



1-1-2014

SB 1262: California Hashes Out Medical Marijuana Industry Regulation and Dispenses Greater Scrutiny of Physician Recommendations

Erika Lewis

Pacific McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Health Law and Policy Commons](#), and the [Legislation Commons](#)

Recommended Citation

Erika Lewis, *SB 1262: California Hashes Out Medical Marijuana Industry Regulation and Dispenses Greater Scrutiny of Physician Recommendations*, 46 MCGEORGE L. REV. 273 (2014).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol46/iss2/4>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

SB 1262: California Hashes Out Medical Marijuana Industry Regulation and Dispenses Greater Scrutiny of Physician Recommendations

Erika Lewis

Code Section Affected

Health and Safety Code §§ 18100–18116 (new). Business and Professions Code §§ 2220.05, 2525 (amended).

SB 1262 (Correa, Principal coauthor: Assembly Member Ammiano); Bill placed in suspense file August 2014.

TABLE OF CONTENTS

I. INTRODUCTION	273
II. LEGAL BACKGROUND	275
A. <i>The Federal Government ‘Just Says No’ to Marijuana</i>	275
B. <i>California Stirs the Pot</i>	276
C. <i>Localities Try to Clear Up the Smoke</i>	277
D. <i>Everybody’s Doing It</i>	280
III. SB 1262.....	281
IV. ANALYSIS.....	284
A. <i>Incentive for Marijuana Control</i>	284
B. <i>Regulating the Wild, Wild West</i>	286
C. <i>Access, Continuance, and Costs: Opposition Has High Concerns</i>	288
D. <i>Preventing Federal Prosecution</i>	291
E. <i>So Why Did SB 1262 Burn Out?</i>	293
V. CONCLUSION.....	294

I. INTRODUCTION

When the United States government fails to implement and enforce a new regulatory scheme, the failure becomes engraved in the minds of the public and it can have catastrophic consequences.¹ For example, the Affordable Health Care Act rollout is remembered for its unwanted complications, including website

1. See generally OECD, REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE (2000), available at <http://www.oecd.org/gov/regulatory-policy/46466287.pdf> [hereinafter REDUCING THE RISK OF POLICY FAILURE] (on file with the *McGeorge Law Review*) (explaining that the success of a regulatory scheme largely depends on whether the group that is effected by the regulations have the ability to comply with the laws and whether the enforcement levels match the ultimate goals of the laws).

malfunctions, a delayed initiation date, and the shutdown of individual market plans.² The Department of Homeland Security's implementation of its National Response Plan proved to be a failure during Hurricane Katrina due to a lack of communication, preparation, and coordination between state and federal responders.³

The implementation phase of a new regulatory scheme is not the only factor that determines whether the scheme will be a success; it must also be managed and enforced.⁴ For example, between 2000 and 2008, existing economic regulatory agencies failed to manage risky financial lending practices that eventually snowballed into the Great Recession of 2008.⁵ These examples are extreme, but they depict what can happen if a regulation is designed, administered, or enforced incorrectly.⁶

Since becoming the first state to legalize medical marijuana, California has struggled to create effective regulations to govern the commercial industry.⁷ For several years, Assembly Member Tom Ammiano proposed legislation for marijuana industry oversight, but each proposal failed.⁸ The state's stalemate is due in part to law enforcement lobbyists derailing proposals for the commercial regulation of marijuana.⁹ In 2014, things changed when the California Police Chief's Association and the League of California Cities sponsored a bill that would initiate a regulatory framework for the medical marijuana industry.¹⁰ SB

2. Tom Cohen, *Rough Obamacare Rollout: 4 Reasons Why*, CNN (Oct. 23, 2013, 9:17 AM), <http://www.cnn.com/2013/10/22/politics/obamacare-website-four-reasons/> (on file with the *McGeorge Law Review*).

3. DONALD P. MOYNIHAN, THE RESPONSE TO HURRICANE KATRINA (2009), available at irgc.org/Hurricane_Katrina_full_case (on file with the *McGeorge Law Review*).

4. See REDUCING THE RISK OF POLICY FAILURE, *supra* note 1, at 20 (asserting that the failure to enforce leads to lack of compliance).

5. *The Origins of the Financial Crisis, Crash Course*, ECONOMIST (Sept. 7, 2013), <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> (on file with the *McGeorge Law Review*).

6. See REDUCING THE RISK OF POLICY FAILURE, *supra* note 1, at 19–20, 22 (listing examples of ramifications that occur when “a rule that is on the books” is not enforced).

7. See generally Assemb. B. 1894, 2014 Leg., Reg. Sess. (Cal. 2014); see also Assemb. B. 473, 2013 Leg., Reg. Sess. (Cal. 2014) (noting both bills were proposed by Assemblyman Ammiano as an attempt to regulate the marijuana industry and both subsequently failed).

8. Assemb. B. 1894, 2014 Leg., Reg. Sess. (Cal. 2014) (as amended on May 23, 2014, but not enacted); Assemb. B. 473, 2013 Leg., Reg. Sess. (Cal. 2014) (as amended May 24, 2013, but not enacted); Assemb. B. 2312, 2012 Leg., Reg. Sess. (Cal. 2012) (as amended May 25, 2012, but not enacted); Assemb. B. 390, 2010 Leg., Reg. Sess. (Cal. 2010) (as amended Jan. 4, 2010, but not enacted).

9. See CAL. POLICE CHIEFS ASS'N, SENATE BILL 1262 (CORREA) MEDICAL MARIJUANA REGULATION (2014), available at www.californiapolicechiefs.org/assets/sb-1262/1262%20fact%20sheet.pdf (on file with the *McGeorge Law Review*) (discussing the inability to impose a decent regulatory scheme of medicinal marijuana since its use became legal in 2003).

10. See Letter from California Police Chiefs Association, Senate Bill 1262 (Correa), to the Honorable Lou Correa, Member of the California Senate Regarding Senate Bill 1262 (Correa) (Feb. 24, 2014), available at www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/Marijuana-Policy/SB-1262-Joint-Letter-to-Senj-Correa.aspx (on file with the *McGeorge Law Review*) (explaining the need for marijuana industry regulation).

1262 stemmed from the industry's need for recognition of marijuana as a state approved medical treatment, guidance for law enforcement, oversight of physician's marijuana recommendations to patients, and clarity regarding the risks the industry faces from the federal government.¹¹ SB 1262 sought to satisfy these needs by implementing statewide regulations and limitations on businesses and physicians within the industry.¹²

II. LEGAL BACKGROUND

Marijuana has had a long and turbulent history throughout the United States, and California's marijuana legislative history is no exception.¹³ While marijuana use is illegal under federal law,¹⁴ many states have chosen to permit its medical use, including California.¹⁵ After becoming the first state to allow medical marijuana, and without any regulatory framework to guide this growing enterprise, California became known as "the wild, wild west."¹⁶

Localities attempted to fill the gaps within the state's marijuana regulations, leaving law enforcement and patients with a patchwork of rules to navigate.¹⁷ This patchwork increased the tension between the conflicting laws of the federal and state government, and consequently the United States Department of Justice responded with a strict set of priorities.¹⁸ Although tension between state and federal preferences has not dissipated, many states continue to legalize and regulate the industry.¹⁹

A. *The Federal Government 'Just Says No' to Marijuana*

In 1970, Congress enacted the Controlled Substances Act (CSA) as a part of the Comprehensive Drug Abuse Prevention and Control Act.²⁰ The CSA

11. Press Release, Lou Correa, Sen., Cal. State S., Correa Medical Marijuana Legislation Clears Assembly Public Safety Committee (2014) [hereinafter Press Release, Assembly Member Correa, Medical Marijuana Legislation], available at <http://sd34.senate.ca.gov/news/2014-06-26-correa-medical-marijuana-legislation-clears-assembly-public-safety-committee> (on file with the *McGeorge Law Review*).

12. See generally S.B. 1262, 2014 Leg., Reg. Sess. (Cal. 2014) (as amended and corrected by Assemb. Comm. on Appropriations, Aug. 7, 2014) (creating licensing regulations for medical marijuana businesses and restricting physician recommendations of the drug).

13. CAL. POLICE CHIEFS ASS'N, *supra* note 9.

14. *Infra* Part II.A.

15. *Infra* Part II.B.

16. Jim Araby, *California Legislators Should Lasso 'Wild West' of Medical Marijuana*, SACRAMENTO BEE (Mar. 25, 2015, 5:00 PM), <http://www.sacbee.com/opinion/op-ed/soapbox/article16312133.html> (on file with the *McGeorge Law Review*).

17. *Infra* Part II.C.

18. *Id.*

19. *Infra* Part II.D.

