

# PUBLIC POLICY ARGUMENTS FOR ENACTING KENTUCKY'S CANNABIS FREEDOM ACT

*Amanda Goff Connors\**

## I. INTRODUCTION

Marijuana has long been considered a gateway drug, but American attitudes are changing as research shows that it is not. The traditional, widespread view in the U.S. is that marijuana use causes addiction to other, harder drugs.<sup>1</sup> However, there is evidence that the link between marijuana use and hard drug use has more to do with association than causation.<sup>2</sup> Most marijuana users do not go on to try hard drugs, but many of the marijuana users that do end up using hard drugs do so because exposure to the illegal drug trade exposes them to harder drugs.<sup>3</sup> Put another way, those who are “vulnerable to drug-taking are simply more likely to start with readily available substances like marijuana.”<sup>4</sup> If consumers were able to purchase marijuana through legal means, they would not be exposed to hard drugs that remain illegal.<sup>5</sup> Since marijuana is currently illegal in half of the U.S., purchasing it often exposes marijuana users to hard drugs, such as cocaine or heroin.<sup>6</sup>

2013 was the first year the majority, or 58 percent, of Americans believed marijuana should be legal.<sup>7</sup> As attitudes

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\* Staff Editor, KY. J. EQUINE, AGRIC., & NAT. RESOURCES L., 2016-2017; B.S. 2013, University of Kentucky; M.P.A. 2014, University of Kentucky; J.D. expected May 2017, University of Kentucky College of Law.

<sup>1</sup> Michelle Taylor, *Is Cannabis a Gateway Drug?*, THE GUARDIAN (Mar. 3, 2015, 6:19 PM), <http://www.theguardian.com/science/sifting-the-evidence/2015/mar/03/is-cannabis-a-gateway-drug>.

<sup>2</sup> *Id.*

<sup>3</sup> Olivia Blair, *Weed not a Gateway Drug, says Addiction Psychiatrist*, INDEP. (Oct. 16, 2015), <http://www.independent.co.uk/life-style/health-and-families/health-news/addiction-psychiatrist-says-he-doesnt-think-of-marijuana-as-a-gateway-drug-cannabis-weed-a6696311.html> [https://perma.cc/2WHY-TLXA]; *Is Marijuana a Gateway Drug?*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/marijuana/marijuana-gateway-drug> [https://perma.cc/6CQG-32B9].

<sup>4</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 3.

<sup>5</sup> Blair, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing>.

toward marijuana change, states across the country are decriminalizing, and even legalizing marijuana.<sup>8</sup> Twenty-three states and the District of Columbia have legalized medical marijuana since 1996.<sup>9</sup> Additionally, Alaska, Colorado, Oregon, Washington State, and California legalized “the sale and distribution of marijuana for adults 21 or older under state law.”<sup>10</sup> Despite states’ willingness to decriminalize marijuana, the federal government refuses to budge on its marijuana prohibition, although it has “lightened prison sentences for federal drug offenders.”<sup>11</sup> It is clear that local governments, state governments, and even the federal government aim to curb over-incarceration through reducing penalties for marijuana crimes.

Kentucky politicians have joined the debate, opening the possibility for it to be the next state to legalize recreational marijuana. Kentucky Senator Perry Clark introduced a bill in the 2016 Legislative Session called the “Cannabis Freedom Act,” which would legalize marijuana in the state and regulate it in the same manner as alcohol.<sup>12</sup> This bill would undo the current prohibition on marijuana while “promot[ing] public safety and responsible cannabis consumption by persons over 21 years of age.”<sup>13</sup> Under this bill, persons over twenty-one “could possess up to an ounce on their person and cultivate up to five plants for personal consumption, but the law would still prohibit lighting up in public.”<sup>14</sup> Persons over eighteen years of age, but under the age

marijuana.aspx?utm\_source=add\_this&utm\_medium=addirthis.com&utm\_campaign=sharing [<https://perma.cc/JK25-4WLU>].

<sup>8</sup> Marijuana Resource Center: *State Laws Related to Marijuana*, OFF. OF NAT'L DRUG CONTROL POL'Y, <https://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana> [<https://perma.cc/EXY4-ZBBT>]; Katy Steinmetz, *What to Know About Marijuana Legalization in California*, TIME (Nov. 9, 2016), <http://time.com/4565438/california-marijuana-faq-rules-prop-64/>.

<sup>9</sup> *Id.*

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

<sup>11</sup> Tim Dickinson, *The War on Drugs is Burning Out*, ROLLING STONE (Jan. 8, 2015), <http://www.rollingstone.com/politics/news/the-war-on-drugs-is-burning-out-20150108> [<https://perma.cc/LA4Q-RQFW>].

<sup>12</sup> Kentucky Senator Files “Cannabis Freedom Act”, LEX18.COM (Dec. 11, 2015, 3:43 PM), <http://www.lex18.com/story/30727538/kentucky-senator-files-cannabis-freedom-act> [<https://perma.cc/5UZ5-EHP4>].

<sup>13</sup> *Id.*

<sup>14</sup> Mike Wynn, *Ky. Lawmaker Wants Legalized Marijuana Debate*, THE COURIER J. (Dec. 17, 2015, 12:21 PM), <http://www.courier-journal.com/story/news/politics/ky-general-assembly/2015/12/17/ky-lawmaker-wants-legalized-marijuana-debate/77471958/> [<https://perma.cc/7TT2-QT6V>].

of twenty-one, could possess marijuana if prescribed by a doctor.<sup>15</sup> Public use of marijuana, however, would still be prohibited.<sup>16</sup>

Other lawmakers oppose the bill and hold the traditional view that marijuana is a gateway drug.<sup>17</sup> Those opposed firmly believe that there is not a chance that the bill will get a committee hearing in the upcoming legislative session. One senator, Senate Judiciary Committee Chairman Whitney Westerfield, said that he has “personally seen cases as a prosecutor where the use of marijuana led to people’s deaths because they were under the influence and operated a vehicle,” yet cited no real evidence to support this statement. Senator Clark argues that other states where recreational marijuana is legal have not experienced the adverse effects that many anticipated and have gained economic benefits.<sup>18</sup>

This Note asserts that legalizing recreational marijuana would have positive impacts on the state of Kentucky in terms of its criminal justice system, state tax revenue, and on Kentuckians as a whole. The first part of this Note examines the history of cannabis in the U.S., including the most recent developments in marijuana law. Nearly half of the states have legalized some form of medical marijuana, and legal recreational marijuana is gaining public favor. Next, this Note considers current public policy issues associated with marijuana, including the burden on the criminal justice system, marijuana “criminals,” and potential tax benefits, demonstrating that Kentucky, as a whole, would be better off if the state legalized marijuana. Finally, this Note will dissect arguments against legalizing marijuana, including concerns with traffic accidents, underage accessibility, and overdosing on edible marijuana. In conclusion, this note recommends Kentucky enact the Cannabis Freedom Act or a similar regulatory scheme for marijuana because the benefits of legalization outweigh the costs.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

## II. HISTORY OF CANNABIS IN THE UNITED STATES, KENTUCKY, AND OTHER STATES

### *A. What is Cannabis?*

Before delving into legal issues surrounding marijuana, the differences between hemp and marijuana are identified. Both marijuana and hemp are different strains of the cannabis plant.<sup>19</sup> Generally, hemp plants are “traditionally well-spaced, and the plants develop[pl] medium height and strong branching,” while marijuana plants are characteristically short, have few branches, and have “very hollow stems.”<sup>20</sup> Both strains are conical in shape, much like a Christmas tree. Hemp plants normally have little intoxicating capacity because the plants are not bred for the purpose of intoxication but for industrial or textile uses.<sup>21</sup> Fiber plants look quite similar to drug strains of the cannabis plant, but narcotic plants often are more fragrant than fiber plants because they grow more flowers and are bred to produce high concentrations of tetrahydrocannabinol (“THC”).<sup>22</sup>

### *B. History of Cannabis*

#### *i. Federal Government*

The United States and Kentucky have not always outlawed production of all types cannabis. Between 1600 and the 1890s, the federal government encouraged hemp production for the manufacture of rope, sails, and clothing.<sup>23</sup> Until the end of the Civil War, Kentucky was the nation’s leader in industrial hemp production, but hemp production declined when tobacco outpaced

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<sup>19</sup> Ernest Small & David Marcus, *Hemp: A New Crop with New Uses for North America, TRENDS IN NEW CROPS AND NEW USES* (2002), <https://www.hort.psu.edu/newcrop/ncnu02/pdf/small.pdf> [https://perma.cc/8Y8D-PPPY].

