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# UNREALISTIC EXPECTATIONS: THE FEDERAL GOVERNMENT'S UNACHIEVABLE MANDATE FOR STATE CANNABIS REGULATION

Rebecca Sweeney\*

*Abstract:* The states that have legalized cannabis maintain a complicated relationship with the federal government. Since the Ogden Memorandum was issued in 2009, the federal government has left regulation of cannabis to the discretion of the states. That policy has recently shifted. In 2018, former U.S. Attorney General Jeff Sessions issued a new memorandum that rescinded guidance for states about how to structure the legalization of cannabis. The federal government's current position is now ideologically aligned with that of states like Nebraska and Oklahoma. These states chose not to legalize cannabis and instead adhere to the Controlled Substances Act's classification of cannabis as a Schedule I substance. In 2015, Nebraska and Oklahoma unsuccessfully petitioned the U.S. Supreme Court for permission to sue Colorado because its cannabis was leaking outside the state's borders. Nebraska and Oklahoma insisted that Colorado's legalization scheme compromises the drug policies of Nebraska, Oklahoma, and other neighboring states. Because the U.S. Department of Justice rescinded its previous guidance and Congress continues to stay silent regarding the tension between state laws, the judicial branch has a new opportunity to validate the concerns of Nebraska and Oklahoma. Therefore, it is even more important for states that legalize cannabis to prevent cannabis from leaking outside their borders. To prevent diversion of cannabis outside its state's borders, the Washington State Legislature has created a regulatory licensing system. But despite Washington's tightly regulated system, the federal government remains concerned about the legalized cannabis industry.

Neither Washington nor Colorado has successfully prevented all cannabis diversion. The Cole Memorandum articulated an unrealistic standard for states' reduction in diversion: total elimination. At the very least, Washington and Colorado's regulatory procedures should be compared to those of other states without legalization. Ultimately, the federal government should conclusively determine whether states are able to legalize cannabis without the overhanging threat of federal intervention on the basis of diversion.

## INTRODUCTION

On November 6, 2012, Washington voters decided to legalize recreational marijuana, also known as cannabis.<sup>1</sup> Voters approved

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1. See Jonathan Martin, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Nov. 6, 2012, 11:40 PM), <https://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/> (last visited Oct. 24, 2018).

legalized recreational cannabis through Initiative 502,<sup>2</sup> which contradicted the past “75 years of national marijuana prohibition.”<sup>3</sup> Even though the required majority of voters passed the Initiative,<sup>4</sup> the state was far from consensus: nineteen of the thirty-nine counties voted against legalization.<sup>5</sup>

Washington became the second state to legalize cannabis, shortly following Colorado’s legalization.<sup>6</sup> Colorado’s voters were similarly divided when they voted to legalize cannabis through Colorado Constitutional Amendment 64.<sup>7</sup> Forty-five percent of voters opposed legalization.<sup>8</sup> Almost two years later in November 2014, Oregon voters legalized cannabis as well,<sup>9</sup> marking the Pacific Northwest as the “nexus of a new social experiment” nationally and internationally.<sup>10</sup> Everyone, including both proponents and opponents of cannabis legalization, waited to hear the federal government’s response.<sup>11</sup>

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2. Voters approved Initiative 502 by 55.7% and counties approved the Initiative by twenty to thirty-nine. See *November 06, 2012 General Election Results*, WASH. SECRETARY ST. (Nov. 27, 2012, 4:55 PM), <http://results.vote.wa.gov/results/20121106/Measures-All.html> [<https://perma.cc/TL5M-4C56>]; *Initiative Measure No. 502 Concerns Marijuana – County Results*, WASH. SECRETARY ST. (Nov. 27, 2012, 4:55 PM), [http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana\\_ByCounty.html](http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html) [<https://perma.cc/TL5M-4C56>].

3. See Martin, *supra* note 1 (quoting Alison Holcomb, Initiative 502’s campaign manager and primary drafter).

4. See *id.*

5. See *Initiative Measure No. 502 Concerns Marijuana – County Results*, *supra* note 2; Peter Clark, *Recreational Marijuana Sales by County vs. 1502 Voters*, CANNA VENTURES (Dec. 27, 2014), <https://canna-ventures.com/blog/county-marijuana-sales-vs-i-502-voters/> [<https://perma.cc/BV9G-GXCM>].

6. See Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFPOST (Nov. 6, 2012), [https://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co\\_n\\_2079899.html](https://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html) [<https://perma.cc/GV8J-X4WX>].

7. COLO. CONST. amend. 64 (2012). Fifty-five percent of Colorado voters approved Amendment 64, and thirty-five out of sixty-four counties approved. See *2012 General Election Results: Amendments and Propositions*, COLO. SECRETARY ST., <https://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/amendProp.html#64> [<https://perma.cc/4WHQ-D5JU>].

8. *Id.*

9. Noelle Crombie, *Recreational Marijuana Passes in Oregon: Oregon Election Results 2014*, OREGONIAN (Nov. 4, 2014), [http://www.oregonlive.com/politics/index.ssf/2014/11/recreational\\_marijuana\\_passes.html](http://www.oregonlive.com/politics/index.ssf/2014/11/recreational_marijuana_passes.html) [<https://perma.cc/JCJ4-GEXM>].

10. Martin, *supra* note 1.

11. *Id.* (“Many legal experts expect the U.S. Justice Department, which remained silent during the presidential-year politics, to push back and perhaps sue to block I-502 based on federal supremacy.”); see also *A Liberal Drift*, ECONOMIST (Nov. 10, 2012), <https://www.economist.com/news/united-states/21565972-local-votes-suggest-more-tolerant->

After Washington and Colorado legalized recreational cannabis, the federal government did not take action.<sup>12</sup> The U.S. Department of Justice (DOJ) only re-stated the Controlled Substances Act (CSA) and reported that the department was “reviewing ballot initiatives.”<sup>13</sup>

The DOJ previously considered whether to actively enforce federal law when states first legalized medical cannabis. In 2009, U.S. Deputy Attorney General David W. Ogden issued the Ogden Memorandum.<sup>14</sup> The Ogden Memorandum merely advised U.S. Attorneys how to interact with states that had only legalized *medical* cannabis.<sup>15</sup> The Ogden Memorandum identified seven key characteristics for when the use of medical cannabis would implicate federal interests and warrant federal prosecution.<sup>16</sup> The federal government did not provide an official response to states that legalized recreational cannabis until August 13, 2012. The response was the Cole Memorandum.<sup>17</sup> The Cole Memorandum articulated similar criteria as the Ogden Memorandum but with respect to recreational cannabis.<sup>18</sup> The Cole Memorandum indicated

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countrybut-not-more-left-wing-one-liberal-drift [https://perma.cc/3LM2-PM2D] (“Marijuana remains illegal under federal law, and the divergence in state and federal thinking may yet spell trouble . . .”).

12. Alex Dobuzinskis & Alina Selyukh, *Pot Legalization Proceeds in Key States with Feds Mostly Silent*, REUTERS (Nov. 15, 2012, 12:05 PM), <https://www.reuters.com/article/us-usa-marijuana-legalization/pot-legalization-proceeds-in-key-states-with-feds-mostly-silent-idUSBRE8AE1NA20121115> [https://perma.cc/QR3Y-ZHLT] (“The Obama administration’s relative silence on moves to legalize recreational marijuana in Colorado and Washington has left officials in those Western states unsure how to move forward without running afoul of the U.S. federal government.”).

13. *Id.* (internal quotations omitted).

14. Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, for Selected U.S. Att’ys (Oct. 19, 2009) [hereinafter Ogden Memorandum], <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [https://perma.cc/S6ZQ-QWR6].

15. *Id.* at 1.

16. Seven key characteristics were identified by the Ogden Memorandum:

[U]nlawful possession or unlawful use of firearms, violence, sales to minors, financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law, amounts of marijuana inconsistent with purported compliance with state or local law, illegal possession or sale of other controlled substances, or ties to other criminal enterprises.

*Id.* at 2.

17. Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, for All U.S. Att’ys (Aug. 29, 2013) [hereinafter Cole Memorandum], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/9QX4-LYS3].

18. See Vince Sliwoski, *Oregon Marijuana, the Feds and the Williams Memo*, CANNA L. BLOG (May 22, 2018), <https://www.cannalawblog.com/oregon-marijuana-the-feds-and-the-williams-memo/> [https://perma.cc/ZYG5-YCMQ].

that the federal government would not challenge state laws legalizing the recreational cannabis industry,<sup>19</sup> and would permit states to follow individual state legalization plans.<sup>20</sup> However, cannabis remains classified by Congress as an illegal Schedule I substance.<sup>21</sup> The Controlled Substances Act first listed cannabis as an illegal substance since 1970,<sup>22</sup> because at that time, the DOJ felt it had “no recognized medical use.”<sup>23</sup>

The state laws that legalized cannabis and its recreational use contradict federal law. This conflict continues to cause concern whether the federal government will enforce the Controlled Substances Act against Washington, Colorado, Oregon, and other states that have subsequently legalized recreational cannabis.<sup>24</sup> To address these concerns, Washington’s I-502 directed the Washington Liquor and Cannabis Board (LCB) to develop rules and procedures in accordance with the federal laws.<sup>25</sup> The LCB created a highly regulated licensing structure that closely limited the availability and production of cannabis,<sup>26</sup> knowing that the federal government would consider diversion of recreational cannabis when determining whether to enforce the Controlled Substances Act.<sup>27</sup> Like Washington, Colorado tried to

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19. Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws if Distribution Is Regulated*, WASH. POST (Aug. 29, 2013), [https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws—for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972\\_story.html?utm\\_term=.93b0b78b1a0f](https://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws—for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html?utm_term=.93b0b78b1a0f) [<https://perma.cc/25T8-U35B>].

20. *See id.*

21. *See* Controlled Substances Act, 21 U.S.C. § 812(c)(10) (2012). The Controlled Substances Act uses the term “marihuana” instead of “cannabis” or “marijuana.”

22. Controlled Substances Act, Pub. L. No. 91-513, § 202, 84 Stat. 1247, 1249 (1970).

23. *Federal Drug Abuse and Drug Dependence Prevention, Treatment, and Rehabilitation Act of 1970: Hearings on S.B. 3562 Before the Special Subcomm. on Alcoholism and Narcotics of the S. Comm. on Labor and Public Welfare*, 91st Cong. 473 (1970) (statement of John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, U.S. Department of Justice).

24. *See* Ferner, *supra* note 6. The article quotes Colorado Governor John Hickenlooper, who stated, “[t]his will be a complicated process, but we intend to follow through. That said, federal law still says marijuana is an illegal drug so don’t break out the Cheetos or gold fish too quickly.” *Id.*

25. *See* Wash. Initiative Measure No. 502, § 10(9) (enacted 2012) (codified in WASH. REV. CODE. §§ 69.50.301–69.50.369 (2018)), [https://www.sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](https://www.sos.wa.gov/_assets/elections/initiatives/i502.pdf) [<https://perma.cc/A34B-RHH3>].

26. *See* WASH. REV. CODE §§ 69.50.301–69.50.395; WASH. ADMIN. CODE § 314-55 (2018).