20. Drug Abuse Prevention and Control Act of 1973 Pub. L. No. 91-513, 84 Stat. 1236 (1970).

categorizes controlled substances into five schedules.²¹ Substances in Schedule I, like marijuana, are designated as having “no currently accepted medical use.”²² As a result, it is illegal to use, possess, dispense, and manufacture marijuana under federal law, save for a few narrow exceptions.²³ Shortly after the CSA’s enactment, the DEA received petitions to reclassify marijuana as a Schedule II drug,²⁴ which would enable physicians to legally prescribe it.²⁵ The federal government has denied every petition and marijuana use remains largely illegal under federal law.²⁶

B. California Stirs the Pot

Despite federal law, Congress passed a statewide initiative known as the Compassionate Use Act (CUA) in 1996.²⁷ The CUA exempts the following from criminal penalties: a patient’s use, possession, and cultivation of marijuana; or a caregiver’s possession or cultivation of marijuana.²⁸ To receive the exemption, a physician must give a written or oral recommendation for medical marijuana as an appropriate treatment.²⁹ While the CUA authorizes patients to treat a wide array of illnesses with the drug,³⁰ the provision does not allow for recreational use or sale.³¹

The CUA generated significant confusion about who could lawfully use medical marijuana and who could not.³² In 2003, the California legislature enacted the Medical Marijuana Program Act (MMPA), which created a registry system that issues identification cards to “qualified patients” and their primary

21. 21 U.S.C. § 812(a) (West 1970).

22. *Id.* Other factors that contribute to placing a drug in Schedule I include “a high potential for abuse” and inadequate safety measures for supervising the drug’s use. *Id.* § 812(A)–(C).

23. *Id.* § 841(a)(1)–(2). The federal government permits a small number of patients to receive medicinal marijuana through the Investigational New Drug Program. See Roger Parloff, *How Marijuana Became Legal*, FORTUNE MAGAZINE (Sept. 2009) http://archive.fortune.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/index.htm (on file with the *McGeorge Law Review*) (discussing how Irvin Rosenfield received marijuana from the federal government under an “investigative new drug program,” which has since been ended).

24. See *Alliance for Cannabis Therapeutics v. Drug Enforcement Administration*, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (finding the Administrator’s assertion that marijuana has not been proven to be medically beneficial is supported by substantial evidence).

25. 21 U.S.C. § 829(a) (2009).

26. See Parloff, *supra* note 23.

27. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996). Since the CUA was passed through voter initiative, the statute cannot be amended by the legislature unless the amendment is specifically related to the initiative empowers the legislature to amend its language. CAL. CONST. art. II, § 10(c); *People v. Kelly*, 47 Cal. 4th 1008, 1025–1026 (1st Dist. 2013).

28. HEALTH & SAFETY § 11362.5(b)(1)(A)–(B).

29. *Id.* § 11362.5(d).

30. *Id.* § 11362.5(b)(1)(A) (listing “cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief” as qualified illnesses).

31. See *id.* § 11362.5 (only permitting use of marijuana with physician approval with no mention of recreational use).

32. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 420, at 1–2 (Sept. 9, 2003).

caregivers who voluntarily apply for one.³³ Law enforcement could then distinguish medicinal marijuana patients from others,³⁴ and patients could access marijuana with a minimal chance of arrest.³⁵

While the MMPA does not formally define “dispensary,” it does state that primary caregivers and patients may “collectively or cooperatively . . . cultivate marijuana for medical purposes.”³⁶ However, a county or city may restrict the geographical location of “cooperatives” that supply marijuana to patients.³⁷ Originally, the Department of Health Services intended to enforce the authorization of cooperative and collective cultivation.³⁸ Yet, a September 2003 amendment shifted the responsibility of preventing diversion—non-medical use—to the California Attorney General.³⁹

C. Localities Try to Clear Up the Smoke

The lack of regulation in California’s medical marijuana laws left local governments in a precarious position.⁴⁰ The MMPA immunizes those who qualify under the statute from State prosecution for collective and cooperative cultivation, but the state Legislature did not provide any direction on how to regulate these acts, making litigation inevitable.⁴¹ In response to the increasing number of marijuana storefronts, cities like Oakland enacted ordinances that required every dispensary to hold a business permit.⁴² Alternatively, Los Angeles did not impose licensing laws.⁴³ Consequently, the city saw at least 850 medical marijuana storefront shops open, close, and re-open without authorization in

33. HEALTH & SAFETY § 11362.7(c)–(d).

34. *Id.* § 11362.71(a)(2). Additionally, in 2010 SB 1449 was enacted, which reduced a marijuana possession charge of 28.5 ounces or less from a misdemeanor to an infraction. *Id.* § 11357(b). Compare *id.* § 11357(b) with *id.* § 11357(b) (West Supp. 2014).

35. *Id.* § 11362.71(e).

36. *Id.* § 11362.775.

37. *Id.* § 11362.768(f).

38. S.B. 420 § 2, 2003–2004 Leg., Reg. Sess. (Cal. 2004) (as enacted Oct. 12, 2003). Section 11362.755 initially appointed the Department of Health Services with the task of regulating, inspecting, and creating criteria for the security and quality of marijuana that these collectives and cooperatives would sell. *Id.*

39. S.B. 420, 2003–2004 Leg., Reg. Sess. (Cal. 2004) (enacted Oct. 12, 2003).

40. See generally CAL. POLICE CHIEF’S ASS’N, MEDICAL MARIJUANA DISPENSARIES (2006), available at <http://www.procon.org/sourcefiles/CAPCAWhitePaperonMarijuanaDispensaries.pdf> (on file with the *McGeorge Law Review*) (noting that because of their lucrative potential, need for secrecy, and high demand, marijuana dispensaries attract a substantial amount of criminal activity that is difficult to track).

41. See William M. Welch, *L.A.’s Marijuana Stores Take Root*, USA TODAY (Mar. 3, 2007, 2:01 AM), http://usatoday30.usatoday.com/news/nation/2007-03-07-pot-clinics_N.htm?csp=34 (noting that in 2005, the number of dispensaries went from four to 98 and these dispensaries had “menus of varieties of pot for sale to anyone with a doctor’s note”); see also 420 Caregivers, LLC v. City of Los Angeles, 219 Cal. App. 4th 1316, 1342 (2d Dist., 2012) (holding that placing a limit on the number of individuals who collectively cultivated medical marijuana did not violate any provision within the MMPA and consequently did not violate California’s due process protection).

42. OAK., CAL., BUS. REGS. ch. 5.80 (2007).

43. L.A., CAL., Ordinances No. 182580 (2010).

2008 alone.⁴⁴ In March 2013, Los Angeles enacted Proposition D, which banned all medical marijuana businesses except those businesses that, at the time, complied with the city's marijuana laws.⁴⁵ Today, while many cities restrict marijuana dispensaries through zoning laws, cities have the option of prohibiting dispensaries completely.⁴⁶

In response to the gaps in California's marijuana laws and increasing marijuana use, cultivation, and sale the legislature presented a flux of legislative proposals,⁴⁷ ballot initiatives,⁴⁸ and guidelines.⁴⁹ These proposals ranged from legalizing the recreational use of marijuana⁵⁰ to creating an agency specifically designed to regulate the product within the Department of Alcoholic Beverage Control.⁵¹

Additionally, judicial decisions have influenced marijuana's legal landscape.⁵² A unanimous California Supreme Court in *Riverside v. Inland Empire* held that Riverside's zoning laws, which banned marijuana dispensaries, were not preempted by state law.⁵³ However, the Court in *Inland Empire* invited the legislature to clarify their holding.⁵⁴

44. *Id.*

45. L.A., CAL., MUN. CODE ORDINANCES § 45.19.6 (2013). In effect, Proposition D grants an immunity to existing dispensaries until the California Supreme Court "rules regarding what cities can and cannot regulate and the City enacts new medical marijuana legislation consistent with that judicial guidance." L.A., CAL., Ordinance No. 182580 (2010).

46. See *Local California Dispensary Regulations*, AMERICANS FOR SAFE ACCESS, <http://www.safeaccessnow.org/article.php?id=3165> (last visited Sept. 8, 2010) (recognizing counties' ability to ban dispensaries).

47. Assemb. B. 473, 2013 Gen. Assemb., Reg. Sess. (Cal. 2013) (as amended May 24, 2013, but not enacted); Assemb. B. 604, 2013 Gen. Assemb., Reg. Sess. (Cal. 2013) (as amended Sept. 11, 2013, but not enacted); Assemb. B. 2312., 2011 Gen. Assemb., Reg. Sess. (Cal. 2011) (as amended May 25, 2012, but not enacted) (note that these proposals were all authored by the same Assembly Member, Tom Ammiano).

48. See *California Proposition 19, The Marijuana Legislation Initiative*, UCHASTINGS.EDU, 60 (Nov. 2, 2010), http://librarysource.uchastings.edu/ballot_pdf/2010g.pdf (on file with the *McGeorge Law Review*) (proposing to legalize marijuana for cultivation, possession, and select commercial transactions).

49. OFFICE OF THE ATT'Y GEN., GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MEDICAL MARIJUANA GROWN FOR MEDICAL USE GUIDELINES 1 (2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf [hereinafter GUIDELINES] (on file with the *McGeorge Law Review*).

