"UNLOCKED POTENTIAL:
SMALL BUSINESSES IN THE CANNABIS INDUSTRY"
HEARING BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
WRITTEN STATEMENT OF PAUL J. LARKIN, JR.
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Madame Chairwoman, Mr. Ranking Member, and Members of the Committee:

Thank you for the opportunity to testify today. My name is Paul J. Larkin, Jr. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at The Heritage Foundation. I testify on my own behalf, however, not on behalf of Heritage.[1] One of the areas of my research and writing is drug policy. I will draw on that work for my presentation today.

I would like to make four points. The first three relate to the general issue of whether, and if so how, to revise the provisions in Title 21 dealing with marijuana, whether for small or large businesses. I make those points because the committee could decide to treat small business differently from large corporations, in the hope that they will not become the equivalent for marijuana of what happened in the tobacco industry: the growth of large-scale commercial enterprises.[2] The issue is also under consideration by other committees and legislators. My last point offers an alternative to large- or small-scale privately owned and operated marijuana distribution businesses. If Congress were now to decide to legalize the recreational use of marijuana, I think that it would be a mistake to turn immediately to a private ownership and distribution model, rather than rely on the model that some states—such as my home state of Virginia—use for the distribution of distilled spirits: state ownership of distribution facilities.

My four points are these: *First*, the federal government, not the states, decides whether to create exceptions to federal law. Accordingly, Congress, not the states, should decide whether federal law should permit the medical or recreational use of marijuana. *Second*, the marijuana plant contains cannabinoids (biologically active ingredients) that have medical uses, but smoking marijuana is not a therapeutically valuable delivery mechanism. Accordingly, the question that Congress should consider is whether Title 21 should be revised to allow marijuana to be used for recreational purposes. *Third*, as part of that inquiry Congress should decide how to help ameliorate the injuries and deaths that will result on the nation's roads from crashes caused by people who use marijuana and drive. *Fourth*, if Congress were to legalize recreational marijuana use, it should require that states own and manage distribution facilities.

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[1] I note my title and affiliation only for identification purposes. Members of The Heritage Foundation (Heritage) staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for Heritage or its board of trustees. Heritage is a public policy, research, and educational organization recognized as exempt under Section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. Heritage is the most broadly supported think tank in the United States. During 2017, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2017 income came from the following sources: Individuals 71%, Foundations 9%, Corporations 4%, Program revenue and other income 16%. The top five corporate givers provided Heritage with 3.0% of its 2017 income. The national accounting firm of RSM US, LLP, annually audits Heritage's books.

[2] Mergers and acquisitions will take place in this industry. *See, e.g.*, *Medicine Man Agrees to Acquire Colorado's Largest Outdoor Marijuana Grower, Manufacturer*, MARIJUANA BUSINESS DAILY, June 5, 2019, https://mjbizdaily.com/medicine-man-agrees-to-acquire-colorados-largest-outdoor-marijuana-grower-manufacturer/. In this industry, as in others, there could eventually be only small number of large businesses.

I. IT MAKES NO SENSE TO DELEGATE TO THE STATES THE AUTHORITY TO DECIDE WHETHER TITLE 21 OF THE U.S.C. CODE APPLIES TO MARIJUANA[3]

For more than 80 years, federal law has prohibited the cultivation and distribution of marijuana. In 1970, Congress placed marijuana in Schedule I of the Controlled Substances Act, a category reserved for drugs that are, as a practical matter, unhelpful and dangerous. In that law, Congress authorized the attorney general to reclassify marijuana, but no attorney general has ever done so. Many people think that the current classification is wrongheaded, while others disagree. The debate has gone back and forth for decades without Congress re-entering the fray, let alone resolving the issue.[4]

Today, however, there are several proposals before Congress to modify Title 21 of the U.S. Code to make it easier for individuals to possess and distribute marijuana. One such bipartisan proposal is H.R. 2093, the Strengthening the Tenth Amendment Through Entrusting States Act, which has the short name the STATES Act.[5] Section 2 of the STATES Act would exempt from Title 21 "any person" who "act[s] in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana."

To say that the STATES Act proposes a novel approach to the relationship between federal and state is quite an understatement. The effect of the STATES Act would be to flip on its head the Supremacy Clause of Article VI of the Constitution because the Act would empower states to pre-empt federal law.[6] If Congress were serious about that approach to legislation, entire fields of federal law would be open to revisitation. Were drugs like heroin at issue, or were any other subject matter at stake—that is, were the question one involving environmental law, employment discrimination law, securities law, telecommunications law, and so forth—no one would claim that Congress should empower the states to erase federal law. We do not let states legalize heroin to be used for medicinal purposes, nor do we let the states opt out of the Clean Water Act, the Endangered Species Act, the Internal Revenue Code, or other economic regulations. There is no persuasive reason to treat cannabis differently.

Perhaps, there would be a justification for treating marijuana differently if it were a legitimate therapeutic substitute for opioids. Unfortunately, however, cannabis cannot serve as a palliative for acute or chronic pain, nor can it be used as an adjunctive treatment of either malady, certainly not in a smokable form. (Indeed, for 50-plus years the nation has tried to persuade people

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[3] My submission here summarizes the views that I set forth in Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J.L. & PUB. POL'Y (forthcoming 2019), and Paul J. Larkin, Jr., *States' Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a "States' Rights" Issue*, 16 GEO. J.L. & PUB. POL'Y 495 (2018).

[4] *See* Paul J. Larkin, Jr., *Marijuana Edibles and "Gummy Bears*," 66 BUFFALO L. REV. 313, 322-28 (2018) [hereafter Larkin, *Gummy Bears*]; Paul J. Larkin, Jr., *Introduction to a Debate–"Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?",* 23 BERKELEY J. CRIM. L. 73 (2018) (both summarizing the debate).

[5] H.R. 2093, the Strengthening the Tenth Amendment Through Entrusting States Act (or STATES Act), 116th Cong. (2019).

[6] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

not to smoke.) If anything, marijuana use worsens the problems besetting people who are physically dependent on, or addicted to, opioids.[7] Yet, in the debate over legalizing medical or recreational marijuana use, opponents of current federal law assume without explaining that the Controlled Substances Act and marijuana are different.