27. *See* Gene Johnson, *Wash. Vows to Try to Keep Weed in State – But How?*, MED. XPRESS (Jan. 29, 2013), <https://medicalxpress.com/news/2013-01-vows-weed-statebut.html> [<https://perma.cc/GSV9-P4D5>] (“Part of the DOJ’s political calculus in deciding whether to sue is likely to be how well the department believes the two states can keep the legal weed within their borders. During a meeting with Inslee last week, Holder asked a lot of questions about diversion, Inslee said.”).

protect its recreational legalization scheme.<sup>28</sup> But instead of limiting licenses, Colorado granted licenses to applicants who satisfied jurisdictional criteria.<sup>29</sup> Colorado hoped to prevent the diversion of legal cannabis by controlling every avenue of access to legal cannabis through legalization and regulation.<sup>30</sup> Colorado permitted vertical integration (control of the production, processing, and sale of a cannabis plant)<sup>31</sup>; personal cultivation (home growing and use)<sup>32</sup>; medical retail sales<sup>33</sup>; and recreational retail sales.<sup>34</sup> In other words, Colorado legalized many more avenues to access cannabis than Washington. In contrast, Washington “ultimately aim[ed] to achieve tighter control of legal marijuana [by] prohibiting home grows and manipulating supply to ensure desirable prices.”<sup>35</sup>

This Comment considers whether the strict limited licensing structure used by Washington effectively prevents diversion of legalized cannabis. To assess effectiveness, this Comment compares the regulatory structures of Washington and Colorado. Part I examines the federal government’s requirements for states that legalize cannabis and endeavors to explicate standards regarding enforcement and diversion. Part II addresses the consequences of failing to regulate cannabis properly or failing to prevent cannabis diversion. This Part examines *Nebraska v. Colorado*<sup>36</sup> and the ramifications of inter-state hostility. Particularly, inter-state hostility in the context of the Trump Administration’s policy on cannabis. Part III describes the measures that Washington took to prevent diversion, and Part IV explains and compares Colorado and Washington’s regulatory structure. Finally, Part V compares the effectiveness of each system with the overall goal of preventing diversion. This Comment argues that the standards

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28. John Walsh, *Q&A: Legal Marijuana in Colorado and Washington*, BROOKINGS (May 21, 2013), <https://www.brookings.edu/research/qa-legal-marijuana-in-colorado-and-washington/> [<https://perma.cc/D5K6-2H2K>].

29. See COLO. CONST. art. 18, § 16(5)(g)(III).

30. See Walsh, *supra* note 28.

31. See *id.* (“In Colorado, the new legal structure is more consistent with its existing, vertically integrated medical market.”).

32. See *id.*; *Home Grow Laws*, COLO.: MARIJUANA (2018), <https://www.colorado.gov/pacific/marijuana/home-grow-laws> [<https://perma.cc/S3QQ-T5R8>].

33. See Walsh, *supra* note 28.

34. See *id.*

35. John Hudak & Philip A. Wallach, *Legal Marijuana: Comparing Washington and Colorado*, BROOKINGS (July 8, 2014), <https://www.brookings.edu/blog/fixgov/2014/07/08/legal-marijuana-comparing-washington-and-colorado/> [<https://perma.cc/JF7H-N8MQ>].

36. 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016) (denying motion for leave to file a bill of complaint).

espoused by the Cole Memorandum unrealistically require states to eliminate all diversion. This expectation places any state that chooses to legalize cannabis in a precarious, uncertain position. The absence of clear answers forces business owners, individual consumers, and tax beneficiaries to balk at this new opportunity. This Comment concludes that an isolated examination of diversion in Colorado and Washington presents meaningless data. Instead, comparing diversion rates between states that have legalized cannabis and those where cannabis remains illegal provides a more realistic understanding of the effectiveness of state regulations. The federal government must recognize that the regulatory schemes of Colorado and Washington cannot completely prevent all diversion, because undoubtedly no system will be able to accomplish that task.

## I. STATE CANNABIS LEGALIZATION CONTRADICTS FEDERAL LAW, WHICH CONTINUES TO CLASSIFY CANNABIS AS AN ILLEGAL SUBSTANCE

The federal government's response to the legalization of medical cannabis gave states the courage to continue pursuing legalization of recreational cannabis.<sup>37</sup> However, the federal government has responded only through rescindable DOJ memoranda.<sup>38</sup> The Ogden and Cole Memoranda provided a veneer of security to fledgling cannabis-based businesses who took the chance that the federal government would allow them to flourish.<sup>39</sup> However, those memoranda are not binding on the federal government.<sup>40</sup> For example, the memoranda do not prevent the federal government from changing its current policy or enforcing the Controlled Substances Act.<sup>41</sup> The Cole Memorandum stated, “[t]his memorandum does not alter in any way the Department’s authority to

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37. See John Ingold, *Federal Government Won't Block Colorado Marijuana Legalization*, DENVER POST (Aug. 29, 2013, 5:33 AM), <https://www.denverpost.com/2013/08/29/federal-government-wont-block-colorado-marijuana-legalization/> [<https://perma.cc/5PAD-2SMR>] (citing Gov. John Hickenlooper's statement earlier that day); Press Release, Wash. State Liquor Control Bd., Liquor Control Board Statement Following Department of Justice's Guidance Memo on Marijuana (Aug. 29, 2013), <https://lcb.wa.gov/pressreleases/liquor-control-board-statement-following-department-justice%E2%80%99s-guidance-memo-marijuana> [<https://perma.cc/56AB-LKHK>].

38. See Cole Memorandum, *supra* note 17; Ogden Memorandum, *supra* note 14.

39. See Ingold, *supra* note 37.

40. See Ogden Memorandum, *supra* note 14, at 2 (“This memorandum is intended solely as a guide . . . .”); Cole Memorandum, *supra* note 17, at 4.

41. See Cole Memorandum, *supra* note 17, at 4; Ogden Memorandum, *supra* note 14.

enforce federal law, including federal laws relating to marijuana . . . .”<sup>42</sup> The Trump Administration underscored the federal government’s authority when the DOJ issued the Sessions Memorandum.<sup>43</sup> U.S. Attorney General Jeff Sessions issued the Sessions Memorandum on January 4, 2018 as a replacement for the Ogden and Cole Memoranda.<sup>44</sup> The Sessions Memorandum removed any perceived sense of security that states felt about federal involvement in state legalization schemes.<sup>45</sup>

This Part discusses the three memoranda issued by the federal government in the last fifteen years relating to cannabis and federal enforcement. First, it explains how the Ogden Memorandum set precedential guidelines for medical cannabis. Second, it addresses the guidelines that the Cole Memorandum established and how they differ from standards for medical cannabis. Finally, it addresses the uncertainty about the future of cannabis after the rescission of the Ogden and Cole Memoranda.

*A. The Ogden Memorandum Responded to Legalization of Medical Cannabis and Set a Precedent for the Cole Memorandum*

Several states initially legalized cannabis for medical purposes, not recreational use.<sup>46</sup> California became the first state to allow medical use of cannabis in 1996.<sup>47</sup> Under California Proposition 215, also known as the Compassionate Use Act of 1996,<sup>48</sup> a “qualifying person and her caregiver” receive “immunity from criminal prosecution when the state attempts to charge such persons with possession or cultivation of marijuana.”<sup>49</sup>

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42. *Id.*

43. See Memorandum from Jefferson B. Sessions, III, Att’y Gen., U.S. Dep’t of Justice, for All U.S. Att’ys (Jan. 4, 2018) [hereinafter Sessions Memorandum], <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/J27U-H78H>].

44. See *id.* at 1.

45. See *id.*

46. See *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Feb. 15, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/UC4F-BQ36>]. Jurisdictions that legalized medical cannabis to some extent before 2009 include: Alaska, California, Colorado, District of Columbia, Hawaii, Maine, Michigan, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

47. See *id.*; *California’s Medical Marijuana Laws & Regulations*, AMS. FOR SAFE ACCESS, [https://www.safeaccessnow.org/californias\\_medical\\_marijuana\\_laws](https://www.safeaccessnow.org/californias_medical_marijuana_laws) [<https://perma.cc/JN52-KT22>].

48. See Cal. Proposition 215, Compassionate Use Act of 1996 (enacted 1996) (codified in CAL. HEALTH & SAFETY CODE 11362.5 (West 2018)).

49. Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 708 (1998) (citing CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 1998)).



The federal government issued its response to California and other states that legalized medical cannabis in the Ogden Memorandum in 2009.<sup>50</sup> The Ogden Memorandum stated, “[P]ursuit of [the federal government’s] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>51</sup> To further guide U.S. Attorneys, the Ogden Memorandum explicitly identified characteristics that, if present, would indicate that the use of cannabis did not comply with state law.<sup>52</sup> The Ogden Memorandum outlined seven characteristics.<sup>53</sup> Most of the characteristics related to criminal activity, such as unlawful possession of firearms, violence, and ties to criminal enterprises.<sup>54</sup> However, the Ogden Memorandum emphasized compliance with state laws.<sup>55</sup> The federal government deferred to state law to impose limits on the amount of “cash” a person may gain or hold from medical cannabis sales.<sup>56</sup> The Ogden Memorandum only outlined areas where the federal government would intervene if the states failed to adequately regulate the cannabis market,<sup>57</sup> and the federal government did not prohibit the states from moving ahead with medical cannabis legalization.<sup>58</sup> Because of this stance, many people thought that the Ogden Memorandum implicitly sanctioned the state’s authority to regulate cannabis use within its boundaries.<sup>59</sup> As a result, the number of medical cannabis clinics

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50. See Ogden Memorandum, *supra* note 14, at 1–2.

51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. See *id.*

55. See *id.* at 2–3.

56. See *id.* at 2.

57. See *id.* at 2–3.

58. See *id.*

59. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 86–87 (2015); John Schroyer, *The Famous Marijuana Memos: Q&A with Former DOJ Deputy Attorney General James Cole*, MARIJUANA BUS. DAILY (July 27, 2016), <https://mjbizdaily.com/the-famous-marijuana-memos-qa-with-former-doj-deputy-attorney-general-james-cole/> [<https://perma.cc/XQB4-M6BN>] (quoting James M. Cole, Deputy Att’y Gen., “[y]ou have to go back to the Ogden Memo, which was the first one kind of in a series, and the sense that U.S. attorneys had, and came to me to try and remedy, which was that people were over-reading the Ogden Memo . . . it wasn’t intended to say that anyone who’s doing it in compliance with state law is just fine . . .”).

exploded.<sup>60</sup> But the black-market cannabis industry also continued to thrive.<sup>61</sup> The black market benefited from the increased awareness and limited availability of legal cannabis, and the demand for cannabis soared.<sup>62</sup> The interaction between legal medical cannabis and illegal recreational cannabis markets forced the federal government to reconsider its stance on legalizing cannabis for anything more than medicinal use.<sup>63</sup> Then the federal government began to crack down on California dispensaries and growers through raids, increased surveillance, and license revocation.<sup>64</sup>

*B. The Cole Memorandum Reiterated Enforcement Priorities Similar to the Ogden Memorandum's*

Even as the federal government's enforcement called into question the viability of legal medical cannabis, Washington and Colorado both forged ahead with the legalization of recreational cannabis in November 2012.<sup>65</sup> In response, on August 29, 2013, James M. Cole, Deputy Attorney General under the Obama Administration, issued guidance for states that legalized recreational cannabis, known as the Cole Memorandum.<sup>66</sup> The Cole Memorandum provided additional guidance for "all federal enforcement" activities and officers, in determining how to respond to the legalization of recreational cannabis.<sup>67</sup> The Memorandum reminded the states that legalized recreational cannabis that the CSA still banned cannabis.<sup>68</sup> Like the Ogden Memorandum, the Cole Memorandum identified eight "enforcement priorities"<sup>69</sup> that the

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60. See Mandalit Del Barco, *California Officials Target Big Marijuana Growers*, NPR (Dec. 1, 2009), <https://www.npr.org/templates/story/story.php?storyId=120983848> [<https://perma.cc/YXF3-GSQ3>].

61. *See id.*

62. *See id.*

63. *See* Chemerinsky, *supra* note 59, at 86–88.