50. *California Proposition 19, The Marijuana Legislation Initiative*, *supra* note 48, at 92.

51. Assemb. B. 473, 2013 Gen. Assemb., Reg. Sess. (Cal. 2013).

52. See *People v. Colvin*, 203 Cal. App. 4th 1029, 1041 (2d Dist. 2012) (holding that collectives and cooperatives organized into retail style storefront dispensaries that make money to pay business expenses, and comply with local ordinances, are granted a defense under section 11362.775); see also *People v. Jones*, 112 Cal. App. 4th 341, 350–51 (3d Dist. 2003) (holding that a defendant's testimony that his doctor stated marijuana "might help, go ahead" constituted as sufficient evidence to raise a reasonable doubt about whether the statement qualified as a doctor recommendation under the CUA).

53. *City of Riverside v. Inland Empire Patients Health and Wellness Center Inc.*, 56 Cal. 4th 729, 762 (2013).

54. *Id.* at 763 ("Of course, nothing prevents future efforts by the Legislature, or by the People, to adopt a different approach. In the meantime, however, we must conclude that Riverside's ordinances are not preempted by state law.").

With the lack of cooperation between federal and state laws, the Department of Justice published a memorandum (DOJ Memo) to provide guidance to US Attorneys.⁵⁵ While the DOJ Memo commits to enforcing the CSA, it also clarifies that the DOJ will only pursue cases that they consider a top priority.⁵⁶ These priorities include:

[1] Preventing the distribution of marijuana to minors; [2] Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [3] Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; [4] Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or illegal activity; [5] Preventing violence and the use of firearms in the cultivation and distribution of marijuana; [6] Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [7] Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [8] Preventing marijuana possession or use on federal property.⁵⁷

Despite California's enthusiasm for medicinal marijuana, the United States Supreme Court in *Gonzales v. Raich* held that the federal government has the power to ban and prosecute marijuana users under the Commerce Clause.⁵⁸ Because of the holding in *Gonzales*, the Commerce Clause grants Congress the authority to proscribe local marijuana cultivation and use, and every time an individual uses, cultivates, or distributes the product, even if the state does not criminalize the acts, the individual is risking federal prosecution.⁵⁹

An initial bill authored by Assembly Member Tom Ammiano failed because it drew heavy criticism from the California Police Chief's Association and the League of California Cities for placing enforcement within the Department of Alcoholic Beverage Control and not preserving local authority as described in *Inland Empire*.⁶⁰ Simultaneously, Senator Lou Correa proposed SB 1262, which

55. GUIDELINES, *supra* note 49, at 1.

56. *Id.*

57. Memorandum for All United States Attorneys, from James M. Cole, Deputy Attorney General (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter DOJ Memo] (on file with the *McGeorge Law Review*).

58. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

59. *Id.*

60. Chris Roberts, *New Weed Order: California Cops are at Last Making a Dope Deal*, S.F. WEEKLY (July 2, 2014), <http://www.sfweekly.com/2014-07-02/news/chem-ales-tom-ammiano-police-union-marijuana-legalization/> (on file with the *McGeorge Law Review*); see also Jeremy White, *California Bill Regulating Medical Marijuana Fails in Assembly*, SACRAMENTO BEE (May 29, 2014), <http://blogs.sacbee.com/capitolalert/latest/2014/05/bill-regulating-medical-marijuana.html> (on file with the *McGeorge Law Review*) (stating that some lawmakers were concerned with the lack of local control in the bill).

drew considerable media coverage because, for the first time in 18 years, police associations were willing to recognize the medical marijuana industry.⁶¹

At first, SB 1262 was considered a pro-law enforcement, anti-medical marijuana bill.⁶² However, through the legislative process the bill transformed into a compromise between medical marijuana advocates and law enforcement.⁶³ As a result, SB 1262 was an attempt to combine the many interests of law enforcement, the federal government, and the medical marijuana industry.⁶⁴

D. Everybody's Doing It

Many other states that allow medical marijuana have already created a scheme—thus California has multiple models at its disposal.⁶⁵ Out of the 20 states and the District of Columbia that authorize marijuana's medicinal or recreational use, 14 have laws that specifically regulate dispensaries.⁶⁶ For example, Arizona dispensaries must be non-profit organizations, must be at least 500 feet away from schools, and may either grow their own marijuana or accept homegrown marijuana from qualified patients.⁶⁷ Similarly, in Nevada a person can own different types of medical marijuana facilities at the same time.⁶⁸

Initially, Colorado's dispensary law used a vertical integration model, requiring every marijuana business to be involved in growing, processing, and selling the drug.⁶⁹ This year, the state opened the market to businesses that specialize in one field.⁷⁰ In Colorado, cultivation sites must also be licensed in

61. Roberts, *supra* note 60.

62. *See id.* (noting that the first version only allowed primary care physicians to recommend medicinal marijuana and many of these doctors are unwilling to recommend the drug).

63. *See* Don Duncan, *So, What's the Deal with SB 1262?*, AMERICANS FOR SAFE ACCESS (Aug. 2, 2014), http://www.safeaccessnow.org/so_what_s_the_deal_with_sb_1262 (on file with the *McGeorge Law Review*) (recognizing that after Assembly Member Ammiano added portions from his AB 1894 bill there was a lot of "back-and-forth" with the bill).

64. *See* editorial, *Legislature Fails, Again, to Regulate Medical Marijuana*, SACRAMENTO BEE (Aug. 15, 2014), www.sacbee.com/incoming/article26026844.html (on file with the *McGeorge Law Review*) (recognizing that SB 1262 was "the closest the Legislature had come to a compromise"). Importantly, Senator Correa was originally the sole author of SB 1262, but after Assembly Member Ammiano's proposed medicinal marijuana bill failed, he became a co-author. *Id.*

65. *See generally* Marijuana Policy Project, *State-by-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, MPP, <http://norml.org/legal/medical-marijuana-2> (last visited Sept. 13, 2014) (on file with the *McGeorge Law Review*) (listing each state's marijuana laws). Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, and Vermont all have state-licensing programs that regulate dispensaries. *Id.*

66. *Id.*

67. Ariz. Proposition 203 (2010), *available at* <http://www.azsos.gov/election/2010/info/pubpamphlet/english/prop203.htm>.

68. 2013 Nev. Stat. 3695.

69. COL. TASK FORCE, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64, at 17 (2013), *available at* <http://www.colorado.gov/cms/forms/dor-%09tax/A64TaskForceFinalReport.pdf> (on file with the *McGeorge Law Review*).

70. COLO. CODE REGS. § 212-1:1.202 (West 2014).

compliance with standard health and safety requirements, which are enforced by local entities, such as building inspectors and fire departments.⁷¹ Each dispensary pays a designated application fee based on how many patients purchase the drug from that medical marijuana center.⁷²

In contrast, Washington uses a multi-tier model where businesses in each stage of production may only hold one license for the purpose of avoiding monopolies in the industry and encouraging smaller businesses to compete.⁷³ These regulatory schemes provide a glimpse into how California can approach the daunting task of regulating commercial marijuana.⁷⁴

III. SB 1262

SB 1262 would have regulated all levels of the medical marijuana industry and implemented stricter oversight of physician recommendations.⁷⁵ The bill would have defined dispensaries as “a distribution operation that provides medical marijuana or medical marijuana derived products . . . to patients.”⁷⁶ A dispensary would have been distinguished from a “[l]icensed manufacturer” . . . who extracts, prepares, derives, produces, compounds, or repackages medical marijuana or medical marijuana products into consumable and nonconsumable forms.⁷⁷ The legislation would have structured the marijuana industry as a chain of commerce where each level of production was designated a specified task.⁷⁸ This organized supply chain would have included licensed cultivation sites, manufacturers, dispensing facilities, transporters, and certified testing laboratories.⁷⁹

For all dispensary facilities, cultivation sites, and manufacturers seeking to carry out their designated function, SB 1262 would have required that each obtain a license⁸⁰ from the newly created Bureau of Medical Marijuana

71. *Id.* § 212-1:1.407.

72. *Id.* § 212-1:1.207.

73. WASH. ADMIN. CODE § 314-55-075 (Westlaw, current through 2014).

74. See generally Office of Nat'l Drug Control Policy, *Marijuana Resource Center: State Laws Related to Marijuana*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana> (last visited Aug. 10, 2014) (on file with the *McGeorge Law Review*) (depicting the different approaches to marijuana industry regulation).

75. SB 1262 Leg., 2013–2014 Sess. at § 2 (Cal. 2014) (as amended and corrected by Assemb. Comm. on Appropriations, Aug. 7, 2014, but not enacted); *id.* at § 4 (amending CAL. BUS. & PROF. CODE § 18101(a)–(c)); *id.* (adding CAL. BUS. & PROF. CODE § 18102(a)–(b)).

76. *Id.* at § 4 (adding CAL. BUS. & PROF. CODE § 18100(f)).

