely detrimental obstacles and barriers to economic growth.¹¹⁶ Legal rules thus need to be circumvented whenever the opportunity arises.¹¹⁷ For some firms, avoidance means directly evading legal obligations, acting illegally because it benefits their own interests, and taking steps to avoid getting caught.¹¹⁸ For other firms, avoidance can manifest as a desire to circumvent legal obligations by interpreting ambiguities in the law to one's favor.¹¹⁹ This is common in tax planning and avoidance, whereby firms exploit legal loopholes to reduce their burden.¹²⁰ While not strictly illegal, this behavior bends the intent of the law to meet firm needs. Another avoidance tactic is to engage in regulatory arbitrage, whereby firms exploit a gap between different jurisdictions to ensure the lightest possible regulatory mandates applicable to the firm.¹²¹ This practice is also not illegal, but also attempts to circumvent the goals of policymakers. Avoidance practices are often just another method of cutting-costs and often considered to not be meaningfully strategic.¹²²

Compliance,¹²³ the second pathway, occurs when firms view laws as a necessary expense of business and attempt to conform with whatever legal obligations are placed on the enterprise.¹²⁴ Compliance firms generate codes of conduct, focus on sanctions to enforce rules, and generally rely on

¹¹⁰ *Id.* at 25.

¹¹¹ Constance E. Bagley, *Winning Legally: Using the Law to Create Value, Marshal Resources, and Manage Risk*, Case No. 9-806-138, at 1–2 (Harvard Business School ed., Aug. 4, 2006) (on file with author). See also Constance E. Bagley, *WINNING LEGALLY: HOW TO USE THE LAW TO CREATE VALUE, MARSHAL RESOURCES, AND MANAGE RISK* (2005).

¹¹² BAGLEY, *supra* note 111, at 1-2, 9-12.

¹¹³ Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 80-94 (2011); see also Kathryn Kisska-Schulze et. al., *Case Baiting*, 57 AM. BUS. L.J. 321, 371 (2020) (providing a general description of the law and strategy literature).

¹¹⁴ Bird, *supra* note 69. See also Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81 (2014).

¹¹⁵ Bird & Orozco, *supra* note 114, at 82.

¹¹⁶ Bird, *supra* note 69, at 12-17.

¹¹⁷ *Id.* at 12-17.

¹¹⁸ Bird & Orozco, *supra* note 114, at 82-83; Bird *supra* note 69, at 13-14.

¹¹⁹ Bird, *supra* note 69, at 14.

¹²⁰ *Id.* For a further discussion of legal loopholes from a strategic perspective, see generally Daniel T. Ostas, *Corporate Counsel, Legal Loopholes, and the Ethics of Interpretation*, 18 TEX. WESLEYAN L. REV. 703 (2012), and Daniel T. Ostas, *The Ethics of Corporate Legal Strategy: A Response to Professor Mayer*, 48 AM. BUS. L.J. 765 (2011).

¹²¹ Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 244-47 (2010); John T. Holden et. al., *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 115 (2020).

¹²² Bird, *supra* note 69, at 13.

¹²³ This pathway should not be confused with recent prominence of corporate compliance, or the rapidly evolving scholarly study of compliance, which has been given substantial prominence in organizations. See Eric C. Chaffee, *Creating Compliance: Exploring a Maturing Industry*, 48 U. TOL. L. REV. 429, 430-31 (2017).

¹²⁴ Bird, *supra* note 69, at 17-18

legal staff only when concrete legal problems present themselves.¹²⁵ Firms pursuing a compliance pathway do not necessarily believe that legal knowledge can help facilitate their business goals. Legal rules are perceived as barriers that need to be overcome, possibly with mere ‘checkbox compliance’ that prioritizes shallow conformance to obligations than a substantive fulfillment of the rule’s primary purpose.¹²⁶

The third pathway of legal strategy is a prevention approach. Firms pursuing a prevention approach implement business practices that prevent legal problems from appearing in the first place.¹²⁷ These practices include employee training and awareness, improved legal information technology, and forward-thinking practices to anticipate legal challenges before they arise.¹²⁸ Managers in prevention firms understand that legal knowledge can be used to manage future business risk.¹²⁹ Legal matters are considered important enough to be measured and quantified in order to support a firm’s business strategy.¹³⁰

The fourth pathway of legal strategy, the advantage approach, is a watershed for firms in legally strategic thinking. Firms now fully embrace an essential idea, that law can be used as source of competitive advantage for organizations. Legal knowledge is rightly recognized as an asset from which to create identifiable and tangible value that boosts the firm’s bottom line.¹³¹ When firms reach the advantage pathway, a wide range of strategic opportunities become available to them. Legal resources now stand as equal partners to business operations.¹³² Firms will, for example, leverage an information disclosure obligation required by the Sarbanes-Oxley Act of 2002 to enhance internal financial controls, or rethink their intellectual property rights to negotiate a stream of value rather than suing to halt potential infringers.¹³³ Legal knowledge is no longer a barrier, but an opportunity that is no less valuable as any other firm asset.

The final transformation approach takes this strategic thinking a step further, seeking competitive advantages from law that are sustainable over the long term and embedding legally strategic thinking throughout the organization.¹³⁴ Firms redefine their very mission or core practices as in alignment with or reinforced by their legal knowledge and assets.¹³⁵ These transformations can require a core shift in how firm leaders perceive the law, as well as an organization-wide redesign of its culture in relation to

¹²⁵ *Id.*

¹²⁶ Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 963 (2017) (describing a “checkbox compliance” mentality that elevates a shallow compliance with specific rules over substantive fulfillment of the law’s purpose.”); Gregg Moran, *Breaches Within Breaches: The Crossroads of ERISA Fiduciary Responsibilities and Data Security*, 73 U. MIAMI L. REV. 483, 515-16 (2019).

¹²⁷ Bird, *supra* note 69, at 23-26.

¹²⁸ Bird & Orozco *supra* note 114, at 83.

¹²⁹ *Id.* at 83.

¹³⁰ *Id.* at 84.

¹³¹ *Id.* See also Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 U. PA. J. BUS. L. 733, 751 (2016).

¹³² Thomas M. Madden, *Law and Strategy and Ethics?* 32 GEO. J. LEGAL ETHICS 181, 201 (2019).

¹³³ Bird, *supra* note 69, at 29-30.

¹³⁴ *Id.* at 31-32; see also Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 210-13 (2019) (discussing how to transform copyright compliance issues from policing costs to revenue sources).

¹³⁵ Bird, *supra* note 69, at 31-32.

legal rules.¹³⁶ The most successful firms not only change their own organization, but integrate their legal strategy with partners throughout the value chain.¹³⁷

B. Legal Strategy in a Climate of Legal Uncertainty

In most industries, core legal obligations are relatively settled. An owner of a furniture chain, an automobile factory, or hardware store has little concern that her products will be made illegal anytime soon. To the extent that regulations do play a role, they influence a firm's operations, marketing strategy, or reporting obligations rather than the existential question of whether or not their product belongs in a legal marketplace. Cannabis firms do not have that luxury. A shift in legislative goals, a backlash against cannabis by the public, or the intervention of firms producing legal substitutes that see cannabis as a threat to their bottom line, could all derail the slow and fitful path cannabis has taken toward legalization.

The legal uncertainty surrounding cannabis firms represents a unique opportunity to illuminate the power of legal strategy in opaque legal environments. Legal strategy, however articulated, is at least as important to the emerging cannabis businesses as it is to established industries. Interestingly, it may apply to, and be leveraged by, the cannabis industry in ways the literature may not have fully explored. Legal strategy scholars generally apply theory to a legal environment in two contexts. First, and most often, legal strategy is used when the legal environment is assumed to be relatively stable. Although the laws of business are continually evolving, there are no major disruptions on the horizon that require a rethinking of a firm's position in relation to the law. For example, when in the 1990s IBM reinvigorated its patent portfolio through strategic leveraging of its assets,¹³⁸ it did so not because a groundbreaking change in patent law loomed on the horizon, but as a result of a thoughtful scan of its legally relevant assets and the legal environment.

The second context in which legal strategy is typically applied is when a groundbreaking change occurs in the legal environment. Some changes are long-awaited and provide years for firms to prepare, such as the long-awaited but enormous implementation of the European Union's General Data Protection Regulation (GDPR).¹³⁹ Other groundbreaking changes can be sudden and largely unexpected, such as the Court's recent and surprising ruling that Title VII of the Civil Rights Act of 1964 protects employees from same-sex discrimination.¹⁴⁰ Such changes test the strategic abilities of organizations to adapt to significant changes in the legal environment, with the most effective firms able to capture value ahead of their rivals.

The cannabis industry and its regulation do not fit cleanly into either context, given the long-standing state legal ambiguity that has engulfed the market. The evolution of cannabis from "national monster"¹⁴¹ to legal product was largely uncoordinated. Significant relaxation of prohibitions, such as

¹³⁶ Bird, *supra* note 69, at 33-38 (citing example of Lincoln Electric Company's unique cultural position and its application to its no layoff policy).

¹³⁷ Bird & Orozco *supra* note 114, at 85.

¹³⁸ Bird, *supra* note 69, at 32-33.

¹³⁹ See W. Gregory Voss & Kimberly A. Houser, *Personal Data and the GDPR: Providing a Competitive Advantage for U.S. Companies*, 56 AM. BUS. L.J. 287, 329-40 (2019).

¹⁴⁰ See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 16, 2020) (describing the ruling as "long-sought and unexpected"), <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html>

¹⁴¹ BONNIE & WHITEBREAD, *supra* note 16, at 92.

the passage of medical cannabis laws, only began in the 1990s.¹⁴² After spreading slowly in the 2000s, since 2010 sixteen states independently passed medical cannabis laws and nine states have legalized recreational cannabis.¹⁴³ Although promising for future reform, the result is, at least from the perspective of cannabis firms, a confusing morass of regulation that inhibits economic growth.¹⁴⁴ Further complicating the legal environment is that federal law prohibits both recreational and medical uses of cannabis.¹⁴⁵

State laws are unable to supersede federal power with cannabis legislation.¹⁴⁶ Conversely, federal law does not appear to preempt state legislation relaxing cannabis regulation.¹⁴⁷ This stalemate continues to change as interest in enforcement of federal cannabis laws begins to erode. President Barack Obama declared enforcement of federal cannabis laws in states that had relaxed regulation a low priority.¹⁴⁸ However, cannabis-related policies tied to organized crime, possession by minors, and trafficking in states where cannabis was illegal remained priorities.¹⁴⁹ President Donald Trump stated that he would permit states to legalize cannabis,¹⁵⁰ but that attitude has cooled over time.¹⁵¹ The result is an environment of continuous uncertainty, with little hope of resolution in the near future.

It would not be entirely unreasonable for a cannabis firm to cease operations and apply its limited resources elsewhere given the substantial legal risks. The industry is populated by a number of small firms and the industry itself, while growing significantly, has yet to mature into a political power bloc that rivals established industries such as health care, insurance, or technology.¹⁵² Investors face a number of risks when purchasing cannabis companies directly or buying publicly traded shares.¹⁵³ However, cannabis companies show no signs of moving forward even when the legal environment regulating them is so unstable. This could be due to a variety of factors such as the sheer potential value of the marketplace, as well as its countercultural origins attracting more than its share of risk-takers.¹⁵⁴

¹⁴² Leslie Shapiro & Katie Mettler, *U.S. Marijuana Law: A History*, WASH. POST. (n.d.), <https://www.washingtonpost.com/graphics/health/marijuana-laws-timeline/>.

¹⁴³ *Id.*

¹⁴⁴ The concept of fifty states serving as laboratories is evocative of Justice O'Connor's opinion in *Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part).

¹⁴⁵ Kathryn E. Hickner & Andrew J. Wilber, *Medical Marijuana: Legal and Practical Considerations for Hospitals*, 12 J. HEALTH & LIFE SCI. L. 39, 42-43 (2019).

¹⁴⁶ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

¹⁴⁷ See, e.g., Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895, 924 (2017).

¹⁴⁸ W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected Federal Trademark Registrations for Marijuana Derivatives*, 55 AM. BUS. L.J. 117, 133 (2018).

¹⁴⁹ *Id.*

¹⁵⁰ Kyle Jaeger, *President Trump Reiterates His Administration Will Let States Legalize Marijuana*, MARIJUANA MOMENT (Aug. 30, 2019), <https://www.marijuanamoment.net/president-trump-reiterates-his-administration-will-let-states-legalize-marijuana/>.

¹⁵¹ See *supra* text accompanying note 97.

¹⁵² See Erin Duffin, *Leading Lobbying Industries in the United States in 2019, By Total Lobbying Spending*, STATISTA (Jan. 2020), <https://www.statista.com/statistics/257364/top-lobbying-industries-in-the-us/>.

¹⁵³ See, e.g., David Jagielski, *4 of the Biggest Risks Facing the Cannabis Industry Today*, THE MOTLEY FOOL (Mar. 17, 2020), <https://www.fool.com/investing/2020/03/17/4-of-the-biggest-risks-facing-the-cannabis-industr.aspx>.