64. *See id.*; Greg Winter, *U.S. Cracks Down on Medical Marijuana in California*, N.Y. TIMES (Oct. 31, 2001), <http://www.nytimes.com/2001/10/31/us/us-cracks-down-on-medical-marijuana-in-california.html> (last visited Dec. 4, 2018); Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Feb. 16, 2012), <https://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> [<https://perma.cc/75QU-FKGG>].

65. *See* Martin, *supra* note 1; Ferner, *supra* note 6.

66. *See* Cole Memorandum, *supra* note 17, at 1.

67. *See id.*

68. *See id.* at 4.

69. The eight enforcement priorities included:

Preventing the distribution of marijuana to minors; Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; Preventing

DOJ felt merited special attention.<sup>70</sup> The Cole Memorandum attempted to interpret and clarify the guidance issued in the Ogden Memorandum.<sup>71</sup> Rather than focus federal government resources on prosecuting lower-level violations, the Cole Memorandum urged federal enforcement agencies to concentrate on the enforcement priorities and leave other violations to local law enforcement agencies.<sup>72</sup> Furthermore, it suggested that those federal enforcement agencies should be less willing to interfere with states that possess “strong and effective regulatory and enforcement systems.”<sup>73</sup> Ultimately, the level of oversight by the federal government hinged on “whether the conduct at issue implicates one or more of the enforcement priorities.”<sup>74</sup>

The federal government’s enforcement priorities between the Ogden Memorandum and Cole Memorandum shifted.<sup>75</sup> While the emphasis remained on preventing criminal activity in conjunction with cannabis, federal concern increased regarding the diversion of legal Washington and Colorado cannabis to places beyond their respective borders.<sup>76</sup> The Cole Memorandum required states to prevent diversion of recreational cannabis.<sup>77</sup> If a state failed to do so, the federal government would intervene in state legalization by enforcing the CSA.<sup>78</sup> To protect the

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state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; Preventing violence and the use of firearms in the cultivation and distribution of marijuana; Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and Preventing marijuana possession or use on federal property.

*Id.* at 1–2.

70. *See id.*

71. *See* Schroyer, *supra* note 59 (“[Question:] Your first major memo sent a chill through the industry. How did that come about, and what was the intention behind it? . . . [Answer:] You have to go back to the Ogden Memo, which as the first one kind of in a series, and the sense that I think the U.S. Attorneys had, and came to me to try and remedy, which was that people were over-reading the Ogden Memo. . . it wasn’t intended to say that anyone who’s doing it in compliance with state law is just fine, and that’s where the misreading was coming in. So we wanted to try to clarify that.”).

72. *See* Cole Memorandum, *supra* note 17, at 3–4.

73. *See id.* at 2.

74. *See id.* at 3.

75. *See* Ogden Memorandum, *supra* note 16, at 2; Cole Memorandum, *supra* note 17, at 2–3.

76. *See* Cole Memorandum, *supra* note 18, at 3.

77. *See id.*

78. *See id.* at 2 (“Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above [diversion].”).

recreational cannabis industry from federal intervention, each state had to fully comply with the Cole Memorandum.<sup>79</sup>

Washington and Colorado each established comprehensive regulatory schemes to comply with the Cole Memorandum's enforcement priorities.<sup>80</sup> The Washington LCB tailored licensing structure to control and regulate the spread of cannabis.<sup>81</sup> By creating a strict, limited regulatory scheme, the LCB seems to have been aiming to “[p]revent[] the diversion of marijuana from states where it is legal under state law in some form to other states.”<sup>82</sup> Colorado similarly created comprehensive regulation to control the flow of recreational cannabis.<sup>83</sup> Instead of limiting licenses numerically, Colorado attempted to regulate every pathway through which a person might obtain cannabis.<sup>84</sup>

### C. *The Sessions Memorandum Jeopardizes the Future of Cannabis and Elevates the Importance of Preventing Diversion*

On January 4, 2018, Attorney General Jeff Sessions rescinded the Cole and Ogden Memoranda through a new memorandum to U.S. Attorneys.<sup>85</sup> Sessions simply stated, “[g]iven the Department’s well-established principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”<sup>86</sup> The press release accompanying the memorandum described it as a “return to the rule of law.”<sup>87</sup> In a statement, Sessions also implied that the previous memoranda undermined that “rule of

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79. *See id.* (“A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice.”)

80. *See* WASH. REV. CODE § 69.50.342 (2018); COLO. REV. STAT. § 12-43.4 (2018).

81. *See Rule Making by the Liquor Control Board Regarding the Production, Processing, and Sale of Marijuana Pursuant to I-502: Hearing Before the H. Gov’t Accountability & Oversight Comm.*, 2013 Leg., 63d Sess., at 9:41 (Wash. 2013) (July 24, 2013, 11:00 am) [hereinafter *Rule Making*], [www.tvw.org/watch/?clientID=9375922947&eventID=2013071022&eventID=2013071022&autoStartStream=true](http://www.tvw.org/watch/?clientID=9375922947&eventID=2013071022&eventID=2013071022&autoStartStream=true) (last visited Oct. 23, 2018) (statement of Rick Garza, Director, Liquor Control Board).

82. *See* Cole Memorandum, *supra* note 17, at 2.

83. *See* 1 COLO. CODE REGS. § 212-2.309 (LexisNexis 2018); Hudak & Wallach, *supra* note 35.

84. *See* 1 COLO. CODE REGS. § 212-2.101; Hudak & Wallach, *supra* note 35.

85. *See* Sessions Memorandum, *supra* note 43.

86. *Id.*; *see also* Martin, *supra* note 1 (discussing the Ogden Memorandum, Cole Memorandum, and other guiding memoranda on cannabis).

87. Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [https://perma.cc/WLF2-C6NG].

law.”<sup>88</sup> After Sessions issued the new guidance, it was uncertain whether the investigation and prosecution of the cannabis industry would actually increase.<sup>89</sup> The Sessions Memorandum explicitly left the decision up to individual U.S. Attorneys.<sup>90</sup> However, U.S. Attorneys follow certain guiding principles, which focus on the policy goals of the federal government.<sup>91</sup>

Invested jurisdictions swiftly responded to the Sessions Memorandum. Seattle Mayor Jenny Durkan stated that it would be “‘nearly impossible’ to ‘physically investigate and prosecute every legal shop’” and further vowed to “prohibit Seattle police officers from cooperating with authorities enforcing federal marijuana laws.”<sup>92</sup> Furthermore, Washington Governor Jay Inslee declared,

In Washington state we have put in place a system in place [sic] that adheres to what we pledged to the people of Washington and the federal government; it’s well regulated, keeps criminal elements out, keeps pot out of the hands of kids and tracks it all carefully enough to clamp down on cross-border leakage. We are going to keep doing that and overseeing the well-regulated market that Washington voters approved.<sup>93</sup>

Colorado responded similarly. Colorado Governor John Hickenlooper stated, “The Cole Memo got it right . . . Colorado has

88. See Avery Anapol, *DOJ: Rolling Back Obama-Era Marijuana Rules a ‘Return to the Rule of Law’*, HILL (Jan. 4, 2018, 1:27 PM), <http://thehill.com/homenews/administration/367439-sessions-rolling-back-obama-era-guidance-that-allowed-legal-marijuana> [https://perma.cc/Y2YS-ZUHN]; Josh Gerstein & Cristiano Lima, *Sessions Announces End to Policy That Allowed Legal Pot to Flourish*, POLITICO (Jan. 4, 2018, 9:31 AM), <https://www.politico.com/story/2018/01/04/jeff-sessions-marijuana-policy-us-attorney-enforcement-324020> [https://perma.cc/846M-24VR] (“In a statement, the attorney general said the department’s earlier guidance ‘undermines the rule of law’ by second-guessing the national drug laws Congress has passed.”).

89. See, e.g., Hillary Bricken, *Breaking News: Bye, Bye Cole Memo, Hello Uncertainty for Marijuana*, CANNA L. BLOG (Jan. 4, 2018), <https://www.cannalawblog.com/breaking-news-bye-bye-cole-memo-hello-uncertainty-for-marijuana/> [https://perma.cc/G5M6-YM9K] (“The question now becomes what will future DOJ enforcement look like?”).

90. See Sessions Memorandum, *supra* note 43, at 1 (“These principles require federal prosecutors deciding which cases to prosecute to weigh all the relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”).

91. See *id.*

92. Lester Black, *What Does Jeff Sessions’ War On Legal Weed Mean For Washington State?*, STRANGER (Jan. 4, 2018, 1:00 PM), <https://www.thestranger.com/slog/2018/01/04/25678999/what-does-jeff-sessions-war-on-legal-weed-mean-for-washington-state> [https://perma.cc/HC6M-DEM6] (quoting Seattle Mayor Jenny Durkan).

93. *Statement from Inslee Regarding Reports That USDOJ Will Rescind Cole Memo*, WASH. GOVERNOR: JAY INSLEE (Jan. 4, 2018), <https://www.governor.wa.gov/news-media/statement-inslee-regarding-reports-usdoj-will-rescind-cole-memo> [https://perma.cc/KK4A-935A].

created a comprehensive regulatory system committed to supporting the will of our voters.”<sup>94</sup> Governor Hickenlooper promised that “[t]oday’s decision [rescinding the Cole Memorandum] does not alter the strength of our resolve in those areas, nor does it change my constitutional responsibilities.”<sup>95</sup> Echoing Governor Hickenlooper, Denver Mayor Michael Hancock called the decision to rescind the Cole Memorandum “severely disappointing.”<sup>96</sup> Colorado’s U.S. Senator, Cory Gardner, strongly criticized the decision because it “trampled on the will of the voters.”<sup>97</sup> Both Governor Hickenlooper and Governor Inslee emphasized the efficacy of their states’ implemented regulatory systems and continued efforts to comply with the Cole Memorandum guidelines.

Both the U.S. Attorneys for Washington and Colorado indicated that, despite the rescission of the Cole Memorandum, their offices and policies would not change. Each U.S. Attorney noted that existing policies, procedures, and goals already comply with the guiding principles articulated in the Sessions Memorandum.<sup>98</sup> U.S. Attorney for the District of Colorado Bob Troyer said that “his office will continue to focus on ‘identifying and prosecuting those who create the greatest safety threats to our communities around the state,’” goals which satisfy

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94. *Gov. Hickenlooper’s Statement on Trump Administration’s Decision to Rescind Policy Guiding Federal Approach to Marijuana Legalization*, COLO. GOVERNOR JOHN HICKENLOOPER (Jan. 4, 2018), <https://www.colorado.gov/governor/news/gov-hickenlooper%E2%80%99s-statement-trump-administration%E2%80%99s-decision-rescind-policy-guiding-federal> [<https://perma.cc/NN3E-X4YJ>].

95. *Id.*

96. See Thomas Mitchell, *Mayoral Candidate Khalatbari Challenges Hancock’s Response to Sessions*, WESTWORD (Jan. 5, 2018, 8:21 AM), <http://www.westword.com/marijuana/denver-mayor-hancock-challenger-respond-to-sessions-move-9855751> [<https://perma.cc/U5S8-UX6M>] (quoting Denver Mayor Michael Hancock).

97. See Jesse Paul & John Murray, *Cory Gardner Says AG Jeff Sessions’ Decision to Rescind Marijuana Policy “Has Trampled on the Will” of Colorado Voters*, DENVER POST (Jan. 4, 2018, 8:51 AM), <https://www.denverpost.com/2018/01/04/cory-gardner-jeff-sessions-marijuana-policy/> [<https://perma.cc/Q4QD-ZBTA>] (quoting Senator Cory Gardner).

