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Food and Agriculture

Chapter 398: The Highly-Regulated Hemp Marketplace— Economic Powerhouse or Law Enforcement Nightmare?

Anthony Serrao

Code Sections Affected

Food and Agriculture Code §§ 81000, 81001, 81002, 81003, 81004, 81005, 81006, 81007, 81009, 81010 (new), 81008 (amended); Health and Safety Code §§ 11018 (amended), 11018.5 (new).
SB 566 (Leno); 2013 STAT Ch. 398.

I. INTRODUCTION

In 2012, the total retail value of hemp products sold in the United States increased to \$500 million.¹ The value is part of an ever-expanding market for hemp products, as sales have increased an average of \$26 million a year since the 1990s.² Nevertheless, hemp and hemp products exist in an uncertain regulatory environment.³ While the growth of cannabis remains illegal, whether it is psychoactive or not, seeds and oils that are nonpsychoactive remain legal to possess in California.⁴ Hemp and hemp products exist within this regulatory exemption, and amidst potentially increasing federal control.⁵ Recognizing this growing marketplace and the increasing importation of hemp products,⁶ Senator Mark Leno introduced the California Industrial Hemp Farming Act, seeking to “create new jobs and economic opportunities for many farmers and manufacturers across California” by exempting nonpsychoactive hemp from the definition of marijuana.⁷

1. Press Release, Vote Hemp, California Hemp Farming Bill SB 566 Garners Strong Support from Businesses, Leading Advocacy Groups and Sheriffs Association (Apr. 2, 2013) (on file with the *McGeorge Law Review*).

2. SENATE COMMITTEE ON AGRICULTURE, COMMITTEE ANALYSIS OF SB 566, at 4 (Apr. 2, 2013).

3. See *infra* note 17 and accompanying text.

4. *Id.*

5. See *Hemp Indus. Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1085 (9th Cir. 2003) (discussing the DEA’s efforts to schedule naturally-occurring THC, effectively barring all hemp and hemp products as Schedule I drugs).

6. Vote Hemp, *supra* note 1.

7. *Id.*; CAL. HEALTH & SAFETY CODE § 11018.5 (enacted by Chapter 398).

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II. LEGAL BACKGROUND

Section A of this Part details the federal drug control policy—known as the Controlled Substances Act—which restricts hemp growth.⁸ Section B describes recent failed federal efforts to restrict the distribution of legal hemp products.⁹ Finally, Section C describes efforts to legalize the growth of industrial hemp at both the federal level and within California.¹⁰

A. Modern Drug Policy: Conditions for a Flowering Hemp Market

The United States regulates all drugs through the Controlled Substances Act (CSA)—the federal legislative cornerstone of modern drug control policy.¹¹ The CSA, which is designed as a comprehensive approach to regulating drugs, substantially consolidates the prior statutory law and regulatory agencies of drug control policy.¹² The CSA classifies all drugs within five schedules.¹³ The schedules are ranked by a drugs' medicinal benefit and its potential for abuse.¹⁴ The highest schedule, Schedule I, includes both marijuana and synthetic equivalents of tetrahydrocannabinols (THC), marijuana's primary psychoactive chemicals.¹⁵ Drugs placed in this schedule are purported to have no accepted medicinal benefit and a high potential for abuse.¹⁶

While marijuana is a Schedule I drug, its definition under the CSA exempts the stalk of the plant as well as the sterilized seeds and oils.¹⁷ This quasi-exemption of certain cannabis products allows for the importation and manufacture of a wide variety of hemp products.¹⁸ The burgeoning market has prompted state efforts in recent years for more pro-hemp legislation, particularly to allow the cultivation of nonpsychoactive hemp; these efforts have prompted stiff federal resistance.¹⁹

8. *Infra* Part II.A.

9. *Infra* Part II.B.

10. *Infra* Part II.C.

11. Controlled Substances Act, 21 U.S.C. §§ 801–971 (2012).

12. 21 U.S.C. § 801(a).

13. *Id.* at § 812(a).

14. *Id.* at § 811(c).

15. *See id.* at § 812(c)(10) (listing marijuana within Schedule I; *id.* at § 812(c)(17) (listing THC within Schedule I).

16. *Id.* at § 812(1)(A)–(C).