77. *Id.* (amending CAL. BUS. & PROF. CODE § 18100(f)–(j)).

78. *Id.* at § 4 (amending CAL. BUS. & PROF. CODE § 18106(a)–(e)); see also *id.* (adding CAL. BUS. & PROF. CODE § 18114) (recognizing that a licensee may only “acquire, cultivate, process, possess, store, deliver, transfer, transport, or dispense medical marijuana” for a purpose listed within the provision).

79. See *id.* at § 4 (amending CAL. BUS. & PROF. CODE § 18100(b)–(k)) (defining the different levels of the manufacture process). For example, a “licensed manufacturer means a person who extracts, prepares, derives, produces, compounds, or repackages” the drug. *Id.* (adding CAL. BUS. & PROF. CODE § 18100(j)).

80. S.B. 1262 at § 4, 2014 Leg., Reg. Sess. (Cal. 2014) (amending CAL. BUS. & PROF. CODE § 18102(c)).

Regulation (the Bureau) within the Department of Consumer Affairs.⁸¹ The Chief, as a representative of the Bureau, would have had the duty to administer and enforce the regulations and requirements implemented by SB 1262.⁸² A loan from the Department of Consumer Affairs would have funded the Bureau and been repaid through licensing fees.⁸³ License issuance and the associated collection of fee revenue would have commenced on January 1, 2016.⁸⁴

The Bureau would have charged a license fee of up to \$8,000 for each applicant, although the Bureau would only have been permitted to grant each applicant a license for “one class of specified medical marijuana activit[y].”⁸⁵ Prior to receiving a license, a business would have been required to comply with all local regulations and permit requirements.⁸⁶ Thus, a license would not have been issued to an establishment that was located in a locality that banned marijuana businesses.⁸⁷ Additionally, the Bureau also would have had the right to renew, revoke, and suspend a license for a broad range of reasons.⁸⁸ Further, under this legislation, facilities that obtained valid licenses would have been required to enforce certain security measures.⁸⁹

For dispensaries in existence prior to SB 1262 that complied with existing local laws, the Bureau would have consulted with the local agency and may have issued a provisional license to the business.⁹⁰ However, the Bureau would have been prohibited from issuing a provisional license to any entity (or individual) that had a pending local or state proceeding against them.⁹¹ Furthermore, a business would have been denied if it employed an individual who had a past federal conviction for drug trafficking.⁹² Once a business obtained a provisional

Prior to acquiring a license, an applicant must supply the following: name, address, telephone number, description of the business, completed application, fee payment, fingerprints, and any additional information the department requires. *Id.* (adding CAL. BUS. & PROF. CODE § 18108(a)–(b)).

81. *Id.* (adding CAL. BUS. & PROF. CODE § 18102(a)).

82. *Id.* (adding CAL. BUS. & PROF. CODE § 18102(e)).

83. *Id.* (adding CAL. BUS. & PROF. CODE § 18103).

84. *Id.* (adding CAL. BUS. & PROF. CODE § 18108(a)).

85. *Id.* (adding CAL. BUS. & PROF. CODE § 18101.2(g)). There are narrow exceptions, which permit a dispensary to grow marijuana within a 1,000-foot piece of land and each production level may also hold a transporting license in addition to their cultivation, manufacturing, or dispensary license. *Id.*

86. *Id.* (amending CAL. BUS. & PROF. CODE § 18108(e)).

87. *Id.* (amending CAL. BUS. & PROF. CODE § 18129).

88. *Id.* The Bureau may deny, suspend, or revoke a license for any reason that “would be contrary to public welfare or morals” or if the applicant “has violated any law prohibiting conduct involving moral turpitude.” *Id.*

89. *Id.* (amending CAL. BUS. & PROF. CODE § 18124). These security measures include: restricting access to the facility to only facility agents, primary caregivers, and qualified patients; limited access areas that are only accessible by authorized personnel; and all marijuana shall be stored in a safe, vault, or secure room that is locked. *Id.*

90. *Id.* (amending CAL. BUS. & PROF. CODE § 18107(a)(1)). A marijuana business that has immunity under Los Angeles’ Proposition D may also be eligible for a provisional license. *Id.* (amending CAL. BUS. & PROF. CODE § 18133).

91. *Id.* (amending CAL. BUS. & PROF. CODE § 18107(d)).

92. *Id.* (amending CAL. BUS. & PROF. CODE § 18110(a)(3)).

license, that facility could have only received marijuana from “other provisionally licensed entities.”⁹³ SB 1262 would have also placed “limit[s] . . . [on] the number of licensed cultivation sites statewide to prevent the diversion of medical marijuana for nonmedical purposes.”⁹⁴

Marijuana delivery and transportation would have required a separate license and such transportation could only have occurred between licensed facilities.⁹⁵ Before transporting marijuana, SB 1262 would have required a licensed processing or dispensary facility to request a specific quantity and keep adequate records.⁹⁶ At least two employees were to supervise vehicles transporting the drug, and drivers could not have transported marijuana across state lines.⁹⁷

SB 1262 also would have created a system to test medicinal marijuana.⁹⁸ Licensed facilities would have been required to contract with a “certified testing laboratory” to have their product tested.⁹⁹ The legislation would have required licensed dispensaries and other establishments to agree on a protocol that ensured the marijuana for sale was safe.¹⁰⁰ Any food containing marijuana, such as cookies or brownies, would have been subject to specified requirements depending on whether the edible was baked, refrigerated, or served hot.¹⁰¹ This regulation would have required each edible to be individually wrapped and labeled with a special warning.¹⁰²

SB 1262 would have subjected physicians who recommended marijuana to greater scrutiny.¹⁰³ The bill would have required a doctor-patient relationship to exist before a doctor could have given a recommendation.¹⁰⁴ Further, after recommending medicinal marijuana to a patient, a doctor could not have

93. *Id.* (amending CAL. BUS. & PROF. CODE § 18107(e)).

94. *Id.* § 18134. The number of cultivation sites allowed will be determined by first considering the number of legal sites permitted by local law. *Id.* The Bureau will then consider factors such as keeping the number of sites at a reasonable amount such that the Bureau can enforce regulation. *Id.*

95. *Id.* (amending CAL. BUS. & PROF. CODE § 18115(a)).

96. *Id.* (amending CAL. BUS. & PROF. CODE § 18115(b)–(c)).

97. *Id.* (amending CAL. BUS. & PROF. CODE § 18117(a), (d)).

98. *Id.* (amending CAL. BUS. & PROF. CODE § 18105(a)(5)).

99. *Id.* at § 7 (amending CAL. HEALTH & SAFETY CODE § 111660(a)).

100. *Id.* (amending CAL. HEALTH & SAFETY CODE § 111661(a)–(c)). These agreements must include recall procedures, testing to “eliminate microbiological contaminants and chemical residue” and a sufficient label. *Id.* § 11161(b). The label must state Tetrahydrocannabinol (THC) and cannabidiol (CBD) levels, a clear warning that marijuana is within the product and a dosage. *Id.*

101. *Id.* (amending CAL. HEALTH & SAFETY CODE § 111662).

102. *Id.* (amending CAL. HEALTH & SAFETY CODE § 111662(d), (f)). The label must include the date of manufacture, the drug’s net weight, and the THC and CBD levels. *Id.* Additionally, no pictures of food may be placed on the package and “only generic food names may be used . . . [f]or example, ‘snickerdoodle’ may not be used to describe a cinnamon cookie.” *Id.* (amending CAL. HEALTH & SAFETY CODE § 111662(g)–(h)).

103. *See id.* at § 2 (amending CAL. BUS. & PROF. CODE § 2220.05(a)(3)) (requiring strict compliance with the Federal Health Insurance Portability and Accountability Act of 1996 and close monitoring of prescriptions by providers).

104. *Id.* at § 3 (amending CAL. BUS. & PROF. CODE § 2525.2) (noting that the doctor must be considered “the patient’s attending physician”).

“accept[ed], solicit[ed], or offer[ed]” compensation to a facility.¹⁰⁵ Additionally, SB 1262 would have required any advertisement that offered a physician’s medical marijuana recommendation to state the requisite disclosure information under the CUA.¹⁰⁶ Further, the Medical Board of California would have investigated doctors who excessively recommended the drug¹⁰⁷ and collaborated with the Center for Medical Cannabis Research in creating medical guidelines.¹⁰⁸

Finally, local governments would have had the discretion to implement a tax on marijuana activities, regardless of whether or not the activity was for profit.¹⁰⁹

IV. ANALYSIS

Since California legalized medical marijuana nearly twenty years ago and state laws have continued to ignore any organized supply chain, the present questions are how to effectively regulate the industry, satisfy the federal government, and provide a safe drug to patients.¹¹⁰ With marijuana’s industrial expansion, California has many reasons to create a regulatory system.¹¹¹ As with any new government rollout, SB 1262 would have raised several issues, including whether local governments would have been capable of policing the industry, whether the legislation would have interfered with qualified patients’ access to the drug, which may have violated the CUA, and how the proposed obligations would have affected existing businesses.¹¹² Finally, a critical issue would have been whether SB 1262 successfully achieved the priorities expressed by the federal government and consequently, whether those working within the marijuana industry would have been protected from federal prosecution.¹¹³

A. Incentive for Marijuana Control

California’s lack of statewide marijuana control for nearly twenty years has led to severe consequences.¹¹⁴ In 2013, California had the highest number of

105. *Id.* (amending CAL. BUS & PROF. CODE § 2525(a)).