One consequence of allowing the states to pre-empt federal law would be to empower them to overrule the judgments of federal officials as to the medical value of smoking marijuana. We do not, however, make scientific decisions today in the same manner that numerous states have adopted medical marijuana schemes: by plebiscite. Federal law has flatly or effectively prohibited the cultivation, processing, and distribution of marijuana since the Marijuana Tax Act of 1937. That date is significant because the following year Congress passed the Federal Food, Drug, and Cosmetics Act of 1938 (FDCA). The FDCA prohibited the distribution in interstate commerce of "adulterated" foods and drugs. That law also empowered and directed the Commissioner of Food and Drugs to examine both products to be sure that they were safe for interstate distribution. In 1962, Congress also prohibited the distribution of new drugs unless and until the Commissioner has found that they are not only "safe," but also "effective." Congress has reaffirmed that judgment on numerous occasions since 1962. Americans have entrusted the decision whether a particular new drug can be sold throughout the nation to experts at the Food and Drug Administration (FDA).

Some cannabinoids have a known therapeutic value, and there may be medicinal potential in others as yet unexamined. We should continue to conduct research into the potential benefits of cannabinoids and should remove any arbitrary or unreasonable roadblocks standing in the way of legitimate research. But that research should be subject to review and approval by the FDA, not by the voters in each state or subdivision. We have not pursued that course for the past 80 years, and there is no good reason to start now.

States that have legalized marijuana to be smoked for medical purposes have simply taken the law into their own hands. Perhaps, they did so in order to "nudge" Congress to reconsider the treatment of marijuana in Title 21. Even if that were the motivation for the state medical marijuana programs, there still is no good reason to hand that judgment off to the states. Congress should have reconciled the Marijuana Tax Act of 1937 and the FDCA of 1938 long before now by directing the FDA Commissioner to decide whether and, if so, when and how marijuana can be used therapeutically. Punting the ball to the states just abdicates a responsibility that Congress should have forthrightly assumed decades ago.

An argument in favor of allowing states to experiment with marijuana regulation, whether for medical or recreational use, draws on the famous metaphor penned by U.S. Supreme Court Justice Louis Brandeis. The argument is that we should allow the states to serve as "laborator[ies]" to "try out novel social and economic experiments without risk to the rest of the country."[8] That

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[7] *See*, e.*g.*, Gabrielle Campbell et al., *Effect of Cannabis Used in People with Chronic Non-Cancer Pain Prescribed Opioids: Findings from a 4-year Prospective Cohort Study*, 3 LANCET PUB. HEALTH e341 (2018); Theodore L. Caputi & Keith Humphreys, *Medical Marijuana Users Are More Likely to Use Prescription Drugs Medically and Nonmedically*, 12 J. ADDICTION MED. 295 (2018); Larkin, Jr. & Madras, *supra* note 3; Mark Olfson et al., *Medical Marijuana and the Opioid Epidemic: Response to Theriault and Schlesinger*, 175 AM. J. PSYCHIATRY 284 (2018); Chelsea L. Shover et al., *Association between Medical Cannabis Laws and Opioid Overdose Mortality Has Reversed over Time*, PNAS, June 10, 2019, https://www.pnas.org/content/pnas/early/2019/06/04/1903434116.full.pdf.

[8] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

argument is a reasonable one in many contexts, but this is not one of them. After all, "Dr. Frankenstein also had a laboratory."[9] With respect to the medical use of drugs, America has followed one course for eight decades. Throwing away that approach just for marijuana is not only unstable—because states or localities will push for exemptions for other drugs—it is likely to injure the public.

To be sure, the STATES Act would not expressly amend the FDCA, so the FDA would continue to possess sole authority to decide what drugs should be distributed in interstate commerce for medical purposes—that is, what drugs are safe and effective. But the creation of an exemption for state medical marijuana programs from related provisions of Title 21 gives legitimacy to the long discredited notion that states should have authority to decide whether drugs are safe and effective. Such a program also would needlessly give rise to controversy and litigation over whether the new federal law impliedly exempts state medical marijuana programs from FDA governance. Besides, if Congress modifies Title 21 to exempt state *recreational* marijuana programs from federal law, there is no reason to address the status of state *medical* marijuana programs at all. Anyone who wants to use marijuana for medical purposes can purchase it in any state with a recreational marijuana program. The feature of the STATES Act that refers to state medical marijuana programs may provide political cover, but it would be of no substantive use.[10]

II. THE RELEVANT QUESTION IS WHETHER CONGRESS SHOULD REVISE TITLE 21 TO PERMIT MARIJUANA TO BE POSSESSED, SOLD, AND USED FOR RECREATIONAL PURPOSES[11]

Gaul might have been divided into three parts, but marijuana needs only two: medical use and recreational use. The former category, however, is a ruse invented to disguise recreational use. The latter category poses serious questions that demand consideration of the benefits and costs of legalizing a commodity that has minimal benefits and some potentially serious costs.[12]

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[9] Mark A.R. Kleiman, *How Not to Make a Hash Out of Cannabis Legalization*, WASH. MONTHLY, Mar.-May 2014, https://washingtonmonthly.com/magazine/marchaprilmay-2014/how-not-to-make-a-hash-out-of-cannabis-legalization/. As noted below, Professor Kleiman favors controlled and regulated marijuana legalization. In his 2014 article, he supported public ownership of distribution facilities.

[10] There is one related point to consider here. State marijuana legalization programs risk interfering with the nation's diplomatic policy, a field that the Constitution expressly forbids the states from regulating. The United States is a signatory to three international agreements requiring participating nations to outlaw the distribution of various controlled substances, such as marijuana. Congress has the authority to prohibit the cultivation and distribution of marijuana in furtherance of its treaty obligations, and the states cannot disrupt federal policy through their own domestic legislation. Yet, that is the effect of the new state marijuana laws. They put the United States at risk of giving the international community the impression that this nation no longer is interested in upholding its commitments to treat cannabis as contraband. Here, as elsewhere, the federal government is entitled to see the value in believing that "a promise is really something people kept, not just something they would say and then forget." The Judds, *Grandpa (Tell Me 'Bout the Good Ol' Days)* (1986). Because the state initiatives permitting private parties to grow or distribute marijuana could adversely affect the judgment of the world community regarding the reliability of the United States as a party to international agreements, those initiatives are invalid under federal law. Atop that, it would be unwise for Congress to bless the states' effort to trespass on an exclusively federal responsibility. That is not behavior the federal government should encourage the states to repeat.