¹⁵⁴ Jordan Schrader, *Risk Takers Go Under Lock and Key to Join Pot Industry*, THE OLYMPIAN (Aug. 5, 2014), <https://www.theolympian.com/news/local/marijuana/article26074579.html>.

Regardless of the reason, cannabis firms should be primed to deploy legal strategies to capture value, but the question remains which strategies will be of most significant benefit. Typically, firms evolve from more simplistic to more sophisticated legal strategies, with the simpler pathways (avoidance and compliance) serving as gateways for the more promising pathways of prevention, advantage, and transformation. The ability to evolve may be based on managers' attitudes toward law, lawyers, and the legal process, as well as the size, leadership, and legal staffing of the firm.¹⁵⁵

The cannabis industry's unique legal environment questions this thinking. Two of the most common pathways of legal strategy for firms are compliance and prevention. Managers navigating in a compliance pathway view the legal environment as a necessary but costly restriction on ordinary operations of the firm.¹⁵⁶ Managers using a compliance strategy are susceptible to adopting a checkbox mentality, whereby legal requirements are siloed away from strategic decisions.¹⁵⁷ The legal environment is provided to managers by counsel or through third-party publications, and managers ensure that all relevant state and federal laws are observed. Like a concrete hurdle, a compliance perspective implicitly perceives the legal environment as fixed, unyielding, and imposed by outside uncontrollable forces.¹⁵⁸ For most firms, a compliance strategy may leave significant legal value left uncaptured, but at least the firm will minimize regulatory scrutiny and not becoming uncompetitive due to legal rules.

Cannabis firms, by contrast, cannot thrive simply by practicing compliance. Compliance plays some role, as firms need to ensure that the plethora of employment, securities, and other legal requirements that any company faces are addressed. There is also a need to ensure that current cannabis-relevant rules remain in focus for managers. However, a cannabis firm executive, when asked about compliance with legal rules, would not be entirely remiss if he replied 'compliance with what'? Cannabis rules change almost continuously, as states and municipalities evolve their plethora of regulations ranging from criminal penalties to zoning and land use laws to the changing attitudes of their constituents.¹⁵⁹ Compliance strategies will thus be imprecise and inevitably subject to change as rules and practices that regulate the industry evolve. Thus, a compliance pathway will have some general use, but alone will not be sufficient in this industry.

Cannabis firms pursuing a prevention pathway may experience similar limitations. This strategy holds that knowledge of the legal environment can be used to minimize risk.¹⁶⁰ Business decisions, made in partnership with legal counsel, encourage a culture where appropriate legal choices become embedded in the enterprise.¹⁶¹ Here too, the cannabis firm faces distinct challenges. Managers can be trained to anticipate legal problems and be astute enough to manage them, but any advice provided to

¹⁵⁵ Bird, *supra* note 113, at 80-94.

¹⁵⁶ Bird & Orozco, *supra* note 114, at 83.

¹⁵⁷ Cf. Nadelle Grossman, *The Duty to Think Strategically*, 73 LA. L. REV. 449, 498 (2013) (citing report recommending boards of directors avoid the checkbox mentality and integrate corporate governance into firm strategy).

¹⁵⁸ Bird & Orozco, *supra* note 114, at 83.

¹⁵⁹ See, e.g., Matthew McComas, "Zoning" in *on Maryland's Nascent Marijuana Industry*, 5 U. BALT. J. LAND & DEV. 167 (2016); Alexis Holmes, *Zoning, Race, and Marijuana: The Unintended Consequences of Proposition 64*, 23 LEWIS & CLARK L. REV. 939 (2019). Additionally, cannabis taxation rules and rates vary significantly from state to state. Urban Institute & Brookings Institution, *The Tax Policy Center's Briefing Book* (n.d.), <https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work>.

¹⁶⁰ Bird & Orozco, *supra* note 114, at 83.

¹⁶¹ Bird, *supra* note 69, at 23.

them by legal staff will be imprecise. If the legal environment is opaque, as it can be in the cannabis context, then suggested prevention strategies can only be based upon estimations of what the law might be today, tomorrow, or a few years from now. As a result, cannabis firms cannot focus on prevention if there is no clear guidance from regulation on what is or is not permissible conduct.

One strategy that can play an unexpected role is avoidance. The avoidance pathway is not normally considered a mature strategy, and often consists of jurisdictional arbitrage or dodging legal obligations altogether.¹⁶² However, with the legal environment so fluid, avoidance strategies represent a legitimate strategic alternative. Cannabis firms face an increasingly weak federal and state regulatory environment, as enthusiasm for allocating limited enforcement resources to cannabis prosecution diminishes.¹⁶³ As noted, the Obama administration placed cannabis enforcement on a low priority.¹⁶⁴ In Oakland, California, residents voted to place cannabis enforcement their lowest priority, even below such minor crimes as jaywalking.¹⁶⁵ The House of Representatives voted in 2019 to prevent the Department of Justice from interfering with state cannabis laws.¹⁶⁶ However, the Trump administration has ramped up its threats of enforcement, leaving cannabis firms once again in a gray area between legality and illegality. As numerous state and local laws highlight, cannabis is far from completely legal.

This presents cannabis firms with the problematic question of whether to avoid running afoul of cannabis regulations or deliberately ignore prohibitions that formally exist but are largely unenforced. Ignoring the law exposes companies to legal peril and the industry to public condemnation as arrogantly believing it is above the law.¹⁶⁷ There are also moral and ethical implications to deciding whether to follow unenforced and underenforced legal rules,¹⁶⁸ and firms who circumvent them can trample upon fundamental values of justice and fair play in a commercial environment. However, firms that do not exploit unenforced obligations risk falling behind their competitors without such scruples. The fact that such a decision is even viable for cannabis firms is a troubling consequence of the currently inconsistent legal environment that is in significant need of reform.

With relatively small firms operating in an opaque legal environment, the likelihood that companies will pursue transformative legal strategies is low. However, the advantage strategy of using

¹⁶² Bird & Orozco, *supra* note, 113 at 82-83; Bird, *supra* note 69, at 12-17.

¹⁶³ If cannabis laws become so underutilized and out of step with public opinion, acts in contravention of those laws could be seen as an act of civil disobedience in order to remove criminalization laws for good. See Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 295 (2010).

¹⁶⁴ See *supra* notes 148–149 and accompanying text.

¹⁶⁵ Trevor Hughes, *New Marijuana Laws in 2019 Could Help Black and Latino Drug Dealers Go Legal*, USA TODAY (Feb. 24, 2019), <https://www.usatoday.com/story/news/2019/02/21/marijuana-legalization-2019-black-latino-dealers-now-getting-help/2838959002/>.

¹⁶⁶ Tom Angell, *Congress Votes to Block Feds From Enforcing Marijuana Laws in Legal States*, FORBES (June 20, 2019), <https://www.forbes.com/sites/tomangell/2019/06/20/congress-votes-to-block-feds-from-enforcing-marijuana-laws-in-legal-states/#6c0d0dcc4b62>

¹⁶⁷ There has been criticism of rideshare firm Uber of imperiously doing just that. See, e.g., ADAM LASHINSKY, *WILD RIDE: INSIDE UBER'S QUEST FOR WORLD DOMINATION* 20 (2017) (“[Uber's] maverick reputation quickly gave way to the perception of a company that considered itself above the law.”); Hubert Horan, *Will the Growth of Uber Increase Economic Welfare?*, 44 TRANSP. L.J. 33, 98 (2017).

¹⁶⁸ Robert Hughes, *Doing the Right Thing: When Moral Obligation is Enough?*, KNOWLEDGE@WHARTON (Nov. 19, 2015), <https://knowledge.wharton.upenn.edu/article/doing-the-right-thing-when-moral-obligation-is-enough/>. See also Robert Hughes, *Breaking the Law Under Competitive Pressure*, 38 LAW & PHIL. 169 (2019).

law as leverage to capture value remains a viable opportunity. With the legal environment so unstable, effective legal knowledge will be challenging to obtain. This creates an opportunity for firms who can read the regulatory tea leaves better than other companies.

Firms must commence an advantage strategy by reviewing the current relationship between managers and legal staff. Legal staff for their part need to act less as hyper-conservative and policing 'cop' of the firm and more as 'entrepreneurial partner' with the top management team.¹⁶⁹ Managers for their part must embed attitudes of engagement and understanding of legal staff as partners in value acquisition. This is no easy task when lawyers are too often perceived as the 'Chicken Little' of the management team or the 'Department of No.'¹⁷⁰ If both managers and legal staff can overcome these predispositions, legal knowledge becomes a valuable asset and legal staff become a partner in risk management and value creation.¹⁷¹ The challenge in bridging this attitudinal gap is significant. However, in that challenge lies the reward not only in terms of value but also the acquisition of a sustainable competitive advantage that is difficult for rivals to easily imitate.¹⁷²

Firms that master this relationship can then turn their focus outward toward the cannabis legal environment. Firms that can anticipate regulatory trends, adapt to those trends through shifting business operations to uses less likely to invoke sanction (i.e. medical cannabis), and implement those adaptations to capture market share will be in a stronger competitive position than their rivals. When cannabis eventually becomes legal, as public opinion and regulatory trends seem to predict, those firms already embedded in legal cannabis sectors will be able to expand their operation faster than new entrants. Such firms will also benefit from a first-mover advantage, whereby the first-to-market builds relationships with consumers and suppliers in the absence of significant competition.¹⁷³ With cannabis sales predicted to reach \$41 billion in less than five years, and the industry still small and highly-fragmented, any company that can navigate the legal environment better than its rivals will have access to a substantial demand for its products.¹⁷⁴ Satisfying that demand will only build that company's brand, improve consumer loyalty, and help lock out competitors. Even with so much growth, according to one cannabis CEO, "it's still day one in the cannabis industry."¹⁷⁵ The opportunities for firms that know the law better than their competitors have profound implications for their future success.

¹⁶⁹ See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC. REV. 457, 463-68 (2000) (summarizing cop, counsel, and entrepreneur typologies of legal counsel).

¹⁷⁰ Christian Lutz et al., *Sarbanes-Oxley: Was it Worth it?*, 5 DEPAUL BUS. & COM. L.J. 643, 650 (2007). See also Jeffrey W. Wheeler, *Oh Great, the Lawyer's Here!*, 33 ACC DOCKET 18, 18 (2015).

¹⁷¹ Bagley, *supra* note 107, at 384.

¹⁷² Bird, *supra* note 113, at 71-80 (summarizing how law can meet the requirements of a sustainable competitive advantage). See also Jay Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. MGMT. 99, 105-12 (1991).

¹⁷³ See generally Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41 (1988) (surveying the literature and benefits of first-mover advantages to firms). See also Bird, *supra* note 60, at 407.

¹⁷⁴ Melissa Kress, *Grabbing the First-Mover Advantage in CBD & Cannabis*, CONVENIENCE STORE NEWS (Nov. 12, 2019), <https://csnews.com/grabbing-first-mover-advantage-cbd-cannabis>.

¹⁷⁵ Brendan Kennedy, *Tilray's CEO on Becoming the First Mover in a Controversial Industry*, HARV. BUS. REV. (Mar.-Apr. 2020), at 33, 37.

IV. STRATEGIC RESPONSES UNDER UNCERTAINTY: THE CASE OF CANNABIS TRADEMARKS

As shown above, the cannabis industry is situated in a uniquely challenging legal environment plagued with mixed political messages, inconsistent enforcement, and an indeterminate but seemingly inevitable evolution toward legalization. These companies have no choice but to navigate this legal environment at their peril. Firms that act too aggressively against eroding cannabis laws (e.g., flaunt their non-compliance with applicable law) risk being targeted by the significant potential enforcement power that remains under state and federal regulation. Firms that act too cautiously by waiting until the legal environment is largely settled before proceeding risk being left behind as competitors seize valuable legal assets and leverage their first-mover advantage into new markets. The most legally astute firms will have the best chance to thrive.

While macro-trends define the legal setting and anticipate the overall future, specific business challenges with legally strategic implications are facing the cannabis industry now. One of the most pressing challenges is the acquisition of trademark rights and protections as firms race to establish their marks and defend their brand equity from rivals. Trademarks are not only powerful communication tools, but also reduce search costs for customers who desire a particular product from a specific manufacturer.¹⁷⁶ Trademarks have the potential to be highly valuable,¹⁷⁷ and powerfully, they never expire and may continue to be valuable as long as the mark is being used in commerce.¹⁷⁸ Thus, the battle for trademark acquisition and protection by competitive cannabis firms is no insignificant matter and is worth analyzing as a law and strategy case study.

This Part first reviews trademark law and its application to the regulation of cannabis. Similar to the industry as a whole, cannabis trademarks exist in a legally grey area. The federal government refuses to register most cannabis-related trademarks, but savvy firms have undertaken strategic behaviors to secure a degree of brand protection. This Part then analyzes five of the most common legal strategies cannabis firms use in relation to trademarks. Each of these strategies is examined through the lens of strategic pathways. This Part finds that legal strategies generally congregate around two types—avoidance and advantage—and explains the implications for each. A summary of firm strategic responses to cannabis policy is available as Exhibit B.