106. *Id.* at § 4 (amending CAL. BUS & PROF. CODE § 18123(a)).

107. *Id.* at § 2 (amending CAL. BUS & PROF. CODE §2220.05(a)(3)).

108. *Id.* at § 3 (amending CAL. BUS & PROF. CODE § 2525.1).

109. *Id.* at § 5 (amending CAL. GOV’T CODE § 23028(a)(1)–(4)).

110. *See* Press Release, Tom Ammiano, Assembly Member, Cal. State Assembly, Public Safety Committee Passes Medical Cannabis Regulation Bill (June 26, 2014) [hereinafter Press Release, Assembly Member Ammiano, Medical Cannabis Regulation] (on file with the *McGeorge Law Review*) (“This bill will not hurt local communities or take control from them. It will benefit them and make sure they are in the driver’s seat, with backup from state regulation. This is a win-win for California.”).

111. *Infra* Part IV.A.

112. *See infra* Part IV.B–C (discussing the many debates regarding SB 1262).

113. *See infra* Part IV.D; *see also* GUIDELINES, *supra* note 49 (noting that the listed priorities are guidelines for U.S. attorneys and not mandates).

114. *See* *People v. Hohanadel*, 98 Cal. Rptr. 3d 347 (4th Dist. 2009) (finding that a storefront dispensary does not become a primary caregiver when a qualified patient names that dispensary as their supplier).

cultivated marijuana plants—a total of 2,903,887 marijuana plants were recorded in California, while Kentucky came in second with 443,788.¹¹⁵ Naturally, given the enormous amount of cultivated marijuana and the lack of statewide regulation, contamination and adverse environmental effects progressively increased.¹¹⁶

In 2009, the Los Angeles City Attorney's Office took a sample of marijuana that was available to patients—it had 1,600 times the amount of bifenthrin (a type of insecticide) than a human should legally consume.¹¹⁷ In 2012, the U.S. Forest Service removed 180,000 pounds of trash, 315,000 feet of black plastic hose, and 19,000 pounds of fertilizer from more than 300 illegal marijuana guerilla grows in the state.¹¹⁸ Moreover, without restriction on who could operate a dispensary or where one could be located, dispensaries multiplied from the single digits to thousands in neighborhoods and near schools and churches.¹¹⁹

Additionally, with physicians' broad discretion to recommend marijuana under the CUA, the line between medicinal use and recreational use was obscured.¹²⁰ Finally, without a statewide standard, federal law enforcement has threatened marijuana businesses in compliance with local ordinances (such as Harborside in Oakland) with federal prosecution.¹²¹ Consequently, with growing

Interestingly, this dispensary had an annual expense rate that went over \$2.6 million, with a \$ 1.7 million annual revenue rate. *Id.* at 1,006.

115. DOMESTIC CANNABIS ERADICATION/SUPPRESSION PROGRAM STATISTICAL REPORT 2013, DEA, available at http://www.justice.gov/dea/ops/cannabis_2013.pdf (on file with the *McGeorge Law Review*).

116. See *Marijuana Crops in California Threaten Forests and Wildlife*, D.A.R.E. (June 28, 2013), <http://www.dare.org/marijuana-crops-in-california-threaten-forests-and-wildlife> (on file with the *McGeorge Law Review*) (explaining that growers often use poisons like d-Con to protect the crop from vermin, which then poisons other animals in the area).

117. Nicholas Sullivan, *Determination of Pesticide Residues in Cannabis Smoke*, 2013 J. of Toxicology 1–2 (2013).

118. USDA Forest Service, *Marijuana Grows and Restoration*, YOUTUBE (USDA Forest Service Feb. 28, 2014), https://www.youtube.com/watch?v=IFNe_KZhpZw (on file with the *McGeorge Law Review*).

119. Compare MEDICAL MARIJUANA REGULATION AND TAXATION ORDINANCE (PROPOSITION D) 26 (Cal. 2010) (estimating about 1,600 dispensaries in Los Angeles) with John Ingold, *Colorado Medical-Marijuana Businesses Have Declined By 40 Percent*, DENVER POST (Mar. 3, 2013), http://www.denverpost.com/ci_22706453/colorado-medical-marijuana-businesses-have-declined (on file with the *McGeorge Law Review*) (noting that since passing regulatory dispensary laws, Colorado dispensaries have decreased from 1,117 in 2010, to 675 in 2013).

120. See Rebecca Dresser, *Irrational Basis: The Legal Status of Marijuana*, HASTINGS CENTER REPORT 10-11-07, 8 (2009) (noting the significant business of marijuana growth for recreational use). Doctors who solely specialize in medical marijuana recommendations often have couriers who deliver the drug for insomnia, headaches, or anxiety “with the practiced efficiency of a home-delivered pizza—and with just about as much legal scrutiny.” *Id.*

121. See Letter from Melinda Haag, U.S. Attorney Gen. for the N. Dist. of Cal., U.S. Dep't of Justice, to John A. Russo, Oakland City Attorney on guidance regarding the City of Oakland Medical Cannabis Cultivation Ordinance (Feb. 1, 2011) (on file with the *McGeorge Law Review*) (noting that Congress listed marijuana as a controlled substance such that the growing, distributing, and possessing is a violation of federal law); see also *Blowing Smoke: Obama Promises One Thing, Does Another on Medical Marijuana*, S.F. WEEKLY (Apr. 6, 2011), <http://www.sfweekly.com/sanfrancisco/blowing-smoke-obama-promises-one-thing-does-another-on-medical-marijuana/Content?oid=2181100> (on file with the *McGeorge Law Review*) (discussing raids by the Obama administration of more than 74 licensed dispensaries, with the majority in

concerns about public safety and health, as well as federal prosecution, the state recognized that the medical marijuana industry needed state regulation.¹²²

B. Regulating the Wild, Wild West

SB 1262's two authors proposed the legislation to impose substantial regulation on a previously unregulated industry.¹²³ The California League of Cities believed SB 1262 would have created the requisite regulatory framework, as the bill created a state-level licensing system, but preserved local control by only granting the State the authority to issue licenses to marijuana facilities after the applicant provided adequate proof that the local government allowed such facilities.¹²⁴ Similarly, the legislation would have deferred to local land use power by continuing to allow local governments to ban dispensaries.¹²⁵ While many advocates supported the intent of SB 1262, some of SB 1262's supporters, like California National Organization for the Reform of Marijuana Laws (NORML), believe that a separate licensing system necessary for this industry because each activity is "better conducted at distinct, stand-alone facilities."¹²⁶

Sponsors anticipated that the legislation would have provided for a safer product, since the regulation would have required random testing "of all medical marijuana prior to packaging for sale and patient exposure to identify and eliminate microbiological contaminants and chemical residue."¹²⁷ According to Dr. Robert Martin, roughly 80% of Southern California dispensaries do not test their marijuana,¹²⁸ and as a result bacteria from dirty barns and unclean hands contaminate the crop, which increases the chance of E. coli poisoning.¹²⁹

With a background in the federal food regulation industry, Dr. Martin says that just as with any food product, medical marijuana must have a quality assurance protocol that ensures the crop is safe for patients.¹³⁰ He believes that

California).

122. CAL. POLICE CHIEFS ASS'N, *supra* note 9.

123. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1262, at 1–7 (June 26, 2014) (creating 54 requirements for regulating marijuana).

124. See *id.* at 12 (asserting California League of Cities' support for SB 1262).

125. LEAGUE OF CALIFORNIA CITIES, SB 1262 (CORREA): MEDICAL MARIJUANA REGULATION AND LOCAL CONTROL, INFORMATION WEBINAR, 18 (Feb. 25, 2014), available at <http://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/Marijuana-Policy/Medical-Marijuana-SB-1262-Webinar.aspx> (on file with the *McGeorge Law Review*).

126. Letter from Dale Gieringer, Director, Cal. NORML, to Senator Ted Lieu, Committee on Business, Professions and Economic Development (Mar. 7, 2014) (on file with the *McGeorge Law Review*) (supporting the intent behind SB 1262 but suggesting amendments prior to full support).

127. SB 1262 Leg., 2013–2014 Sess. at § 7 (Cal. 2014) (as corrected Aug. 7, 2014, but not enacted) (amending CAL. HEALTH & SAFETY CODE § 111661(b)).