[11] My submission here summarizes the views that I set forth in Larkin, *Gummy Bears*, *supra* note 4, and Paul J. Larkin, Jr., *The Medical Marijuana Delusion*, PENN. REGULATORY REV. (Dec. 17, 2018).

[12] For a summary of the benefits and costs of the status quo versus legalization, see Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, 39 NAT'L AFFAIRS 68 (Spring 2019); *see also infra* note 32.

A. MEDICAL MARIJUANA IS A HOBGOBLIN

People have practiced rudimentary forms of medicine for millennia. They used whatever plants were handy, or ancestors had found useful, in the hope of curing illness or obtaining relief from its misery. Cannabis is one of those plants; archaeological evidence shows that people used it more than 10,000 years ago. Some argue, therefore, that we should allow private parties to use marijuana as a natural treatment for pain, anxiety, and other disorders. Contemporary medicine, however, does not rely on home grown, herbal folk remedies to cure disease, for a host of reasons.

Until the twentieth century, it was common for pharmacists to prepare, and physicians to administer nostrums created from complex natural plants, such as marijuana. But not today. So that a physician knows exactly what medications to prescribe for a patient, contemporary pharmacology requires that prescription and over-the-counter medications have standard ingredients, formulations, and potency. Marijuana does not. It contains hundreds of chemicals, and its features can vary by strain, breeding, region and process of cultivation, storage time, and so forth. Consider its psychoactive component—Δ^9tetrahydrocannabinol or THC. Cannabis had approximately a 3-4 percent THC content from the 1960s through the 1980s, but today can be 12-20 percent in the plant form or in hashish (dried cannabis resin and crushed plants), with hash oil (an oil-based extract of hashish) having an even greater THC content (15-50 percent), and other formulations in the 90 percent range. The FDA could never approve a drug to be used without knowing its potency.

Moreover, there is no standard "dosage" for smoked marijuana, unlike manufactured pharmaceuticals. The latter have an active ingredient specified in milligrams, and the usage directions, which by law must appear on the package's label, state precisely how many pills (for example) should be taken and when. There are no comparable uniform measurements or standards regarding the amount of smoked marijuana's components, or directions for use. There also is no standard number of inhalations, no standard depth of an inhalation, and no standard length of one. Accordingly, a physician cannot precisely know how much of those constituents someone receives. And that does not even begin to address the problem caused by the presence of toxins, such as pesticides, fungi, mold, lead, formaldehyde and other substances that can and have contaminated commercial marijuana and that are forbidden in commercial pharmaceuticals.

In sum, the rudimentary features of a drug required by modern pharmacology—and demanded by federal law— to be deemed a medicine are critically important for a physician to know when treating a patient. The smokable form of marijuana does not qualify.

B. RECREATIONAL MARIJUANA IS A CONUNDRUM

Once the ruse of medical marijuana is put aside, we come to the real issue: Should Congress legalize the recreational use of marijuana? This question is a difficult one. There are a number of factors that Congress should consider.

1. American society permits alcohol and tobacco to be sold to adults, both can lead to severe individual and widespread societal harms, and there is no serious movement afoot to outlaw either product on a nationwide basis. Regulation, not a flat ban, is the approach that the nation follows in that regard. *As for alcohol*: The Constitution leaves to the states the issue whether—and, if so, how—to permit the distribution of alcohol.[13] There is very little room for Congress to

[13] U.S. CONST. amend. XXI, § 2.

regulate alcohol distribution[14] even though it is responsible for numerous, severe harms.[15] *As for tobacco*: For years, Congress did not fully address the issue whether the federal government should regulate the manufacture and sale of tobacco products, particularly cigarettes.[16] In 2009, Congress decided to change its stance. It passed the Family Smoking Prevention and Tobacco Control Act.[17] That law authorizes the Commissioner of Food and Drugs to regulate the distribution of tobacco products. Perhaps, that approach would be a sensible one in the case of marijuana. What does not appear sensible, however, is the notion that Congress should hand over this issue to the states. It is difficult to understand why the federal government should allow tobacco to be sold only under federal regulation, but to authorize the states to have complete control over marijuana.

2. Long-term use of marijuana can lead some users to become dependent on, if not addicted to, marijuana. Long-term use can also lead some people to suffer serious mental disorders, such as psychosis. Of course, not everyone who uses marijuana will suffer either fate, but we cannot discern in advance which individuals will be unlucky.[18]

3. Legalization of adult recreational marijuana use will inevitably lead to greater access to and use of marijuana by minors. That is a particular problem when THC is added to edible products.

4. As discussed in Part II below, legalizing recreational marijuana use will increase the number of roadway accidents attributable to cannabis use. All that in order to legalize use of a drug that will not save lives and that, on the contrary, in some cases will have the opposite effect.

The questions for Congress are similar to the ones that first-year law students learn in torts class. What are the potential harms from permitting recreational marijuana use? What are the potential benefits? What is the likelihood and extent of each? What preventative measures can avoid the harms while not interfering with the benefits? What is the cost of those measures? What is the likelihood of error of making each of those judgments? Should Congress take or avoid the risks of prohibition versus legalization? And can a mistaken judgment be remedied at a reasonable cost?

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[14] There might be some room. *See* Granholm v. Heald, U.S. 544 U.S. 460 (2005) (ruling that, notwithstanding the Twenty-First Amendment, a state law regulating the interstate sale of alcoholic beverages can violate the Commerce Clause, U.S. Const. art. I, § 8, cl. 3). But there isn't much.