17. *See id.* at § 802(16) (excluding from the definition of marijuana “the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination”).

18. *See* Vote Hemp, *supra* note 1 (noting total retail value of hemp products sold in the United States was in excess of \$500 million).

19. *Id.*

B. Restricting Hemp: Federal Pushback Against the Growing Market

In 2001, following years of increasing importation and manufacturing of hemp products, the Drug Enforcement Agency (DEA) announced that it interpreted the definition of THC within the CSA to include “any product that contains any amount of tetrahydrocannabinols (THC) . . . even if such product is made from portions of the cannabis plant that are excluded from the CSA definition of [marijuana].”²⁰ Simultaneously, the DEA issued a proposed rule to explicitly amend the definition of THC to include both naturally-occurring and synthetic THC as Schedule I substances, thereby eliminating confusion over the distinction.²¹ Because nonpsychoactive hemp contains trace amounts of THC, this definition would functionally bar all hemp products for containing Schedule I drugs.²²

Pro-hemp organizations and manufacturers filed suit against the DEA shortly after the publication of the interpretive rule.²³ In *Hemp Industries Association v. Drug Enforcement Administration (Hemp I)*, the court reasoned that the inclusion of hemp seeds and oil in the definition of THC plainly contravened existing DEA and CSA regulations.²⁴ In 2003, the DEA promulgated its final ruling to alter the definition of THC.²⁵ Pro-hemp organizations again brought suit to bar the enforcement of the regulation in *Hemp Industries Association v. Drug Enforcement Administration (Hemp II)*.²⁶ The DEA defended the redefinition by claiming that hemp seeds and oils—specifically excluded from the definition of marijuana—were historically included in the definition of THC.²⁷ The court again disagreed, holding that the regulation effectively scheduled naturally-occurring THC for the first time.²⁸

20. Interpretation of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51530 (Oct. 9, 2001).

21. Clarification of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51535 (proposed Oct. 9, 2001) (to be codified at 21 C.F.R. pt. 1308.11).

22. *See Hemp Indus. Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1082 (9th Cir. 2003) (“Enhanced analytical testing indicates that ‘a THC Free status is not achievable in terms of a true zero.’”).

23. *Id.* at 1085–86.

24. *Id.* at 1090.

25. *See* Amended Definition of Tetrahydrocannabinols, 21 C.F.R. § 1308.11 (2003) (amending the definition to include “tetrahydrocannabinols naturally contained in a plant of the genus *Cannabis* . . . as well as synthetic equivalents of the substances contained in the cannabis plant”).

26. *Hemp Industries Association v. Drug Enforcement Agency*, 357 F.3d 1012 (9th Cir. 2004).

27. *See id.* at 1016 (defending prior inaction on the matter by reasoning that the “intentional use of such products [hemp seeds and oils] in foodstuffs is relatively new within the United States”).

28. *See id.* at 1015 (describing the regulation as a “scheduling action—placing nonpsychoactive hemp in Schedule I for the first time—that fails to follow the procedures for such actions required by the [CSA]”); *id.* at 1018 (asserting that such inclusion of naturally-occurring THC would render the separate category of marijuana under the CSA meaningless).

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C. Recent Efforts to Legalize Hemp Cultivation

While the possession of hemp seeds and oils remains legal under federal law,²⁹ the growth of the hemp plant remains decidedly illegal.³⁰ In an effort to change federal policy on point, former Rep. Ron Paul (Texas) introduced the Industrialized Hemp Farming Act each Congressional term from 2005–2011; each time the Act died in committee.³¹ The Act would amend the federal definition of marijuana to exclude industrial hemp grown for a lawful purpose.³² A version of the Act was again introduced by Rep. Thomas Massie (Kentucky) in 2013, although Congress will probably not act on it.³³

In California, Senator Mark Leno has thrice introduced legislation that would permit the cultivation of hemp; each proposed bill passed the legislature, only to be vetoed by the governor.³⁴ AB 1147, introduced in 2005, would have permitted the cultivation of industrial hemp in California subject to strict regulations for growth and THC testing.³⁵ Following the veto of AB 1147, Leno introduced AB 684 in 2007, which proposed a scaled-back program that would have permitted limited cultivation of hemp in four pilot counties.³⁶ Most recently in 2011, Senator Leno introduced SB 676, again proposing a pilot program to test the cultivation of industrial hemp within California.³⁷

29. *See id.* at 1015 (rejecting DEA’s attempted regulation that included portions of the cannabis specifically excluded from the definition of “marijuana”).