128. Telephone Interview with Robert Martin, co-founder of CW Analytical Laboratories (May 29, 2014) (notes on file with the *McGeorge Law Review*) (explaining that marijuana grows relatively clean, but like any crop there must be standards and practices of hygiene and certification to provide a clean product).

129. *Id.*

130. *Id.* At his own testing facility, Dr. Martin provides a certificate of guarantee to every dispensary after

businesses that fail to test their marijuana would have complied with SB 1262's testing requirements because a tested product is an indication of business acumen.¹³¹ In response to the claim that a testing requirement would interfere with patients' easy access to medical marijuana, Dr. Martin believes that if a business wishes to remain in the industry and provide a safer drug to qualified patients, they would ultimately have complied with the proposed testing requirement.¹³²

Some critics were concerned that local governments would have been unable to provide adequate law and safety enforcement to execute SB 1262's requirements.¹³³ Local public health departments do not have the training or expertise to enforce laws relating to medicinal marijuana.¹³⁴ SB 1262 specifies that local governments would have had primary responsibility to administer and enforce regulations created by the Bureau, but many local governments are adamant that local agencies are not capable of regulating the growth and harvest of marijuana.¹³⁵

However, the Bay Area has had success in regulating commercial marijuana activity.¹³⁶ After enacting its marijuana dispensary-licensing requirement, Oakland appointed a local agency to oversee the implementation and enforcement of its marijuana legislative landscape.¹³⁷ Once California's legislature passed the MMPA in 2004 and the number of dispensaries began to increase steadily outside of Oakland, the number of dispensaries within the city remained relatively low.¹³⁸ This was because Oakland's ordinance limits the total number of dispensaries to eight.¹³⁹ Additionally, Oakland requires that marijuana

testing, which then allows him to partner with these vendors because it gives them the feeling that they are receiving a quality product. *Id.*

131. *Id.*

132. *Id.* "I don't think [marijuana businesses] understand business planning if they see testing as a block to providing safe access to patients. If you are concerned about giving a safe product then you want to provide a safe product." *Id.*

133. See Paul A. Smith, Senate Bill 1262—Oppose Unless Amended (Apr. 24, 2014) ("[W]e believe that SB 1262 requires a dramatic restructuring to limit a county's role and responsibilities and place the date-to-day regulation of medical marijuana with the State of California.").

134. SENATE COMMITTEE ON HEALTH, MEDICAL MARIJUANA REGULATION OF PHYSICIANS, DISPENSARIES, AND CULTIVATION SITES, at 9 (Apr. 30, 2014).

135. *Id.* See, e.g., Joseph Leeper, *Humboldt County: It's Role in the Emerald Triangle*, XXX Cal. Geographical Society 93, 94 (1999) (noting that some counties, such as Mendocino, Humboldt, and Trinity, have faced numerous odor complaints, excessive electricity use, and increased crime including robbery and burglary since medical marijuana was legalized).

136. Thomas Heddleston, *A Tale of Three Cities: Medical Marijuana, Activism, and Local Regulation in California*, 35 HUMBOLDT J. OF SOC. REL. 123, 132 (2013).

137. Deborah A. Edgerly, ANNUAL REPORT OF THE MEASURE Z COMMUNITY OVERSIGHT COMMITTEE FOR 2006, Pub. Safety Comm., Reg. Sess., at exhibit B (2007).

138. See Thomas Heddleston, *supra* note 136, at 133 FIGURE 1 (2013) (comparing Oakland's regulatory approach to Los Angeles' *laissez faire* approach where between 2004 and 2008, Oakland's number of dispensaries increased from approximately 25 to 40 while Los Angeles saw an increase from approximately 4 to 200 dispensaries).

139. Arturo M. Sanchez, CITY OF OAKLAND AGENDA REPORT, Pub. Safety Comm., at 9 (Cal. 2011).

sold at dispensaries must be tested for safety and THC levels, and as a result, more than 80% of all dispensaries in the area regularly test their product.¹⁴⁰ These numbers support the notion that local governments have the ability to keep dispensary businesses at a reasonable number and enforce regulations pertaining to testing and taxation.¹⁴¹

In contrast, a minority of localities have laws that regulate marijuana cultivation.¹⁴² One example is Mendocino County, which imposes a zip-tie provision where the Sheriff's Department distributes zip-ties to marijuana growers—approximately 100 in total—who place the zip-tie around the plant; this way law enforcement can distinguish between legal and illegal plants.¹⁴³ While this regulation has proved workable for the area, very few other localities have grow regulations in place, and consequently would have had to create new grow laws to comply with SB 1262.¹⁴⁴ Therefore, while localities would have had the capability of enforcing SB 1262's dispensary provisions, it is unclear whether cities and counties could have successfully regulated commercial cultivation.¹⁴⁵

C. Access, Continuance, and Costs: Opposition Has High Concerns

“Mom and pop” marijuana farmers have voiced a concern about their ability to continue to operate under a regulatory scheme like that proposed under SB 1262.¹⁴⁶ The Mendocino Cannabis Policy Council has argued that there needs to be a limit on how many plants a farm may grow, otherwise smaller farms will be forced out of business.¹⁴⁷ Additionally, the \$8,000 non-refundable fee would have

140. *Id.* at 9.

141. Heddeleston, *supra* note 136, at 132 (describing Oakland's progressive approach to regulating dispensaries kept the total number of dispensaries down, limited their proximity to schools, and created financial standards on those seeking to enter the industry).

142. Letter from Dale Gieringer, Director, Cal NORML, to Mike Gatto, Chair, Assemb. Appropriations Comm. on Cal NORML's New Position on SB 1262 (Aug. 11, 2014), available at http://www.canorml.org/SB1262_Approps_le2.pdf [hereinafter Letter from California NORML, Cal NORML's New Position] (on file with the *McGeorge Law Review*).

143. See Joe Mozingo, Mendocino County Spars with Feds over Conflicting Marijuana Laws, L.A. TIMES (Jan. 20, 2013), <http://articles.latimes.com/2013/jan/20/local/la-me-mendo-pot-20130122> (on file with the *McGeorge Law Review*) (describing the use of zip-ties to identify legal plants).

144. See California NORML, *Local Medical Marijuana Cultivation and Possession Guidelines in California*, CANORML (last updated Sept. 13, 2014), <http://www.canorml.org/medical-marijuana/local-growing-limits-in-california#RanchoCordova> (on file with the *McGeorge Law Review*) (noting that out of the few cities and counties that have grow regulations, most of them apply to individual gardens and not large crops, although some cities and counties have simply banned outdoor marijuana cultivation altogether).

145. See *id.* (discussing the limited use of cultivation regulations).

146. See Letter from Karen O'Keefe, Director of State Polices, Marijuana Pol'y Project, and Chris Lindsey, Legislative Analyst, Marijuana Pol'y Project to Mike Gatto, Chair, Assemb. Appropriations Comm., on, Revised Comments on SB 1262, MPP Opposes Unless Amended, at 1 (Aug. 5, 2014), available at <http://www.mpp.org/states/california/SB-1262-Concerns.pdf> [hereinafter Letter from Marijuana Policy Project, Opposes Unless Amended] (on file with the *McGeorge Law Review*) (discussing concerns regarding the lack of tiered fees for smaller growers).

147. Jane Fatcher, *Cannabis Group Vows to Protect Mendocino's Mom and Pop Growers*, AVA NEWS

been difficult for small farmers to pay, and as a result would have forced them to cease cultivation or continue to grow without a license, violating the proposed law under SB 1262.¹⁴⁸

Marijuana advocates also opposed SB 1262's proposed regulations on existing marijuana businesses.¹⁴⁹ As a result of compromise, the legislation gave pre-existing entities a grace period in which the Bureau would have issued a provisional license until the enterprise could apply for a standard license to avoid business interruption.¹⁵⁰ However, critics like the MMPA asserted that the provision gave the Bureau too much discretion when issuing a provisional license.¹⁵¹ "The [B]ureau should be required, not allowed, to issue provisional licenses to entities that operate in compliance with local laws."¹⁵²

For example, Colorado gave preferential treatment to existing medical marijuana businesses and it awarded businesses that complied with local regulations state-issued licenses.¹⁵³ By expediting a smoother transition for existing businesses in compliance with local law, Colorado ensured that state regulators would oversee businesses that were already established and familiar with regulatory compliance; thus, the state shaped the foundation of an industry to be more likely to comply with the new regulations.¹⁵⁴

Additionally, since SB 1262 would have denied employment to those who had a "past felony criminal conviction for drug trafficking," many who had previous convictions related to marijuana would have been denied employment opportunities within the marijuana industry.¹⁵⁵ According to California NORML, "Prior offenders should not be branded for life for offenses that are now becoming obsolescent."¹⁵⁶ However, this provision would have incorporated priorities that the federal government expects states to implement.¹⁵⁷

Another criticism of the legislation was its potential interference with patient access to medical marijuana.¹⁵⁸ In many cities and counties that ban dispensaries,

SERVICE (June 21, 2014), <http://theava.com/archives/32539> (on file with the *McGeorge Law Review*).