[15] *See*, *e.g.*, Paul J. Larkin, Jr., *Swift, Certain, and Fair Punishment—24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. OF CRIM. L. & CRIMINOLOGY 39, 42-43 (2016) ("Alcohol has a long history of use in western civilization, and it is widely consumed in America today. Alcohol abuse, however, has been with us as long as alcohol itself. Most people can consume alcohol in moderation or intermittently without suffering any adverse long-term effect. But not all. Some individuals become dependent on alcohol, and years of overuse not only seriously impairs their health but also can prove fatal. Excessive alcohol consumption today imposes more than $200 billion on the nation each year in morbidity and mortality costs, as well as various other direct and collateral costs, expenses that dwarf tax revenues from alcohol sales. Alcohol also may be the most commonly used intoxicant by individuals who break the criminal laws.") (footnotes omitted) [hereafter Larkin, *24/7 Sobriety*].

[16] *See*, *e.g.*, FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000); Graham v. R.J. Reynolds Tobacco Co., 857 F.3d 1169, 1186-91 (11th Cir. 2017) (en banc) (both discussing congressional regulation of tobacco).

[17] Pub. L. No. 111-31, 123 Stat. 1776 (2009).

[18] For a layman's explanation of why the discussion in the text is so, see ALEX BERENSON, TELL YOUR CHILDREN: THE TRUTH ABOUT MARIJUANA, MENTAL ILLNESS, AND VIOLENCE (2019). *See also* Larkin, *Gummy Bears*, *supra* note 4, at 323-36 & nn.28-53 (collecting scientific studies and reports).

The question is whether to revise federal law, so it is Congress's duty to debate and answer those questions. Deciding to "let this cup pass from me"[19] is not a responsible course. Whether the recreational benefits of marijuana use outweigh its harms is precisely the discussion that Congress should have, not whether there is some particular benefit for small businesses.

III. CONGRESS SHOULD ACT TO AMELIORATE THE INJURIES AND DEATHS THAT WILL RESULT FROM CRASHES CAUSED BY PEOPLE WHO CONSUME MARIJUANA AND DRIVE[20]

If Congress were to decide to legalize recreational use marijuana, Congress should address the inevitable harmful sequelae of that decision. One of them would be an increase in roadway crashes, injuries, and fatalities caused by a larger number of people who use marijuana and drive. For decades now, the nation has sought to lower the carnage caused by people who "have had one too many" and drive. Generally, public and private efforts to stop drinking and driving have successfully driven down the number of alcohol-caused crashes. Legalizing marijuana for recreational use will lead to an about-face in that effort. There will be an increase in marijuana use, some of those users will decide to get behind the wheel, and some drivers who are "one toke over the line" will injure or kill innocent passengers, pedestrians, or other drivers. Legalizing marijuana use without also acting to ameliorate that problem would be irresponsible.

A. THE PROBLEM OF MARIJUANA-IMPAIRED DRIVING

The primary psychoactive ingredient in marijuana—Δ^9tetrahydrocannabinol (THC)—hampers a driver's ability to quickly and effectively process and respond to unexpected or rapidly changing driving scenarios. In fact, other than alcohol, marijuana is currently the biggest problem drug for roadway safety—not because it is more impairing than drugs like heroin, but because it is more commonly used, a use that is increasing rapidly. More than 30 states now permit adults to use cannabis for medical or recreational purposes. Those states might expand their current lawful uses. Other states are likely to consider joining them.

If marijuana-impaired driving alone were not a serious enough public health hazard, consider this: A large number of people combine marijuana with alcohol, which only worsens impairment. That combination is particularly common (perhaps increasingly so, given marijuana legalization) and especially troublesome given the additive or synergistic debilitating effect that such a cocktail has on safe motor vehicle handling. Someone with a blood alcohol content (BAC) level below 0.08 but who is also under the influence of marijuana would not be deemed impaired as a matter of law, but very well might be more incapacitated than someone with a BAC level

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[19] *Matthew* 26:39 (KJV).

[20] My submission here summarizes the views that I set forth in Paul J. Larkin, Jr., *The Problem of "Driving While Stoned" Demands an Aggressive Public Policy Response*, 11 J. DRUG POL'Y ANALYSIS Issue 2 (2018) [hereafter Larkin, *The Problem of "Driving While Stoned"*]; Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015) [hereafter Larkin, *Drugged Driving*]; and Paul J. Larkin, Jr., Robert L. DuPont & Bertha K. Madras, *The Need to Treat Driving under the Influence of Drugs as Seriously as Driving under the Influence of Alcohol*, THE HERITAGE FOUND., BACKGROUNDER No. 3316 (May 16, 2018), https://www.heritage.org/sites/default/files/2018-05/BG3316_1.pdf. For competing views, see Mark A.R. Kleiman et al., *Driving While Stones: Issues and Policy Options*, 11 J. DRUG POL'Y ANALYSIS Issue 2 (2018) (arguing that stoned driving is a minor risk and should be treated as a traffic offense on a par with speeding). The two *Journal of Drug Policy Analysis* articles cited above are best read together.

above the limit. That aggravates our impaired-driving problem, because, given today's technology, we cannot use the same approach to measure THC impairment that we use for alcohol.

There is reason to be concerned that more widespread and greater use of marijuana will lead to an increase in fatal and non-fatal motor vehicle crashes. The evidence collected so far might not be conclusive, because there is evidence going both ways. Every state with a medical or recreational marijuana scheme certainly should collect data regarding the effect of any such program on highway safety. What we know so far, however, is very troubling.

Consider the data from Colorado since that state enacted a recreational marijuana initiative in 2012. According to a September 2018 report by the Strategic Intelligence Unit of the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA) Task Force, since 2012 traffic deaths involving drivers who tested positive for marijuana have increased by 35 percent, while the number of marijuana-related fatalities jumped 151 percent from 55 in 2013 to 138 in 2017. In 2017, 76 of the 112 drivers involved in fatal wrecks tested positive for THC, not an inactive cannabis metabolite, in their blood—and therefore in their brain—which indicates marijuana use within hours preceding the crash. The 2017 number translates to one person killed every 2.5 days. Earlier HIDTA Task Force Reports, as well as publications by other organizations, also found similar results.