A. Trademark Law and the Regulation of Cannabis

Trademark law is intended to prevent consumer confusion by facilitating identification of goods from a specific firm, such that buyers can purchase their preferred products.¹⁷⁹ This ability to differentiate a firm's wares from their rivals' encourages "investment in goodwill" through "advertisements and [product] quality."¹⁸⁰ To that end, trademark law prevents the adoption of a mark

¹⁷⁶ Abigail Rubinstein, *7 Reasons Why Trademarks are Important to Your Business*, ENTREPRENEUR (July, 24, 2014), <https://www.entrepreneur.com/article/235887>. See also 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:2 (5th ed. 2019).

¹⁷⁷ Neda Ghomeshi, *Celebrities Dabbing with Marijuana Trademarks*, 33 ENT. & SPORTS LAW 113, 114 (2017).

¹⁷⁸ Kenneth L. Port, *The Congressional Expansion of American Trademark Law: A Civil Law System in the Making*, 35 WAKE FOREST L. REV. 827, 898-99 (2000).

¹⁷⁹ *Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 672 (3d Cir. 1989).

¹⁸⁰ *Id.*

that is likely to be confused with another’s trademark.¹⁸¹ If a trademark owner is able to establish that another’s confusing use infringes on its mark, they may secure damages and an injunction ceasing the infringing use.¹⁸²

Protectible marks include words, logos, designs, or a combination of these elements that can identify the goods or services of a particular firm.¹⁸³ This type of brand protection is vital to nascent cannabis firms “seeking to develop and protect an identity.”¹⁸⁴ Further, as the market has continued to grow, firms have opened franchises, which requires protection of trademarks that will be licensed out under the franchising agreement.¹⁸⁵

Trademark rights begin to accrue when a party uses their mark in commerce, regardless of if the owner chooses to register it with a governmental body.¹⁸⁶ As discussed below, however, registration of a mark creates significant benefits. Pursuant the Lanham Act, companies may request that the USPTO register their trademark.¹⁸⁷ Assuming the application satisfies a series of statutory requirements (*e.g.*, not conflicting with an existing mark), a certificate of registration will issue.¹⁸⁸ Federal registration is usually viewed as the preferable method of protecting a brand¹⁸⁹ due to additional substantive and procedural rights that it affords the registrant.¹⁹⁰ The federal system does not, however, stand alone. State-level trademark protections are available to parties making use of a mark within the state.¹⁹¹ These rights are created by common law, state statute, or both.¹⁹²

State and federal trademark protections create exclusive rights to use the mark within a particular area of commerce—regarding both subject matter and geography.¹⁹³ The difference between state and federal rights is in their geographic scope. State protections exist only within their respective

¹⁸¹ Stone Brewing Co., LLC v. MillerCoors LLC, No. 3:18-CV-00331-BEN-LL, 2020 WL 1508489, at *3 (S.D. Cal. Mar. 27, 2020).

¹⁸² Keith M. Stolte, *Remedying Judicial Limitations on Trademark Remedies: An Accounting of Profits Should Not Require A Finding of Bad Faith*, 87 TRADEMARK REP. 271, 274 (1997).

¹⁸³ 15 U.S.C. § 1127 (2018); *see also* Kellogg Co. v. Nat’l Biscuit Co., 305 U.S. 111, 120 (1938) (holding that “Shredded Wheat” could not be a trademark since it was “primarily associated with the article rather than a particular producer”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (AM. LAW INST. 1995).

¹⁸⁴ Shabnam Malek, *Trademarks and Branding in the Cannabis Industry Protecting Ip in the Shadow of the Csa*, ABA SciTECH LAW, Spring 2017, at 12.

¹⁸⁵ Shannon L. McCarthy & Dawn Newton, *Franchising A Marijuana Business: It's Not Quite Mission Impossible*, 35 FRANCHISE L.J. 357, 367 (2016); Shabnam Malek, *Trademarks and Branding in the Cannabis Industry Protecting Ip in the Shadow of the Csa*, ABA SciTech Law., Spring 2017, at 12.

¹⁸⁶ Mytee Prod., Inc. v. Shop Vac Corp., No. 13CV1610 BTM BGS, 2013 WL 5945060, at *2 (S.D. Cal. Nov. 4, 2013) (citing Sengoku Works LTD. v. RMS Int’l, LTD., 96 F.3d 1217, 1219 (9th Cir.1996)).

¹⁸⁷ 15 U.S.C. § 1051 (2018).

¹⁸⁸ 15 U.S.C. § 1051-2 (2018).

¹⁸⁹ Patricia Kimball Fletcher, *Joint Registration of Trademarks and the Economic Value of a Trademark System*, 36 U. MIAMI L. REV. 297, 298 n.7 (1982) (citation omitted); Cynthia E. Kernick, *Protecting Your Intellectual Property: An Introduction*, PRAC. LAW., April 2007, at 49, 50 (“[F]ederal [trademark] protection is generally preferable.”).

¹⁹⁰ *In re Tam*, 808 F.3d 1321, 1328 (Fed. Cir. 2015), *as corrected*, (Feb. 11, 2016), *aff’d sub nom*, *Matal v. Tam*, 137 S. Ct. 1744 (2017).

¹⁹¹ *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001).

¹⁹² Steven J. Eisen & Anne J. Cheatham, *Trademark and Marketing Issues for Financial Institutions*, 60 CONSUMER FIN. L.Q. REP. 194, 198-99 (2006).

¹⁹³ *Dow Jones & Co., Inc. v. Int’l Sec. Exch., Inc.*, 451 F.3d 295, 308 (2d Cir. 2006); *Wiener King, Inc. v. Wiener King Corp.*, 407 F. Supp. 1274, 1280 (D.N.J. 1976) (reversed on other grounds).

jurisdictions¹⁹⁴ and may be limited to areas of actual use and natural expansion.¹⁹⁵ In contrast, federal registration provides for nationwide constructive use regarding the claimed types of goods or services,¹⁹⁶ thus preventing later adoption of the mark nationwide if the junior use would create consumer confusion.¹⁹⁷ These constructive rights do not generally supersede prior adopters of the mark; senior parties can continue use within their existing geographic area.¹⁹⁸

Firms applying for registration of their trademarks typically focus on meeting various statutory requirements, such as sufficient distinctiveness of the mark to merit protection. Unlike most other industries, however, cannabis firms must grapple with the question of legality of the subject matter to receive trademark protection. A party must use a mark in *legal* commerce to secure a federal trademark registration.¹⁹⁹ Both “marijuana” and THC are illegal (i.e., listed under Schedule I) under the federal CSA.²⁰⁰ The USPTO, accordingly, refuses to register marks associated with THC and marijuana for failure to use the trademark in legal commerce.

As an example of this limitation, the Trademark Trial and Appeal Board (Board) rejected trademark registration for a green cross which it concluded had become a symbol of the medical cannabis industry.²⁰¹ In another case, the Board affirmed the rejection of ‘JUJU JOINTS’ and ‘POWERED BY JUJU’ for smokeless cannabis or marijuana vaporizing devices.²⁰² The Board reasoned that “if the goods on which a mark is intended to be used are unlawful, there can be no bona fide intent to use the mark in lawful commerce.”²⁰³

Federal courts have also relied on the illegality requirement. A recent Northern District of California opinion addressed whether an earlier state-level cannabis trademark created rights superior to those of a junior user with a federally registration.²⁰⁴ In *Kiva Health Brands v. Kiva Brands*, the plaintiff owned a junior, federally registered mark (Kiva) for chocolates, while the defendant was the mark’s senior user for cannabis infused chocolates.²⁰⁵ Deviating from the usual black-letter rule that prior use trumps subsequent federal registration, the court deemed defendant’s earlier cannabis-related use

¹⁹⁴ *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001).

¹⁹⁵ *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 9 F. Supp. 2d 1347, 1355 (S.D. Fla. 1998); *Stat Ltd. v. Beard Head, Inc.*, 60 F. Supp. 3d 628, 633 (E.D. Va. 2014).

¹⁹⁶ *Glow Indus., Inc. v. Lopez*, 273 F. Supp. 2d 1095, 1115 (C.D. Cal. 2003); *St. Joe Co. v. Watercolor Salon, LLC*, No. 3:13-CV-294-CWR-FKB, 2014 WL 11514961, at *2 (S.D. Miss. June 12, 2014).

¹⁹⁷ *Butler v. Hotel California, Inc.*, 106 F. Supp. 3d 899, 905 (N.D. Ohio 2015) (citing *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001) & *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1188-89 (6th Cir. 1997)).

¹⁹⁸ *Allard Enterprises, Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001); *Dorpan, S.L. v. Hotel Melia, Inc.*, 728 F.3d 55, 62 (1st Cir. 2013).

¹⁹⁹ *Clorox Co. v. Armour-Dial, Inc.*, 214 U.S.P.Q. 850, 851 (Trademark Tr. & App. Bd. 1982); *Dessert Beauty, Inc. v. Fox*, 617 F. Supp. 2d 185, 189 (S.D.N.Y. 2007), *aff’d*, 329 F. App’x 333 (2d Cir. 2009).

²⁰⁰ 21 C.F.R. § 1308.11 (2016).

²⁰¹ *In Re Morgan Brown*, 119 U.S.P.Q.2d 1350 (2016). *See also* 1 MCCARTHY, *supra* note 176, § 19:124.

²⁰² *In re JJ206, LLC*, 120 U.S.P.Q.2d 1568 (T.T.A.B. 2016).

²⁰³ *Id.* at *2.

²⁰⁴ *Kiva Health Brands LLC v. Kiva Brands Inc.*, No. 19-CV-03459-CRB, 2019 WL 4249075, at *1–3 (N.D. Cal. Sept. 6, 2019); *see also* *Kiva Health Brands LLC v. Kiva Brands Inc.*, No. 19-CV-03459-CRB, 2020 WL 759409, at *9–10 (N.D. Cal. Feb. 14, 2020) (reaching a similar conclusion).

²⁰⁵ *Kiva Health Brands LLC*, 2019 WL 4249075, at *1–3.

irrelevant.²⁰⁶ It stated that to hold otherwise would “put the government in the anomalous position of extending the benefits of trademark protection to a seller based upon actions the seller took in violation of that government’s own laws.”²⁰⁷ This embodies two cannabis-specific market trends: 1. the field’s uncertain, opaque legal environment, and 2. occasional, unexpected regulatory backsliding contrary to the overarching trend of cannabis normalization.

These decisions place cannabis firms in an unusual position. A requirement for registration, largely irrelevant to most industries, remains a substantial challenge for the cannabis industry. The following sections examine strategies employed as firms navigate their legal environment in light of both the legality requirement and the clearly softening attitude of states toward cannabis sales and consumption.

B. Legal Strategy #1: Trademark Laundering

Unable to secure trademark protection for marks associated with cannabis goods, firms engage in “trademark laundering”—registering a mark in a field related to the drug and then using the same mark on their actual cannabis goods.²⁰⁸ The *de jure* protection afforded by that registration only extends to the claimed product types (e.g., clothing),²⁰⁹ but the actual scope of protection is substantially broader.

Consider the example of a cannabis firm (named CannaCo) that registers “Hypothetical Marijuana” for clothing goods. Beyond securing protection for the mark as used on clothing, this act disincentivizes adoption of the mark by CannaCo’s rivals. If a competitor considered adopting the Hypothetical Marijuana mark for cannabis goods, it would likely find the registration and—not wanting to create legal entanglements with CannaCo—select a different trademark. The threat of expensive litigation with CannaCo—even if alleging infringement of a registered clothing mark might be a weak

²⁰⁶ *Id.* (“To hold that KBI’s prior [illegal] use of the KIVA mark ... is a legitimate defense to KHB’s federal trademark would put the government in the anomalous position of extending the benefits of trademark protection to a seller based upon actions the seller took in violation of that government’s own laws.” (citations and internal quotations omitted)). *But see* Nat. Footwear Ltd. v. Hart, Schaffner & Marx, 760 F.2d 1383, 1395 (3d Cir. 1985) (stating the usual rule that “a federal registrant is still subject to the defense of a prior user of the mark who has established a market in specific areas notwithstanding that senior user’s failure to register.”).

²⁰⁷ *Id.* (quoting *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626, 630 (9th Cir. 2007)). It is notable that the defendant relied on *common law* state level rights (as opposed to state registrations) in this case, but the underlying anti-illegal use premise remains, and it seems unlikely the option would vary for state registration-based rights. It is interesting that the USPTO seems to have no problem with the anomalous position of protecting marijuana products through patent law. “[T]he USPTO has granted several patents for marijuana plants. Indeed, the granting of marijuana patents have been criticized as too [easy to get.]” Nicholas J. Landau & James W. Wright, Jr., *Cannabis Patents, Trademarks, and Other Forms of Intellectual Property Face Difficulties* 31 INTELL. PROP. & TECH. L.J. 8, 9 (2019). Utility patent 9,095,554 covers a type of specialty hybrid cannabis plant (granted 2015). Plant patent 27,475 claims a “new strain [having] energizing and motivating psychoactive effects as opposed to the lethargy normally associated with *ssp. indica* and show hypotensive effects.” (granted 2016). The claimed plant’s appearance is described as having “a few branched hairs on the stem that are not characteristic of the species, but [is] ordinary in most other respects.” *Id.*

²⁰⁸ Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 251-52 (2016).