148. See Letter from Marijuana Policy Project, Opposes Unless Amended, *supra* note 146, at 5 (calling the fee "unreasonable").

149. *Id.*

150. SB 1262 Leg., 2013–2014 Sess. at § 4 (Cal. 2014) (as corrected Aug. 7, 2014, but not enacted) (amending CAL. BUS. & PROF. CODE § 18107(a)(1)); see also Duncan, *supra* note 63 (asserting that ASA helped negotiate an easier transition for existing businesses).

151. Letter from Marijuana Policy Project, Opposes Unless Amended, *supra* note 146, at 1.

152. *Id.* at 5.

153. JOHN HUDAK, CENTER FOR EFFECTIVE PUBLIC MANAGEMENT AT BROOKINGS, COLORADO'S ROLLOUT OF LEGAL MARIJUANA IS SUCCEEDING 27 (July 2014), available at <http://www.brookings.edu/research/reports/2014/07/colorado-marijuana-legalization-succeeding> (on file with the *McGeorge Law Review*).

154. *Id.* at 10.

155. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1262, at 13 (June 26, 2014).

156. Letter from California NORML, Cal NORML's New Position, *supra* note 142, at 2.

157. See DOJ Memo, *supra* note 57, at 1 (prioritizing the prevention of the use of a state licensed marijuana business for disguising other illegal activity).

158. See *People v. Kelly*, 47 Cal. 4th 1008, 1042 (2010) (holding that amendments made by the legislator

patients rely on receiving their supply from other patients and caregivers who grow marijuana through cooperatives.¹⁵⁹ By prohibiting this activity to continue, SB 1262 would have forced many patients to find a new supplier located outside of the city or county in which they lived.¹⁶⁰ Moreover, the Medical Marijuana Policy Project stresses that limiting the number of cultivation sites could potentially cause shortages and thereby deprive patients access to medical marijuana.¹⁶¹ Because SB 1262 would have only allowed dispensaries to receive their supply from licensed cultivation sites, other sources of supply, including overages grown by cooperatives, would no longer have supplied the market.¹⁶² Without this source of marijuana, shortages could cause dispensaries to close or to obtain the drug from a black market supplier.¹⁶³

Similarly, Colorado initially only issued licenses to pre-existing businesses and prevented any new business from applying for a license until 2014.¹⁶⁴ According to the Center for Effective Public Management at Brookings, limiting the pool of applicants during the implementation stage was beneficial because it allowed regulators at the state level “breathing room to get the regulatory model right.”¹⁶⁵ Nonetheless, NORML claimed that since many localities did not regulate cultivation sites prior to SB 1262’s proposal (with the exception of Mendocino County), the existing sites would have failed to provide proof that they complied with local laws, and thus have been ineligible for a state-issued license.¹⁶⁶

Additionally, legislators forecasted that the Bureau’s launch would have cost at minimum \$20 million and these costs could have exceeded profits from license fees.¹⁶⁷ This startup cost—which would have been \$58 million—is charged to the Department of Consumer Affairs’ budget and represents 35% of the Department’s total budget.¹⁶⁸ Given the legal risk that would have been inherent in applying for a license, California NORML estimates that profits from provisional license fees would have been at most \$3 million, not enough to provide the capital necessary to fund the program.¹⁶⁹ However, it is unclear whether NORML’s profit estimate took into account the potential profits from

may not take away rights created by the voter initiative, the CUA).

159. Letter from California NORML, Cal NORML’s New Position, *supra* note 142, at 1–2.

160. *See City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal. 4th 729, 745–746 (2013) (holding that neither the CUA nor the MMPA preempts local governments from banning dispensaries).

161. Letter from Marijuana Policy Project, Opposes Unless Amended, *supra* note 146, at 3–4.

162. *Id.*

163. *Id.*

164. COL. TASK FORCE, *supra* note 69, at 17.

165. HUDAK, *supra* note 153, at 27.

166. Letter from Dale Gieringer, Cal. NORML, *supra* note 126.

167. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1262 (Aug. 13, 2014).

168. *Id.*

169. Letter from California NORML, Cal NORML’s New Position, *supra* note 142.

marijuana tax revenue, which could have been used to fund the state's infrastructure.¹⁷⁰

Lastly, critics argue that the proposed amendment that would have limited physician recommendations to a patient's "attending physician" interfered with a qualified patient's ability to access marijuana and would have illegally amended the CUA.¹⁷¹ This restriction could have potentially hindered a qualified patient's access to the drug because many primary care physicians refuse to recommend medical marijuana.¹⁷² This is because many hospitals prohibit marijuana recommendations and doctors working within these hospitals do not want to place their HMO or DEA license at risk.¹⁷³

However, the CUA does not prevent the Medical Board of California from taking disciplinary actions against physicians "who fail to comply with accepted medical standards when recommending marijuana," and these standards include history between the physician and patient.¹⁷⁴ Ultimately, determining whether requiring a patient to get a medical marijuana recommendation from an attending physician violates the CUA depends on whether the provision is understood as an amendment to the voter initiative (which would violate California's constitution) or whether the provision is perceived as regulating a related, but distinct, area of law (which is permissible).¹⁷⁵

D. Preventing Federal Prosecution

As *Gonzalez* illustrates, persons who comply with California's CUA are still at risk of facing federal charges under the Commerce Clause.¹⁷⁶ This is because Congress may regulate intrastate activity, though purely local, that aggregately affects interstate commerce.¹⁷⁷ However, advocates argue that states with a

170. See MARIJUANA POLICY PROJECT, STATE MEDICAL MARIJUANA PROGRAMS' FINANCIAL INFORMATION 1 (2013), available at <http://www.mpp.org/assets/pdfs/library/State-Medical-Marijuana-Programs-Financial-Information.pdf> (on file with the *McGeorge Law Review*) (estimating that dispensaries generate \$105 million every year).

171. SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF SB 1262, at 14 (Apr. 21, 2014).

172. Nate Bradley, *CCIA Board Member Sean Luse's Letter Regarding SB 1262*, CALIFORNIA CANNABIS INDUSTRY ASS'N (Apr. 4, 2014), http://www.cacannabisindustry.org/ccia_board_member_sean_luse_regarding_sb_1262 (on file with the *McGeorge Law Review*).

173. *Id.*

174. See ASSEMBLY BUSINESS, PROFESSIONS AND CONSUMER PROTECTION, COMMITTEE ANALYSIS OF SB 1262, at 9 (June 17, 2014) (noting that acceptable standards for recommending medical marijuana include "history and prior examination of the patient").

175. See *People v. Kelly*, 47 Cal. 4th 1008, 1049 (2010) (finding that the MMP's specific limitation on the amount of medical marijuana a patient—who did not register for an identification card—may cultivate or possess was as an unconstitutional amendment to the CUA).

176. See *Gonzales v. Raich*, 545 U.S. 1, 6 (2005) (finding that the MUA and the CUA do not affect the enforceability of the federal Controlled Substances Act).

177. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

statewide regulatory system are less vulnerable to federal interference.¹⁷⁸ Indeed, Attorney General Eric Holder announced that federal interference would not occur in states that had “strong and effective regulatory and enforcement systems.”¹⁷⁹

For example, Colorado’s attorney general has allowed hundreds of dispensaries throughout the state to continue to operate and stated, “there’s not going to be a substantial change” since the state implemented its marijuana regulatory scheme.¹⁸⁰ SB 1262 sought to achieve this same end through the Bureau and to address relevant priorities in the DOJ Memo.¹⁸¹

Background checks on those who would have applied for a permit under SB 1262 could have reduced the opportunities for drug trafficking organizations to participate in the medical marijuana industry.¹⁸² Colorado and Washington have both adopted this strategy.¹⁸³ By preventing individuals with past felony convictions from working in dispensaries, SB 1262 could have prevented members of gangs and other criminal enterprises from working and profiting from the industry.¹⁸⁴ Additionally, SB 1262 attempted to thwart criminals from profiting from California’s medicinal marijuana industry by tracking where the supply came from, which would have reduced the possibility that revenues funded illegal activities.¹⁸⁵ For example, drug trafficking organizations from Mexico that cultivate marijuana in California and sell the drug to dispensaries would have had a harder time continuing this activity because the Bureau would have required the dispensary to provide the origin of the supply.¹⁸⁶

178. Carly Schwartz, *California’s Medical Marijuana Industry Gets a Much-Needed Kick in the Pants*, HUFFINGTON POST (Apr. 10, 2014), http://www.huffingtonpost.com/2014/04/09/california-medical-marijuana-regulations_n_5119010.html (on file with the *McGeorge Law Review*); see also Jacob Sullum, *U.S. Attorneys Say Marijuana Memo Won’t Affect Their Anti-Pot Work*, FORBES (Sept. 9, 2013), <http://www.forbes.com/sites/jacobsullum/2013/09/09/u-s-attorneys-say-marijuana-memo-wont-affect-their-anti-pot-work/> (on file with the *McGeorge Law Review*) (“[I]t seems to be the case that federal prosecutors have largely not interfered in states that have robust regulatory systems to control the marijuana industry and that the harassment mostly seems to occur in states that do not have clear regulations in place, such as California, Montana and Washington.”).