Those sad facts are not surprising when one considers the following. An anonymous November 2017 Colorado Department of Transportation survey concluded that 69 percent of respondents admitted to driving while "high" from marijuana within the prior year, 55 percent said that driving under the influence of marijuana was safe, and 55 percent of that group said that they had driven while high an average of 12 times in the prior 30 days. The one word that best describes those results is "scary." Finally, there is evidence that this problem might last longer than the average person expects. One study found that chronic daily marijuana users still suffered from impairment three weeks into abstinence, past the point at which the average person might think himself free of THC's disabling effect.

One final point in this regard. Legalizing any psychoactive substance puts innocent parties at risk of grave bodily injury or death if they drive because some other drivers might be impaired by any such substance. That is a critical factor to consider. As I have explained elsewhere:

> Like the debate over marijuana legalization, the challenge to the constitutionality and morality of capital punishment has been the subject of vigorous dispute for the last several decades. One of the most common and powerful arguments advanced against the death penalty is that the criminal justice system is so riddled with flaws that there is an unacceptable risk that an innocent person will be executed. In any event, the argument goes, the difference between who lives and dies is entirely arbitrary.
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> Ironically, the adoption of medical and recreational marijuana schemes poses the same risk of killing the innocent. Yet, we do not see any discussion of this cost of reform of the nation's marijuana laws, let alone any outcry against liberalization that it will cost innocent lives. It is time that we should.
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> There should be little doubt that the existence of medical and recreational marijuana schemes increases the risk of highway morbidity and mortality. Logic compels that conclusion. Eliminating criminal penalties for marijuana possession

> and use will entice some new number of people to use marijuana who avoided it because it had been a crime. Some number of those people will drive after becoming impaired. In turn, some number of those people will contribute to an accident, perhaps one involving a fatality. It certainly is the case that a legislature could decide that marijuana liberalization will lead to an increase in marijuana use and therefore decide to allocate any burden on the party—the marijuana user—who increases the risk of morbidity and mortality to deter people from using marijuana and driving.
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> The result is this: adoption of medical and recreational marijuana initiatives poses the risk of killing entirely innocent parties, whether they are other motorists, passengers, or pedestrians, in a purely random manner. Those people are no less innocent, and no less dead, than the hypothetical individual who is wrongfully convicted of a capital crime and executed. That omission deserves especial blame in the case of increased *recreational* use of marijuana. Whatever benefit marijuana may offer the people who smoke it, it cannot save lives. It can, however, take them.[21]

The bottom line is that the problem of marijuana-impaired driving is a serious one.

B. REMEDIES FOR THE PROBLEM OF DRUG-IMPAIRED DRIVING

The STATES Act at least recognizes that problem. Section 5 of that bill would direct the Comptroller General to complete within one year a study into "the effects of marijuana legalization on traffic safety." Such an investigation might be valuable, but it is insufficient. Congress can direct the Comptroller General to conduct that investigation *today*, without waiting for passage of the STATES Act. Moreover, the problem is not attributable to marijuana alone. Other drugs, such as opioids and benzodiazepines (minor tranquilizers), can impair someone's ability to drive a motor vehicle safely.

Numerous other parties are aware of this problem, have studied it, and have sought to develop responses to it. The National Highway Traffic Safety Administration of the Department of Transportation; the Office of National Drug Control Policy; the Governors' Highway Safety Association; numerous private organizations such as the American Automobile Association, the Institute for Behavior and Health, and the Insurance Institute for Highway Safety—those and other public and private entities are troubled by drug-impaired driving and are working to minimize its harmful consequences. I am confident that all of those entities would be willing to continue to work *today* with Congress in any such inquiry that Congress would direct.

There is far more that Congress can do today to address this problem. Congress appropriates funds for interstate highway construction, and it can place reasonable conditions on the receipt of those funds.[22] Below is a list of reasonable policies that would help address the problem of

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[21] Larkin, *The Problem of "Driving While Stoned," supra* note 20, at 5 (emphasis in original). I realize that legislators regularly make decisions with life-or-death consequences. *See* Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005); Paul J. Larkin, Jr., *The Demise of Capital Clemency*, 73 WASH. & LEE L. REV. 1295, 1317-18 (2016). My point is that the decision to legalize marijuana for recreational use fits into that category, not that it is unique.

[22] *See* South Dakota v. Dole, 482 U.S. 203 (1987) (holding that Congress has the Article I authority to condition receipt of a small portion of federal highway funds on the adoption of a minimum drinking age).

drug-impaired driving. Congress has the power to require every state with medical or recreational marijuana programs to adopt these proposals as a condition of the continued receipt of federal highway monies.

- **Proposal:** Apply to every driver under age 21 who tests positive for any illicit or impairing drug, including marijuana and impairing prescription drugs, the same zero-tolerance standard specified for alcohol, the use of which in this age group is illegal.
- **Proposal:** Apply to every driver found to have been impaired by drugs, including marijuana, the same remedies and penalties that are specified for alcohol-impaired drivers, including administrative or judicial license revocation.
- **Proposal:** Test every driver involved in a crash that results in a fatality or a serious injury (including injury to pedestrians) for alcohol and impairing drugs, including marijuana, a panel of opioids, and prescription drugs.
- **Proposal**: Test every driver involved in a crash involving a fatality or serious injury for marijuana in every state with medical or recreational marijuana laws.
- **Proposal:** Test every driver arrested for driving while impaired for both alcohol and impairing drugs, including marijuana.
- **Proposal:** Require federal, state, and local law enforcement officers to use reliable oral fluid testing technology at the roadside for every driver arrested for impaired driving.
- **Proposal**: Authorize the creation of a national database similar to the National Crime Information Center that collects the information for DWI program and policy decisions and that is accessible by state and local law enforcement officers.
- **Proposal:** Require states to collect/collate/publish alcohol/drug/polydrug data.
- **Proposal**: Require every state with medical or recreational marijuana laws to collect data on all crashes in which marijuana is suspected to have contributed to the crash and report that data to NHTSA.
- **Proposal**: Require every state to inform all people applying for a driver's license and renewing a past license of all prescription drugs that can impair driving, as well as all illicit drugs.
- **Proposal**: Implement 24/7 Sobriety Programs in every area subject to federal jurisdiction.[23]
- **Proposal:** Require that DWI recordkeeping separately classify alcohol, drugs, and polydrug use.
- **Proposal:** Lower the Blood-Alcohol Content Threshold from 0.08 g/dL to 0.05 (or lower) in every state that has authorized marijuana to be used for medical or recreational purposes.