²⁰⁹ *S Indus., Inc. v. Kimberly-Clark Corp.*, No. 96 C 3916, 1996 WL 388427, at *1 (N.D. Ill. July 9, 1996).

case—is sufficient to discourage others from adopting CannaCo’s trademark.²¹⁰ Through this mechanism, a firm like CannaCo can create some brand protection by registering their brand for a legal good that is related to cannabis.

This behavior embodies the avoidance pathway of legal strategy. The cannabis firm recognizes a legal obstacle (i.e., the inability to register cannabis-related marks), and chooses to circumvent it to attain a particular goal (i.e., brand protection for their cannabis goods). Consistent with many avoidance strategies, trademark laundering avoids technical breaches of regulations, but still distorts the intent of the law to benefit the firm.

C. Legal Strategy #2: Registering Trademarks While CBD’s Legal Status Was Ambiguous

While the legal status of CBD (the popular cannabis derivative) is now settled under federal law,²¹¹ there was a period of public confusion regarding the scope of federal regulation.²¹² Until 2018, the DEA maintained that CBD was illegal.²¹³ However, the drug was readily available to the public through online and traditional retailers,²¹⁴ and sales were booming.²¹⁵ The then-muddled legal status of CBD was confused by new state laws allowing for CBD consumption²¹⁶ and federal disinterest in enforcing anti-cannabis laws in states with their own regulations.²¹⁷ Trademark applicants would use this legal uncertainty to their advantage.

With the commercial success of CBD, firms attempted to secure federal registrations associated with the drug. These applications technically ran afoul of the prohibition against registering trademarks associated with illicit drugs like CBD (which was still illegal at that time).²¹⁸ Some applicants, however, successfully used the common confusion about CBD’s legal status to circumvent this limitation.

²¹⁰ This dissuasion technique is particularly effective against firms that are just starting to consider adopting a new mark, and thus, have invested very little in the mark relative to the cost of potential litigation and having to rebrand if they lose the lawsuit. Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U. L. Rev. 1293, 1313 n.92 (2016); *Upjohn Co. v. Am. Home Prod. Corp.*, No. 1:95CV237, 1996 WL 33322175, at *24 (W.D. Mich. Apr. 5, 1996) (describing “the ease with which a different mark could have been selected”).

²¹¹ 21 C.F.R. § 1308.11 (2016).

²¹² Debra Borchart, *Hemp Cannabis Product Sales Projected to Hit \$1 Billion in 3 Years*, FORBES.COM (Aug 23, 2017), <https://www.forbes.com/sites/debraborchart/2017/08/23/hemp-cannabis-product-sales-projected-to-hit-a-billion-dollars-in-3-years/#3d13764f474c>.

²¹³ Schuster & Wroldsen, *supra* note 148, at 128 n.70 (detailing the DEA’s stance that CBD was a Schedule I drug).

²¹⁴ Borchart, *supra* note 212.

²¹⁵ Debra Borchart, *The Cannabis Market That Could Grow 700% by 2020*, FORBES.COM (Dec. 12, 2016), <http://www.forbes.com/sites/debraborchart/2016/12/12/the-cannabis-market-that-could-grow-700-by-2020/#419324f671ed>.

²¹⁶ See GA. CODE ANN. § 16-12-190-91 (effective April 16, 2015); FLA. STAT. ANN. § 381.986 (effective March 25, 2016); OKLA. STAT. ANN. tit. 63, § 2-802 (effective April 30, 2015); see also *State Marijuana Laws* NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 18, 2016), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

²¹⁷ White House Office of the Press Secretary, *Remarks by President Obama in Town Hall with Young Leaders of the Americas*, at *14, Apr. 9, 2015, available at 2015 WL 1594090; Memorandum from James M. Cole, Deputy Attorney General to United States Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

²¹⁸ See, e.g., U.S Trademark Application Serial No. 86,563,386 Office Action (dated Jun. 2, 2015).

These parties admitted selling CBD and proffered self-serving positions to secure registrations. Some argued that CBD was not an illegal drug.²¹⁹ Others proffered that they could exclude all illicit chemicals in making their wares.²²⁰ Still others flatly argued that CBD marks were “in use in [lawful] commerce.”²²¹ These approaches led to non-standardized CBD-mark examination procedures at the USPTO,²²² and some applications were registered despite the prohibition on registering marks associated with illegal goods.

These behaviors embody the avoidance pathway of legal strategy. Firms recognized uncertainties associated with enforcement of CBD laws (i.e., under-enforcement) and used this to further systemic uncertainties by confusing trademark examiners about the drug’s legality. By encouraging this confusion, applicants avoided limitations on registering marks associated with illegal drugs and furthered their own economic interests. This behavior is consistent with practitioners of the avoidance pathway who will commonly circumvent legal obstacles when the opportunity arises.²²³

D. Legal Strategy #3: Betting on the Future Legalization of Cannabis

Forward thinking Cannabis firms made relatively small investments which they hope will increase in value as normalization of the cannabis industry continues.²²⁴ This strategy has been followed in the cannabis trademark realm. As an example, the above-described early registrants of CBD marks (starting in November of 2014²²⁵) have created significant first mover advantages in branding. CBD-related trademark registrations have only increased in value, as the drug shifted from a federally prohibited drug²²⁶ to a legal²²⁷ market darling, with annual sales predicted to increase over 700% (to \$5

²¹⁹ U.S. Trademark Application Serial No. 86,315,166, Office Action Response (dated Oct. 31, 2014) & Registration Certificate (dated Aug. 29, 2016). The DEA would later foreclose this avenue of argument. 81 Fed. Reg. 90194–96 (Dec. 14, 2016).

²²⁰ U.S. Trademark Application Serial No. 86,133,713, Office Action Response (dated Sep. 12, 2014). Applicant’s argument about making CBD that is consistent with the CSA was accepted, though the application would eventually go abandoned for other reasons. U.S. Trademark Application Serial No. 86,133,713 Notice of Abandonment (dated Jul. 08, 2016). The DEA would later dispute the feasibility of economically manufacturing CBD without THC. 81 Fed. Reg. 90195 fn.1 (Dec. 14, 2016) (“Although it might be theoretically possible to produce a CBD extract that contains absolutely no amounts of other cannabinoids, the DEA is not aware of any industrially-utilized methods that have achieved this result.”).

²²¹ U.S. Trademark Application Serial No. 86,455,188, Statement of Use (dated Feb. 10, 2016) & Registration Certificate (dated Jul. 05, 2016). *But see* 81 Fed. Reg. 90194–96 (Dec. 14, 2016).

²²² Schuster & Wroldsen, *supra* note 148, at 146-57.

²²³ *Id.* at 12-17.

²²⁴ Neil W. Hamilton, Verna Monson & Jerome M. Organ, *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, *Prof. Law.*, 2012, at 1, 15 (discussing how—in the presence of legal change—a firm can “gain a competitive advantage against other [firms] not prepared for these changes”).

²²⁵ Trademark Registration Number 4643694 (registered November 25, 2014 for PROCANA for “Dietary supplements containing CBD for therapeutic uses,” among other things).

²²⁶ Schuster & Wroldsen, *supra* note 148, at 128 n.70 (2018)

²²⁷ The Agriculture Improvement Act of 2018, § 10112 (creating legal means to produce CBD via hemp).

billion) in 2019 and to \$23 billion in 2023.²²⁸ Further, these early positions in CBD branding will continue to bear fruit, as the FDA begins to approve CBD-based drugs for sale.²²⁹

Moreover, actions taken to increase brand-value in the nascent cannabis goods market will continue to appreciate as cannabis normalization proceeds. Parties that have already cultivated brand value in this market can expect their investments to blossom as cannabis moves towards the possibility of full federal legalization.²³⁰ A recent Barclay's report notes that if cannabis were legal today, the market "could be worth \$28 billion, increasing to \$41 billion by 2028 on a pre-tax basis."²³¹ Other analysis suggest an even higher value.²³²

The approach of securing early cannabis brand protection that could increase in value as normalization occurs is an example of the advantage pathway of strategy. Firms undertaking advantage behaviors analyze the legal environment of their business (e.g., the ongoing normalization of cannabis) and make forward-looking legal decisions to benefit the firm. These types of action embody how strategic use of the law (e.g., securing early trademark protection) can be a source of competitive advantage. As shown here, an advantage firm employs legal knowledge as it would any other firm asset.

E. Legal Strategy #4: Adopting Existing Trademark Regimes to New Cannabis-Related Uses

Another example of strategic behavior is the repurposing of existing legal regimes for new, cannabis-related uses.²³³ State-level trademark laws in California have been employed in this manner. The California system traditionally allows registrations within "the classifications adopted by the United States Patent and Trademark Office,"²³⁴ which does not provide cannabis-specific categories.²³⁵ Recognizing this shortcoming, cannabis firms in the jurisdiction found a way to circumvent the limitation and still secure state registrations.

²²⁸ *From Farm to Aisle U.S. CBD Market 2019 Report*, BRIGHTFIELD GROUP, https://global-uploads.webflow.com/596691afde3c5856d866ae50/5d25fbbc528d2e6c4abf56a3_US%20CBD%20Market%20Report_July2019.pdf

²²⁹ *FDA approves first drug comprised of an active ingredient derived from marijuana to treat rare, severe forms of epilepsy* (June 25, 2018), U.S. FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms>; U.S. Food and Drug Administration, <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis>

²³⁰ Angelica LaVito, *US Lawmakers Look to Legalize Pot in 'Historic' Marijuana Reform Hearing*, CNBC (Jul. 10, 2019), <https://www.cnbc.com/2019/07/10/us-lawmakers-look-to-legalize-pot-in-historic-marijuana-reform-hearing.html>

²³¹ Sheetz, *supra* note 8.

²³² Varma, *supra* note 8.

²³³ Justin W. Evans & Anthony L. Gabel, *Preparing Legal Entrepreneurs as Global Strategists: The Case for Entrepreneurial Legal Education*, 32 ARIZ. J. INT'L & COMP. L. 727, 786 (2015) (discussing how a smart attorney can "lower the firm's legal transaction costs and legal risks by innovatively harnessing the jurisdiction's legal flexibilities").

²³⁴ Cal. Bus. & Prof. Code § 14235 (West).

²³⁵ Alex Padilla (California Secretary of State), *Registering Cannabis-Related Trademarks in California*, <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/04/Registering-Cannabis-Related-Trademarks-in-California.pdf> ("These classification codes do not include specific categories for cannabis goods or services.").

Initially, an amendment to the state's trademark laws was proffered to accommodate cannabis marks. It would, however, fail.²³⁶ Facing this setback, businesses attempted to convince the state government to allow registration of cannabis-marks despite the lack of a cannabis-specific category and failure of the statutory amendment. They were successful.

As of January 1, 2018, firms obtained the right to register cannabis marks in California under existing law,²³⁷ so long as the applicant selected "one or more classification codes from the list adopted by the United States Patent and Trademark Office."²³⁸ This move relied not on statutory change, but rather a new interpretation of existing law. Cannabis-specific registrations were possible, if applicants shoehorned the mark into existing categories like pharmaceuticals (code 5), agricultural products (code 31), smokers articles (code 34), advertising and business (code 39), and delivery services (code 39).²³⁹ The state's secretary of state suggested that applicants "choose the code(s) which best categorize the good(s) or service(s) associated with their Trademark as if these goods or services did not involve cannabis."²⁴⁰

This new adaptation of extant state law proved beneficial despite not being tailored to cannabis goods.²⁴¹ A trademark description search with the California Secretary of State found 34 registrations under "marijuana."²⁴² A contemporaneous search for "dispensary" identified three registrations. The search term "CBD" likewise returned 25 responses.

State-level cannabis registrations have proven to provide some degree of protection. In *HeadSpace International v. Podworks*, a cannabis concentrates firm alleged infringement of its Washington-state trademark registration by a junior cannabis business.²⁴³ After a trial court granted the defendants' motion to dismiss, a Washington state appellate court reversed, finding that the mark was used in legal commerce such that rights accrued to the registrant.²⁴⁴ As the earlier-discussed *Kiva* case

²³⁶ For example, un-enacted California state bill AB-64 (Dec. 12, 2016) provided that that it "authorize[d] the use of specified [trademark] classifications for marks related to cannabis, including medicinal cannabis, goods and services that are lawfully in commerce under state law in the State of California."