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

<sup>21</sup> *Id.*

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

<sup>23</sup> *Marijuana Timeline*, PUB. BROADCASTING SERVICE, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Sept. 22, 2016) [https://perma.cc/9T48-R4M2].

its production and other materials replaced hemp in textile and industrial use.<sup>24</sup> Recreational use of marijuana was not introduced to the U.S. until after the Mexican Revolution of 1910.<sup>25</sup> At that time, Mexican immigrants brought the drug to the U.S., and there was much fear and prejudice associated with it.<sup>26</sup> Anti-drug campaigners claimed “terrible crimes were attributed to marijuana and the Mexicans who used it.”<sup>27</sup> As fear and propaganda against marijuana mounted, the Federal Marihuana Tax Act of 1937 effectively banned all “production and sales of cannabis”.<sup>28</sup> Despite animus against marijuana, there was a resurgence of hemp production during the Second World War when the Department of Agriculture started its “Hemp for Victory” program to grow hemp to be used to make necessary military supplies.<sup>29</sup>

However, other than its use during the war, hemp production was almost nonexistent in the U.S. until recent changes in the law.<sup>30</sup> Hemp producers have been associated with illegal marijuana dealers through previous legislation.<sup>31</sup> After World War II, the federal government enacted two laws setting mandatory minimum sentences for marijuana and other drug-related offenses.<sup>32</sup> These laws included industrial hemp, even though hemp is not a drug.

Federal “mandatory [minimum] sentences for drug-related offenses, including marijuana,” were established in 1952 under the Boggs Act and in 1956 under the Narcotics Control Act.<sup>33</sup> At that time, the penalty for “[a] first offense marijuana possession” was a “minimum sentence of 2-10 years with a fine of up to \$20,000.”<sup>34</sup> By 1970, mandatory minimums were believed to be “unduly harsh,” and ineffective in eliminating “the drug culture

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<sup>24</sup> See generally *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> *Id.*

<sup>28</sup> Robin Lash, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 321 (2002).

<sup>29</sup> See PUBLIC BROADCASTING SERVICE, *supra* note 23.

<sup>30</sup> Lash, *supra* note 28, at 322.

<sup>31</sup> *Id.*

<sup>32</sup> See PUBLIC BROADCASTING SERVICE, *supra* note 23.

<sup>33</sup> See generally *id.*

<sup>34</sup> *Id.*

that embraced marijuana use throughout the 60s.”<sup>35</sup> As a result, Congress abolished mandatory minimums for most drug offenses.<sup>36</sup>

### THE WAR ON DRUGS

President Nixon commenced the “war on drugs” in 1971 in response to a perceived need for a national drug policy.<sup>37</sup> Policymakers thought if the government instituted federal policing on drug trafficking in the U.S., the amount of drug trafficking would significantly decrease in a short period of time.<sup>38</sup> Over time, penalties in some states regarding marijuana were reduced along with some states decriminalizing marijuana.<sup>39</sup> However, when President Reagan took office things changed.<sup>40</sup> In 1984, “Nancy Regan launch[ed] her ‘Just Say No’ anti-drug campaign” in response to the flourishing Columbian drug trade, which introduced cocaine to the United States. Federal mandatory minimum sentencing laws were reinstated in 1986 when President Reagan signed the Anti-Drug Abuse Act.<sup>41</sup> Again, industrial hemp was not excluded from this law. Although the U.S. tightened its drug policy during the War on Drugs era, California was the first state to legalize medical marijuana in 1996.<sup>42</sup>

Despite decriminalization and legalization of marijuana in some states, the War on Drugs continues.<sup>43</sup> Over the past forty-five years, the War on Drugs came with high monetary and social costs.<sup>44</sup> The price of this “war” is estimated to be over \$40 billion

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See generally *Timeline: America’s War on Drugs*, NAT'L PUB. RADIO (Apr. 2, 2007, 5:56 PM), <http://www.npr.org/templates/story/story.php?storyId=9252490> [<https://perma.cc/7CPM-LL7J>].

<sup>38</sup> See Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J. (Jan. 4, 2013, 8:39 PM), <http://www.wsj.com/articles/SB10001424127887324374004578217682305605070> [<https://perma.cc/G7S6-3ZDG>].

<sup>39</sup> See PUBLIC BROADCASTING SERVICE, *supra* note 23.

<sup>40</sup> See NATIONAL PUBLIC RADIO, *supra* note 37.

<sup>41</sup> *Id.*

<sup>42</sup> See PUBLIC BROADCASTING SERVICE, *supra* note 23.

<sup>43</sup> *Id.*

<sup>44</sup> Becker & Murphy, *supra* note 38.

a year, which funds police spending, court costs, and prison expenditures.<sup>45</sup> In terms of social costs, the American high school dropout rate remains approximately 25 percent, and the U.S. prison population has swelled “from 330,000 in 1980 to about 1.6 million today” largely as a result of harsh penalties for drug trafficking convicts.<sup>46</sup> Many students who drop out of high school are “black or Hispanic children living in poor neighborhoods.”<sup>47</sup> It is common for this group of dropouts to get involved in the drug trade to make enough money to live on, as they would otherwise likely have low-paying jobs.<sup>48</sup>

#### MANDATORY MINIMUM SENTENCING LAWS

Another weapon of the federal government in the War on Drugs is mandatory minimum sentencing laws. These laws set forth minimum sentences for certain offenses that may not be altered by a judge. In large part, mandatory minimums are responsible for the U.S.’s ever increasing prison population.<sup>49</sup> In July 2014, President Obama set forth a comprehensive “plan for criminal justice reform in America,” in which he called for “the end of mandatory minimum sentences for nonviolent drug offenders,” as well as many other changes in the prison system.<sup>50</sup> Nonviolent drug offenders owe some debt to society, but should not be incarcerated, according to Obama.<sup>51</sup> “[Y]ou don’t owe 20 years. You don’t owe a life sentence. That’s disproportionate to the price that should be paid. And by the way, the taxpayers are picking up the tab for that price.”<sup>52</sup> Each year, the “U.S. spends about \$80 billion . . . on incarcerations . . . .”<sup>53</sup> The U.S. houses 25 percent of the world’s prison population with around “2.2 million

<sup>45</sup> See *id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Ben Wolfgang, *Obama Calls for Overhaul of Prison System, End of Mandatory Minimum Sentences*, WASH. TIMES (July 14, 2015), <http://www.washingtontimes.com/news/2015/jul/14/obama-calls-for-overhaul-of-prison-system-end-of-m/?page=all> [https://perma.cc/WTR7-HK79].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

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

Americans in prison.”<sup>54</sup> Under his new plan, President Obama “commuted the sentences of 46 such nonviolent drug offenders,” showing that during his last eighteen months in office, the president “intends to focus on criminal justice reform.”<sup>55</sup> The President’s opinion is “[f]or nonviolent drug crimes, we need to lower mandatory sentences or get rid of them entirely.”<sup>56</sup> He believes that judges should be given “some discretion” when a young person could be steered “in a better direction.”<sup>57</sup> Conversely, House Republicans on the Judiciary Committee “are deeply concerned” the President seeks to give an advantage to select groups of offenders through abuse of power and “refusal to enforce laws.”<sup>58</sup>