Polydrug use is sufficiently common today that the states should test every driver involved in a crash, particularly one involving a fatality, not only for alcohol but also for legal and illegal impairing drugs. Moreover, all 50 states fix 21 as the minimum drinking age *and* the minimum age for recreational marijuana use. It therefore makes sense that states should apply to everyone under that age who tests positive for any illegal drug use whatever administrative penalty the states impose for underage drinking and driving. Colorado and Washington have attempted to collect and report the data reflecting the consequences of the legalization schemes in those states. Other states should do the same, and Congress can require them to do so as a condition of receiving federal highway funds. That is particularly important in the case of marijuana legalization, because of the dramatic changes that we have seen since California first legalized medical marijuana in

[23] For a discussion of 24/7 Sobriety programs, see Larkin, *24/7 Sobriety*, *supra* note 15.

1996. Where a state has changed its laws to allow marijuana to be used for medical or recreational purposes, that state has an obligation to its residents—and anyone else who uses the state's roadways—to inform the public whether liberalization has increased the risk of grave bodily injury of death whenever they drive.

I previously have argued that states with medical or recreational marijuana programs should lower the BAC standard for alcohol.[24] That approach would not address the risk that marijuana use alone poses to highway injury or death, but it could help lessen the number of crashes caused by a marijuana-alcohol cocktail. I continue to believe that we should not let the perfect be the enemy of the good and that saving some lives is better than saving none. I am aware of the powerful opposition that the national alcoholic beverage industry and local drinking establishments would bring to bear against any such proposal. Yet, I do not believe that trying to keep some impaired drivers off the road by lowering the BAC level for alcohol is just tilting at windmills. At a minimum, forcing opponents of this option to justify their position would enhance the public discourse over drug-impaired driving, because there is value in forcing someone to articulate an unpersuasive argument.

III. IF CONGRESS DECIDES TO LEGALIZE RECREATIONAL MARIJUANA USE, IT SHOULD REQUIRE STATES TO OWN AND OPERATE MARIJUANA DISTRIBUTION FACILITIES

Marijuana legalization is not "a binary choice," with complete legalization and a heavy criminal justice crackdown as the only two options.[25] There are points in between. That debate also misses the boat because it focuses on the *demand* side of the matter. An important aspect of this issue is the *supply* side: who may cultivate, possess, and distribute agricultural marijuana.[26] Even here there are multiple options. For example, one option is reducing criminal penalties for growing and possessing a limited amount of marijuana in one's home for personal use. Moreover, even for commercial distribution, the debate so far has largely focused on the choice between large- and small-scale commercial businesses. That is a mistake. Private ownership of commercial facilities is not the only option. There are at least two others that should be discussed: namely, limiting production and distribution to businesses in a not-for-profit industry or limiting them to state-owned operations.

Two experts on the subject of marijuana have endorsed alternatives to large- or small-scale private ownership of distribution businesses. In a 2018 article entitled *Against a Weed Industry*, Jonathan Caulkins, a professor at Carnegie-Mellon University, recommended a not-for-profit model.[27] By contrast, in a 2014 article entitled *How Not to Make a Hash Out of Cannabis Legalization*, NYU Professor Mark Kleiman argued in favor of state ownership of marijuana stores.[28]

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[24] *See* Larkin, *The Problem of "Driving While Stoned," supra* note 20; Larkin, *Drugged Driving*, *supra* note 20.

[25] Jonathan Caulkins, *Against a Weed Industry*, NAT'L REV., Mar. 15, 2018, https://www.nationalreview.com/magazine/2018/04/02/legal-marijuana-industry-leap-unknown/. Unless otherwise noted, quotations that follow in Part III come from Professor Caulkins' article.

[26] *Id.*

[27] *Id.*

[28] Kleiman, *supra* note 9.

Either option is better than recreating the same ownership and distribution system that we have today for cigarettes, but I think that Professor Kleiman has the better of the argument.

A. OPTION 1: LARGE-SCALE FOR-PROFIT OWNERSHIP OF MARIJUANA DISTRIBUTION

Professors Caulkins and Kleiman make a powerful case for avoiding a scheme involving the distribution of marijuana by privately owned for-profit companies, especially large corporations. As Professors Caulkins explains, "Free-market capitalism unleashes awesome forces. The quest for ever greater profits stimulates innovation in products and production processes, yielding a wider range of cheaper and more effective products in which consumers can indulge—and sometimes over-indulge."[29] That outcome is "a blessing in the case of 99 percent of products, but not all of them. We do not allow corporations to sell human organs, sexual favors, or performance-enhancing steroids for non-medical use, and some harbor misgivings about for-profit prisons and universities."[30]

Professor Caulkins argues that "this cautious approach" is necessary because cannabis is not "a regular article of commerce."[31] It is quite unlike ordinary commercial products, like automobiles, flashlights, telephones, and the like. It is far closer to items such as alcohol and tobacco. Why? For several reasons, such as the ones that I mentioned above: It has the potential to render users dependent on or addicted to the drug; it can lead to severe mental health problems; it can create havoc on the roadways; and so forth—all of which can wind up creating major problems for a significant proportion of the population.[32] "The trick to legalizing marijuana, then," Professor Kleiman put it, "is to keep at bay the logic of the market—its tendency to create and exploit people with substance abuse disorders."[33]

The reason is that different people will consume marijuana in different ways and in different amounts. Moderate use of marijuana by adults at home is not likely to lead to major health or

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[29] Caulkins, *supra* note 25.