²³⁷ Alex Padilla (California Secretary of State), Secretary of State Alex Padilla Launches Cannabizfile Online Cannabis Business Portal, Releases PSA Featuring Actor Cheech Marin, <https://admin.cdn.sos.ca.gov/press-releases/2017/pdf/ap17-107.pdf>

²³⁸ Alex Padilla (California Secretary of State), *Registering Cannabis-Related Trademarks in California*, <https://cannabis.ca.gov/wp-content/uploads/sites/13/2019/04/Registering-Cannabis-Related-Trademarks-in-California.pdf>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Contra* CA AB-64 (Dec. 12, 2016) (unenacted bill providing for two marijuana specific trademark categories: "500 for goods that are cannabis or cannabis products, including medicinal cannabis or medicinal cannabis products." And "501 for services related to cannabis or cannabis products, including medicinal cannabis or medicinal cannabis products.").

²⁴² Alex Padilla (California Secretary of State), *California Secretary of State Trademark Search*, <https://tmbizfile.sos.ca.gov/Search/SearchResults?SearchType=DESCRIPTIONOFMARK&SearchCriteria=marijuana&SearchSubType=KEYWORD> (searched Sept. 30, 2019).

²⁴³ *HeadSpace Int'l LLC v. Podworks Corp.*, 428 P.3d 1260, 1262 (Wash. Ct. App. 2018), *review denied*, 192 Wash. 2d 1027, 435 P.3d 269 (2019).

²⁴⁴ *Id.* at 1265-66. It is notable that the "legal use in commerce" discussion focused on whether the California plaintiff's license agreement with a Washington firm was legal, as opposed to the less nuanced issue of marijuana being illegal under federal law. *Id.* Presumptively, if the court had an issue with the latter topic, it would have been raised during the "legal use in commerce discussion." *Id.* at 1265-66.

highlights, this approach is, however, subject to some drawbacks if the a federal court refuses to recognize prior user rights under the Lanham Act.²⁴⁵

The repurposing of existing California trademark law exemplifies the advantage pathway of legal strategy. Firms recognized the potential value of a state registration and the substantive uncertainty surrounding laws that did not specifically state that cannabis related marks *could not* be registered in California.²⁴⁶ They then acted proactively to secure a beneficial interpretation of existing law. Through this use of legal knowledge regarding statutory interpretation, California cannabis firms were able to create a recognizable asset for the firm in the form of a trademark registration. This asset creation through legal knowledge is a hallmark of the advantage pathway.²⁴⁷

F. Legal Strategy #5: Cultivating Federal Legalization of Cannabis

Given the increasing normalization of cannabis and the rapid evolution of regulation, some legally astute firms are attempting to bring about beneficial statutory or administrative change. These moves to effect strategic advantage are exemplified in attempts to change the legal status of CBD. The drug has been recognized for some time as having substantial market growth potential.²⁴⁸ There was but a single problem; the DEA considered it an illegal drug.²⁴⁹ Despite this glaring issue, firms continued to enter the market due to lax enforcement policies.²⁵⁰

As CBD's market enlarged, competitors attempted to create brand recognition by, among other things, securing federal trademark registrations.²⁵¹ Some early firms exploited uncertainty regarding CBD's legal status to secure federal protection.²⁵² But after the DEA issued new guidance clarifying CBD to be a Schedule I prohibited narcotic,²⁵³ the Trademark Office stopped registering these marks. On this point, one examiner rejected a CBD-related application, stating bluntly that CBD goods are "a per se violation of federal law [and related marks] cannot be in lawful use in commerce."²⁵⁴

Unsurprisingly, cannabis firms sought to alter both the classification of the drug and the USPTO's refusal to register marks associated with it. Certain parties lobbied for changes facilitating "trademark

²⁴⁵ Kiva Health Brands LLC v. Kiva Brands Inc., No. 19-CV-03459-CRB, 2019 WL 4249075, at *1–3 (N.D. Cal. Sept. 6, 2019).

²⁴⁶ See Evans & Gabel, *supra* note 62, at 372.

²⁴⁷ Bird & Orozco, *supra* note 114, at 84. See also Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 U. PA. J. BUS. L. 733, 751 (2016).

²⁴⁸ Schuster & Wroldsen, *supra* note 148, at 134–35 (citing Borhardt, *supra* note 215).

²⁴⁹ *Id.* at 128 n.70 (detailing the DEA's stance that CBD was a Schedule I drug).

²⁵⁰ *Id.* at 133–34.

²⁵¹ *Id.* at 134–35.

²⁵² Schuster & Wroldsen, *supra* note 148, at 146–57.

²⁵³ 81 Fed. Reg. 90,194–96 (Dec. 14, 2016); 21 C.F.R. § 1308.11 (2016).

²⁵⁴ US TM App. 86982881, Aug. 23, 2017 Office Action. The communication stated:

The Drug Enforcement Administration has recently changed Schedule 1 of the CSA to include a new drug code, 7350, for marijuana extract. This definition has been interpreted to include the cannabinoid CBD. *** Since applicant is selling its smokeless vaporizer pipes for the purpose of consuming the CBD liquids, the goods are unlawful drug paraphernalia under the CSA which is defined to include any device or equipment designed for use or primarily intended for use in connection with the ingestion of an unlawful controlled substance.

Id.

protection for cannabis/marijuana products in legalized states.”²⁵⁵ Others addressed the underlying classification of CBD, lobbying for legal “cannabinoid based medicine” (e.g., CBD) and associated statutory proposals.²⁵⁶ These campaigns represent a decentralized movement towards cannabis regulatory change that were ultimately successful.

The Farm Bill of 2018 removed commercial hemp from the list of illegal drugs, and in doing so, also rendered hemp-derived CBD legal.²⁵⁷ The legislation likewise effected the desired trademark policy, with the USPTO acknowledging that marks associated with legal CBD would be trademark eligible as of December 20, 2018.²⁵⁸ The effects of this change were substantial.

Prior to these changes, the ability to register a CBD-related mark was uncertain at best. The predictability of this new policy—alongside significant market growth—fueled an explosion of filings in this field. An October 2020 trademark search identified 6,549 applications filed for CBD or cannabidiol.²⁵⁹ Over 80% of these filings were submitted in the twenty-two month period after the law changed.²⁶⁰

Again, this creation of an identifiable business asset (a federal trademark registration) is indicative of cannabis firms pursuing an advantage pathway. Unlike the above adaption of the existing California system to a new use, these firms utilized knowledge of the regulatory and legislative system to

²⁵⁵ See, e.g., Secretary of the Senate, Office of Public Records, *Lobbying Report for Federal Advocates, Inc. for Quarter 1, 2018*, <http://disclosures.house.gov/ld/ldxmlrelease/2018/Q1/300945051.xml>.

²⁵⁶ See, e.g., Secretary of the Senate, Office of Public Records, *Lobbying Report for OFW Law on behalf of Greenwich Biosciences, Inc., for Quarter 3, 2018*, <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=9B2DD092-AE8A-452C-A308-DE8EF4C0F0E8&filingTypeID=69>.

²⁵⁷ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10112, 132 Stat. 4490, 4909.

²⁵⁸ Examination Guide 1-19 Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill (May 2, 2019), U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf>.

²⁵⁹ *Search Trademark Database*, U.S. PATENT & TRADEMARK OFFICE, <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (follow “search out trademark database (TESS)” and then “Word and/or Design Mark Search (Free Form)”). The October 7, 2019 search was for: (cbd or cannabidiol) [gs]

²⁶⁰ The recognition that CBD could be legally derived from industrial hemp has not, however, cleared the way to secure trademark registrations for all uses of the drug. A series of recent applications have been rejected because the commercial use associated with the mark is illegal under the Food, Drug & Cosmetics Act (“FDCA”). U.S. Trademark Application Serial No. 88402517, December 14, 2019 Office Action (dealing with “Dietary supplements containing CBD derived from flax and other lawful sources”); U.S. Trademark Application Serial No. 88435941, December 05, 2019 Office Action (dealing with “Nutritional supplements in the form of tablets or capsules or caplets or powder or gummies”); U.S. Trademark Application Serial No. 88251157, August 27, 2019 Office Action (dealing with “Nutritional supplement to infuse cannabinoids to drinks or edibles for increasing/boosting energy”); U.S. Trademark Application Serial No. 88329594 November 21, 2019 Office Action (dealing with “Herbal tinctures for medical purposes”). The USPTO has recently cited the FDCA in stating “any product intended to have a therapeutic or medical use, and any product (other than a food) that is intended to affect the structure or function of the body of humans or animals, is a drug” that must be approved by the Food and Drug Administration (FDA) to be sold. U.S. Trademark Application Serial No. 88402517, December 14, 2019 Office Action (citing 21 U.S.C. § 321(g)(1) (2018)). This position has been recently endorsed in a Trademark Trial and Appeal Board opinion, which noted that the FDCA still applies regardless of the status of industrial hemp and CBD derived therefrom. In re Stanley Brothers Social Enterprises, LLC, Serial No. 86568478, at 11–16 (T.T.A.B. June 16, 2020) Whether FDCA refusals to register marks for therapeutic CBD goods that lack FDA approval will prove a substantial issue for some in this market remains to be seen.

bring about a beneficial statutory change that also changed the application of trademark regulations (e.g., CBD marks could be registered now that it was no longer illegal). Through this proactive legal strategy, enduring value for the firms was created.

V. THREE PRAGMATIC PROPOSALS FOR ALLEVIATING LEGAL UNCERTAINTY IN THE CANNABIS INDUSTRY

If one theme emerges from surveying the legal environment of cannabis regulation, it is that such regulation is difficult to navigate for cannabis-related firms. Contradictory rules and erratic enforcement leave firms in a unique legal context from which to plan their legal and business strategies. Although hope springs eternal,²⁶¹ a full federal legalization of marijuana for recreational and medicinal purposes is far from guaranteed in the foreseeable future. Until that happens, regulators at various levels of government can take uncertainty-reducing steps to smooth the transition of cannabis firms from prohibition to legalization. These steps will not only reduce regulatory chaos, but also enable cannabis-firms to avoid accidental violations, adapt to future legal landscapes, and perform meaningful long-term legal and business strategic planning.

This Part recommends three reform strategies that can achieve legislative goals while minimizing unnecessary turbulence for the cannabis industry. The first Part recommends that federal legislators welcome the notion of the fifty-state laboratory for evolving standards and provide a clear objective statement of executive policy regarding enforcement that firms can rely upon. The second Part proposes that regulators include grace periods in new legislation in order to enable firms to sufficiently adapt to new regulatory changes. Finally, both regulator and regulated should embrace public-private partnerships that help create rules that both meet public goals and avoid unnecessary harm to regulated entities.

A. *Embrace the Fifty State Laboratory of Cannabis Regulation*

The current state of uncertainty surrounding cannabis regulation largely centers on the relationship between state and federal law. While states are unable to preempt federal mandates, Congress and the federal executive have failed to clarify the scope of regulation that states may pursue. This uncertainty about the states' ability to regulate cannabis inhibits a primary feature of the federal system: the laboratory of democracy.

The United States' hierarchical form of government presents states with the ability to implement novel policies to benefit its citizenry, which, if successful, can be later adopted through the nation.²⁶² Each state represents a "laboratory" in which new laws can be tested. Indeed, this laboratory

²⁶¹ Compare Kyle Jaeger, *When Will Marijuana Finally be Legalized Nationwide? Researchers Have A Forecast*, MARIJUANA MOMENT (Oct. 24, 2018) (presenting models by researchers and concluding that "[t]he probability that [federal marijuana legalization] would happen after 2028 is lower than 30 percent."), with Keith Speights, *Here's How Shockingly Low the Odds of U.S. Marijuana Legalization Really Are*, MOTLEY FOOL (Aug. 18, 2019) (concluding that "the odds of marijuana being legalized in the U.S. within the next few years is less than 1 in 300."), <https://www.fool.com/investing/2019/08/18/heres-how-shockingly-low-the-odds-of-us-marijuana.aspx>.

²⁶² Sonya C. Bishop, *Poverty, Mental Health, and Technology: Using Medicaid S 1315a Innovation Grants to Test Out Own-Time Telemental Health Technology*, 90 TEMP. L. REV. 467, 490 (2018); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1335 (2009).

is at work regarding cannabis regulation,²⁶³ with various jurisdictions holding cannabis to be illegal, decriminalized, available for medical use, or fully legal. In a dissent, Justice O'Connor recognized the California experiment on novel cannabis regulation to embody the ideals of democratic laboratories.²⁶⁴

These experiments have borne fruit throughout the country. In 1996 California citizens voted to pass Proposition 215, which allowed for medical use of cannabis within the state.²⁶⁵ This was the first, and highly controversial,²⁶⁶ such enactment within the United States. This policy allowed a subset of the country to experiment with this policy, which has apparently been a success, as shown through adoption of medical marijuana in at least thirty states. However, this percolation of ideas would function better if state legislators had unambiguous guidance on the scope of policies that will not conflict with federal enforcement actions.