#### CURRENT FEDERAL LAW

In 2014, Congress enacted a law that contains a rider prohibiting the Justice Department from spending funds appropriated by the law to “prevent” states from ‘implementing’ their medical marijuana law.”<sup>59</sup> Congress reapproved this rider in December 2015, ensuring it will stay in place for a second fiscal year.<sup>60</sup> On its face, it seems this rider would prohibit the Justice Department from raiding medical marijuana facilities and from pursuing federal cases.<sup>61</sup> The media have overstated the significance of this rider to the point that it has led many to wrongly believe that the federal government legalized medical marijuana.<sup>62</sup> Despite public opinion, the Justice Department has continued both raids and prosecution, which seemingly “prevent[s]” states from executing their own medical marijuana

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Jacob Sullum, *Congress Did Not Legalize Medical Marijuana*, FORBES (Dec. 31, 2015, 8:15 AM), <http://www.forbes.com/sites/jacobsullum/2015/12/31/congress-did-not-legalize-medical-marijuana/#7b59a71e715c> [<https://perma.cc/Z99R-79PR>].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

laws.<sup>63</sup> The ban many thought was lifted essentially remains in place.<sup>64</sup>

To date, the Supreme Court has decided only two cases involving marijuana, one that supports the legislature's stance and one that does not. In *Gonzales v. Raich*, respondents claimed that the federal government violated the Commerce Clause when DEA "agents seized and destroyed all six" of their marijuana plants.<sup>65</sup> The respondents were California residents who were prescribed medical marijuana. The Court held that the Commerce Clause "includes the power to prohibit the local cultivation and use of marijuana in compliance with California law" because "Congress has the power to regulate activities that substantially affect interstate commerce."<sup>66</sup> If the Court were to hold otherwise, "a gaping hole" would be left in the Controlled Substances Act.<sup>67</sup> Thus, the Court held that medical marijuana, although legal in California, remains illegal at the federal level.<sup>68</sup>

In another landmark marijuana decision, *Moncrieff v. Holder*, the Supreme Court held that a "non-citizen's conviction for a marijuana distribution offense fails to establish that the offense involved . . . more than a small amount of marijuana, it is not an aggravated felony."<sup>69</sup> The Immigration and Nationality Act provides that if a noncitizen is convicted of an "aggravated felony," that person may be deported from the U.S.<sup>70</sup> In this case, the government and Fifth Circuit believed that the amount of marijuana did not matter, and that the defendant should be deported.<sup>71</sup> However, the defendant only had a "small amount of marijuana," which is not punishable as a felony under federal law, but is a misdemeanor.<sup>72</sup> This is the first major case in which the Court has held that trafficking marijuana, an illicit

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Gonzales v. Raich*, 545 U.S. 1, 7 (2005).

<sup>66</sup> *Id.* at 17.

<sup>67</sup> *Id.* at 22.

<sup>68</sup> *Id.* at 40.

<sup>69</sup> *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683–84 (2013).

<sup>70</sup> *Id.* at 1683.

<sup>71</sup> *Id.* at 1688.

<sup>72</sup> *Id.* at 1683.

substance, was not an aggravated felony. For the first time, the Court held for the individual and not the War on Drugs.

*ii. Other States*

CALIFORNIA

California legalized medical marijuana in 1996, and legalized recreational marijuana on November 8, 2016.<sup>73</sup> Although medical marijuana has been available to Californians for twenty years, “there is no evidence that its use by teenagers has risen . . . since legalization.”<sup>74</sup> There are concerns that taxing medical marijuana would push consumers to drug dealers, but most Californians purchase legal marijuana likely “because it is so easy to get reliable and high-quality marijuana legally.”<sup>75</sup>

After twenty years of legal medical marijuana, California is updating its laws regarding medical marijuana regulation. In October 2015, “Governor Brown signed into law three bills that comprise the California Medical Marijuana Regulation and Safety Act” (“MMRSA”).<sup>76</sup> The impact of the Act is that state law will regulate medical marijuana, which will replace the current “unregulated gray marijuana marketplace.”<sup>77</sup> The three bills that comprise MMRSA each have a distinctive purpose, but all regard medical marijuana control.<sup>78</sup> First, AB 266 “focuses on MMRSA’s overall regulatory and licensing set up.”<sup>79</sup> Second, AB 243 concentrates on “regulating marijuana cultivation for medical use and on California’s environmental concerns regarding marijuana cultivation.”<sup>80</sup> Third, SB 643 provides “standards for licensed

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<sup>73</sup> Adam Nagourney & Rick Lyman, *Few Problems with Cannabis for California*, N.Y. TIMES (Oct. 26, 2013), [http://www.nytimes.com/2013/10/27/us/few-problems-with-cannabis-for-california.html?\\_r=0](http://www.nytimes.com/2013/10/27/us/few-problems-with-cannabis-for-california.html?_r=0) [https://perma.cc/Z4XB-JLGS]; Steinmetz, *supra* note 8.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Hilary Bricken, *An Overview of California’s New (And Improved) Medical Marijuana Laws*, ABOVE THE LAW (Oct. 12, 2015, 4:20 PM), <http://abovethelaw.com/2015/10/an-overview-of-californias-new-and-improved-medical-marijuana-laws/?rf=1> [https://perma.cc/P62W-9HMW].

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

medical physicians . . . who recommend marijuana for medical use and it delves into the criminal background standards for applicants.”<sup>81</sup> Additionally, each of the bills require “various state agencies” to create rules and procedures for tracing cannabis product, record keeping, anti-diversion systems for transporting cannabis product, quality assurance testing standards, robust labeling and packaging, safe product handling, and security requirements.<sup>82</sup> The changes in California’s medical marijuana law will not go into effect “until at least January 2018,” and licenses for recreational marijuana shops will not be issued until January 2018, but the changes in California’s marijuana laws are proof that marijuana is here to stay and that regulation is key.<sup>83</sup>

#### COLORADO

Colorado legalized medical marijuana in 2001 and passed Amendment 64 in 2012, legalizing recreational marijuana. At first, Governor Hickenlooper opposed the initiative and wished he could have reversed it, but he changed his mind.<sup>84</sup> The Colorado governor saw that the state made a lot of progress and thinks the state “might actually create a system that can work.”<sup>85</sup> In its first year with legal marijuana, Colorado brought in \$228 million in marijuana sales and \$37 million in tax revenue.<sup>86</sup> Since then, Colorado has become “one of the fastest growing economies” in the U.S. with an unemployment rate well below the national average.<sup>87</sup> Tax revenue will primarily be used to fund “youth prevention efforts focused on marijuana and overall mental health. . . [i]n the first year after legalization, the state saw “a

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; Steinmetz, *supra* note 8.

<sup>84</sup> Bill Whitaker, *The Marijuana Effect*, CBS NEWS (Jan. 11, 2015), <http://www.cbsnews.com/news/colorado-pot-marijuana-60-minutes/> [<https://perma.cc/2CSU-CNTM>].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Art Way, *Colorado and Marijuana Legalization One Year Later: What Has Changed?*, HUFFINGTON POST (Dec. 30, 2014, 5:26 PM), [http://www.huffingtonpost.com/art-way/colorado-and-marijuana-le\\_b\\_6397664.html](http://www.huffingtonpost.com/art-way/colorado-and-marijuana-le_b_6397664.html) [<https://perma.cc/JX2J-T6C6>].

slight decline in youth use rates.”<sup>88</sup> As of 2014, Colorado’s marijuana possession charges dropped “from nearly 30,000 in 2010,” to “below 2,500,” and all drug arrests in the state have dropped by 41 percent.<sup>89</sup>

Opponents of Colorado’s legal marijuana include the Colorado Association of Chiefs of Police.<sup>90</sup> They say that even though recreational marijuana is legal, the black market for marijuana remains.<sup>91</sup> The state taxes marijuana at 28 percent, and some dealers wish to get around paying the tax, which makes illegal marijuana cheaper than legal marijuana.<sup>92</sup>

Other opponents include Colorado’s neighbor states, Nebraska and Oklahoma, which “claim that the federal Controlled Substances Act, or CSA, preempts Colorado’s marijuana law.”<sup>93</sup> Until now, the federal government has taken a hands-off approach to Colorado’s legal marijuana, but now it must act.<sup>94</sup> Procedurally, because two states brought suit against another state, the case immediately went to the Supreme Court.<sup>95</sup> The issue at hand involved interstate commerce and federal preemption.<sup>96</sup> Colorado’s legal marijuana is making its way into Nebraska and Oklahoma where marijuana is illegal, and it is apparently straining their criminal justice systems.<sup>97</sup> As stated earlier, marijuana remains illegal at the federal level, so it seems that the federal government would side with Nebraska and Oklahoma because the CSA, a federal act, would trump Colorado’s law under the Supremacy Clause.