[30] *Id.*

[31] *Id.*

[32] Marijuana is not as severe a threat to individual and public health as alcohol, he notes. *Id*. ("Cannabis is a dependence-inducing intoxicant, but a relatively safe one. Overdoses—particularly from edibles—prompt many thousands of people to seek care in emergency rooms every year, but overdose deaths are all but impossible. Even long-term use doesn't cause much organ damage. Yes, cannabis smoke contains carcinogens, but not enough to make excess cancers visible in epidemiological studies. Cannabis intoxication impairs reaction time, memory, and one's ability to perform tasks that require attention, but it does not produce reckless or aggressive behavior the way alcohol does."). But it is not a harmless product. *Id.*; *see also* Kleiman, *supra* note 9 ("The undeniable gains from legalization consist mostly of getting rid of the damage done by prohibition. . . . Another gain from legalization would be to move the millions of Americans whose crimes begin and end with using illegal cannabis from the wrong side of the law to the right one, bringing an array of benefits to them and their communities in the form of a healthier relationship with the legal and political systems. Current cannabis users, and the millions of others who might choose to start using cannabis if the drug became legal, would also enjoy an increase in personal liberty and be able to pursue, without the fear of legal consequences, what is for most of them a harmless source of pleasure, comfort, relaxation, sociability, healing, creativity, or inspiration. For those people, legalization would also bring with it all the ordinary gains consumers derive from open competition: lower prices, easier access, and a wider range of available products and means of administration, held to quality standards the illicit market can't enforce.").

[33] Kleiman, *supra* note 9

societal problems. "Adults' using a few times a week when not at work, school, or minding children is pretty harmless, and that describes almost half of cannabis users."[34] But that practice "describes only a tiny share of cannabis *use*."[35] As he explained, "Such moderate, adult use is engaged in by about one in three cannabis users, but accounts for only 2 percent of consumption and so a trifling share of sales and profits."[36] A far smaller number of daily or dependent users consume far more marijuana person. "[D]aily and near-daily users who account for about 80 percent of consumption. As policy liberalized, cannabis transformed from a weekend party drug to a daily habit, becoming more like tobacco smoking and less like drinking. The number of Americans who self-report using cannabis daily or near-daily grew from 0.9 million in 1992 to 7.9 million in 2016."[37]

If you think that's bad, hold on. It gets worse.

"Just under half of consumption is by people who report either having been in alcohol or drug treatment or suffering enough current problems to meet medical criteria for substance-use disorder. (Since denial is a hallmark of addiction, this proportion is likely conservative.)"[38] Moreover, "[a]bout 60 percent of consumption is by people with a high-school education or less, a group with lower disposable income and greater sensitivity to falling prices."[39] And prices have declined—"sharply."[40] The result is that legalization will create serious problems for an unknown—albeit hopefully small—number of Americans.

Professor Kleiman voiced the same concerns:

> The losses from legalization would mainly accrue to the minority of consumers who lose control of their cannabis use. About a quarter of the sixteen million Americans who report having used cannabis in the past month say they used it every day or almost every day. Those frequent users also use more cannabis per day of use than do less frequent users. About half of the daily- and near-daily-use population meets diagnostic criteria for substance abuse or dependence—that is, they find that their cannabis habit is interfering with other activities and bringing negative consequences, and that their attempts to cut back on the frequency or quantity of their cannabis use have failed. (Those estimates are based on users' own responses to surveys, so they probably underestimate the actual risks.)

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[34] Caulkins, *supra* note 25.

[35] *Id*. (emphasis in original).

[36] *Id*. ("Likewise, many kids use, but most do not use daily, and there are some adults who use ten to 20 times per month.").

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] Product variety has also increased. *Id*. ("Product variety has exploded, including THC-infused candies and edibles, oils that can be vaped (akin to e-cigarettes), and chunks of 70-plus percent THC that are suitable for flash-vaporization ("dabbing"). The increase in average daily dose has been startling. Until 2000, the average potency of seized cannabis never exceeded 5 percent, and 4 percent was typical. Someone consuming one 0.4-gram joint each weekend night was consuming 0.032 grams of THC per week, or 4.6 milligrams per day. Daily users now average about 1.3 grams per day. At 20 percent potency, that is 260 milligrams per day—nearly 60 times as much.").

> And then, of course, there are the extreme cases. A substantial number of these daily users spend virtually every waking hour under the influence. Legal availability is likely to add both to their numbers and to the intensity of their problems.[41]

Put differently,

> Cannabis consumption, like alcohol consumption, follows the so-called 80/20 rule (sometimes called "Pareto's Law"): 20 percent of the users account for 80 percent of the volume. So from the perspective of cannabis vendors, drug abuse isn't the problem; it's the target demographic. Since we can expect the legal cannabis industry to be financially dependent on dependent consumers, we can also expect that the industry's marketing practices and lobbying agenda will be dedicated to creating and sustaining problem drug use patterns." [42]

Using a purely private distribution system is part of the problem. As Professor Kleiman estimated in 2014:

> The systems being put into place in Washington and Colorado roughly resemble those imposed on alcohol after Prohibition ended in 1933. A set of competitive commercial enterprises produce the pot, and a set of competitive commercial enterprises sell it, under modest regulations: a limited number of licenses, no direct sales to minors, no marketing obviously directed at minors, purity/potency testing and labeling security rules. The post-Prohibition restrictions on alcohol worked reasonably well for a while, but have been substantially undermined over the years as the beer and liquor industries consolidated and used their economies of scale to lower production costs and their lobbying muscle to loosen regulations and keep taxes low . . . .
>
> The same will likely happen with cannabis. As more and more states begin to legalize marijuana over the next few years, the cannabis industry will begin to get richer—and that means it will start to wield considerably more political power, not only over the states but over national policy, too.
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> That's how we could get locked into a bad system in which the primary downside of legalizing pot—increased drug abuse, especially by minors—will be greater than it needs to be, and the benefits, including tax revenues, smaller than they could be. It's easy to imagine the cannabis equivalent of an Anheuser-Busch InBev peddling low-cost, high-octane cannabis in Super Bowl commercials. We can do better than that, but only if Congress takes action—and soon.[43]

B. OPTION 2: NOT-FOR PROFIT VS. STATE OWNERSHIP OF MARIJUANA DISTRIBUTION

To avoid those problems, Professor Caulkins proposes that Congress use a ten-year period to study the effects of a radical change in our controlled substances laws. In his words:

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[41] Kleiman, *supra* note 9.