98. See Associated Press, *U.S. Attorney for Colorado: No Changes on Marijuana Enforcement*, FOX31 NEWS (Jan. 4, 2018, at 11:51 AM), <http://kdvr.com/2018/01/04/u-s-attorney-for-colorado-status-quo-on-marijuana-prosecutions/> [<https://perma.cc/KP5Y-AZVT>]; Evan Bush & Mike Carter, *‘An Attack on Seattle’: Washington State Officials Say They Won’t Back Down on Legal Pot as Sessions Rescinds Obama-Era Policy*, SEATTLE TIMES (Jan. 4, 2018, 9:31 AM), <https://www.seattletimes.com/seattle-news/seattle-state-officials-say-they-wont-back-down-on-legal-pot-as-feds-plan-change/> (last visited Dec. 4, 2018); Press Release, U.S. Att’y’s Office W. Dist. of Wash., U.S. Dep’t of Justice, U.S. Attorney Annette L. Hayes Statement on Federal Marijuana Prosecutions in the Western District of Washington (Jan. 4, 2018), <https://www.justice.gov/usao-wdwa/pr/us-attorney-annette-l-hayes-statement-federal-marijuana-prosecutions-western-district> [<https://perma.cc/5Q3E-6VG3>].

the criteria of the Sessions Memorandum.<sup>99</sup> Acting U.S. Attorney for the Western District of Washington Annette L. Hayes mirrored Troyer's remarks but also added that her office would continue to "focus on those who pose the greatest safety risk to the people and communities we serve."<sup>100</sup> U.S. Attorney for the Eastern District of Washington Joseph H. Harrington issued a nearly identical statement recognizing the importance of public safety.<sup>101</sup>

While the U.S. Attorneys insist that enforcement surrounding cannabis will continue as before, the Sessions Memorandum foreshadows a new direction. The future of the cannabis industry and consequences for state laws are uncertain.<sup>102</sup> Some predict that the U.S. Attorneys will continue enforcement as before, except there will "likely be a ripple effect from this news [of the Sessions Memorandum]."<sup>103</sup> Hilary Bricken, a noted cannabis legal scholar,<sup>104</sup> wrote, "current access to banking, any tax reform progress, and investment are going to feel the chill of uncertainty and the threat of federal enforcement."<sup>105</sup> For example, banks remain wary of investing in cannabis businesses due to the businesses' precarious legal position and potential liability.<sup>106</sup>

The focus of this Comment thus far has been on the enforcement of federal law by the executive branch of the federal government, such as the DOJ. The federal legislative and judicial branches have not yet acted in response to state legalization of recreational cannabis. Congress,

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99. See *U.S. Attorney for Colorado: No Changes on Marijuana Enforcement*, *supra* note 98.

100. See *U.S. Attorney Annette L. Hayes Statement on Federal Marijuana Prosecutions in the Western District of Washington*, *supra* note 98.

101. Press Release, U.S. Att'y's Office E. Dist. Wash., U.S. Dep't of Justice, Federal Marijuana Enforcement Policy (Jan. 4, 2018), <https://www.justice.gov/usao-edwa/pr/federal-marijuana-enforcement-policy> [<https://perma.cc/GQY8-Q38Q>] ("When weighing those considerations public safety is always at the fore.")

102. Bricken, *supra* note 89.

103. *Id.*

104. Hilary Bricken is an attorney at Harris Bricken, PLLC and the lead editor of the Canna Law Blog. Bricken was named one of the 100 most influential people in the cannabis industry in 2014 by Cannabis Business Executive. See *Hilary Bricken*, ABOVE THE LAW (Jan. 4, 2018), <https://abovethelaw.com/author/hbricken/?rf=1> [<https://perma.cc/QP8R-2SXU>]; Rob Meagher, Kyle Meagher & Jeff Hare, *The Most Influential People in the Cannabis Industry*, *The Cannabis Business Executive* 100, CANNABIS BUS. EXEC (Nov. 12, 2014), <https://www.cannabisbusinessexecutive.com/cbe100-2014/> [<https://perma.cc/LN74-RWPN>].

105. Bricken, *supra* note 89.

106. See Monica Mendoza, *Colorado Lawmakers Fire Back at AG Sessions' Move to Rescind Obama-Era Pot Rules*, DENVER BUS. J. (Jan. 4, 2018, 11:30 AM), <https://www.bizjournals.com/denver/news/2018/01/04/colorado-lawmakers-fire-back-at-ag-sessions-move.html> (last visited Dec. 1, 2018) (quoting Don Childears, President and CEO of the Colorado Bank Association).

however, passed the Rohrabacher-Blumenauer amendment in 2014 to prevent the federal government from using funds to prosecute legalized medical cannabis use.<sup>107</sup> After the Trump administration's rescission of the Cole Memorandum, the amendment's future became uncertain.<sup>108</sup> While the Rohrabacher-Blumenauer amendment is still in effect,<sup>109</sup> its protection only extends to medical cannabis.<sup>110</sup> No similar protection exists for recreational cannabis. Therefore, the future of legalized recreational cannabis remains unprotected by Congress.

## II. STATE OPPOSITION TO LEGALIZED CANNABIS CREATES INCENTIVES FOR THE JUDICIARY TO POLICE THE CANNABIS INDUSTRY

On December 18, 2014, Nebraska and Oklahoma requested permission from the U.S. Supreme Court to sue Colorado,<sup>111</sup> noting that the Court has exclusive jurisdiction over disputes between different states.<sup>112</sup>

Nebraska and Oklahoma argued that “[Colorado’s] Amendment 64 and its resultant statutes and regulations are devoid of safeguards to ensure marijuana cultivated and sold in Colorado is not trafficked to other states, including [Nebraska and Oklahoma].”<sup>113</sup> Nebraska and Oklahoma feared the repercussions of legalizing cannabis in Colorado would have on their own states, calling cannabis diversion a “dangerous gap” in the federal drug system.<sup>114</sup> The plaintiff states argued that the “gap” is actively “undermining [Nebraska and Oklahoma’s] own

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107. See Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, H.R. 4660, 113th Cong. § 558 (2014) (enacted) (as amended by H. Amdt. 25, 113th Cong. (2014), 160 Cong. Rec. H5008 (daily ed. May 29, 2014)); NORML, *Federal Spending Bill Includes Medical Marijuana Protections*, DAILY CHRONIC (Mar. 23, 2018), <http://www.thedailychronic.net/2018/90242/federal-spending-bill-includes-medical-marijuana-protections/> [<http://perma.cc/25XS-NRFR>].

108. See NORML, *supra* note 107.

109. See S. Amdt. 3712, 115th Cong. (2018), 164 Cong. Rec. S5698 (Aug. 16, 2018) (amending H.R. 6157, 115th Cong. (2018) (enacted)). This bill is up for renewal on December 7, 2018. *Id.*

110. *Id.*; Hilary Bricken, *No Congressional Couch Lock: State Medical Marijuana Laws Protected Through September 30th*, ABOVE THE LAW, (Mar. 27, 2018) <https://abovethelaw.com/2018/03/no-congressional-couch-lock-state-medical-marijuana-laws-protected-through-september-30th/> [<https://perma.cc/6UR8-F3TT>].

111. Motion for Leave to File Complaint at 1, *Nebraska v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016) (No. 144), 2014 WL 7474136.

112. Complaint at 1, *Nebraska v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016) (No. 144), 2014 WL 7474136.

113. *Id.* at 3.

114. *Id.* at 3.



marijuana bans, draining their treasuries, and placing stress on their criminal justice systems.”<sup>115</sup> Nine former administrators of the U.S. Drug Enforcement Administration between 1973 to 2007 filed a brief as *Amici Curiae* to support Nebraska and Oklahoma.<sup>116</sup>

Nebraska and Oklahoma cited the Supremacy Clause<sup>117</sup> and the Necessary and Proper Clause<sup>118</sup> to support their argument that it is “unlawful to conspire to violate the [Controlled Substances Act].”<sup>119</sup> Nebraska and Oklahoma alleged:

[T]he diversion of marijuana from Colorado contradicts the [CSA’s] clear Congressional intent, frustrates the federal interest in eliminating commercial transactions in the interstate controlled-substances market, and is particularly burdensome for neighboring states like [Nebraska and Oklahoma] where law enforcement agencies and the citizens have endured the substantial expansion of Colorado marijuana.<sup>120</sup>

In supplemental briefing, Nebraska and Oklahoma attacked the Solicitor General’s view that “because Colorado law does not explicitly ‘direct[] or authorize[]’ the transport of Colorado marijuana across state lines, Colorado bears no responsibility for the fact that those harmful border crossings occur.”<sup>121</sup> The plaintiff states compared Colorado’s cannabis industry to a “massive criminal enterprise,” which would protect its growers and distributors in violation of federal law.<sup>122</sup>

Despite Nebraska and Oklahoma’s concerns,<sup>123</sup> the U.S. Supreme Court denied the motion to file a bill of complaint.<sup>124</sup> While the majority

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115. *See id.* at 3–4.

116. Brief for All Nine Former Administrators of Drug Enforcement as *Amici Curiae* in Support of Plaintiff States’ Motion for Leave to File a Bill of Complaint, *Nebraska v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016) (No. 144), 2015 WL 1262747.

117. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”)

118. U.S. CONST. art. I, § 8, cl. 18.

119. Complaint at 7, *Nebraska v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2014) (No. 144), 2014 WL 747136.

120. *Id.* at 6.

121. *See* Plaintiffs’ Supplemental Brief at 3, On Motion for Leave to File Complaint, *Nebraska v. Colorado*, 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016) (No. 220144), 2016 WL 74964 (citation omitted).

122. *See id.* at 4.

123. While Oklahoma legalized medical marijuana in June 2018 (the thirtieth state to do so), Oklahoma has not provided any indication that their position on recreational marijuana has changed. *See* Tom Angell, *Oklahoma Voters Legalize Marijuana for Medical Use*, FORBES (June 26, 2018),

decision did not explain its reasoning for denying the motion, Justice Thomas and Justice Alito dissented.<sup>125</sup> The dissent's main reason was jurisdictional: both Justices questioned whether the Court could decline to hear a case under its original and exclusive jurisdiction.<sup>126</sup> Nevertheless, the dissent recognized that the harms alleged by Nebraska and Oklahoma are “significant” and merit attention.<sup>127</sup>

### III. WASHINGTON'S REGULATORY SCHEME LIMITS CERTAIN INDUSTRY LICENSES OF CANNABIS TO BALANCE ELIMINATING THE ILLICIT MARKET AND SECURING BORDERS

To comply with the veiled mandate of the Cole Memorandum and prevent a suit by neighboring states, the Washington Legislature instructed the state's LCB to create a regulatory structure for the legalized cannabis industry.<sup>128</sup> The LCB “mirrored” the pre-existing liquor regulatory scheme to cabin cannabis production and sales in an effort to comply with the enforcement priorities of the Cole Memorandum and prevent diversion.<sup>129</sup> By limiting the number of parties able to legally sell cannabis, the LCB hoped to control legalized cannabis itself. This Part first discusses the Legislature's statutory grant of authority to the LCB. Next, it examines the regulations that the LCB promulgated to accomplish the goals of the Cole Memorandum. Finally, it assesses whether those regulations have effectively prevented diversion to other states.

#### A. *The Washington Legislature Required the LCB to Create Regulations for the Cannabis Industry*

The Washington Legislature codified the Uniform Controlled Substances Act in 1971.<sup>130</sup> The initial enactment of the Washington Uniform Controlled Substances Act penalized possession and use of

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10:11 PM), <https://www.forbes.com/sites/tomangell/2018/06/26/oklahoma-voters-legalize-marijuana-for-medical-use/#7c29c84d1374> [<https://perma.cc/QLR6-4BUU>].

124. *See Nebraska*, 136 S. Ct. at 1034.