<sup>88</sup> Jacob Sullum, *As Colorado Loosened Its Marijuana Laws, Underage Consumption and Traffic Fatalities Fell*, FORBES (Aug. 11, 2014, 3:27 PM), <http://www.forbes.com/sites/jacobsullum/2014/08/11/as-colorado-loosened-its-marijuana-laws-underage-consumption-and-traffic-fatalities-fell/#2715e4857a0b3a19634f5ebc> [https://perma.cc/UB5X-VZ23].

<sup>89</sup> Whitaker, *supra* note 85.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> Zachary Bolitho, *The Case Against Colorado’s Pot Law*, L.A. TIMES (June 25, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0625-bolitho-colorado-preempt-20150624-story.html> [https://perma.cc/W7BD-GQ6V].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> *Id.*

Interestingly, the U.S. Department of Justice sides with Colorado.<sup>98</sup> Colorado “doesn’t permit pot buyers to take their marijuana across state borders,” and Nebraska and Colorado did not assert this claim.<sup>99</sup> In an Amicus Brief, Solicitor General Donald Verrilli stated, “At most, they have alleged that third-party lawbreakers are inflicting those injuries, and that Colorado’s legal regime makes it easier for them to do so.”<sup>100</sup> The bottom line is that Nebraska and Oklahoma have not truly suffered an injury as a result of Colorado’s legal marijuana, and “Colorado can’t be responsible for what third parties do when they leave the state.”<sup>101</sup> Most likely, the Supreme Court will dismiss this case. If so, this case will be the first in which the federal government chooses not to interfere with a state’s marijuana law and would send the opposite message of *Raich*.

#### OREGON

Oregon is in the process of implementing its new marijuana laws and “sales plan faster than any other state so far.”<sup>102</sup> Oregon “legalized marijuana possession and small personal grow operations on July 1[, 2015],” and on October 1, the state put in place a system “to sell and tax” marijuana.<sup>103</sup> Now anyone over the age of twenty-one in Oregon can purchase “marijuana, seeds, and immature plants” from medical marijuana dispensaries.<sup>104</sup> January 4, 2016, was the first day that individuals “could officially apply for licenses to operate recreational [marijuana] businesses in Oregon.”<sup>105</sup>

<sup>98</sup> Colorado Public Radio Staff, *Feds Side with Colorado Over Marijuana Lawsuit*, CO. PUB. RADIO (Dec. 17, 2015), <https://www.cpr.org/news/story/feds-side-colorado-over-marijuana-lawsuit> [<https://perma.cc/H4XJ-6TMV>].

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Andy Campbell, *You Can Now Buy Marijuana Legally in Oregon*, HUFFINGTON POST (Oct. 1, 2015, 8:10 AM), [http://www.huffingtonpost.com/entry/marijuana-legal-oregon\\_us\\_560ca43ae4b0dd85030ad17d](http://www.huffingtonpost.com/entry/marijuana-legal-oregon_us_560ca43ae4b0dd85030ad17d) [<https://perma.cc/8LLK-5MBK>].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Bryan M. Vance, *Big Changes Come to Oregon’s Cannabis Industry this Year*, OR. PUB. BROADCASTING (Jan. 21, 2016, 8:00 AM),

However, retail store applications will likely not be approved until at least October.<sup>106</sup> Right now, the state's focus is on approving applications for growers, so their crop will be ready to sell when retail store applications are approved.<sup>107</sup> After licensing growers, Oregon will grant licenses to "laboratories, processors, and wholesalers" before retailers.<sup>108</sup> Until retail stores open near the end of 2016, consumers will be able to purchase recreational marijuana from medical marijuana stores through the end of the year.<sup>109</sup> Tax revenue from marijuana sales will initially be used to "pay for . . . costs associated with launching the recreational marijuana program."<sup>110</sup> Once these costs are paid off, marijuana tax revenue will be dispersed among Oregon public schools, state police and local law enforcement, and drug and alcohol abuse treatment services.<sup>111</sup>

#### KENTUCKY

Kentucky passed House Bill 463 in March 2011 in an effort to reform Kentucky's penal code by "reducing penalties for some drug crimes and steering the defendants into addiction treatment."<sup>112</sup> Lawmakers expected the reform to create \$400 million in savings in ten years. The reform decreased the number of prisoners from around twenty-three thousand in 2011 to between 20,500 and 21,500 in 2014, but Kentucky's prison population was supposed to decrease by two thousand more inmates by 2014.<sup>113</sup> As a result, the state Corrections Department has saved \$34.3 million dollars by moving inmates to local jails from prisons and "convert[ing] a state prison in Frankfort into a Kentucky State Police training center."<sup>114</sup> The state has used its

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<http://www.opb.org/news/article/marijuana-cannabis-oregon-recreational-sales-laws/>  
[<https://perma.cc/N8Y5-GVNF>].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> John Cheves, *After 3 Years, Overhaul of Kentucky's Drug-Crime Laws Hasn't Created Expected Savings*, LEXINGTON HERALD-LEADER (Feb. 15, 2014), <http://www.kentucky.com/news/politics-government/article44471586.html> [<https://perma.cc/TF9C-GZVM>].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

savings to fund addiction treatment programs. Now Kentucky prisons are more crowded, the number of treatment beds needed for addicts increased by “1,831 since 2011,” and rehabilitation programs are not offered to inmates.<sup>115</sup>

Additionally, HB 463 revised the criminal code so that the persistent-felony-offender statute is not triggered by drug possession.<sup>116</sup> This means people arrested for marijuana possession more than once do not face enhanced prison sentences.<sup>117</sup> The bill also provides no penalty for first and second time possession offenders, if they “complete addiction treatment and commit no new crimes.”<sup>118</sup> Furthermore, the bill narrowed the scope of drug trafficking offenses to include only those who are “caught with substantial quantities of drugs.”<sup>119</sup> As of 2014, Kentucky released more than 7,100 inmates through the bill’s “mandatory re-entry supervision” requirement and has saved “the state an estimated \$25.1 million in incarceration costs.”<sup>120</sup> State officials said around 80 percent of inmates released under supervision have not been arrested again, but some of the prison savings must be spent keeping track of the large number of parolees.<sup>121</sup>

University of Kentucky College of Law Professor Robert Lawson said “HB 463 . . . didn’t reach far enough.”<sup>122</sup> The reform only covered drug offenses, while the state needs “a long-overdue review of all crimes and penalties.”<sup>123</sup> Even the drug offense reform was not enough, according to Lawson.<sup>124</sup> As an example, Professor Lawson explained that when offenders are charged with “drug trafficking within 1,000 yards of a school” prosecutors add on “enhanced felony penalties.”<sup>125</sup> Many times, prosecutors use this offense to “lengthen prison sentences for drug addicts caught with a stash in their car several blocks from a school

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

campus.”<sup>126</sup> Instead of doing away with this offense, the bill “reduced the area it covered from 1,000 yards to 1,000 feet.”<sup>127</sup> Doing away with this offense altogether would prevent even more drug users from being incarcerated when they should receive addiction treatment instead.<sup>128</sup>

In 2013, Kentucky enacted a statute that would allow farmers to grow industrial hemp in Kentucky.<sup>129</sup> In 2014, the Federal Farm Bill was signed into law, which legalized industrial hemp nationally.<sup>130</sup> The combination of these laws allowed Kentucky farmers to grow industrial hemp through a five-year pilot program focused on research and development.<sup>131</sup> Kentucky’s first crop of industrial hemp in almost seventy years was grown during the summer of 2014.<sup>132</sup>

Five Kentucky universities participated in the pilot program in 2014, each focusing on a different aspect of hemp research.<sup>133</sup> The University of Louisville is involved with a project to farm hemp on a former industrial site to determine if the hemp crop can cleanse polluted soil on the site. Kentucky State University is studying “Kentucky heirloom hemp seed,” which is thought to be “old Kentucky hemp seed.” This project was conducted in conjunction with the “Homegrown by Heroes program for military veteran farmers.”<sup>134</sup> Murray State University is involved with a project to see if European hemp

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.*

<sup>129</sup> KY. REV. STAT. ANN. § 260.854 (West, Westlaw through 2016 Sess.).