As it currently stands, state congresses adopting pro-cannabis legislation appear to be flaunting their non-compliance with federal policy. This perception may have negative repercussions for individual legislators, whose political opponents can this against them. Likewise, constituents may look unfavorably on those who pass laws legalizing certain aspects of cannabis if the federal government later arrests the citizen for cannabis-related crimes. Negative repercussions of this nature discourage states from passing cannabis legislation, and therefore, precludes experimentation with novel types of regulation. Indeed, as Professor Althouse recognized, “[i]f one really believes in the laboratories concept, one should want to free the states to conduct their policy experiments.”²⁶⁷

This situation could be remedied by a clear message expressing the federal government’s intent with regard to enforcement of cannabis regulations. An objective statement of executive policy would provide a reasonable degree of predictability in enforcement upon which state legislators could rely. For example, a now-rescinded 2013 memo from the Attorney General (the “Cole Memo”) indicated that federal enforcement would be minimal in states with their own cannabis policy.²⁶⁸ “Permission” of this nature mitigates political harm from passing state cannabis regulations and minimizes the likelihood that a voter acting consistent with state law would be federally punished. Unfortunately, the Cole Memo was rescinded in 2018, with instructions for federal prosecutors to “follow well-established principles when pursuing prosecutions related to marijuana activities.”²⁶⁹ This rescission returned cannabis policy to a state of uncertainty for both state legislators and businesspeople.²⁷⁰ A return to the policy

²⁶³ Kimberly A. Houser, *What Inconsistent Federal Policy Means for Marijuana Business Owners: Washington's I-502 and the Federal Controlled Substances Act*, 50 GONZ. L. REV. 305, 314 n. 65 (2015).

²⁶⁴ *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

²⁶⁵ Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2005).

²⁶⁶ ELAINE MINAMIDE, *MEDICAL MARIJUANA* 49-51 (2009).

²⁶⁷ Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779, 788 (2005)

²⁶⁸ Memorandum from Deputy Attorney Gen. James M. Cole, to U.S. Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/NS5L-ZFNR>].

²⁶⁹ Justice Department Issues Memo on Marijuana Enforcement, DEPARTMENT OF JUSTICE (Jan. 4, 2018).

²⁷⁰ Joanna S. Suder et. al., *First State or Follower? Marijuana in Delaware*, 26 WIDENER L. REV. 21, 33 (2020) (The rescission of the Cole Memo “and the lack of a uniformly-applied USDOJ policy position have created uncertainty within the financial, insurance, and marijuana industries.”). Similarly, the federal legislature maintains the authority to create certainty in cannabis enforcement. For instance, in 2014 (and in several subsequent years) Congress specifically prevented the Department of Justice from utilizing any funds to prosecute cases associated with medical marijuana where it is legal under state law. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Congress has enacted an essentially identical rider in the

presented by in the Cole Memo would create a set of reasonable expectations under which state-level legislators can craft novel cannabis regulations that are unlikely to conflict with federal policy and without obviously flaunting non-compliance with federal law.

Should the federal government truly want to encourage the laboratory of democracy, it can reschedule cannabis under the CSA and allow for some legal uses of cannabis.²⁷¹ Similarly, an express federal determination that state cannabis regulation is not preempted by federal would allow states to undertake novel policies without facing an unknowable possibility of federal enforcement actions.²⁷² This would permit state legislators to experiment with cannabis regulations that are consistent with federal law, while the federal government would still maintain some authority regarding cannabis. In this situation, states can truly act a “laboratory of democracy” because their legislators would not fear conflicts with federal law—and political repercussions—in passing new regulations.

B. Embed Grace Periods in Novel Cannabis Regulations

If there is an overarching theme that arises from modern cannabis policy, it is that its laws are replete with uncertainty. This uncertainty imposes costs in firms. Firms are burdened with switching costs to keep up with changing legislation. The risk of unexpected enforcement can force firms to assume practices more cautious than what the law would reasonably require. A simple solution would be to recommend bright-line rules that are harmonized at both state and federal levels. However, too many conflicting social and political forces make this unlikely in the immediate future. Far more likely is that state and federal cannabis rules continue their incremental and lurching path toward legalization.²⁷³

Fortunately, however, there are tools that state and local policymakers can use to smooth the transition between old and new regulatory standards. One of those tools is to implement certainty-enhancing protections within state statutes that protect cannabis firms from reasonable misinterpretations of statutory language. Such protections grant badly needed certainty for firms while at the same time avoid further destabilizing what little consistency remains in cannabis regulation. One of the most promising of those tools is the implementation of generous grace periods after the passage of significant new cannabis legislation.

A grace period is a specific period of time after a rule is enacted that regulated entities will not be subject to enforcement by regulatory authorities. Grace periods are utilized in a variety of areas

appropriations acts for the years since 2014. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2016). Provisions of this nature again provide some degree of political protection to state legislators choosing to enact cannabis-friendly legislation. However, the federal executive has undermined some of this protection by indicating a possible intent to ignore this limitation. Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress*, FORBES.COM (Dec. 21, 2019), <https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/#252170024256>.

²⁷¹ Norman Miller et. al., *Controlled Substance Laws: Are They Meeting the Health Needs of the Public?*, 7 MICH. ST. U. J. MED. & L. 81, 86 (2003) (panel session) (statement by Michelle Rick describing acceptable uses for different schedules of drugs).

²⁷² John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL'Y 1, 24 (2019).

²⁷³ Even within states, multiple systems may be established for different uses of cannabis. See Alice Mead, *Legal and Regulatory Issues Governing Cannabis and Cannabis-Derived Products*, 10 FRONTIERS IN PLANT SCI. 1, 4 (2019).

ranging from bankruptcy to patent law, whereby an inventor has a period of time after public disclosure of an invention whereby she may still file a patent application and not lose patent rights.²⁷⁴

Grace periods can benefit both the regulatory authorities tasked with enforcement of the new rules as well as entities that will be subject to the new regulation. Enforcement authorities may not necessarily be fully prepared to respond to legislative mandates, and a grace period enables authorities to develop enforcement plans and allocate optimal use of their limited resources. When enforcement does begin, the additional time to transition decreases the chance that rules will misinterpreted or misapplied. Grace periods also assist regulated entities by giving them an additional period of time to adapt their practices to the new rules. Additional time to comply can reduce switching costs and lower the chance of accidental noncompliance.

Grace periods can also encourage relationship building between regulator and regulated entities. Initially, a grace period shows restraint by the legislature and acknowledges that firms will need time to adapt to the new rules. They can also reduce backlash from regulated entities who accuse government authorities of pushing new obligations too far and too fast.²⁷⁵ Grace periods also facilitate cooperation between the parties, with such cooperation laying the building blocks of mutual trust between regulator and regulated.

Grace periods appear sporadically in cannabis-related legislation. For example, a 2001 rule promulgated by the Drug Enforcement Administration related to the CSA provided a 120-day grace period for companies to remove consumable products from the shelves.²⁷⁶ California utilized a grace period that allowed unlicensed cannabis medical cooperatives to operate without interference until a license was obtained.²⁷⁷ Oklahoma used a grace period to allow the purchase of untested cannabis for medical reasons after a testing requirement was enacted.²⁷⁸

Not all grace periods are intrinsically successful, however. When San Luis Obispo County, California instituted a grace period for cannabis growers, any goodwill from the measure was apparently erased by poor implementation of the underlying ordinance requiring growers to obtain a county-issued

²⁷⁴ See, e.g., Frederick W. Struve, *Ending Unnecessary Novelty Destruction: Why Europe Should Adopt the Safety-Net Grace Period as an International Best Practice*, 39 WM. MITCHELL L. REV. 1404, 1405 (2013); Renee L. Metzler, *Not All Grace Periods are Created Equal: Building a Grace Period from the Ground Up*, 13 MARQ. INTELL. PROP. L. REV. 371, 372-73 (2009); David Gray Carlson, *Security Interests in the Crucible of Voidable Preference Law*, 1995 U. ILL. L. REV. 211, 223-24 (discussing grace period by secured interests in bankruptcy).

²⁷⁵ See generally Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TULANE L. REV. 259 (2016) (presenting examples of remedial delays by the judiciary that soften negative responses from regulated entities).

²⁷⁶ Seaton Thedinger, *Prohibition in the United States: International and U.S. Regulation and Control of Industrial Hemp*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 419, 437 (2006) (citing Interpretation of Listing of "Tetrahydrocannabinols" in Schedule I, 66 Fed. Reg. 51,530 (Oct. 9, 2001) (to be codified at 21 C.F.R. pt. 1308). The grace period was subsequently extended. Lucien J. Dhooge, *The North American Free Trade Agreement and Hemp: America's War on Drugs Gets Nipped in the Bud*, 21 WIS. INT'L L.J. 65, 68 (2003).

²⁷⁷ Patrick Beggan, *California Grace Period for Unlicensed Cannabis Co-ops Expires Jan. 9*, GANJAPRENEUR (Jan. 4, 2019), <https://www.ganjapreneur.com/california-grace-period-for-unlicensed-cannabis-co-ops-expires-jan-9/>.

²⁷⁸ *No More Untested Cannabis for Sale as of April 1: Oklahoma Medical Marijuana Authority to Implement New Rule*, TULSA WORLD (Feb. 15, 2020), https://tulsaworld.com/news/local/marijuana/no-more-untested-cannabis-for-sale-as-of-april-1-oklahoma-medical-marijuana-authority-to/article_f7017494-3286-535a-b76d-53134b5bd318.html.

permit.²⁷⁹ Growers complained that the enforcement “abeyance” was not helpful because it took growers as long as a year and a half to obtain the necessary permits. One grower called the process fraught with “ridiculous roadblocks” that were “designed to stop the forward process . . . [of] the industry as a whole[.]”²⁸⁰ Another complained that the expiration of the grace period, and the refusal of county government to extend it, would force him prematurely sell his inventory at low prices.²⁸¹

Another grace period was criticized because it had anti-competitive effects. A Colorado task force recommended that the state “provide a grace period for one year” that limited “new application[s] for adult-use marijuana license to medical marijuana license holders in good standing or applicants that had an application pending with the Medical Marijuana Enforcement Division prior to December 10, 2012.”²⁸² This measure was criticized as propping up a “cannabis cartel” and fostering protectionism in favor of established growers over new market entrants.²⁸³ Established competitors received preferential application and licensing fees, and a requirement that a store must grow at least 70% of what they sell advantaged larger operations.²⁸⁴ One blogger interpreted this as a “cozy arrangement” between government and industry insiders that kept out competition.²⁸⁵

When grace periods are enacted with the regulated parties in mind, they can be of significant assistance to cannabis growers and sellers adjusting to the new rules. When Humboldt County, California enacted a Commercial Medical Marijuana Land Use Ordinance to regulate cannabis agriculture, regulated farmers expressed concern that they may not be able to apply with its provisions.²⁸⁶ County officials responded by granting farmers who did not comply with the ordinance a provisional license and a two-year window to bring themselves into compliance.²⁸⁷ The grace period gave farmers breathing room to adjust their agriculture practices in order to meet the new regulations.²⁸⁸ With regulatory instability in marijuana regulation a chronic problem, grace periods can be a powerful tool in ensuring a smooth transition from one regulatory transition to the next. Implemented with public input, and with the goal of benefiting the entire market, grace periods can be an influential policy tool to mitigate regulatory volatility for cannabis firms.

C. Facilitate Stakeholder Networks that Enable Cannabis Firms to Thrive

²⁷⁹ Peter Johnson, *Cannabis Growers Worry as Enforcement Grace Period Nears End*, NEW TIMES (Dec. 12, 2019), <https://www.newtimeslo.com/sanluisobispo/cannabis-growers-worry-as-enforcement-grace-period-nears-end/Content?oid=9079895>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² John Hudak, *Colorado’s Rollout of Legal Marijuana is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE WESTERN L. REV. 649, 681 (2015) (COLO. DEP’T OF REVENUE: ENFORCEMENT DIVISION—MARIJUANA, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO 16 (2013)).

²⁸³ Jacob Sullum, *Denver Creates a Cannabis Cartel, Reinforcing Colorado’s Pot Protectionism*, FORBES (Sep. 23, 2013), <https://www.forbes.com/sites/jacobsullum/2013/09/23/denver-creates-a-cannabis-cartel-reinforcing-colorados-pot-protectionism/#1f9936e7c9db>.

²⁸⁴ *Id.*

²⁸⁵ *Id.* (citing Jeremy P. Meyer, *Denver Council Passes Historic Retail Marijuana Rules and Regulations*, THE DENVER POST (Sept. 17, 2013), <https://www.denverpost.com/2013/09/17/denver-council-passes-historic-retail-marijuana-rules-and-regulations/>).