125. *See id.*

126. *See id.* at 1034–35 (Thomas, J., dissenting).

127. *See id.*

128. WASH. REV. CODE § 69.50.342 (2018).

129. *Rule Making*, *supra* note 81, at 13:44 (statement of Rep. Christopher Hurst).

130. 1971 Wash. Sess. 1794 (codified as amended at WASH. REV. CODE § 69.50 (2018)).

cannabis.<sup>131</sup> After the passage of I-502, the Legislature amended the Washington Uniform Controlled Substances Act to include the laws related to cannabis legalization.<sup>132</sup>

The Washington Legislature authorized the LCB to “adopt rules”<sup>133</sup> as well as the “procedures and criteria”<sup>134</sup> for designing the rules.<sup>135</sup> The rules that LCB adopts must be “for the purpose of carrying into effect the provisions of [I-502].”<sup>136</sup> I-502 directed the government to take “marijuana out of the hands of illegal drug organizations” and incorporate “it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.”<sup>137</sup> In a presentation to the Washington House Government Accountability and Oversight Committee, LCB Director Rick Garza stated that the “Agency Objective” focused on creating rules and “[i]nclud[ed] strict controls to prevent diversion, illegal sales, and sales to minors.”<sup>138</sup>

Pursuant to the Revised Code of Washington 69.50.345, the LCB must provide rules regarding producers, processors, and retailers of cannabis.<sup>139</sup> These rules must address licensing,<sup>140</sup> taking special care to consider: (a) “[s]ecurity and safety issues”; (b) the “provision of adequate access to licensed sources . . . to discourage purchases from the illegal market”; and (c) “economies of scale.”<sup>141</sup> When determining how many licenses to award in each county, the LCB must consult with the Office of Financial Management. The LCB must consider multiple factors, such as safety issues and sufficiency of licensed sources to undercut the illicit market, as well as the “[p]opulation distribution” and the “number of retail outlets holding medical marijuana endorsements.”<sup>142</sup> Based on these criteria, the LCB developed rules to regulate cannabis licenses.

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131. 1971 Wash. Sess. 1802.

132. WASH. REV. CODE §§ 69.50.301–69.50.395.

133. *Id.* § 69.50.342.

134. *Id.* § 69.50.345.

135. *Id.*

136. *Id.* § 69.50.342(1).

137. Wash. Initiative Measure No. 502 (enacted 2012) (codified in WASH. REV. CODE, §§ 69.50.301–369 (2018)), [https://www.sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](https://www.sos.wa.gov/_assets/elections/initiatives/i502.pdf) [<https://perma.cc/A34B-RHH3>].

138. *Rule Making*, *supra* note 81, at 9:41 (statement of Rick Garza, Director, Liquor Control Board).

139. WASH. REV. CODE § 69.50.345(1) (2018).

140. *See id.* § 69.50.345(1)–(2).

141. *Id.* § 69.50.345(6)(a)–(c).

142. *Id.* § 69.50.345(2)(a)–(d).

*B. LCB Promulgated Regulations that Created a Limited Licensing Scheme to Comply with Its Statutory Mandate*

The LCB drafted rules to comply with its legislative mandate. The rules covered cannabis licenses, the application process, requirements to receive licenses, and reporting.<sup>143</sup> These licensing rules primarily encompass three categories: (1) “general information”<sup>144</sup>, (2) qualifications and the application processes<sup>145</sup>; and (3) types of violations.<sup>146</sup> While creating the initial rules for the licensing scheme under Washington Administrative Code 314-55-015, the LCB submitted the proposed rules for publication in the Washington State Register.<sup>147</sup> The purpose of the rules read: “This is a new [cannabis] industry in the state of Washington. Rules are needed to clarify the new laws created by [I-502] so the public is aware of the qualifications and requirements for marijuana licenses in the state of Washington.”<sup>148</sup>

The LCB initially restricted the number of applicants for each type of license—the producer,<sup>149</sup> processor,<sup>150</sup> and retail<sup>151</sup> license. But the LCB limited the producer and processor licenses differently from retail licenses.<sup>152</sup> Producer and processor license applications had to apply within a thirty-day period,<sup>153</sup> while retail license applications were governed by “time frames published on [the LCB] web site.”<sup>154</sup> According to the LCB, the thirty-day application window was designed to allow all “qualified” applicants the opportunity to apply, and “[c]losing the window after 30 days [would] allow[] the Board the opportunity to assess the market and see what changes.”<sup>155</sup> Moreover, producers and processors had no limit on the number of licenses.<sup>156</sup>

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143. WASH. ADMIN. CODE § 314-55 (2018).

144. *Id.* § 314-55-015.

145. *See id.* §§ 314-55-020, 075, 077, 079.

146. *See id.* §§ 314-55-520, 525, 530, 535.

147. 13-14 Wash. Reg. 124 (July 3, 2013).

148. *Id.*

149. WASH. ADMIN. CODE § 314-55-075(4).

150. *Id.* § 314-55-077(12).

151. *Id.* §§ 314-55-081(1)–(2).

152. *See* WASH. STATE LIQUOR CONTROL BD., FREQUENTLY ASKED QUESTIONS ABOUT THE I 502 PROPOSED RULES 1 (2013) [hereinafter *FAQ*], [https://lcb.wa.gov/publications/Marijuana/I-502/proposed\\_rules/i-502\\_Proposed\\_Rules\\_FAQs.pdf](https://lcb.wa.gov/publications/Marijuana/I-502/proposed_rules/i-502_Proposed_Rules_FAQs.pdf) [https://perma.cc/V9KW-8NPA].

153. WASH. ADMIN. CODE §§ 314-55-075(4), 077(12).

154. *Id.* § 314-55-081(1).

155. *FAQ*, *supra* note 152, at 1.

156. *See id.*

The LCB originally limited retail license applications to a thirty-day window, just like processor licenses and producer licenses.<sup>157</sup> The LCB copied Colorado’s practice of using a thirty-day window.<sup>158</sup> The agency felt that it would be best for processors and producers to understand how many retail locations would be available in order to gauge the market capacity.<sup>159</sup> However, the LCB amended the rules on October 21, 2013, to provide the LCB with additional discretion to adjust the time-window, rather than firmly limiting retail applications to a thirty-day window as with producer and processor licenses.<sup>160</sup>

The LCB also limited the number of available retail licenses. The LCB limited retail licenses by apportioning them according to “estimated consumption data and population data” in discrete amounts per county.<sup>161</sup> The LCB recognized that “[m]unicipalities could conceivably zone marijuana [and] related businesses out of their geographical area.”<sup>162</sup> Regardless, the LCB could not force cities to host cannabis retailers if the cities chose not to do so. The LCB sent allotted licenses to cities and local municipalities and then let each decide whether to issue business licenses according to the unique local zoning rules.<sup>163</sup> A lottery system determined who received an application if the number of applications exceeded the allotted amounts in each municipality.<sup>164</sup> However, the LCB allots retail licenses according to a “priority system,”<sup>165</sup> that preferences applicants who have applied, operated, and maintained a cannabis license.<sup>166</sup> Next, applicants who operated a “collective garden” receive priority,<sup>167</sup> and then, the LCB considers other applicants.<sup>168</sup>

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157. 13-14 Wash. Reg. 124 (July 3, 2013).

158. *Rule Making*, *supra* note 81, at 12:29 (statement of Rick Garza, Director, Liquor Control Board).

159. *Id.* at 1:09:14.

160. 13-14 Wash. Reg. 91 (July 3, 2013) (codified as amended at WASH. ADMIN. CODE § 314-55-081) (repealed 2018); *see also* 15-19 Wash. Reg. 59 (Sept. 23, 2015) (codified as amended in scattered sections of WASH. ADMIN. CODE § 314-55).

161. 13-14 Wash. Reg. 91.

162. *FAQ*, *supra* note 152, at 2.

163. *See Rule Making*, *supra* note 81, at 55:19 (statement of Rick Garza, Director, Liquor Control Board).

164. *See id.* at 40:55.

165. WASH. ADMIN. CODE § 314-55-020(3).

166. *Id.* § 3-14-55-020(3)(a).

167. *Id.* § 3-14-55-020 (3)(b).

168. *Id.* § 3-14-55-020 (3)(c).

After creating the rules, the LCB began the complicated process of calculating the appropriate number of retail licenses per municipality. On March 19, 2013, the LCB hired BOTEC Analysis Corporation as a “marijuana consultant” for Washington’s implementation of I-502.<sup>169</sup> Specifically, BOTEC analyzed the cannabis “Retail Store Allocation” between Washington localities.<sup>170</sup> BOTEC provided “five ‘mathematical’ methods” to distribute the retail stores throughout Washington, based on population and distance.<sup>171</sup>

However, the BOTEC analysis began with two assumptions about the initial cannabis market. First, BOTEC assumed that the legal cannabis market would grow “to serve roughly one-quarter of marijuana consumption in Washington.”<sup>172</sup> However, the study recognized that one of the “biggest” uncertainties was “how much market share I-502 stores can take away from the medical access points and the purely illegal black market.”<sup>173</sup> BOTEC assumed that cannabis consumption would mirror the consumption of liquor.<sup>174</sup> So, they decided that the number of total cannabis retailers in Washington should be “close to the number of LCB liquor stores in service during their last full year of operation.”<sup>175</sup> Accordingly, BOTEC advised the LCB to distribute approximately 330 stores throughout all counties.<sup>176</sup>

The BOTEC analysis and LCB expectations differed from reality. Legal cannabis from new stores composed 35% of the market, rather than 25%,<sup>177</sup> and the revenues were significantly higher.<sup>178</sup> As a result,

169. Press Release, Wash. State Liquor & Cannabis Bd., Liquor Control Board Announces BOTEC Analysis Corporation as Marijuana Consultant (Mar. 19, 2013), <https://lcb.wa.gov/pressreleases/liquor-control-board-announces-botec-analyses-corporation-marijuana-consultant> [https://perma.cc/L57R-5LEX].

170. JONATHAN P. CAULKINS & LINDEN DAHLKEMPER, BOTEC ANALYSIS CORP., RETAIL STORE ALLOCATION (2013), [https://lcb.wa.gov/publications/Marijuana/BOTEC%20reports/Re\\_Store\\_Allocation\\_Task\\_Report-Final.pdf](https://lcb.wa.gov/publications/Marijuana/BOTEC%20reports/Re_Store_Allocation_Task_Report-Final.pdf) [https://perma.cc/89PB-2RUW].

171. *See id.* at 3.

172. *Id.* at 4; *see also* BEAU KILMER ET AL., RAND DRUG POLICY RESEARCH CTR., BEFORE THE GRAND OPENING: MEASURING WASHINGTON STATE’S MARIJUANA MARKET IN THE LAST YEAR BEFORE LEGALIZED COMMERCIAL SALES (2013), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR400/RR466/RAND\\_RR466.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR466/RAND_RR466.pdf) [https://perma.cc/VV6Y-W7K7].

173. CAULKINS & DAHLKEMPER, *supra* note 170, at 3.

174. *Id.*

175. *Id.* at 4.

176. *Id.* at 5.