30. 21 U.S.C. § 802(16) (2012).

31. Industrial Hemp Farming Act of 2005, H.R. 3037, 109th Cong. (2005); Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007); Industrial Hemp Farming Act of 2009, H.R. 1866, 111th Cong. (2009); Industrial Hemp Farming Act of 2011, H.R. 1831, 112th Cong. (2011).

32. *See* Industrial Hemp Farming Act of 2011, H.R. 1831, 112th Cong. (2011) (defining industrial hemp as “the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis”).

33. Industrial Hemp Farming Act of 2013, H.R. 525, 113th Cong. (2013); *see also* Vote Hemp, *supra* note 1 (on file with the *McGeorge Law Review*) (noting that eight states have redefined marijuana to exclude industrialized hemp, without federal involvement, but these states necessarily do so in direct conflict with CSA and do not immunize hemp cultivation from federal marijuana prosecution).

34. AB 1147, 2005 Leg., 2005–2006 Sess. (Cal. 2005) (as amended on Aug. 21, 2006, but not enacted); AB 684, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as amended on Aug. 27, 2007, but not enacted); SB 676, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on Aug. 30, 2011, but not enacted).

35. AB 1147, 2005 Leg., 2005–2006 Sess. (Cal. 2005) (as amended on Aug. 21, 2006, but not enacted).

36. AB 684, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as amended on Aug. 27, 2007, but not enacted).

37. SB 676, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on Aug. 30, 2011, but not enacted); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 676, at 9 (Jan. 4, 2012) (including a veto message from Governor Brown stating that “[i]t is absurd that hemp is being imported into the state, but our farmers cannot grow it”).

III. CHAPTER 398

Section A of this part describes amendments to the definition of marijuana that excludes industrial hemp.³⁸ Section B notes the various regulations placed on growers of lawful industrial hemp by Chapter 398.³⁹ Section C details further regulations concerning how hemp is grown.⁴⁰ Section D addresses the potential conflict between marijuana crimes and lawful hemp growth.⁴¹ Section E discusses the potential fiscal impact of the legislation.⁴²

A. *Redefining Marijuana*

Chapter 398 amends the definition of marijuana in the Health and Safety Code to exclude industrial hemp that is grown for a lawful purpose.⁴³ Chapter 398 defines industrial hemp as “a fiber or oilseed crop, or both, that is limited to nonpsychoactive types of the plant *Cannabis sativa* L. and the seed produced therefrom, having no more than three-tenths of 1 percent tetrahydrocannabinol (THC)”⁴⁴ However, the definition excludes the “resin or flowering tops extracted therefrom, fiber, oil, or cake, or the sterilized seed, or any component of the seed, of the plant that is incapable of germination.”⁴⁵

B. *Regulating Growers of Industrial Hemp*

Chapter 398 creates an Industrial Hemp Advisory Board (Advisory Board) to assist the Secretary of Food and Agriculture in regulating hemp.⁴⁶ They advise the Secretary on all matters relating to enforcement and regulation procedures.⁴⁷

The Advisory Board implements a registration fee that the hemp growers and seed breeders must pay in order to offset the enforcement costs associated with the commissioners’ duties.⁴⁸ Commissioners are to collect this fee, which is used to fund the various enforcement provisions of Chapter 398.⁴⁹

38. *Infra* Part III.A.

39. *Infra* Part III.B.

40. *Infra* Part III.C.

41. *Infra* Part III.D.

42. *Infra* Part III.E.

43. CAL. HEALTH & SAFETY CODE § 11018 (amended by Chapter 398).

44. *Id.* § 11018.5 (enacted by Chapter 398).

45. *Id.*

46. CAL. FOOD & AGRIC. § 81001(a) (enacted by Chapter 398) (This Advisory Board consists of eleven members, who represent various hemp and law enforcement industry representatives. Members of the Advisory Board serve three-year terms and do not receive a salary).

47. *Id.* at § 81001(d) (enacted by Chapter 398).