<sup>130</sup> 7 U.S.C.A. § 5940 (West, Westlaw through PL 114-219).

<sup>131</sup> Cheryl Kaiser et al., *Industrial Hemp Production*, 1 (Sept. 2015), <https://www.uky.edu/Ag/CCD/introsheets/hempproduction.pdf> [https://perma.cc/NZD8-7Z34]; Jessica Firger, *The Great Kentucky Hemp Experiment*, NEWSWEEK (Oct. 11, 2015 10:05 AM), <http://www.newsweek.com/2015/10/23/great-kentucky-hemp-experiment-381870.html> [https://perma.cc/H9Z9-QRPy].

<sup>132</sup> Firger, *supra* note 128; Gregory Hall, *Kentucky Harvests Its First Hemp Crop*, THE COURIER J. (Sept. 25, 2014), <http://www.courier-journal.com/story/money/2014/09/23/uk-harvests-hemp-crop/16095035/> [https://perma.cc/99CT-SBDC].

<sup>133</sup> Gregory A. Hall, *Kentucky Announces 5 Hemp Pilot Projects*, USA TODAY (Feb. 17, 2014, 9:11 PM), <http://www.usatoday.com/story/news/nation/2014/02/17/kentucky-hemp-pilot-projects/5566925/> [https://perma.cc/HN6R-7HBW].

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

seed will grow well in Kentucky.<sup>135</sup> The University of Kentucky and Eastern Kentucky University focus their research on “basic agricultural issues” associated with hemp production, including “production cost and machinery for planting, harvesting and transportation.”<sup>136</sup> The University of Pikeville joined the aforementioned Kentucky universities in 2015, and partnered with Freedom Seed and Feed, LLC to develop a research program focused on development of the industrial hemp industry in the “coalfield region of Eastern Kentucky.”<sup>137</sup> The hemp research pilot program will bring jobs to Kentucky, and if successful, could become a new industry, providing more jobs for Kentuckians.

In April 2014, Kentucky passed a law permitting doctors at the University of Kentucky and University of Louisville research hospitals to treat patients with cannabidiol because it is “particularly effective in treating seizures in children.”<sup>138</sup> Cannabidiol is derived from cannabis plants, and prescribing doctors will get their supply from the crops of Kentucky’s industrial hemp farmers. In 2015, Kentucky House of Representatives Speaker Greg Stumbo introduced House Bill 3, which would have legalized medical cannabis in the form of “a pill, liquid, oil or vapor” but not smoking marijuana.<sup>139</sup> The bill would have limited “patients to a 60-day supply of medicine, and it include[ed] penalties for patients or doctors who engage in illegal drug dealing through the program.”<sup>140</sup> In proposing this bill, Speaker Stumbo did not expect the legislature to pass it that year. His aim was to “start a conversation among lawmakers” and “[move] the issue forward.”<sup>141</sup>

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> University of Pikeville, *Industrial Hemp Helping Define Kentucky’s Economic Landscape*, CAMPUS NEWS (Apr. 9, 2014, 12:00 AM), <http://www.upike.edu/News/Campus/Industrial-hemp-helping-define-Kentucky%e2%80%99s-economic?rss=UPikeCampusNews> [https://perma.cc/E9SH-KMRE].

<sup>138</sup> John Cheves, *Kentucky Lawmakers Discuss Medical Marijuana Bill, but No Vote is Planned*, LEXINGTON HERALD-LEADER (Feb. 12, 2015, 2:47 PM), <http://www.kentucky.com/living/health-and-medicine/article44553690.html> [https://perma.cc/NN5S-MP5P].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

### RACIAL DISPARITY

The criminalization of marijuana has had devastating effects on society as a whole, but one demographic has borne the brunt of harsh penalties for marijuana crimes. Data shows that black and white people “use marijuana at comparable rates,” but black people “are more likely than whites to be arrested for marijuana offenses.”<sup>142</sup> On average, black people in the U.S. are 3.7 times more likely to be arrested than white people.<sup>143</sup> Blacks in Kentucky are six times more likely to be arrested for marijuana offenses than whites, which makes Kentucky the state with the fifth highest disparity among races in marijuana arrests in the U.S.<sup>144</sup> Black people only make up 8 percent of Kentucky’s population, but blacks make up 36 percent of Kentuckians arrested for marijuana possession.<sup>145</sup>

The effect of this disparate treatment goes beyond the marijuana conviction itself; a large number of black people are hindered from acquiring gainful employment, getting an education, and participating in family life.<sup>146</sup> Even a misdemeanor conviction can inhibit a person from retaining their driver’s license, getting insurance, bank loans, public housing, and student financial aid.<sup>147</sup> Some states, including Kentucky, place a lifelong ban on “voting, jury service, or eligibility for public benefits like food stamps” for felons.<sup>148</sup> A marijuana arrest on its own can cause the arrestee to lose his or her job.<sup>149</sup> Many arrests do not lead to convictions, but potential employers can

<sup>142</sup> Jesse Wegman, *The Injustices of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), [http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?\\_r=0](http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?_r=0) [https://perma.cc/UTF7-TV8T].

<sup>143</sup> *Id.*

<sup>144</sup> *The War on Marijuana in Black and White*, AM. CIV. LIBERTIES UNION (June 2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf#11> [https://perma.cc/UM28-3XQ6].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See Wegman, *supra* note 139.

<sup>149</sup> *Id.*

still find arrest records for marijuana offenses online for free up to a year following the arrest.<sup>150</sup>

States across the U.S. have different policies regarding voting rights for felons.<sup>151</sup> Only four states, Kentucky, Florida, Iowa, and Virginia, “permanently bar all citizens with a felony record from voting.”<sup>152</sup> All other states have less restrictive felon disenfranchisement policies, which range from disenfranchisement only for specific types of felonies to no restrictions on felon voting, even during their prison term.<sup>153</sup> Just like the federal government’s War on Drugs, state felon disenfranchisement laws have a disparate impact on African Americans.<sup>154</sup> In the U.S. as a whole, 2.2 million black persons are disenfranchised as a result of a conviction, “more than 40% of whom have completed the terms of their sentences.”<sup>155</sup>

As of 2013, Kentucky and two other states suspended the voting rights of “at least one out of every five African-Americans.”<sup>156</sup> Specifically, in Kentucky the black felon disenfranchisement rate is 22 percent, in Florida it is 23 percent, and in Virginia it is 20 percent, while the national average is 7.7 percent.<sup>157</sup> In Kentucky, around 74 percent have already fulfilled their prison sentences – this is a problem because black persons make up only 13.2 percent of Americans and only 8.2 percent of Kentuckians.<sup>158</sup> In Kentucky specifically, the number of disenfranchised black persons is significantly disproportionate to the number of black Kentuckians. This means that a higher portion of black Kentuckians will have lower access to jobs,

<sup>150</sup> *Id.*

<sup>151</sup> *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, SENT’G PROJECT (Sept. 2013), [http://sentencingproject.org/doc/publications/fd\\_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf) [<https://perma.cc/9XZX-6EW6>].