177. MARK A.R. KLEIMAN ET AL., BOTEC ANALYSIS CORP., ESTIMATING THE SIZE OF THE MEDICAL CANNABIS MARKET IN WASHINGTON STATE (2015), <https://lcb.wa.gov/publications/Marijuana/BOTEC%20reports/BOTEC-MMJ-Report.pdf> [https://perma.cc/HF4P-DE2E].

cannabis consumption and demand exceeded expectations for 2012–2013.<sup>179</sup>

Even though the demand for legal cannabis exceeded expectations, several local jurisdictions in Washington denied the retail licenses<sup>180</sup> allocated by the LCB.<sup>181</sup> In July 2014, the LCB authorized approximately 330 licenses,<sup>182</sup> and held a lottery to choose from 2,200 applications.<sup>183</sup> Currently, there are 519 retail licenses and 1,188 producer and processor licenses.<sup>184</sup> The ratio is significantly skewed. “Washington handed out grower licenses more quickly than retail licenses, creating an imbalance between farms and stores.”<sup>185</sup> In sum, the supply is outstripping the demand.<sup>186</sup>

### C. *Limited Licensing Has Not Alleviated Concerns of Diversion from Washington State*

Despite Washington’s tightly regulated system, the DOJ remains watchful and concerned about the state’s legalized cannabis industry.<sup>187</sup>

178. *Report: WA Cannabis Consumption Double Initial Predictions*, MARIJUANA BUS. DAILY (Dec. 18, 2013), <https://mjbizdaily.com/report-wa-cannabis-consumption-double-initial-predictions/> [<https://perma.cc/Y8LR-D922>].

179. *See id.*

180. *Marijuana Regulation in Washington State*, MRSC (July 17, 2018), <http://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462deb576b/Marijuana-Regulation-in-Washington-State.aspx> (last visited Dec. 1, 2018); *see also infra* Appendix E.

181. *See* WASH. REV. CODE § 69.50.331(9) (2018) (“A city, town, or county may adopt an ordinance prohibiting a marijuana producer or marijuana processor from operating or locating a business within areas zoned primarily for residential use or rural use with a minimum lot size of five acres or smaller.”).

182. Kirk Johnson, *Sales of Recreational Marijuana Begin in Washington*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/us/washington-to-begin-sales-of-recreational-marijuana.html> (last visited Oct. 28, 2018).

183. Associated Press, *Washington State Issues First Legal-Marijuana Business License*, N.Y. POST (Mar. 6, 2014, 5:21 AM), <https://nypost.com/2014/03/06/washington-state-issues-first-legal-marijuana-business-license/> [<https://perma.cc/9N2G-U8SX>].

184. *Marijuana Dashboard: Licensing*, WASH. ST. LIQUOR & CANNABIS BOARD (2018), <https://data.lcb.wa.gov/stories/s/WSLCB-Marijuana-Dashboard/hbnp-ia6v/> [<https://perma.cc/5FUK-M3QQ>].

185. Jane Wells, *Washington Has More Pot than It Can Smoke*, CNBC (Feb. 11, 2015, 10:53 AM), <https://www.cnbc.com/2015/02/11/legal-marijuana-sales-so-much-pot-in-washington-growers-giving-it-away.html> [<https://perma.cc/Z8UY-2BHW>].

186. *Id.*; *see also Chart of the Week: Recreational Cannabis Surplus in WA Squeezing Growers*, MARIJUANA BUS. DAILY (Jan. 4, 2016), <https://mjbizdaily.com/chart-week-recreational-cannabis-surplus-wa-squeezing-growers/> [<https://perma.cc/B3K5-D3J7>]; *see infra* Appendix A.

187. *See* Letter from Jefferson B. Sessions III, Att’y Gen., U.S. Dep’t of Justice, to Jay Inslee, Governor, State of Wash., and Bob Ferguson, Att’y Gen., State of Wash. (July 24, 2017).

Before issuing the Sessions Memorandum, Attorney General Sessions directed comments to Washington to highlight that the Cole Memorandum does not prevent “investigation or prosecution” even if none of the enforcement priorities are violated.<sup>188</sup> The letter advised Washington to tighten its regulations controlling Washington cannabis.<sup>189</sup> The Washington State Marijuana Impact Report, a study by the Northwest High Intensity Drug Trafficking Area,<sup>190</sup> found that Washington cannabis had spread to forty-three different states.<sup>191</sup> Concerned, Attorney General Sessions insinuated that regulations in Washington did not sufficiently regulate cannabis.<sup>192</sup>

The Report also recognized that the total pounds per year of Washington cannabis seized outside of the state had declined, and was at a lower level than it had been pre-legalization.<sup>193</sup> While Washington’s sales along the Oregon border dropped 41% when Oregon legalized cannabis, only “11.9 percent was potentially being diverted out of Washington overall, and it dropped to 7.5 percent after Oregon’s legalization.”<sup>194</sup> Increasing legalization decreases diversion.<sup>195</sup> Additionally, University of Oregon economist Keaton Miller stated that when conducting randomized searches along the Idaho border of Washington, one “might expect to find illegally transported marijuana at most 4 percent of the time.”<sup>196</sup> While Washington’s strict licensing

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[hereinafter Letter from Jeff Sessions], <https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf> [<https://perma.cc/J27U-H78H>].

188. *Id.* at 1.

189. *Id.* at 2.

190. DAVE RODRIGUEZ, NW. HIGH INTENSITY DRUG TRAFFICKING AREA, WASHINGTON STATE MARIJUANA IMPACT REPORT 92–98 (2016) [hereinafter NWHIDTA REPORT], <http://www.riag.ri.gov/documents/NWHIDTAMarijuanaImpactReportVolume1.pdf> [<https://perma.cc/28WK-TG74>].

191. *Id.*

192. See Letter from Jeff Sessions, *supra* note 187, at 2.

193. NWHIDTA REPORT, *supra* note 190, at 95; see *infra* Appendix B. Cannabis diversion peaked in 2012 and has been declining ever since. *Id.*

194. *Oregon’s Marijuana Legalization Prompted Big Drop in Sales in Washington’s Border Counties*, EUREKALERT! (Sept. 5, 2017), [https://www.eurekalert.org/pub\\_releases/2017-09/uoo-oml090517.php](https://www.eurekalert.org/pub_releases/2017-09/uoo-oml090517.php) [<https://perma.cc/9RRR-NBXY>] (citing Benjamin Hansen, Miner Professor of Economics at the University of Oregon); Benjamin Hansen, Keaton Miller & Caroline Weber, *The Grass Is Greener on the Other Side: How Extensive Is the Interstate Trafficking of Recreational Marijuana?* (Nat’l Bureau of Econ. Research, Working Paper No. 23762, 2018), <https://www.nber.org/papers/w23762.pdf> [<https://perma.cc/6P8L-FPRV>].

195. See *Oregon’s Marijuana Legalization Prompted Big Drop in Sales in Washington’s Border Counties*, *supra* note 194.

196. *Id.*



scheme does not eradicate all diversion, there is evidence that only a small amount of cannabis escaped outside of state borders.

#### IV. COLORADO'S LICENSING SYSTEM DOES NOT LIMIT LICENSES AND ALLOWS ALMOST ALL QUALIFIED APPLICANTS TO OPERATE RETAIL STORES

On November 6, 2012, Colorado voters legalized recreational cannabis through a constitutional amendment passed as a ballot initiative.<sup>197</sup> Amendment 64 created a “fully regulated system of cultivation and sales, which will eliminate the underground marijuana market and generate tens of millions of dollars per year in new revenue and criminal justice savings.”<sup>198</sup> According to House Bill 1284, Colorado had a pre-existing “framework for medical marijuana centers (dispensaries), cultivation facilities, and manufacturers of edible marijuana products.”<sup>199</sup> Colorado’s enforcement agency for both medical and recreational cannabis, the Department of Revenue’s Marijuana Enforcement Division (MED),<sup>200</sup> has the authority to “develop industry regulations. . . .”<sup>201</sup>

First, this Part addresses how the Colorado medical cannabis regulation system incorporated the recreational system. Second, this Part examines the effectiveness of Colorado’s recreational cannabis regulations.

##### A. *Colorado Amended Its Constitution to Secure the Right to Legal Cannabis Use*

Amendment 64 created a new section of the Colorado Constitution, appending section 16 to Article XVIII.<sup>202</sup> The section opened by articulating the purpose of the Amendment:

In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use

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197. See Ferner, *supra* note 6 (quoting Mason Tvert, co-director of the Campaign to Regulate Marijuana like Alcohol).

198. *Id.*

199. MILES K. LIGHT ET AL., THE MARIJUANA POLICY GRP., MARKET SIZE AND DEMAND FOR MARIJUANA IN COLORADO 5 (2014).

200. See Hudak & Wallach, *supra* note 35.

201. See *MED Rulemaking*, COLO. DEP'T REVENUE, <https://www.colorado.gov/pacific/enforcement/MEDrulemaking> [<https://perma.cc/J6HL-Y5W3>].

202. COLO. CONST. amend. 64 (2012).

of marijuana should be legal for persons twenty-one years of age or older and taxed in a similar manner to alcohol.<sup>203</sup>

Article XVIII, section 16 also established additional rationales,<sup>204</sup> definitions,<sup>205</sup> permissible personal uses of cannabis,<sup>206</sup> permissible retail activities relating to cannabis,<sup>207</sup> regulatory structures,<sup>208</sup> social areas which remain unaffected,<sup>209</sup> medical cannabis provisions which remain unaffected,<sup>210</sup> manner of enactment,<sup>211</sup> and effective date.<sup>212</sup>

The new amendment created requirements for establishing the regulatory structure.<sup>213</sup> The section first required that the Department of Revenue<sup>214</sup> develop regulations for the implementation of cannabis by July 1, 2013.<sup>215</sup> The regulations had to establish procedures for “issuance, renewal, suspension, and revocation”<sup>216</sup> of cannabis licenses and requirements to prevent diversion of cannabis.<sup>217</sup> Additionally, the section created a preference for applicants who had previously distributed or produced cannabis according to regulations governing medical cannabis, and had consistently complied with those requirements.<sup>218</sup>

Amendment 64 also required local jurisdictions to act before the MED issued licenses to applicants<sup>219</sup> by identifying the local entity that will process applications by October 1, 2013.<sup>220</sup> The Constitution did not permit the local jurisdictions’ rules to conflict with the state regulations.<sup>221</sup> However, the Colorado Constitution empowered each

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203. *Id.* at art. XVIII, § 16(1)(a).

204. *Id.* § 16(1)(a)–(d).

205. *Id.* § 16(2).

206. *Id.* § 16(3).

207. *Id.* § 16(4).

208. *Id.* § 16(5).

209. *Id.* § 16(6).

210. *Id.* § 16(7).

211. *Id.* § 16(8).

212. *Id.* § 16(9).

213. *Id.* § 16(5)(a)(I).

214. *Id.* § 16(2)(c).

215. *Id.* § 16(5)(a).

216. *Id.* § 16(5)(a)(I).

217. *Id.* § 16(5)(a)(V).

218. *Id.* § 16(5)(b).

219. *Id.* § 16(5)(a)(I).

220. *Id.* § 16(5)(e).

221. *Id.*

jurisdiction to adopt its own procedures and rules, even to the extent that the jurisdiction could substantially limit the availability of licenses within their jurisdiction or prohibit cannabis operations entirely.<sup>222</sup> If local jurisdictions chose not to allow cannabis licenses, the decision to prohibit was placed on the general election ballot.<sup>223</sup> This method of deciding whether local jurisdictions may prohibit licenses is different from Washington because it places more power in the hands of the people.

The Constitution also required the Department of Revenue to “[b]egin accepting and processing applications on October 1, 2013,”<sup>224</sup> as well as “[i]ssue an annual license to the applicant . . . unless the department finds the applicant is not in compliance with regulations.”<sup>225</sup> The Department did not have the discretion to deny or approve an applicant unless the applicant failed to meet the necessary qualification.<sup>226</sup> The Department of Revenue may also refuse to accept an application if the local jurisdiction informs the Department that an applicant is not in compliance with its own regulations or the local jurisdiction exceeded its own numerical limit on licenses.<sup>227</sup> The Department of Revenue may accept all compliant license applications unless a jurisdiction affirmatively limits its available applications before the license is accepted. This structure differs from Washington because the Colorado structure does not place limits on licenses.