48. *See id.* at § 81005 (enacted by Chapter 398) (excluding agricultural research institutions from this fee).

49. *Id.* at § 221 (amended by Chapter 398).

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Chapter 398 requires that, biannually,⁵⁰ all growers of industrial hemp register with their local county commissioner.⁵¹ Their registration shall detail the location of the proposed hemp growth,⁵² the purpose of the hemp growth, and which preapproved strain of hemp is to be grown.⁵³ Growers must also seek permission from the commissioner before making any changes to their hemp growth operation.⁵⁴ Additionally, Chapter 398 mandates these same registration procedures for proposed seed breeders.⁵⁵

C. Industrial Hemp Growth Procedures

Chapter 398 allows the growth of only certain preapproved varieties of industrial hemp.⁵⁶ The legislation requires that industrial hemp be densely planted and mandates that it be grown on a plot of at least five acres.⁵⁷ Further, it imposes restrictions on the cultivation and horticultural tending of industrial hemp,⁵⁸ in addition to signage denoting the presence of industrial hemp.⁵⁹ These regulations on plot size and cultivation distinguish industrial hemp plots from marijuana plots.⁶⁰

Chapter 398 also mandates that non-exempted industrial hemp growers submit a sample of their crop for laboratory testing before harvest, which is when potential THC content is at its highest level.⁶¹ These tests must be obtained from a laboratory registered with the DEA.⁶² In order to pass as authorized industrial hemp, the sample must contain no more than 0.3% THC.⁶³ Laboratories that issue passing samples must provide certified copies of the report to growers.⁶⁴ These growers must retain copies of the report to provide to both law enforcement

50. *Id.* at § 81003(a)(2)(B) (enacted by Chapter 398).

51. *See id.* at § 81003(a) (enacted by Chapter 398) (excluding agricultural research institutions).

52. *Id.* at § 81003(a)(1)(B) (enacted by Chapter 398).

53. *Id.* at § 81003(a)(1)(C) (enacted by Chapter 398).

54. *Id.* at § 81003(c) (enacted by Chapter 398).

55. *Id.* at § 81004 (enacted by Chapter 398); *id.* at § 81000(f) (enacted by Chapter 398) (defining seed breeder as “an individual or public or private institution or organization that is registered with the commissioner to develop seed cultivars intended for sale or research”).

56. *Id.* at § 81002 (enacted by Chapter 398).

57. *See id.* at § 81006(a)(1) (enacted by Chapter 398) (mandating that each minimum five-acre plot shall contain no less than one contiguous acre of industrial hemp).

58. *Id.* at § 81006(b)–(c) (enacted by Chapter 398); *see also* 2013 Cal. Stat. Ch. 398 § 2(h)(5) (“Signs of horticultural tending include, but are not limited to, pathways or rows within the field that provide access to each plant, the pruning of individual plants, or the culling of male plants from the field.”).

59. CAL. FOOD & AGRIC. CODE § 81006(b) (enacted by Chapter 398).

60. 2013 Cal. Stat. ch. 398 § 2(h)(5).

61. FOOD & AGRIC. § 81006(f) (enacted by Chapter 398); *see also id.* §81006(f)(2) (enacted by Chapter 398) (mandating that “the entire fruit-bearing part of the plant including the seeds shall be used as a sample”).

62. *Id.* § 81006(f)(4) (enacted by Chapter 398).

63. *Id.* § 81006(f)(5) (enacted by Chapter 398).

64. *Id.*

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officials on request and purchasers and transporters of hemp.⁶⁵ Chapter 398 requires that any sample that exceeds 1% THC be destroyed by the grower within forty-eight hours.⁶⁶ Samples that exceed 0.3% but are less than 1% must be submitted for secondary testing.⁶⁷ Samples exceeding 0.3% on this secondary test must be destroyed as soon as practicable within forty-five days of the test.⁶⁸

D. Marijuana Crimes Alongside Legal Hemp Cultivation

Chapter 398 provides immunity from prosecution for the cultivation or possession of marijuana when hemp that tests between 0.3% and 1% is grown in compliance with the law.⁶⁹ The legislation does not extend this immunity to hemp that has a THC content above 1%.⁷⁰ Further, it does not immunize those who grow industrial hemp for any unlawful purpose.⁷¹ Finally, Chapter 398 specifically states that it is the intent of the legislature not to overburden law enforcement agencies with such regulating.⁷²