²⁸⁶ Ryan B. Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297, 361 (2015).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

No business operates in isolation. Every company has at least some external engagement, whether it be customers, shareholders, workers, communities, trade associations, communities, or any one of the numerous entities that firms collaborate with in order to function.²⁸⁹ These external entities are known as stakeholders, generally defined as “one who is involved in or affected by a course of action.”²⁹⁰ In the context of business, stakeholders are entities “without whose support the organization would cease to exist.”²⁹¹ Stakeholders serve numerous functions for an organization, such as supplying raw materials, distributing the final product, trading labor for wages as employees, investing capital for eventual return, or regulating the organization. Stakeholders can have a formal contractual relationship with the entity or have an indirect or secondary relationship that arises through the firm’s impact on society.²⁹² When stakeholder relations become formalized or longstanding, they coalesce into a multi-stakeholder network that firms explicitly rely upon to leverage opportunities, solve problems, or achieve long-term goals.²⁹³

Cannabis firms need stakeholder networks more than most. The legal sale of cannabis is not merely the extension of an established product, but the emergence of an entirely new industry. Industry standards of good business practices have not been fully established. Trade associations and advocates must expend resources fighting for the industry’s legal existence instead of advancing long-term industry goals. Cannabis firms lack a mature production and distribution network, and the one that exists is only just emerging from the shadows of illegitimacy.²⁹⁴ Capital markets tied to cannabis companies remain underdeveloped and insecure, resulting in unpredictable volatility that inhibits the industry establishing itself as a legitimate investment alternative.²⁹⁵ The result is a kind of “Wild West” for the cannabis industry, where aspiring legitimate producers struggle to establish consistent relationships and remain operational within the twilight of respectability.²⁹⁶

²⁸⁹ See Ramon Casadesus-Masanell & Joan E. Ricart, *How to Design a Winning Business Model*, HARV. BUS. REV., Jan.-Feb. 2011, at 101, 105 (“[F]ew business models operate in vacuums—at least, not for long.”).

²⁹⁰ Leighton Lord & Heather Matthews, *Stakeholder Engagement in Environmentally Sensitive Economic Development Projects*, 66 S.C. L. REV. 625, 626 (2015).

²⁹¹ *Id.* (citing R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, CAL. MGMT. REV., Spring 1983, at 88, 89). The definition of stakeholder has taken a variety of forms since it was first articulated in the early 1960s, though a common theme of relationships between entities runs through them. Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 858 (1997).

²⁹² Andrew Keay, *Stakeholder Theory in Corporate Law: Has it Got What it Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 259-60 (2010).

²⁹³ See Gabriel Eweje et al., *Multi-Stakeholder Partnerships: A Catalyst to Achieve Sustainable Development Goals*, MARKETING INTELLIGENCE & PLANNING __ (forthcoming 2020) (defining a multi-stakeholder network as “a web of groups, organizations and/or individuals who come together to address a complex and shared cross-boundary problem, issue or opportunity.”). See also Julia Roloff, *Learning from Multi-Stakeholder Networks: Issue-Focused Stakeholder Management*, 82 J. BUS. ETHICS 233, 235 (2008).

²⁹⁴ See Erica C. Phillips, *Cannabis Supply Chains Coming Out of the Shadows*, WALL ST. J. (Aug. 23, 2018), <https://www.wsj.com/articles/cannabis-supply-chains-coming-out-of-the-shadows-1535016610>.

²⁹⁵ Nick Thomas, *Cannabis ETFs Post Steep Declines in Line with Marijuana Stocks, But Longer-Term Prospects Appear Bright*, MARIJUANA BUS. DAILY (Mar. 2, 2020), <https://mjbizdaily.com/cannabis-etfs-post-steep-declines-in-line-with-marijuana-stocks-but-longer-term-prospects-appear-bright/>.

²⁹⁶ See Kevin Dowd, *The Wild West of the Budding Cannabis Industry*, PITCHBOOK (June 21, 2019), <https://pitchbook.com/news/articles/the-wild-west-of-the-budding-cannabis-industry>; Luke Scheuer, *The Worst of Both Worlds: The Wild West of the “Legal” Marijuana Industry*, 35 N. ILL. U. L. REV. 557, 570-72 (2015) (discussing the impact of professional stakeholders on the cannabis industry).

Full legalization of cannabis production and distribution, the act that would allow the cannabis industry to take its place as a legitimate trade, is not likely in the immediate future. However, government actions and engagements can help stabilize the cannabis industry through constructing and reinforcing its stakeholder networks. These second-order reforms serve two functions. First, they help stabilize the cannabis industry today by enabling it to function more like a legitimate business even without the full sanction of federal legalization. Second, such reforms will enable firms to grow more rapidly when legalization eventually occurs.

Reforms could enable cannabis stakeholder networks to thrive even in a climate of uncertain legality. First, cannabis firms should have access to insurance industry networks in order to manage risk for routine and catastrophic events. Like most other companies, cannabis firms want to insure themselves against business-related and other risks that can plague their operations. A slip-and-fall at a cannabis retailer, lawsuit exposure from product liability, and unexpectedly poor crop harvests are all routine operational risks for which insurance can provide protection.²⁹⁷ The insurance industry, however, has approached cannabis firms cautiously in part due to the uncertain legal environment.²⁹⁸ Only a few insurers currently offer coverage to cannabis firms.²⁹⁹ This results in an underdeveloped market for risk management with higher than efficient premiums, and some companies not being able to obtain or afford insurance at all.³⁰⁰ Even though cannabis holds significant promise as a legitimate industry, some insurance experts are still recommending that “excluding [cannabis-related] industries would be the most prudent approach, given the anticipated turmoil in this developing business.”³⁰¹

Legal reform would provide badly needed clarity to insurance of cannabis-related organizations. One of the most promising reforms would be passage of laws similar to the Clarifying Law Around Insurance of Marijuana Act or CLAIM Act.³⁰² The CLAIM Act states in part that an insurer doing business with a cannabis-related firm that is legal under that firm’s state law “may not be held liable pursuant to any Federal law (including regulations).”³⁰³ Further, a federal agency cannot penalize an insurer, or limit the policies of an insurer, “solely because the insurer has engaged in the business of insurance in connection with a cannabis-related business.”³⁰⁴ The Act would give vital certainty and legitimacy to

²⁹⁷ Don Jergler, *Top Risks Facing Cannabis Industry in 2020 Not What You Think*, INS. J. (Nov. 14, 2019), <https://www.insurancejournal.com/news/national/2019/11/14/548501.htm>.

²⁹⁸ See, e.g., *Insurers Remain Cautious About Marijuana Insurance Market*, INS. J. (Mar 14, 2019), (citing report concluding that “one of the key barriers [to offering insurance] is the federal government still classifies it as a controlled substance, continuing its status as an illegal drug even as individual states increasingly legalize its use.”).

²⁹⁹ NAT. ASS’N INS. COMM., CANNABIS AND INSURANCE (May 15, 2020), https://content.naic.org/cipr_topics/topic_cannabis_and_insurance.htm

³⁰⁰ Robert Armstrong, *US Cannabis Companies Struggle to Secure Insurance*, FIN. TIMES (Dec. 4, 2019), <https://www.ft.com/content/6123ab6e-1169-11ea-a225-db2f231cfeae>; Jonathan S. Salant, *Legal Marijuana Businesses Can’t Buy Insurance, Menendez Wants to Change That*, NJ.COM (July 22, 2019), <https://www.nj.com/marijuana/2019/07/legal-marijuana-businesses-cant-buy-insurance-menendez-wants-to-change-that.html>.

³⁰¹ Matthew Clark, *Legal Marijuana: Implications for the Insurance Industry*, MUNICH RE LIFE US: PERSPECTIVES (June 2020), <https://www.munichre.com/us-life/en/perspectives/marijuana-legalization-implications-insurance-industry-employee-benefits.html>. The article further predicted that “[w]e expect that those taking the jump this year can expect to have more trouble than the typical retail businesses making and selling established products.” *Id.*

³⁰² Clarifying Law Around Insurance of Marijuana Act, H.R. 4074, S.B. 2201 (116th Cong. 2019-20) [hereinafter CLAIM Act]. See also Don Jergler, *Clarifying Law Around Insurance of Marijuana Act Would Reduce Gaps, Expert Says*, INS. J. (Aug. 8, 2019), <https://www.insurancejournal.com/news/national/2019/08/08/535299.htm>.

³⁰³ CLAIM Act, § 2(c).

³⁰⁴ *Id.* § 2(b).

cannabis businesses who need risk management services, and also facilitate long-term strategic planning to enable firms and the industry to grow.

Second, cannabis firms must have unfettered and legitimate access to networks in capital markets. Cannabis is a growth industry, with some cannabis stocks quickly transforming themselves from penny stocks to highly-desirable securities.³⁰⁵ Some firms have reporting astounding growth, with returns between 2000% and 7500% reported over a three-year period.³⁰⁶ Such growth is of course unsustainable, and cannabis stocks are, as one writer described, “fraught with big time risks, hefty volatility, [and] zero profits . . . many marijuana stocks are just speculative bets.”³⁰⁷ Exchange traded funds (ETFs) tied to cannabis firms have posted 50% losses within a short period of time.³⁰⁸ In spite of this volatility, investors are still bullish on the long-term prospects of the cannabis industry.³⁰⁹ This is in part because unlike some tech stocks that needed to create a market for their inventions, cannabis firms already have a substantial demand for their products in North America.³¹⁰

No matter how optimistic investors may be about future growth, cannabis firms cannot reach their potential without unfettered access to capital markets.³¹¹ Cannabis firms still struggle to find a bank that is willing to provide them with basic financial services.³¹² This barrier represents a “mark of condemnation” that forces firms to deal largely in cash, which increases the risk of robbery as well as the difficulty to pay taxes or complete other transactions that do not accept cash payments.³¹³ Banks are also reluctant to lend to cannabis firms, recognizing the possibility that the federal government could seize a firm’s assets and leave the lender nothing to collect from the loan.³¹⁴

Legal reform should provide protections for banks and other financial services firms to ensure fair access to capital markets. That reform can begin with passage of legislation similar to the Secure and Fair Enforcement of Banking Act of 2019, also known as the SAFE Banking Act.³¹⁵ The Act prevents federal banking regulators from interfering with deposit insurance of an institution just because it lends to a cannabis-related business.³¹⁶ The Act also prevents regulators from discouraging cannabis-related loans or otherwise taking corrective actions on loans made to cannabis-related businesses.³¹⁷ Proceeds from cannabis-related loans will also not be considered proceeds from illegal activity triggering a

³⁰⁵ Luke Scheuer, *The Green Rush: The Public Marijuana Securities Market*, 26 WIDENER L. REV. 53, 55 (2020).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 56 (quoting Aaron Levitt, *3 Ways to Buy into the Marijuana Boom Without the Risk*, YAHOO FINANCE (May 20, 2019), <https://finance.yahoo.com/news/3-ways-buy-marijuana-boom-162435010.htm>).

³⁰⁸ Thomas, *supra* note 295.

³⁰⁹ *Id.*

³¹⁰ Brett Relander, *Funding Platforms for Marijuana Startups*, INVESTOPEDIA (May 3, 2020), <https://www.investopedia.com/articles/investing/030515/funding-platforms-emerging-marijuana-startups.asp>.

³¹¹ See, e.g., Robert Hoban, *The Cannabis Industry Needs Banking Now*, FORBES (Aug. 18, 2020), <https://www.forbes.com/sites/roberthoban/2020/08/18/the-cannabis-industry-needs-banking-now/#531da4a53a58>.

³¹² James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, BUS. LAW TODAY (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/.

³¹³ *Id.* See also Yuki Noguchi, *Bags of Cash, Armed Guards and Wary Banks: The Edgy Life of a Cannabis Company CFO*, NPR (Apr. 10, 2019), <https://www.npr.org/2019/04/10/710076855/bags-of-cash-armed-guards-and-wary-banks-the-edgy-life-of-a-cannabis-company-cfo>.

³¹⁴ See Noguchi, *supra* note 305.

³¹⁵ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a) (2019).

³¹⁶ *Id.* § 2(a)(1).

³¹⁷ *Id.* §§ 2(a)(2), 2(a)(4).

violation of money laundering laws and related prohibitions.³¹⁸ The Act also provides protections for insurers.³¹⁹ Although it has met resistance in the Senate,³²⁰ the Act has bipartisan support, with one member of Congress believing that it could be passed if it could get out of committee.³²¹ Without a regulatory infrastructure that shields financial institutions from money laundering charges and related risks from providing financial services to cannabis-related companies, the cannabis financial market will remain underdeveloped and fraught with uncertainty.

Finally, no stakeholder network will be complete without industry engagement with regulators. Overlapping and inconsistent state and federal regulations have created “one of the most complex patchwork of compliance laws for the foreseeable future.”³²² This patchwork gives those who enforce these laws the power of life or death over the industry. Most regulators are well-intentioned, but the extraordinary convolution of the legal environment means that unintentional regulatory outcomes to the detriment of cannabis firms are inevitable.

Public-private partnerships between regulators and industry representatives can alleviate this problem. A public-private partnership is a cooperative venture between state agencies and private business in order to reach a mutually beneficial goal.³²³ While some partnerships emphasize joint financial gain,³²⁴ others are formed as cooperative ventures between private actors and the state.³²⁵ When cooperatively formed, such partnerships have been widely applied to solve pressing social problems.³²⁶ Public-private partnerships can be established as NGO-government alliances, community-local government cooperation, or contracting-out of traditional state responsibilities.³²⁷ Transcending an instrumental principal-agent interaction, effective public-private partnerships can nurture joint commitment, shared risk, and a long-term orientation toward shared objectives.³²⁸

The evolving cannabis industry and its challenging regulatory environment are well-suited for public-private cooperation. Where public and private interests’ cross paths, and where many of the challenges in cannabis regulation lie, are at the state and local levels of government. Such regulatory authorities, especially state and local ones, may not have sufficient time, resources, or experience to craft optimally effective cannabis regulation that meets public goals without negative spillover effects.