*B. The MED Designed Colorado’s Recreational Licensing Structure to Incorporate the Pre-Existing Medical Dispensary Structure*

Before Colorado passed Amendment 64, in November 2000, Colorado voters passed Amendment 20,<sup>228</sup> amending its Constitution to include article XVIII, section 14, which legalized the use of medical cannabis.<sup>229</sup> Article XVIII, section 14 required the General Assembly to

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222. *Id.*

223. *Id.*

224. *Id.* § 16(5)(g)(I).

225. *Id.* § 16(5)(g)(III).

226. *See id.*

227. *See id.*

228. *Amendment 20 to Colorado’s State Constitution*, AMS. FOR SAFE ACCESS, [https://www.safeaccessnow.org/amendment\\_20\\_to\\_colorado\\_s\\_state\\_constitutionnew](https://www.safeaccessnow.org/amendment_20_to_colorado_s_state_constitutionnew) [<https://perma.cc/725A-HKYV>].

229. *Id.* § 14.

“define such terms and enact such legislation as may be necessary for implementation of this section.”<sup>230</sup>

The Colorado General Assembly initially codified authorization for medical cannabis under the “Power and Duties of the Department of Public Health and Environment.”<sup>231</sup> However, in 2010—after the Ogden Memorandum—the General Assembly enacted an entirely new statutory scheme that authorized structures for medical cannabis in the Colorado Revised Statutes (C.R.S.).<sup>232</sup> MED received a mandate to “promulgate such rules and such special rulings and findings as necessary for the proper regulation and control of the cultivation, manufacture, distribution, and sale of medical marijuana and for the enforcement of this article.”<sup>233</sup>

MED responded by creating “Rules Regarding the Sales, Manufacturing and Dispensing of Medical Marijuana.”<sup>234</sup> The Rules promote a “*vertically integrated* closed-loop commercial medical marijuana regulatory scheme by . . . [creating] requirements aimed at ensuring public safety, facilitating full operational transparency, and eliminating illicit diversion of marijuana.”<sup>235</sup> The emphasis in the regulations remains on preventing cannabis from leaking outside of the normal, sanctioned purchases at medical cannabis facilities.<sup>236</sup> The 2010 statutory scheme provided stricter requirements for the licensing of medical cannabis businesses, based on the Colorado liquor-licensing code.<sup>237</sup> The liquor-licensing code and medical cannabis code require that any person applying for a medical cannabis license first procure a license from the local municipality before applying for a state-issued license.<sup>238</sup> This requirement differs from Washington in that there is no state grant of a license unless the local jurisdiction has already approved the license. Applicants who expect to use the license granted by the state authority must first be granted a license by the local authority.<sup>239</sup>

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230. COLO. CONST. art. XVIII, § 14(8).

231. COLO. REV. STAT. § 25-1.5-106 (2003).

232. *Id.* § 12-43.3 (2010).

233. *Id.* § 12-43.3-202(b)(1).

234. COLO. CODE REGS. § 212-1 (2018).

235. *Id.* § 212-1 (2011)

236. *See id.*

237. *See* Michael Dohr, *Medical Marijuana in Colorado*, NAT’L CONF. ST. LEGS., <http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/medical-marijuana-in-colorado.aspx> [<https://perma.cc/HH32-C9JQ>].

238. *See id.*; 2010 Colo. Sess. Laws. 1648 (codified as amended COLO. REV. STAT. § 12-43.3 (2018)); COLO. REV. STAT. § 12-43.3-305(2).

239. *See* Dohr, *supra* note 237.

Through the C.R.S., the General Assembly permits the regulation of the recreational cannabis industry.<sup>240</sup> The “Colorado Retail Marijuana Code” appears under the Health portion of the Professions and Occupations section.<sup>241</sup> The Colorado General Assembly established four types of cannabis licenses: retail stores, retail cultivation facilities, retail products manufacturers, and retail testing facilities.<sup>242</sup> A person may operate “dual operation[s]” if the local jurisdiction permits.<sup>243</sup> This structure is similar to the vertical-integration established in the state’s medical cannabis regulatory scheme.<sup>244</sup> Furthermore, Colorado allows “home grow operations” but these programs are closely regulated by capping “the number of plants that can be possessed or grown on a residential property.”<sup>245</sup>

Unlike Washington, Colorado does not further limit licenses either through a time window or allocation by population throughout the state.<sup>246</sup> Instead, the regulations rely on the application procedures,<sup>247</sup> schedule of fees,<sup>248</sup> qualifications,<sup>249</sup> and continued compliance with licensing regulations<sup>250</sup> to filter out unsatisfactory applicants. The regulations further elaborate on the “existing, vertically integrated medical market.”<sup>251</sup> Washington expressly prohibits vertical integration,<sup>252</sup> but Colorado only mandated vertical integration until October 2014, when regulations changed to allow for separation between the different stages of cannabis production.<sup>253</sup>

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240. *See id.*

241. COLO. REV. STAT. § 12-43.4.

242. *Id.* § 12-43.4-401(1)(a)–(d).

243. *Id.* § 12-43.4-401(2)(a).

244. *See Dohr, supra* note 237.

245. H.B. 17–1220, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

246. *See* COLO. CODE REGS. § 212-2 (2018).

247. *Id.* §§ 212-2.201–2.204.

248. *Id.* §§ 212-2.207–2.210.

249. *Id.* § 212-2.231.

250. *Id.* §§ 212-2.250–2.252.

251. *Id.* § 212-2.304; *see also* Walsh, *supra* note 28.

252. *See* Walsh, *supra* note 28.

253. *Id.*

### C. *Colorado Continues to Struggle with Diversion*

As of January 15, 2018, Colorado had issued 509 retail store licenses, as well as 999 cultivator and manufacturer licenses.<sup>254</sup> While the gap between producers or processor licenses and retail store licenses is smaller in Colorado than in Washington, cannabis is still diverted outside of Colorado's borders.<sup>255</sup> Washington, Colorado, and the federal government remain concerned about the consequences of diversion.<sup>256</sup>

According to the spokesperson for Oklahoma's Bureau of Narcotics and Dangerous Drugs, Colorado cannabis has "a reputation in Oklahoma because of how strong it is."<sup>257</sup> Authorities seized Colorado cannabis in thirty-six different states in 2015 and approximately 3,500 pounds of cannabis between 2009–2015, an increase from pre-legalization statistics.<sup>258</sup> Therefore, Nebraska and Oklahoma's concern that cannabis would flow into their states and force them to use their resources to combat the illegal cannabis is justified.

## V. NEITHER WASHINGTON NOR COLORADO IMPLEMENTED REGULATORY SCHEMES THAT EFFECTIVELY ELIMINATE *ALL* DIVERSION: A NEW STANDARD SHOULD BE DEVELOPED

Almost six years ago, Washington and Colorado legalized cannabis. As studies reveal holes in the regulatory systems, the structure of the cannabis industry keeps changing. Diversion continues to be a problem for both states and a significant concern for the status of legal cannabis. The current presidential administration's position on cannabis furthers the uncertainty, and the Sessions Memorandum further jeopardizes the viability of the cannabis industry. While the Cole Memorandum

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254. Thomas Mitchell, *Colorado Cannabis Dispensary Counter: Growth From 2014 to 2018*, WESTWORD (Jan. 15, 2018, 8:12 AM), <https://www.westword.com/marijuana/colorado-dispensaries-how-many-are-there-9885310> [<https://perma.cc/U5S8-UX6M>].

255. See KEVIN WONG ET AL., ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO 111, 112 (2016) [hereinafter THE LEGALIZATION OF MARIJUANA IN COLORADO], <https://www.rmhidta.org/html/2016%20FINAL%20Legalization%20of%20Marijuana%20in%20Colorado%20The%20Impact.pdf> [<https://perma.cc/6WF7-57V2>]; see *infra* Appendices C, D.

256. See generally, Letter from Jeff Sessions, *supra* note 187.

257. Eric Gorski & John Ingold, *More Colorado Pot Is Flowing to Neighboring States, Officials Say*, DENVER POST (Sept. 3, 2013, 11:45 AM), <http://www.denverpost.com/2013/09/03/more-colorado-pot-is-flowing-to-neighboring-states-officials-say/> [<https://perma.cc/5PAD-2SMR>].

258. THE LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 255, at 111–12; see *infra* Appendices C, D.

cautioned states in regulating the cannabis industry, the Sessions Memorandum created a void. DOJ rescinded the only guidance available, without replacing it or providing an indication of what steps the federal government might take with respect to cannabis investigation and prosecution. Left with no guidance from the federal government, the active disapproval from other states becomes more problematic.

Congress's refusal to resolve the tension between states and the federal government has shifted the pressure to the judiciary to fashion a resolution. For example, the U.S. Supreme Court might reconsider allowing a state-versus-state challenge, as seen in *Nebraska v. Colorado*.<sup>259</sup> While federal courts have jurisdiction to resolve the dispute, Congress is better able to consider all the consequences. Rather than allowing the executive branch to continue issuing and rescinding temporary guidance, or requiring the judicial branch to create widespread law after considering the narrow complaints of a few states, the legislative branch should create uniformity for the entire nation.

Both Washington and Colorado continue to make reforms to prevent diversion.<sup>260</sup> For example, Colorado more closely regulated its home-grown program by capping "the number of plants that can be possessed or grown on a residential property."<sup>261</sup> Similarly, Washington incorporated the medical industry into its recreational licensing scheme and permitted cannabis retail stores to obtain medical cannabis endorsements.<sup>262</sup> However, the producers and processors still outnumber the retailers, and prices have dropped as the supply outstrips the demand.<sup>263</sup> The imbalance between supply and demand does not help eliminate the illegal market or stop "excess" cannabis from leaving the state.<sup>264</sup> Despite Washington and Colorado's hopes to account for all cannabis produced and sold in their respective states, questions linger

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259. 577 U.S. \_\_\_, 136 S. Ct. 1034 (2016).

260. See Alice Wallace, *Colorado Budget Proposal Calls for New Task Force to Target Illegal Marijuana Ops*, CANNABIST (Nov. 1, 2017, 6:35 PM), <https://www.thecannabist.co/2017/11/01/colorado-budget-task-force-illegal-marijuana-operations/91494/> [https://perma.cc/6GY5-R9QN].

261. See H.B. 17–1220, 71st Gen. Assemb. Reg. Sess. (Colo. 2017).

262. WASH. REV. CODE § 69.50.345(2)(d) (2018).

263. Bart Schaneman, *Washington State Cannabis Oversupply Spurs Calls for Legal Change*, MARIJUANA BUS. DAILY (Jan. 10, 2018), <https://mjbizdaily.com/washington-state-cannabis-supply-hits-new-low-spurs-calls-change/> [https://perma.cc/6Z8R-GVJD].

264. Martin Kaste, *Despite Legalization, Marijuana Black Market Hides in Plain Sight*, NPR (May 16, 2018, 6:50 AM), <https://www.npr.org/2018/05/16/610579599/despite-legalization-marijuana-black-market-hides-in-plain-sight> (last visited Oct. 28, 2018).

about whether the regulatory systems will ever effectively prevent diversion, as defined by the federal government.

As demonstrated by Attorney General Jeff Sessions's letter to Washington Governor Jay Inslee, states that have legalized cannabis must assume that any diversion of cannabis to outside states may result in federal intrusion.<sup>265</sup> The emphasis on complete and total elimination of diversion poses a significant problem for states with legalization schemes. The official data available, such as the Washington State Marijuana Impact Report, only focuses on whether cannabis is escaping from each state.<sup>266</sup> The studies do not consider the diversion in the context of other black-market products (human organs, cocaine)<sup>267</sup> or in comparison to the illegal cannabis industries in states that have not legalized cannabis (like Idaho).<sup>268</sup> The focus of the studies thus far is not on the mechanisms by which cannabis escapes or the sources of the diverted Washington cannabis. The binary focus on whether diversion exists should shift to a more nuanced assessment. Completely eliminating diversion is likely not feasible—imposing the unrealistic standard cripples the industry without providing guidance for future change.