E. Assessing the Economic Impact of Chapter 398

Chapter 398 requires the Attorney General to submit to the Senate and Assembly Committees on Agriculture and Public Safety reported instances involving the use of industrial hemp plots to disguise marijuana growth⁷³ and any claims that marijuana is lawfully grown industrial hemp.⁷⁴ Additionally, the legislation provides that the Hemp Industries Association shall assist the Advisory Board in reporting to the Assembly and Senate Committees on Agriculture and Public Safety on the economic impact of the California Industrial Hemp Farming Act within the state,⁷⁵ as well as the economic effect that hemp can have in the states that allow its cultivation.⁷⁶ Chapter 398 also grants the

65. *Id.* at § 81006(f)(10) (enacted by Chapter 398).

66. *Id.* at § 81006(f)(7) (enacted by Chapter 398).

67. *Id.* at § 81006(f)(6)–(7) (enacted by Chapter 398).

68. *Id.* at § 81006(f)(7) (enacted by Chapter 398).

69. *Id.* at § 81006(f)(8) (enacted by Chapter 398).

70. *Id.*; *but see id.* § 81007(f)(9) (enacted by Chapter 398) (exempting industrial hemp grown by established agricultural research institutions when such growth “contributes to the development of types of industrial hemp that will comply with the three-tenths of 1 percent THC limit established in this division”).

71. *See id.* § 81007 (a) (enacted by Chapter 398) (stressing that Chapter 398 shall not allow the possession of “resin, flowering tops, or leaves that have been removed from the hemp plant,” which are excluded from the definition of industrial hemp).

72. 2013 Cal. Stat. ch. 398 § 2(h).

73. FOOD & AGRIC. § 81008(1) (enacted by Chapter 398).

74. *Id.* § 81008(2) (enacted by Chapter 398).

75. *Id.* § 81009(a) (enacted by Chapter 398).

76. *Id.* § 81009(b) (enacted by Chapter 398).

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Attorney General the ability to recommend additional regulations as necessary and to work with the Industrial Hemp Advisory Board in their implementation.⁷⁷

IV. ANALYSIS

Section A addresses the impact of Chapter 398 alongside federal law.⁷⁸ Section B discusses the administrative bodies and enforcement mechanisms of Chapter 398.⁷⁹ Section C details the regulatory framework of hemp growth under Chapter 398 and its impact on law enforcement personnel.⁸⁰ Finally, Section D describes the fiscal impact of hemp legalization.⁸¹

A. Chapter 398 Amidst Conflicting Federal Law

Prior to the passage of Chapter 398, California governors had a history of citing conflicting federal law when vetoing hemp legislation.⁸² Chapter 398's design is therefore not without intention; indeed, Senator Leno has stated that the legislation was "carefully crafted to eliminate conflicts with federal law."⁸³ Additionally, Chapter 398 passed with a legislative declaration specifically recognizing the ruling in *Hemp II*, which rejected the scheduling of naturally occurring THC.⁸⁴ The legislation therefore addresses the changing politics surrounding hemp law.⁸⁵ In doing so, it constructs a tightly regulated, but economically promising, marketplace for hemp cultivation by distinguishing hemp growth and harvesting from cannabis.⁸⁶ It enables California cultivators "to be some of the most prepared farmers in America to grow hemp once the federal government allows it."⁸⁷

B. The Enforcement Mechanisms of Chapter 398

Chapter 398 assigns the regulatory authority of hemp control to the Department of Food and Agriculture.⁸⁸ The Secretary of Food and Agriculture

77. *Id.* § 81006(g) (enacted by Chapter 398).

78. *Infra* Part IV.A.

79. *Infra* Part IV.B.

80. *Infra* Part IV.C.

81. *Infra* Part IV.D.

82. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 676, at 5 (Jan. 4, 2012) (noting vetoes by Governors Davis, Schwarzenegger, and Brown concerning prior hemp cultivation measures).

83. Vote Hemp, *supra* note 1 (on file with the *McGeorge Law Review*).

84. 2013 Cal. Stat. ch. 398 § 2(b).