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; *Background Information on Restoration of Voting Rights in Kentucky*, KENTUCKIANS FOR THE COMMONWEALTH (Aug. 2013), [https://www.kftc.org/sites/default/files/docs/resources/background\\_information\\_on\\_voting\\_rights\\_in\\_ky.pdf](https://www.kftc.org/sites/default/files/docs/resources/background_information_on_voting_rights_in_ky.pdf) [<https://perma.cc/9BC6-FRCH>].

<sup>158</sup> *State & County QuickFacts Facts: Kentucky*, <http://quickfacts.census.gov/qfd/states/21000.html> [<https://perma.cc/55X3-9LHE>].

education, housing, bank loans, etc., than Kentuckians who are white or of other races. Through such disparate treatment based on race, the government continues to perpetuate negative stereotypes against black people by disallowing them to fully participate in society by taking away a large number of their voting rights and over-incarcerating blacks for low-level drug offenses.

The ACLU published a report in 2013 highlighting the extent of racial disparity in drug arrests in Kentucky. According to Ezekiel Edwards, the Director of the Criminal Law Reform Project at the ACLU and a main author of the report, “State and local governments have aggressively enforced marijuana laws selectively against black people and communities, needlessly ensnaring hundreds of thousands of people in the criminal justice system at tremendous human and financial cost.”<sup>159</sup> The report shows that in 2010, Kentucky arrested 6,540 people for marijuana possession, which was 31.8 percent of all drug arrests in the state that year. Furthermore, the ACLU found that Nelson, Campbell, and Kenton counties had the highest rates of racial disparity in marijuana possession arrests in the state. Kentucky’s high rate of marijuana possession arrests in 2010 came at a high cost of almost \$19.5 million dollars.

#### CURRENT KENTUCKY MARIJUANA PENALTIES

In Kentucky, it is currently a crime to possess, grow, or sell marijuana. Possession is a Class B misdemeanor with a “maximum term of incarceration . . . no greater than forty-five . . . days.”<sup>160</sup> Cultivating five or more marijuana plants is a Class D felony for a first offense and a Class C felony for subsequent offenses, which means an individual could be imprisoned for one to five years for a first offense and between five and ten years for a subsequent offense.<sup>161</sup> If one cultivates fewer than five

<sup>159</sup> *New Report Features Original Data Analysis on Marijuana Arrest Rates by Race and Details High Costs of Enforcement*, AM. CIV. LIBERTIES UNION (June 4, 2013), <https://www.aclu.org/news/kentucky-black-people-found-be-six-times-more-likely-be-arrested-marijuana-possession-white> [<https://perma.cc/GJ3S-NMUB>].

<sup>160</sup> KY. REV. STAT. ANN. § 218A.1422 (West, Westlaw through 2016 Sess.).

<sup>161</sup> § 218A.1423(2); § 532.060(2).

marijuana plants, the first offense is a Class A misdemeanor, and a subsequent offense is a Class D Felony.<sup>162</sup> This means that a convicted individual could be imprisoned for a year or less for a first offense and between one and five years for a subsequent offense. Kentucky's greatest penalties for marijuana offenses are for traffickers.

It is a Class A misdemeanor for a first trafficking offense of less than eight ounces of marijuana and a Class D felony for a subsequent offense, which means one could be imprisoned for twelve months or less for a first offense and between one and five years for a second offense.<sup>163</sup> If one traffics between eight ounces and five pounds of marijuana, the first offense is a Class D felony and a subsequent offense is a Class C felony, which means the offender could be imprisoned for one to five years for a first offense and between five and ten years for a subsequent offense.<sup>164</sup> Finally, trafficking more than five pounds of marijuana is a Class C felony for the first offense and a Class B felony for a subsequent offense, which means the term of imprisonment is between five and ten years for a first offense and between ten and twenty years for a subsequent offense.<sup>165</sup>

### III. PUBLIC POLICY ARGUMENTS FOR ENACTING KENTUCKY'S CANNABIS FREEDOM ACT

#### *A. Impacts on Law Enforcement, Courts, and Prisons*

In 2014, Kentucky arrested 15,131 individuals for marijuana offenses, which accounted for nearly 26 percent of all drug arrests in the state that year.<sup>166</sup> Fewer people are arrested for heroin, methamphetamine, cocaine, and other hard drug possession than are arrested for marijuana possession.<sup>167</sup> In general, the effects of marijuana are less harmful to individuals, their families, and their communities than hard drugs, yet

<sup>162</sup> § 218A.1423(3); § 532.060(2).

<sup>163</sup> § 218A.1421(2); § 532.060(2); § 532.090.

<sup>164</sup> § 218A.1421(3); § 532.060(2).

<sup>165</sup> § 218A.1421(4); § 532.060(2).

<sup>166</sup> *2014 Crime In Kentucky*, KY. ST. POLICE (2014), [http://www.kentuckystatepolice.org/pdf/cik\\_2014.pdf](http://www.kentuckystatepolice.org/pdf/cik_2014.pdf) [<https://perma.cc/8UEY-64NG>].

<sup>167</sup> *Id.*

Kentucky courts spend limited time and funding on individuals arrested for marijuana offenses each year.

Legalizing marijuana under the Cannabis Freedom Act would inevitably reduce the rate of marijuana possession arrests for individuals over twenty-one years of age. Arrests of minors in possession would decrease too because they would have less access to marijuana. Marijuana dispensaries would be required to check identification of all customers like alcohol retailers do. It is unclear how the rate of marijuana distribution arrests would be impacted by the legalization of recreational marijuana. Of course, the black market for marijuana would remain, but its size would likely decrease as customers might prefer to purchase marijuana through legal means. Some illegal distributors of marijuana would likely either drop out of the market or make their business legal. Again, this would reduce the likelihood of minors obtaining marijuana because ease of access would decrease.

As a result of decreased marijuana arrests, Kentucky courts would waste less time and money on marijuana offenders, and courts would be able to focus their resources on prosecuting those who commit violent crimes and property crimes. Generally speaking, violent and property crimes are more detrimental to society than possession of marijuana. Prosecutors and public defenders, which are often over-worked, would be more effective in solving these types of crimes, if they did not have to needlessly spend time adjudicating marijuana crimes.<sup>168</sup>

It follows that Kentucky's prisons would become less crowded. The implementation of HB 463 did not reduce Kentucky's prison population as much as policymakers hoped.<sup>169</sup> Enacting the Cannabis Freedom Act would reduce the number of Kentucky prisoners because people would not be arrested for possession, and marijuana could be cultivated and sold through

<sup>168</sup> See generally Kristina Goetz, *As Demand for Public Defenders Rises in Kentucky, the Quality of Representation is at Risk, Leaving the State Vulnerable to Litigation*, THE COURIER J. (Nov. 19, 2015), <http://www.courier-journal.com/story/news/crime/2015/11/19/kentucky-public-defenders-risks/76046976/> [<https://perma.cc/E94V-NUCT>]; see generally R.G. Dunlop & Jason Riley, *Flaws in Kentucky's Court System can Lead to Injustice, Tragedy*, THE COURIER J. (Oct. 2, 2003), [http://archive.courier-journal.com/cjextra/2003projects/justice/day1/p1\\_state.html](http://archive.courier-journal.com/cjextra/2003projects/justice/day1/p1_state.html) [<https://perma.cc/ZCW4-TXB5>].

<sup>169</sup> Cheves, *supra* note 135.

legal means. This would save Kentucky prisons and, subsequently, taxpayers a considerable amount of money, as “[i]t costs Louisville taxpayers \$68 a day to house an inmate.”<sup>170</sup> If Kentucky prisons were less crowded with marijuana criminals, then they could use more of their funds to rehabilitate and educate inmates whom committed violent crimes and property crimes instead. Criminals who commit crimes such as rape or theft harm society much more than someone who possesses marijuana, thus it is important to teach such criminals how to become productive, law-abiding citizens while they are imprisoned. If money is wasted incarcerating marijuana users, such valuable education cannot be afforded.