The Cole Memorandum proposed an unrealistic standard for assessing regulation and preventing diversion. The government should use comprehensive assessments, which consider the context and success of regulation to date before threatening state legalization schemes.

To effectively address the issue of diversion, more studies and information should be conducted to determine the size of both the legal and illegal cannabis markets, and the traffic patterns of diverted cannabis. Congress should then consider this information and act. Without more information on these subjects, changing cannabis licensing schemes and regulations will not adequately solve the issue of diversion or alleviate the federal government's concerns.

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265. See Letter from Jeff Sessions, *supra* note 187.

266. See NWHIDTA REPORT, *supra* note 190; THE LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 255.

267. Joshua B., *America's 8 Biggest Black Market Industries*, RICHEST (March 22, 2014), <https://www.therichest.com/rich-list/the-biggest/8-of-americas-biggest-black-market-industries/> [<https://perma.cc/FTG2-RKKQ>].

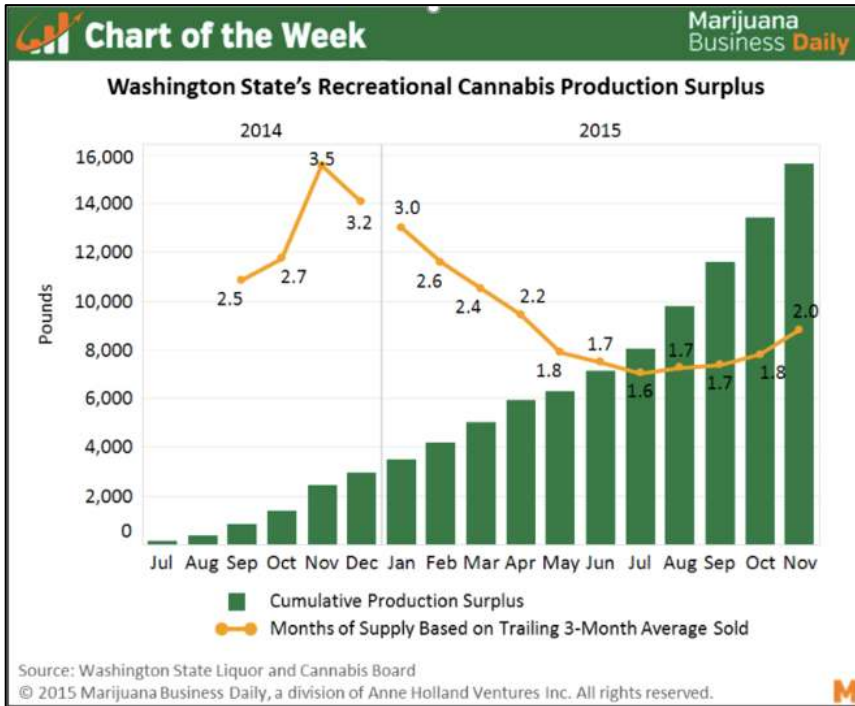


## CONCLUSION

Washington and Colorado paved the path to legalization of recreational cannabis. The tension between the Controlled Substances Act and state legalization created additional pressure for both states to develop robust statutory and regulatory schemes to prevent cannabis from leaking into other states. The consequences of failing to completely eliminate diversion carries the threat of criminal enforcement by the DOJ or suit by other states in the U.S. Supreme Court, which could ultimately invalidate the legal status of cannabis in Washington and Colorado.

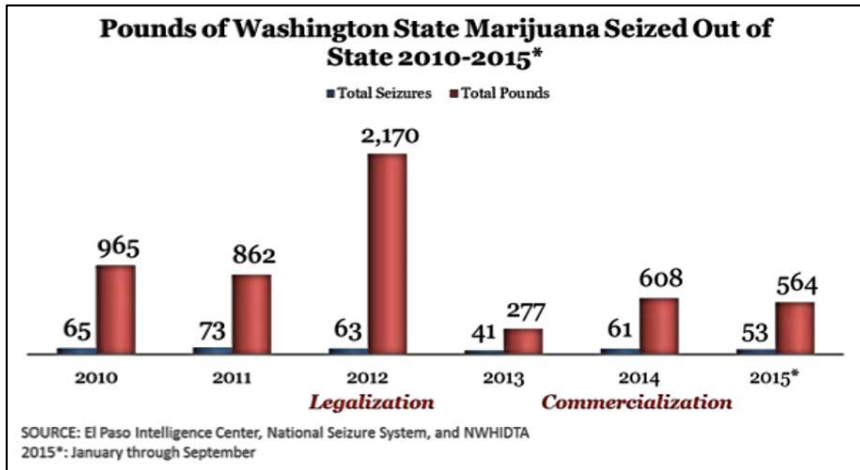
While Washington and Colorado each attempted to create strict regulations to control cannabis, neither has completely eliminated diversion. Because total elimination of diversion is an unrealistic expectation, the federal government—executive, legislative, and judicial branches—should consider more than simply whether diversion exists. Instead, the federal government should analyze the effectiveness of regulations in a multi-factored context to understand whether legalized recreational cannabis actually creates a more significant burden on state resources than it did prior to legalization.

APPENDIX A: WASHINGTON STATE'S RECREATIONAL CANNABIS PRODUCTION SURPLUS<sup>269</sup>



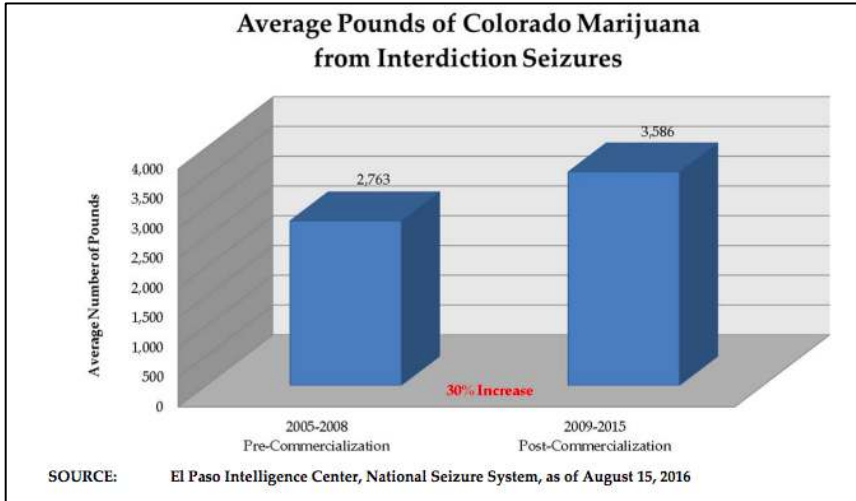
<sup>269</sup>. *Chart of the Week: Recreational Cannabis Surplus in WA Squeezing Growers*, *supra* note 186.

APPENDIX B: POUNDS OF WASHINGTON STATE MARIJUANA SEIZED OUT OF STATE 2010-2015<sup>270</sup>



270. NWHIDTA REPORT, *supra* note 190, at 95.

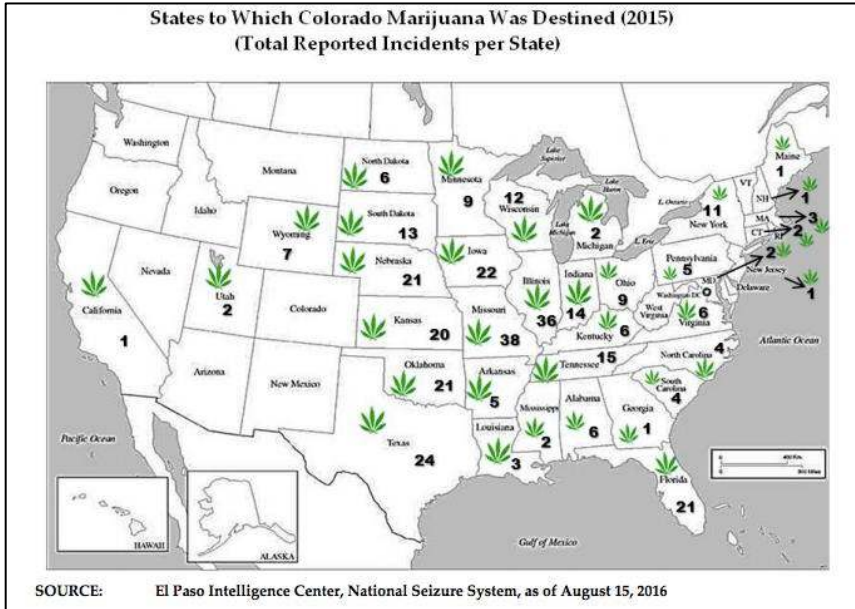
APPENDIX C: AVERAGE POUNDS OF COLORADO MARIJUANA FROM INTERDICTION SEIZURES<sup>271</sup>



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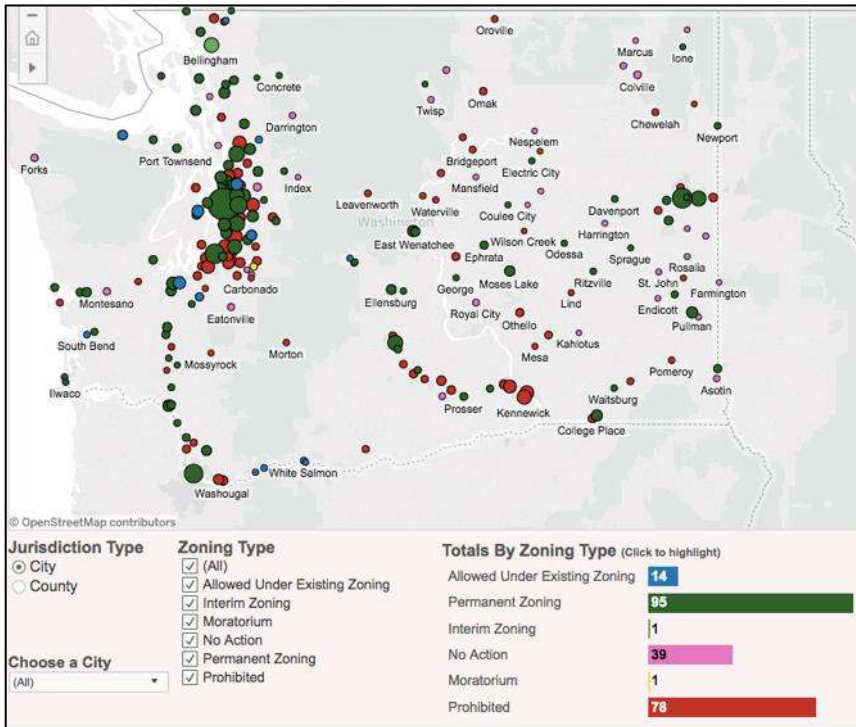
271. THE LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 255, at 111.

APPENDIX D: STATES TO WHICH COLORADO MARIJUANA WAS DESTINED (2015)<sup>272</sup>



272. THE LEGALIZATION OF MARIJUANA IN COLORADO, *supra* note 255, at 111–12.

APPENDIX E: WASHINGTON MAP OF ZONING ORDINANCES FOR STATE-LICENSED MARIJUANA BUSINESSES<sup>273</sup>



273. *Marijuana Regulation in Washington State*, supra note 180.