85. *Id.*

86. CAL. HEALTH & SAFETY CODE § 11018.5 (enacted by Chapter 398); *see* CAL. FOOD & AGRIC. CODE § 81007 (enacted by Chapter 398) (setting forth required procedures concerning growth and testing of hemp).

87. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 6 (Apr. 30, 2013).

88. FOOD & AGRIC. § 81001(a) (enacted by Chapter 398).

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operates in consultation with the Industrial Hemp Advisory Board.⁸⁹ The Advisory Board provides input to the Secretary of Food and Agriculture that addresses both economical and safety concerns in promulgating regulations.⁹⁰ There is also substantial information available to the Advisory Board through Chapter X's registration process for growers, including the location, cultivar, purpose, and size of all hemp growth operations.⁹¹ This well-sourced information should allow the Advisory Board to assess the impact of its hemp regulations and recommend its adjustment as necessary.⁹²

Nevertheless, Chapter 398 does not derive its entire regulatory framework from the Advisory Board or Secretary.⁹³ Functionally, the mandatory testing and disposal requirements of Chapter 398 promote self-regulation by growers who wish to sell or transport their hemp crop.⁹⁴ Growers who do not meet the requirements for testing will not be issued a certified lab report authorizing their hemp for sale in California.⁹⁵ Because this certified lab report must accompany the sale or transportation of hemp, growers will likely be heavily motivated to seek laboratory testing.⁹⁶ However, these testing requirements would arguably not prevent a determined hemp purchaser from disregarding the laboratory certification requirement.⁹⁷

C. The Regulations of Chapter 398 and the Role of Law Enforcement

1. Chapter 398's Regulatory Scheme

Chapter 398 thoroughly regulates the growth and harvest of hemp to distinguish it from marijuana.⁹⁸ Chapter 398 regulates growth by restricting horticultural tending and "pruning of individual plants,"⁹⁹ in addition to dense

89. *Id.* § 81001(e) (enacted by Chapter 398).

90. *See id.* § 81001(a)(5)–(7) (enacted by Chapter 398) (describing various industry representatives within the Advisory Board whose primary interests will likely be economic); *id.* at § 81001(a)(8) (enacted by Chapter 398) (including law enforcement representatives who will likely be concerned with safety).

91. *Id.* § 81003 (enacted by Chapter 398).

92. *See id.* § 81006 (g) (allowing the Attorney General to recommend new regulations to be implemented in conjunction with the Industrial Hemp Advisory Board).

93. *See id.* § 81006(f)(1)–(10) (enacted by Chapter 398) (mandating and describing laboratory testing procedures required for the lawful sale of hemp within the state).

94. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013) (noting that Chapter 398 "ensures that hemp crops meet the three-tenths of one percent THC standard" in describing how law enforcement will not be burdened).

95. FOOD & AGRIC. § 81006(f)(5) (enacted by Chapter 398).

96. *See id.* at § 81006(f)(10) (enacted by Chapter 398).

97. *See id.*

98. 2013 Cal. Stat. ch. 398 § 2(h)(5).

99. FOOD & AGRIC. § 81006(c) (enacted by Chapter 398); *see also* 2013 Cal. Stat. Ch. 398 § 2(h)(5) (defining horticultural tending as "includ[ing], but . . . not limited to, pathways or rows within the field that provide access to each plant, the pruning of individual plants, or the culling of male plants from the field").

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planting requirements.¹⁰⁰ Hemp plants do not need the same individualized attention and cultivation required to effectively grow marijuana plants.¹⁰¹ Therefore, regulations that prohibit pruning and tending of individual plants do little to affect hemp growth while demonstrating to law enforcement that the crop is not marijuana.¹⁰² However, both supporters and opponents of hemp legalization recognize that untrained citizens might not readily distinguish the hemp from marijuana.¹⁰³ Other countries that permit hemp growth employ the use of signage that denotes the presence of industrial hemp as opposed to marijuana.¹⁰⁴ Chapter 398 employs this signage requirement in recognition of the potential inability for would-be thieves, who might confuse lawful industrial hemp for marijuana, to recognize other cultivation regulations.¹⁰⁵