Currently, marijuana possession is a misdemeanor, but all other marijuana offenses are felonies in Kentucky. The Cannabis Freedom Act would legalize possession, questionably would impose civil liability anyone who sells marijuana without a license, and would reduce the severity of penalties for unlicensed marijuana cultivation. Under the new scheme, cultivation of five or fewer plants would become a Class B misdemeanor, cultivation of six to ten plants would be a Class A misdemeanor, and cultivation of eleven or more plants would be a Class D felony.<sup>171</sup> It is unclear whether these penalties only apply to unlicensed marijuana cultivators. All penalties described in the bill are attached to cultivation, but there are no penalties laid out for those who sell, process, or test marijuana without a license. Therefore, these penalties may also apply to sellers and processors.

The bill also provides that “[n]o person shall cultivate, possess, test, transfer, or sell cannabis in this state without first obtaining a license under this section except as provided in . . . this Act.”<sup>172</sup> The bill would repeal the current sections that provide offenses for marijuana trafficking, possession of marijuana, and marijuana cultivation. However, there is not an

<sup>170</sup> Jason Riley, *Arrests for Marijuana, Other Misdemeanors Plummet Since Law Change*, WDRB.COM (Aug. 15, 2015, 1:55 PM), <http://www.wdrb.com/story/26291478/sunday-edition-lmpd-now-ticketing-offenders-with-small-amounts-of-pot> [https://perma.cc/5FXL-C2RG].

<sup>171</sup> S.B. 13, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016).

<sup>172</sup> *Id.* § 9.

explicit section in the Cannabis Freedom Act that imposes penalties on anyone who sells cannabis without a license. Although cultivation and retail sales seem to have two separate meanings in the bill, Section 14 only discusses penalties for persons who “act[ed] in the capacity of a cannabis *cultivation* facility under the provisions of this chapter without having secured a license.”<sup>173</sup> This provision reads as though it would apply to any of the four types of facilities that require a license, which are cultivation, processing, testing, and retail facilities.

Although it is unclear what the bill’s intended penalty for illegal marijuana traffickers or processors is, this Note argues that the Section 14 penalty for unlicensed cultivators apply to unlicensed sellers. This means that any unlicensed seller would be “subject to uniform civil penalties pursuant to KRS 131.180 and interest at the tax interest rate as defined in KRS 131.010(6).”<sup>174</sup> Thus, anyone who sells, cultivates, or processes marijuana without a license in Kentucky would be subject to tax penalties rather than prison sentences.

It would be logical for the bill’s civil and criminal liability provisions to apply, not only to unlicensed cultivators, but also to unlicensed sellers, processors, and testers. Under this scheme, each type of facility would face an equal penalty for not seeking a license. Furthermore, each person who did not obtain a license would be subject to a Class D felony at maximum. While this is a high penalty, the crime has more to do with tax evasion than anything. Anyone who grows eleven or more plants stands to make a sizeable sum of money from the sale of those plants, and it is reasonable for the government to want their share in taxes.

Reducing penalties for marijuana cultivation and possibly selling, processing, and testing, means that fewer Kentuckians would be convicted of felonies. Fewer felons mean more Kentuckians get to keep their right to vote. Since current Kentucky law disallows anyone with a felony to vote, this law could reduce the number of felons in the state, allowing more Kentuckians to have their voices heard on matters that affect their rights and their family’s rights.

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<sup>173</sup> *Id.* § 14.

<sup>174</sup> *Id.* § 11(5).

This Note previously discussed the racial disparity in marijuana arrests. Statistics show that whites and blacks use marijuana at comparable rates, yet significantly more black people are arrested for marijuana offenses. This is important because negative stereotypes of black people are perpetuated through disparate arrest rates. Far too often young black males are seen as uneducated, criminals, thugs, bad parents, or poor workers, but the government perpetuates these stereotypes when police arrest more blacks than whites for the same crime. If Kentucky legalized marijuana under the Cannabis Freedom Act, fewer young, low-income, black individuals would get arrested for possession or sale of marijuana. If these individuals were never arrested, they might have a better chance of obtaining a college education, a job, housing, and/or bank loans. Negative black stereotypes could be diminished through the enactment of the Cannabis Freedom Act because no one over the age of twenty-one would be arrested for marijuana possession.

Also, this racial disparity in marijuana arrests arguably violates the Equal Protection Clause of the Fourteenth Amendment, which provides, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>175</sup> Courts apply a two-part test to determine when a state’s racial classification is unconstitutional when based on a strict scrutiny basis of review.<sup>176</sup> First, the state must show that there is a compelling governmental interest, and second, the government has the burden of showing that the interest is narrowly tailored with no other facially neutral alternative to implement the proposed policy.<sup>177</sup> Generally, governmental classification based on race will be found unconstitutional. In *Brown v. Board of Education*, this test was applied wherein the Court determined that separate but equal treatment for black and white school children was unconstitutional.

Although *Brown* has nothing to do with marijuana-related arrests, its principles are applicable. First, Kentucky does not have a compelling governmental interest in arresting more black

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<sup>175</sup> U.S. CONST. amend XIV, § 1.

<sup>176</sup> *Brown v. Board of Educ.*, 347 U.S. 686 (1954).

<sup>177</sup> *Id.*

people than white people for marijuana offenses. There is evidence that black and white individuals use marijuana at the same rate. There is no indication that black marijuana users are more dangerous than white marijuana users. Second, the application of the law is not narrowly tailored because there is a facially race neutral alternative—arrest blacks and whites equally for marijuana offenses because whites use marijuana as much as blacks. Black and white people are not treated equally under Kentucky's current marijuana law, but enacting the Cannabis Freedom Act would fix the problem because people over the age of twenty-one would no longer be arrested for marijuana possession.

#### *B. Impacts on Kentucky's Budget*

The Cannabis Freedom Act sets forth the tax burden for licensing, application fees, and for sales from cultivation to retail. A license or license renewal for a cultivating, processing, testing, or retail facility would cost \$5,000.<sup>178</sup> When applying for a license, there is a nonrefundable \$100 application fee.<sup>179</sup> When a cultivation facility sells or transfers cannabis to a processing or retail facility in Kentucky, marijuana plants shall be taxed as follows: “[t]hirty dollars . . . per ounce on all cannabis flowers;” “[t]en dollars . . . per ounce on all parts of the cannabis plant other than the flowers; and” “[t]en dollars . . . per immature cannabis plant.”<sup>180</sup> The bill also states that lesser quantities would be taxed at a proportional rate.<sup>181</sup>

However, the bill does not set forth a sales tax. Under the bill, marijuana is to be regulated in the same way as alcohol. Thus, marijuana would likely be taxed at 6 percent, which is Kentucky's current sales tax. When Oregon legalized marijuana, it did not have a scheme through which to collect taxes at first because the state does not have a general sales tax.<sup>182</sup> Currently, Oregon taxes marijuana at 25 percent, but the rate is set to drop

<sup>178</sup> S.B. 13, *supra* note 168.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Vance, *supra* note 102.

to 17 percent.<sup>183</sup> After the tax rate drops, “local municipalities” will be “able to tack on an additional 3 percent.”<sup>184</sup> In comparison, Colorado taxes recreational marijuana 10 percent “on top of the 2.9 percent state sales tax” and allows local governments to include their own sales tax.<sup>185</sup> Washington taxes its recreational marijuana sales at 37 percent.<sup>186</sup> It is safe to say that Kentucky could tax recreational marijuana at a higher rate than its general sales tax and not hinder the market. Colorado generated \$37 million in its first year of legal marijuana sales, and \$70 million in the fiscal year ending on June 30, 2015 despite its heightened taxes.<sup>187</sup>

The Cannabis Freedom Act would fund public schools and addiction treatment facilities in Kentucky. 30 percent of generated tax revenue would go to the “public school fund to support education excellence in Kentucky.”<sup>188</sup> 20 percent would “be transferred to the Kentucky Department of Education,” which would award scholarships “to applicants based on socioeconomic need in order to attain an education” at a public university in the state.<sup>189</sup> 20 percent of the tax money would be appropriated “to the Office of Drug Control Policy, which” would give “grants to substance abuse treatment programs that employ evidence-based behavioral health treatment or medically assisted treatment.”<sup>190</sup> 15 percent of the tax revenue would go “to the Kentucky Law Enforcement Council, which” would grant money “to city or county law enforcement agencies to pay for body armor, bullet-resistant windshields for police vehicles, communications equipment, or training.”<sup>191</sup> The final 15 percent would “be deposited into the general fund.”<sup>192</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Whitaker, *supra* note 81; Tanya Basu, *Colorado Raised More Tax Revenue from Marijuana than Alcohol*, TIME (Sept. 16, 2015), <http://time.com/4037604/colorado-marijuana-tax-revenue/> [https://perma.cc/QCM5-HGK5].