³¹⁸ *Id.* § 3.

³¹⁹ *Id.* § 4(c).

³²⁰ Kyle Jaeger, *Marijuana Banking Protections Excluded from Senate Coronavirus Relief Legislation*, MARIJUANA MOMENT (July 28, 2020), <https://www.marijuanamoment.net/marijuana-banking-protections-excluded-from-senate-coronavirus-relief-legislation/>.

³²¹ *Does the Safe Banking Act Still Have a Chance?*, JDSUPRA (July 24, 2020), <https://www.jdsupra.com/legalnews/does-the-safe-banking-act-still-have-a-87478/>.

³²² 3 RICHARD W. BLACKBURN AND JEFFREY J. BINDER, *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 47:31 (2020).

³²³ Stephen H. Linder, *Coming to Terms with the Public-Private Partnership: A Grammar of Multiple Meanings*, 43 AM. BEHAV. SCI. 35, 35 (1999).

³²⁴ *See, e.g.*, Elyse Martin, *What Successful Public-Private Partnerships Do*, HARV. BUS. REV., Jan. 18, 2019 (citing as an example of a public-private partnership “where businesses supplement public investment in return for reaping rewards such as tolls and fees.”), <https://hbr.org/2019/01/what-successful-public-private-partnerships-do>.

³²⁵ Linder, *supra* note 323, at 35.

³²⁶ Derick W. Brinkerhoff & Jennifer M. Brinkerhoff, *Public-Private Partnerships: Perspectives on Purposes, Publicness, and Good Governance*, 31 PUB. ADMIN. REV. 2, 2 (2011).

³²⁷ *Id.* at 3.

³²⁸ *Id.*

Public-private partnerships tied to cannabis have existed for decades, with a subtle collaboration between city authorities in Amsterdam and its coffeeshops paving the way for decriminalization in Dutch drug policy.³²⁹ Public-private partnerships can also be as creatively designed as the parties wish. Successful global examples include a state-sanctioned Argentinian industrial park dedicated to the cannabis production and its derivatives,³³⁰ a Danish pilot program to trial medical cannabis products in order to expand knowledge of medicinal uses and encourage investment,³³¹ and a Canadian collaboration between government and industry to develop a cannabis production facility near a local airport, resulting in more full-time jobs and over \$12 million in indirect economic benefits for the area.³³² Similar partnerships facilitated the marketing and sale of industrial hemp in the United States.³³³

Partnerships need not be broad arrangements across an industry, but can be simple one-off collaborations between a single firm and a local government. Cannabis producer and distributor MariMed wanted a location for their cannabis cultivation and manufacturing facility, and the City of New Bedford sought to increase the jobs and tax base for the municipality.³³⁴ The City and MariMed successfully negotiated a Host Community Agreement, which gave the City a guaranteed tax base and benefits to local vendors and provided to MariMed an assurance that its state licenses would be met with City approval.³³⁵ As a City representative explained, “[i]n general, ARL [MariMed’s parent] and the city have developed a cooperative working relationship Based on its conduct thus far, the city has confidence the company will meet its obligations to New Bedford under the HCA (Host Community Agreement) going forward.”

In another collaboration, two Maryland state universities have partnered with cannabis growers in order to better understand the medicinal implications of cannabis use.³³⁶ The universities gain access to company knowledge and resources, and the businesses receive legitimization of their industry through the academic affiliation.³³⁷ Local impoverished populations have also benefitted, with one

³²⁹ Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717, 735 (1990).

³³⁰ Javier Hasse, *Argentina to Open First Industrial Park for Cannabis Cultivation, Processing*, YAHOO! FINANCE (Aug. 12, 2020), <https://finance.yahoo.com/news/argentina-open-first-industrial-park-200532260.html>.

³³¹ *Innovation and Investment Opportunities in Denmark’s Medical Cannabis Sector*, 420INTEL (Jan. 24, 2020), <https://420intel.com/articles/2020/01/24/innovation-and-investment-opportunities-denmarks-medical-cannabis-sector>.

³³² *Public-Private Partnership to Stimulate Economic Growth and Create Jobs for Kapuskasing!*, CANNASSIST (Dec. 5, 2017), <https://cannassist.com/public-private-partnership-to-stimulate-economic-growth-and-create-jobs-for-kapuskasing/>.

³³³ Brief of Members of U.S. Congress as Amici Curiae Supporting Petitioners, *Hemp Industry Association v. Drug Enforcement Administration*, 720 Fed. Appx. 886 (No. 17-70162), 2018 WL 472313 at *15. Farmers of industrial hemp, a cannabis plant product but with negligible levels of psychoactive agents, have collaborated with cannabis farmers to avoid cross-pollination that will interfere with crop production of their respective products. See Ryan B. Stoa, *Marijuana Appellations: The Case for Cannabicultural Designations of Origin*, 11 HARV. L. & POL’Y REV. 513, 537 (2017).

³³⁴ *MariMed & New Bedford Collaboration: A Win-Win for Job Retention and Creation*, MARI-MED INC. (Dec. 14, 2017), <https://www.globenewswire.com/news-release/2017/12/14/1262038/0/en/MariMed-New-Bedford-Collaboration-A-Win-Win-for-Job-Retention-And-Creation.html>.

³³⁵ *Id.*

³³⁶ Fenit Nirappil, *Partners in Pot: Maryland Marijuana Businesses Seek Novel Collaborations*, WASH. POST (Dec. 16, 2015), https://www.washingtonpost.com/local/dc-politics/partners-in-pot-maryland-marijuana-businesses-seek-novel-collaborations/2015/12/26/c965bea2-a8bc-11e5-bff5-905b92f5f94b_story.html.

³³⁷ *Id.*

cannabis firm even sharing a portion of its profits with the town where it plans to host their business.³³⁸ This community engagement will also give the company an advantage on obtaining one of the only fifteen highly coveted growing licenses available in Maryland.³³⁹ The result is a long-term public-private partnership between an engaged business and a supportive community, that is based on mutual benefit, trust, and shared goals.

When public and private entities work together to build mutually beneficial relationships, the parties can rely on those same relationships to solve challenges in the partnership going forward. For example, in an effort to collaborate with private cannabis firms, the Grand Rapids City Commission voted to fast track approval of licenses to grow, process, transport, and sell recreational cannabis.³⁴⁰ Soon after the fast track vote, the City Commission realized that having energy-reliant cannabis enterprises in the city could jeopardize its own goals to reduce energy and water consumption.³⁴¹ The City again partnered with local businesses, the U.S. Green Building Council of West Michigan,³⁴² and other interested stakeholders to find sustainable solutions such as the use of LED grow lights for cannabis growers that would enable the City to reach its environmental benchmarks.³⁴³

Public-private partnerships represent a promising area for growth and stability in the cannabis industry. State and local governments have the legitimacy of democratically-based support for their authority, but often lack the economic resources to meet desired public policy goals. Cannabis firms have significant financial potential, but are clouded by weak legitimacy as a business model and inconsistent legal standards. These collaborations provide each party with a valuable benefit and can also help build a lasting stakeholder network between private and public entities and their communities. The result is a growing industry which can shield itself from regulatory convulsions through long-term and sustained engagement with government officials. The very legal uncertainty which firms are trying so hard to manage becomes mitigated, enabling more stable firm growth and development until full legalization eventually manifests as a consistent state and federal public policy.

VI. CONCLUSION

After decades of near-uniform condemnation and use as a tool for manipulative discrimination, cannabis is making a comeback. Public opinion has shifted in favor of legalization, and a number of states have passed legislation that have relaxed earlier restrictions. The question appears to be not a matter of if, but rather when, full legalization of cannabis will happen. However, the transition from criminal source to legitimate drug has not been smooth. Conflicting state and federal mandates, taken in

³³⁸ *Id.*

³³⁹ *Id.* See also Greg Larry, *Maryland to Award 15 Licenses to Grow Cannabis*, CUMBERLAND TIMES-NEWS (Aug. 4, 2015), https://www.times-news.com/news/maryland-to-award-15-licenses-to-grow-cannabis/article_cf4b7bc6-3ae0-11e5-bd09-afc400d3a8f6.html; MARYLAND MEDICAL CANNABIS COMM'N, GROWERS FAQ, <https://mmcc.maryland.gov/Pages/growers.aspx> (Last visited Sep. 13, 2020).

³⁴⁰ Kate Carlson, *Grand Rapids to Fast Track Recreational Cannabis Businesses Ahead of Schedule*, MIBIZ (July 8, 2020), <https://mibiz.com/sections/economic-development/grand-rapids-to-fast-track-recreational-cannabis-businesses-ahead-of-schedule>.

³⁴¹ Kate Carlson, *Green Building Group Helps Cannabis Growers Reduce Energy Consumption*, MIBIZ (Aug. 25, 2020), <https://mibiz.com/sections/real-estate-development/green-building-group-helps-cannabis-growers-reduce-energy-consumption>.

³⁴² THE U.S. GREEN BUILDING COUNCIL OF WEST MICHIGAN, <https://www.usgbcwm.org/> (last visited Sep. 13, 2020).

³⁴³ Carlson, *supra* note 341.

conjunction with constantly evolving regulations, has created significant uncertainty for cannabis and cannabis-related enterprises.

This article focuses on the cannabis industry and how such firms manage to survive. All three types of uncertainty – substantive, systemic, and enforcement uncertainty – exist at a high level in the legal environment of cannabis. This creates a unique environment for understanding how firms receive and respond to legal rules under nebulous and conflicting legal guidance. Applying the theoretical model of legal strategy, we posit that firms will tend toward will drift toward risky decisions. Some firms will implement high-risk and legally dubious strategies in hopes that the laws will continue to change before they are the target of enforcement. Other firms will attempt to avoid legal mandates altogether by skirting the scope of rules or exploiting weaknesses in regulatory language.

These concepts bear fruit in the case study of how firms respond to federal attempts to regulate trademarks for cannabis-related products and brands. Given the federal government’s refusal to register cannabis-related marks, we observe a variety of risk-laden strategic behaviors embodying several of the macro-level strategic approaches described earlier in the manuscript. The section presents an early law and strategy analysis of a single aspect of the cannabis market; we encourage similar future research into market participants’ responses to regulatory pressures in other segments of the field.

Lastly, this article proposes three methods through which uncertainty in the industry can be mitigated without undermining the already unstable cannabis legal environment. We initially describe how reduced federal uncertainty about cannabis regulation furthers laboratories of democracy, which encourages experiment with novel cannabis laws. Further, the paper discusses how the use of grace periods for cannabis regulatory implementation affords market participants the ability to evolve to new laws whose scope can become clearer during the delay. Lastly, we address how inter-stakeholder networks facilitate market legitimacy while mitigating regulatory uncertainty. In consideration of these suggestions, regulators stand to benefit by encouraging market growth within equitable regulations. The theoretical insights of this manuscript likewise provide a strategic framework upon which to analyze this nascent field that embodies a legal environment of significant uncertainty and novelty.

Exhibit A
Cannabis Policy and Effect on Legal Uncertainty

Trends in Cannabis Policymaking	Effects on Legal Uncertainty	Type of Legal Uncertainty Created
Public opinion eroding against legalization	Flagging public support undermines legitimacy of regulatory controls	Systemic Uncertainty
Haphazard shifts in cannabis policy	Policymakers fail to send consistent signals in support of regulation	Systemic Uncertainty
Poorly drafted cannabis rules and referendums	Law are ambiguous and open to misinterpretation and abuse	Substantive Uncertainty
Repeated and incremental changes in regulation	Repeated changes generate ambiguity in language and increase switching costs for firms	Substantive Uncertainty
Sporadic and unexpected policy backsliding	Enforcement becomes highly variable, creates lack of predictability for regulated firms	Enforcement Uncertainty
Fading enforcement before repeal	Deprioritization of enforcement undermines moral strength of rules, encourages lawbreaking	Enforcement Uncertainty

Exhibit B
Cannabis Firm Strategic Responses to Legal Uncertainty

Legal Uncertainties Driving Firm Responses	Legal Strategy Pathway	Cannabis Firm Strategic Response
Substantive Uncertainty and Enforcement Uncertainty	Avoidance	Laundering Trademarks
Substantive Uncertainty and Enforcement Uncertainty	Avoidance	Registering trademarks while legal status remains ambiguous
Substantive Uncertainty and Systemic Uncertainty	Advantage	Betting on the future legalization of cannabis
Substantive Uncertainty and Systemic Uncertainty	Advantage	Adopting existing trademark regimes to cannabis-friendly uses
Substantive Uncertainty and Systemic Uncertainty	Advantage	Changing federal legalization of cannabis