Chapter 398 also regulates the harvest of hemp by setting a maximum limit of THC that must be verified by laboratory testing.¹⁰⁶ However, the maximum allowable amounts of THC are quite low—roughly twenty-five times lower than marijuana.¹⁰⁷ These limits on THC content minimize the psychoactive properties of hemp, ensuring that the plant cannot effectively be used as a drug.¹⁰⁸ Indeed, the limits on THC ensure that a would-be user of hemp products could not test positive for THC, no matter how much contact they had with hemp.¹⁰⁹ In promulgating these limits, Chapter 398 also mandates that growers destroy hemp exceeding the maximum limit of THC¹¹⁰—further ensuring the dissemination of only nonpsychoactive hemp.¹¹¹

Chapter 398 goes even further in its regulatory scheme by casting an outright ban on the use of hemp flowers for any purpose.¹¹² The legislation recognizes that

100. See FOOD & AGRIC. § 81006(a)(1) (enacted by Chapter 398) (mandating that hemp be planted on plots at least five acres in size).

101. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013) (noting that hemp commonly “grows in dense groves”); *id.* at 9 (noting the establishment of “various plant cultivation prohibitions to allow visual differentiation between hemp and marijuana fields”).

102. See *id.* at § 2(h)(5).

103. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013).

104. See *id.* (noting that the use of signs in Canada was successful in deterring theft).

105. *Id.*

106. See CAL. FOOD & AGRIC. CODE §81006(f)(4) (enacted by Chapter 398) (detailing maximum legal limits of THC); *id.* §81006(f)(10) (enacted by Chapter 398) (mandating that growers provide certified copies of THC testing upon sale of hemp).

107. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 9 (Apr. 30, 2013).

108. See Vote Hemp, *supra* note 1 (on file with the *McGeorge Law Review*) (“Hemp has absolutely no value as a recreational drug.”).

109. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 9 (Apr. 30, 2013).

110. FOOD & AGRIC. §81006(f)(7) (enacted by Chapter 398). *But see id.* §81006(f)(8) (enacted by Chapter 398) (extending immunity from prosecution for marijuana cultivation when a person complies with regulations for growth and the THC content is greater than 0.3% but less than 1%).

111. 2013 Cal. Stat. Ch. 398 § 2(h)(2).

112. See FOOD & AGRIC. §81007(a) (enacted by Chapter 398) (exempting this restriction only for THC laboratory testing in compliance with Chapter 398).

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hemp flowers may not have the same psychoactive properties as marijuana flowers.¹¹³ Nevertheless, it makes possession outside of a lawful cultivation field completely illegal.¹¹⁴ Legalizing the possession of hemp flowers would burden law enforcement and effectively require officials to test the material to determine whether it is legal hemp or illegal marijuana.¹¹⁵ By making hemp flowers illegal, Chapter 398 creates a presumption in favor of law enforcement, allowing the possession of hemp flowers to be equated with marijuana possession.¹¹⁶ This restriction presumably limits the amount of THC testing required of law enforcement¹¹⁷ without restricting portions of the plant used in the hemp market.¹¹⁸

2. *The Role of Law Enforcement*

According to the office of Senator Leno, the regulations surrounding hemp growth and testing were critical in gaining greater support from law enforcement agencies—particularly the California Sheriffs Officers Association—than past hemp legalization efforts.¹¹⁹ However, the consensus on Chapter 398’s regulatory scheme remains far from unanimous.¹²⁰ Chapter 398 remains divisive among law enforcement agencies despite the legislative intent to minimize any burden surrounding hemp legalization.¹²¹ Truly, Chapter 398 draws the entirety of its recorded opposition from law enforcement agencies.¹²²

Many law enforcement agencies reject Chapter 398’s efforts to regulate the growth and cultivation of hemp as insufficient.¹²³ They insist that criminals will deliberately disguise lawful hemp cultivation.¹²⁴ Additionally, they argue that

113. 2013 Cal. Stat. Ch. 398 § 2(h)(4).

114. FOOD & AGRIC. § 81007 (enacted by Chapter 398).

115. *See* Letter from Opposition to Senate Bill 566, to Senate Public Safety Committee, Cal. State Senate (Apr. 21, 2013) [hereinafter Letter from Opposition] (on file with the *McGeorge Law Review*).

116. *Id.*; SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013).