<sup>188</sup> S.B. 13, *supra* note 168.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

Kentucky stands to collect millions of dollars in tax revenue if recreational marijuana is legalized under the Cannabis Freedom Act. It is hard to argue that the state's public schools and addiction treatment programs would not benefit from having millions of dollars added to their budgets. Just as eliminating marijuana offenses could keep young persons in school, additional funding is at least as instrumental, if not more. Kentucky cut its "per-student investment in K-12 schools by 11.4 percent between 2008 and 2015 once inflation is taken into account."<sup>193</sup> This ranks Kentucky the eleventh worst state in school funding budget cuts.<sup>194</sup>

In 2014, the state increased its per student spending by thirty-seven dollars, but this is not enough.<sup>195</sup> Legalizing marijuana and reaping the tax benefits seen in states like Colorado would improve Kentucky's public school funding unlike any other means could. There is hardly any other option to increase school funding outside of increasing existing tax rates. Increasing property tax rates, for example would not be fair to Kentuckians, since holding property is generally seen as necessary. It is not an activity the state wants to deter. On the other hand, taxing marijuana at a high rate is fair. Marijuana is an intoxicant and is not a necessity, thus taxing it is a fair penalty for its use. Since taxing marijuana at a high rate is likely the fairest way to generate tax revenue to increase public school funding, Kentucky should enact the Cannabis Freedom Act and make the Kentucky one of the states with the highest public school funding.

### *C. Arguments Against Legalizing Marijuana Are Unconvincing*

Despite convincing arguments that marijuana is not as harmful as traditionally believed, it still has many dogged opponents. One of the main arguments against legalizing marijuana is that drivers impaired by marijuana will cause an

<sup>193</sup> Ashley Spalding, *Kentucky's School Funding Cuts Among the Nation's Deepest*, KY. CENT. FOR ECON. POL'Y (Oct. 16, 2014), <http://kypolicy.org/kentuckys-school-funding-cuts-among-nations-deepest/> [https://perma.cc/S4KH-PVQC].

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

increased number of traffic accidents. Driving under the influence of marijuana is not as safe as driving sober.<sup>196</sup> Studies show that “marijuana impairs all the cognitive abilities needed for safe driving, including tracking, motor coordination, visual function and divided attention.”<sup>197</sup> However, driving drunk is much more dangerous. According to one study, drunk drivers are likely to “weave in their own lane,” “weave out of their lane or speed.”<sup>198</sup> In contrast, marijuana users are only likely to “weave within their own lane.” Furthermore, a 2013 Colorado study “found that in the year after medical marijuana laws were passed, traffic fatalities fell.”<sup>199</sup> This may occur because people are using marijuana when they would regularly be drinking.<sup>200</sup> Colorado has experienced this effect, and the state’s traffic fatalities are near all-time lows.<sup>201</sup> Whatever the cause, there is no evidence that legal marijuana increases traffic accidents.

A second argument claimed by marijuana opponents is that more children will use marijuana if it is legalized. If it is socially acceptable for adults to use it, children will not think it is hazardous.<sup>202</sup> If it is legal and widely distributed, children will have greater access to it.<sup>203</sup> Despite this concern, teen marijuana use has decreased in recent years.<sup>204</sup> In California, a study found no evidence that marijuana use in high school students increased, since the state legalized medical marijuana.<sup>205</sup> This evidence seems to indicate that regulation is the key to keep minors from

<sup>196</sup> Tia Ghose, *The Disturbing Truth About Driving While Stoned*, HUFFINGTON POST (July 6, 2015, 2:27 PM), [http://www.huffingtonpost.com/entry/the-truth-about-driving-while-stoned\\_us\\_559d56e6e4b05b1d028f849f](http://www.huffingtonpost.com/entry/the-truth-about-driving-while-stoned_us_559d56e6e4b05b1d028f849f) [https://perma.cc/ENZ2-KTJM].

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See Radley Balko, *Since Marijuana Legalization, Highway Fatalities in Colorado are at Near-Historic Lows*, WASH. POST (Aug. 5, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/08/05/since-marijuana-legalization-highway-fatalities-in-colorado-are-at-near-historic-lows/> [https://perma.cc/E6KC-7446].

<sup>202</sup> Christopher Ingraham, *The Case for Marijuana Legalization just Got Stronger*, WASH. POST (Dec. 16, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/16/one-of-the-biggest-arguments-against-marijuana-legalization-is-falling-apart/> [https://perma.cc/RSZ3-5Z9T].

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Nagourney & Lyman, *supra* note 70.

using marijuana. If Kentucky were to legalize recreational marijuana and regulate it like it does alcohol, then high school use rates may drop. Again, this is another way that Kentucky could keep teens in school and keep young people from committing crimes.

A third argument against legalizing marijuana is that people will overdose on edibles. There has been at least one case where an exchange student in Colorado ingested six times more than the recommended serving of marijuana, which contributed to his death.<sup>206</sup> After consuming the high dose of edible marijuana, the student “jumped off a balcony on the fourth floor of his building.”<sup>207</sup> In this case, the individual consumed five servings of edible marijuana, although he was advised not to.<sup>208</sup> While the death of the student is tragic, it could have been prevented through regulation.<sup>209</sup> It is easy to say that the individual in this case should have known not to eat that much marijuana at once. However, it takes longer to experience the “high” from edibles than inhaled marijuana, so it may seem like the product is not working.<sup>210</sup> This death indicates that Colorado and other states legalizing marijuana need to improve “public health messaging to reduce the risk for overconsumption of THC.”<sup>211</sup> Since this incident, Colorado has set a limit on the amount of THC in edibles and set a rule that their containers must be child proof.<sup>212</sup> Additionally, the CDC recommends that marijuana edibles “should have clear guidelines and labels.”<sup>213</sup> Beyond these precautionary measures, the user of the product should take responsibility for their health and be cautious of what they consume as they would with alcohol.

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<sup>206</sup> Avaneesh Pandey, *Marijuana Overdoes Through Pot Edibles a Cause for Concern, Says CDC*, INT'L BUS. TIMES (July 27, 2015, 3:22 AM), <http://www.ibtimes.com/marijuana-overdose-through-pot-edibles-cause-concern-says-cdc-2025323> [https://perma.cc/5XDT-VEVU].

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

#### IV. CONCLUSION

Marijuana legalization is a debate that cannot be ignored. Evidence shows that marijuana is not as dangerous as traditionally believed and that the War on Drugs has done more harm to our communities than good. Even the federal government has loosened its hard stance against marijuana in recent years. As attitudes change toward marijuana and the War on Drugs, states must act in the interest of their constituents.

While the Cannabis Freedom Act was not signed into law during the 2016 legislative session, it is important for state legislators to debate the topic because of the impacts marijuana has on Kentuckians who receive marijuana offenses, its impacts on the state's criminal justice system, and the potential tax revenue it would provide. It is in the best interest of Kentuckians to legalize recreational marijuana through the Cannabis Freedom Act or a similar regulatory scheme. Fewer Kentuckians, and especially Black Kentuckians, would be subject to marijuana possession arrests, thus the state's criminal justice system will see a reduction in its caseload. As a result, Kentucky's large prison population would decrease in size, and there would be fewer disenfranchised felons. Additionally, Kentucky's schools and addiction treatment services would benefit from increased funding generated from marijuana tax revenue.

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