179. DOJ Memo, *supra* note 57, at 3.

180. Sullum, *supra* note 178. Notwithstanding, U.S. Attorneys closed about 50 dispensaries because they were located too close to schools. *Id.*

181. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, BILL ANALYSIS OF SB 1262 at 16 (June 26, 2014).

182. See Greg Sargent, *Why Expanding Background Checks Would in Fact Reduce Crime*, WASH. POST (April 3, 2013), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime/> (on file with the *McGeorge Law Review*) (noting that running criminal background checks for firearms sales reduces the number of criminals who obtain guns).

183. WASH. ADMIN. CODE § 314-55-020 (West 2014); COLO. CODE REGS. § 212-1:1.201 (West 2014).

184. SB 1262 Leg., 2013–2014 Sess. at § 4 (Cal. 2014) (as corrected Aug. 7, 2014, but not enacted) (amending Cal. Bus. & Prof. Code § 18110(a)(3)).

185. See *id.* (amending CAL. BUS & PROF. CODE § 18116(a)–(b)) (requiring a licensee to keep all records that show expenses related to the licensee’s business as well as banking records for seven years).

186. See DEA, THE DEA POSITION ON MARIJUANA 16 (2011), available at http://www.justice.gov/dea/pr/multimedia-library/marijuana_position.pdf (“The [drug trafficking organizations] have tapped the . . . consumer . . . through outlets provided by the dispensaries, generating millions of dollars in cash which is easily

The federal government also prohibits marijuana from leaving the state, and according to a lead advocate for marijuana legalization, Alison Holcomb, “excess supply creates incentive to divert outside the state.”¹⁸⁷ For example, the state of Washington conducted detailed studies to predict the amount of marijuana use within the state so regulations could limit the total amount of marijuana production, which is capped at 80 metric tons.¹⁸⁸ Similarly, by limiting cultivation sites and relying on local governments to limit the number of dispensaries, SB 1262 would have capped marijuana output on a broader scale.¹⁸⁹

Even if SB 1262 could have successfully carried out the priorities listed by the DOJ, the threat of federal prosecution would still remain.¹⁹⁰ To the extent that the DOJ memorandum grants any rights at all, it is left to the U.S. Attorney’s discretion.¹⁹¹ Melinda Haag, the U.S. Attorney for the Northern District of California, has taken an aggressive stance against the marijuana industry.¹⁹² In a letter to Oakland’s city attorney, she stated: “We will enforce the [CSA] vigorously against individuals and organizations . . . even if such activities are permitted under state law.”¹⁹³ Because enforcing the CSA is largely within the U.S. Attorney General’s discretion, even if SB 1262 could have adequately enforced the relevant priorities, the industry would still have been at risk.¹⁹⁴

E. Why Did SB 1262 Burn Out?

Considering the number of revisions and instances when marijuana advocacy groups voiced their support, withdrew their support, and reestablished their support, there are many theories offered about why SB 1262 never made it beyond the Assembly Appropriations Committee.¹⁹⁵ The Marijuana Policy Project

smuggled south of the border back to the [drug trafficking organizations].”).

187. Gene Johnson, *Washington State Tries to Keep Legal Marijuana in State*, HUFFINGTON POST (Jan. 29, 2013), http://www.huffingtonpost.com/2013/01/29/washington-state-marijuana_n_2572918.html? (on file with the *McGeorge Law Review*).

188. RAND, DRUG POLICY RESEARCH CENTER, BEFORE THE GRAND OPENING, MEASURING WASHINGTON STATE’S MARIJUANA MARKET IN THE LAST YEAR BEFORE LEGALIZED COMMERCIAL SALES xii (2013), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR466/RAND_RR_466.pdf (on file with the *McGeorge Law Review*).

189. SB 1262 Leg., 2013–2014 Sess. at § 4 (Cal. 2014) (as corrected Aug. 7, 2014, but not enacted) (amending Cal. Bus. & Prof. Code § 18134).

190. See DOJ Memo, *supra* note 57, at 1 (explaining that “this memorandum does not alter in any way the Department’s authority to enforce federal law . . . relating to marijuana, regardless of state law”).

191. *Id.*

192. Letter from Melinda Haag, U.S. Attorney Gen. for the N. Dist. Of Cal., U.S. Dep’t of Justice, to John A. Russo, Oakland City Attorney on guidance regarding the City of Oakland Medical Cannabis Cultivation Ordinance (Feb. 1, 2011) (on file with the *McGeorge Law Review*).

193. *Id.*; see also Letter from Dennis K. Burke, U.S. Attorney, to Will Humble, Director, Ariz. Dep’t of Health Services, at (May 2, 2011) (stating “compliance with [Arizona laws] and regulations does not render possession or distribution of marijuana lawful under federal statute”).

194. DOJ Memo, *supra* note 57, at 3.

195. History of SB-1262 Medical Marijuana, S.B. 1262, 2014 Sess. (Cal. 2014), <http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml> (on file with the *McGeorge Law Review*).

surmised that the legislation's biggest flaw was appointing the Department of Consumer Affairs as the department to oversee marijuana regulation, since the department never had any stake in the legislation's outcome.¹⁹⁶ Alternatively, California NORML theorized that the lifetime ban on all individuals who had any prior drug trafficking felonies was the "poison clause" that kept the bill from passing.¹⁹⁷ Another offered reason boils down to SB 1262's price tag—estimated at \$20 million.¹⁹⁸

Perhaps the biggest qualm when it came to turning SB 1262 into law was the provision that required local governments to comply with testing, distribution, and security measures.¹⁹⁹ In spite of these contentions, SB 1262 showed how it is possible to regulate the industry and future bill proposals will unquestionably incorporate many concepts from the stalled bill.²⁰⁰ However, both of SB 1262's authors served their final terms in 2014 and statewide initiatives legalizing marijuana are likely to reach the ballot in 2016, leaving the future of medical marijuana uncertain.²⁰¹

V. CONCLUSION

The Affordable Care Act, the National Response Plan, and the Great Recession of 2008 all provide examples of how crucial implementing and enforcing regulatory frameworks are for successful government administration.²⁰² With a growing marijuana industry, SB 1262's implementation of a regulatory scheme could have been just what the doctor ordered—a roadmap for those within the industry, law enforcement, and all levels of government.²⁰³

As with any new regulation, SB 1262 was not without its issues, but it nonetheless shed light on how important it is for law enforcement and marijuana advocates to work together to regulate all levels of marijuana commerce.²⁰⁴

196. Karen O'Keefe, *California Medical Marijuana Regulation*, MARIJUANA POLICY PROJECT'S BLOG (Aug. 18, 2014), <http://blog.mpp.org/tag/sb-1262/> (on file with the *McGeorge Law Review*) (asserting that the Department of Consumer Affairs "never expressed any interest" in regulating marijuana considering the department did not appear at any stakeholder meeting).

197. Brian Bahouth, *The Death of SB 1262 and the Need to Further Regulate Medical Marijuana in California*, CANNABIS RADIO NEWS (Aug. 21, 2014), <http://www.cannabisradionews.org/the-death-of-sb-1262-and-the-need-to-further-regulate-medical-marijuana-in-california/> (on file with the *McGeorge Law Review*) (interviewing the executive director of California's NORML, Dale Gieringer).

198. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 1262, 3 (Aug. 13, 2014).

199. *Legislature Fails, Again, to Regulate Medical Marijuana*, *supra* note 64.

200. James Poulos, *New CA Pot Bill Snuffed Out*, CAL WATCHDOG.COM (Aug. 21, 2014), <http://calwatchdog.com/2014/08/21/new-ca-pot-bill-snuffed-out/> (on file with the *McGeorge Law Review*).

201. *Id.*

202. OECD, REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE 11 (2000), available at <http://www.oecd.org/gov/regulatory-policy/46466287.pdf> (on file with the *McGeorge Law Review*).

203. Press Release, Assembly Member Ammiano, Medical Cannabis Regulation, *supra* note 110.

204. Duncan, *supra* note 63.

Future proposals will not only have other states' marijuana regulations as examples, but will also have SB 1262 as a guideline for anticipating problems that this thoughtful legislation encountered.²⁰⁵ Although California will never know if SB 1262 would have been successful, the state will inevitably see future marijuana regulatory proposals and only time will tell whether they will be successful.²⁰⁶

205. *See generally* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 20–24 (2013), available at <http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf> (on file with the *McGeorge Law Review*).

206. *See* HUDAK, *supra* note 153, at 2 (explaining that while Colorado's marijuana regulations have proved prosperous, it is still too early to conclude whether the framework's policies will be effective).