117. *Id.*

118. 2013 Cal. Stat. Ch. 398 § 2(e) (noting that manufacturers of hemp products commonly import the seeds, fibers, and oils of the plant for use in materials).

119. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013); *see also* Press Release, Vote Hemp, California Hemp Farming Bill SB 566 Earns Strong Support from Businesses, Leading Advocacy Groups and Sheriffs Association (Apr. 2, 2013) (on file with the *McGeorge Law Review*) (quoting the Association as being “pleased to support SB 566”).

120. *See* Letter from Opposition, *supra* note 115, (listing the various law enforcement organizations that opposed SB 566).

121. *See* Letter from John Lovell, Legislative Counsel, California Police Chiefs Association, to Mark Leno, Senator, Cal. State Senate (Mar. 22, 2013) [hereinafter Letter from John Lovell] (on file with the *McGeorge Law Review*) (opposing Chapter 398 on behalf of the California Police Chiefs Association and the California Narcotics Officers Association).

122. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 566, at 7 (May 28, 2013).

123. *See* Letter from Opposition, *supra* note 119.

124. Letter from John Lovell, *supra* note 120.

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even lawful hemp cultivation may be at risk for potential theft from criminals who mistake the crop for marijuana.¹²⁵ Notwithstanding such opposition, the regulations allow growers to distinguish hemp crops from marijuana while still planting in a manner that is economical for hemp cultivation.¹²⁶ Additionally, Chapter 398 mandates that one member of the Advisory Board shall be a law enforcement representative provided by the California State Sheriffs' Association.¹²⁷ Because the Advisory Board assists in the promulgation and enforcement of hemp regulations, law enforcement agencies have a Chapter 398-mandated input in determining hemp growth requirements.¹²⁸

D. The Fiscal Impact of Chapter 398

Chapter 398 delegates new regulatory responsibilities to the Department of Food and Agriculture and to local county commissioners.¹²⁹ Therefore, it requires growers of industrial hemp to pay to cover the expenses associated with regulating hemp growth.¹³⁰ The legislation also extracts a registration and a subsequent renewal fee to cover the costs of registering growers.¹³¹ Because these costs are delegated to the growers of industrial hemp, they do not impact the state budget.¹³²

V. CONCLUSION

With the passage of Chapter 398, California now awaits federal action on legalizing hemp growth.¹³³ Ideally, California's decision to legalize hemp might encourage and motivate greater action at the federal level.¹³⁴ Nevertheless, while the stage is set for hemp growth, the green light for growth has yet to appear.¹³⁵

It also remains to be seen how Chapter 398's regulatory framework will foster hemp growth.¹³⁶ Concerns about the safety of hemp legalization and its

125. See Letter from Opposition, *supra* note 115 (citing vandalism of hemp crops in countries that have already legalized cultivation, particularly incidents involving the theft of hemp product under the mistaken belief that the plants are marijuana).

126. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 566, at 7 (Apr. 30, 2013).

127. CAL. FOOD & AGRIC. CODE § 81001(a)(3) (enacted by Chapter 398).

128. *Id.* § 81001(a)(3) (enacted by Chapter 398).

129. See FOOD & AGRIC. § 81001 (enacted by Chapter 398) (describing the obligations of the newly-created Advisory Board).

130. *Id.* § 81005 (enacted by Chapter 398).

131. *Id.* § 81006 (enacted by Chapter 398).

132. *Id.* § 81005 (enacted by Chapter 398); *id.* § 81006 (enacted by Chapter 398).

133. 2013 Cal. Stat. ch. 398 § 8.

134. Vote Hemp, *supra* note 1.

135. 2013 Cal. Stat. ch. 398 § 8.

136. FOOD & AGRIC. § 81009 (enacted by Chapter 398).

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impact on marijuana laws persist.¹³⁷ Nonetheless, the regulations on hemp growth and growers are significant in relation to the potential safety concerns. It has yet to be seen how feasible hemp growth might become within California—and whether the state can compete with the heavily subsidized foreign markets that had a head-start on legalization.¹³⁸

137. Vote Hemp, *supra* note 1 (on file with the *McGeorge Law Review*).

138. Letter from John Lovell, Legislative Counsel, California Police Chiefs Association, to Mark Leno, Senator, Cal. State Senate (Mar. 22, 2013) (on file with the *McGeorge Law Review*).