[42] *Id.*

[43] *Id.*

> I suggest that we pause for a decade and restrict legal supply to nonprofit organizations. One option would require organizations applying for a state license to be nonprofit groups whose governance structures focus them on serving the public interest. I suggest two conditions. First, the majority of governing-board members must come from the child-welfare and treatment communities. Second, the organization's charter must define its mission as meeting existing demand, in order to undercut the black market, but not promoting greater consumption.[44]

In 2014, Professor Kleiman argued in favor of a government distribution mechanism:

> What's needed is federal legislation requiring states that legalize cannabis to structure their pot markets such that they won't get captured by commercial interests. There are any number of ways to do that, so the legislation wouldn't have to be overly prescriptive. States could, for instance, allow marijuana to be sold only through nonprofit outlets, or distributed via small consumer-owned co-ops (see Jonathan P. Caulkins, "Nonprofit Motive"). The most effective way, however, would be through a system of state-run retail stores.
>
> There's plenty of precedent for this: states from Utah to Pennsylvania to Alabama restrict hard liquor sales to state-operated or state-controlled outlets. Such "ABC" ("alcoholic beverage control") stores date back to the end of Prohibition, and operationally they work fine. Similar "pot control" stores could work fine for marijuana, too. A "state store" system would also allow the states to control the pot supply chain. By contracting with many small growers, rather than a few giant ones, states could check the industry's political power (concentrated industries are almost always more effective at lobbying than those comprised of many small companies) and maintain consumer choice by avoiding a beer-like oligopoly offering virtually interchangeable products.
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> * * * * *
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> Of course, there's a danger that states themselves, hungry for tax dollars, could abuse their monopoly power over pot, just as they have with state lotteries. To avert that outcome, states should avoid the mistake they made with lotteries: housing them in state revenue departments, which focus on maximizing state income. Instead, the new marijuana control programs should reside in state health departments and be overseen by boards with a majority of health care and substance-abuse professionals. Politicians eager for revenue might still press for higher pot sales than would be good for public health, but they'd at least have to fight a resistant bureaucracy.[45]

I think that the government ownership option is preferable to using not-for-profit companies. States use this approach for the distribution of distilled spirits. In Virginia, for example,

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[44] Caulkins, *supra* note 25.

[45] Kleiman, *supra* note 9.

distilled spirits (e.g., bourbon, vodka) can be purchased only at a state-operated Alcoholic Beverage Control store.[46] State operation of the means of distribution has several advantages over even not-for-profit operation.

1. State ownership of distribution stores would make it easier for a state to monitor marijuana sales and store employees to prevent unauthorized distribution to minors and to the black market. Businesses always have an incentive to increase profits. Some stores or bars that sell alcohol or cigarettes are willing to "wink" at the requirement that a purchaser prove that he is an adult. The same phenomenon is likely to occur with the private sale of cannabis. Yes, some state employees would have the same motivation. But it is far easier for a state to monitor activities in its own stores, staffed with its own employees, than to investigate the goings-on of a large number of private businesses. State undercover law enforcement officers can also enter and look around in any part of a state-owned store, while officers would not ordinarily be able to enter non-public portions of a private business.

2. Advertising restrictions are a reasonable means of reducing demand, and they can be more easily defended against a Free Speech Clause challenge if the state owns the distribution facilities. Privately owned and operated businesses will seek to expand their client base as far as possible—that is, until the last dollar spent on expanding the business returns a dollar in new revenue. Advertising is a means of attracting new customers, and private businesses will seek to advertise their business until the marginal cost of advertising equals the marginal revenue from that business strategy. For some time now, the Supreme Court of the United States has protected purely commercial speech against federal and state regulation, striking down a host of advertising regulations[47] that, in years gone by, would easily have passed muster.[48] Whether Congress or a state can limit advertising by a private not-for-profit entity is debatable under current law. States

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[46] *See*, *e.g.*, VA. CODE ANN. § 4.1-101 (2019) (creating the Virginia Alcoholic Beverage Control Authority).

[47] *See*, *e.g.*, Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) (holding unconstitutional a state law restricting the sale, disclosure, and use of pharmacy records of patients to enable pharmaceutical companies to discern physician prescription practices); Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999) (*GNOB*) (holding unconstitutional a federal statute restricting gambling advertising to residents of a state where gambling is legal); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (holding unconstitutional a federal law prohibiting beer labels from disclosing alcohol content); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding unconstitutional a state law flatly banning the advertising of liquor prices). *Contra* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding constitutionality of the federal law discussed in *GNOB* to a broadcaster in a state where gambling is illegal).

[48] *Compare*, *e.g.*, Valentine v. Christian, 316 U.S. 52 (1942) (holding that commercial speech is not entitled to Free Speech Clause protection), *with*, *e.g.*, Va. Bd. of Pharmacy v. Va. Consumer Citizens Council, Inc., 425 U.S. 748 (1976) (overruling *Valentine*).

are not "persons,"[49] however, and have no First Amendment rights. Accordingly, Congress can allow state ownership conditioned on foregoing advertising.[50]

3. State ownership would help avoid the problems that arise whenever the law permits only one particular business form—such as not-for-profit concerns—to participate in an activity, even though the members of the industry prefer other forms—such as for-profit concerns. Corporation law is largely within the bailiwick of the states to devise, and there is a risk that particular states might bend their own laws to encourage or enable parties to obscure the true ownership of a not-for-profit enterprise. That risk might be slight, but there is little or no risk of such legal chicanery if the state itself must own the cannabis distribution business.

4. States ownership of marijuana distribution facilities might not have the same banking problems that for-profit and not-for-profit business would have with using the national banking system for receipts from the sale of marijuana. States that have the same structure as the federal government—that is, states that have a state-owned and operated treasury—can deposit the proceeds into its treasury rather than use the interstate banking system. That might avoid the need to revise the banking laws to address the problems resulting from the operation of a large-scale cash business. The fewer statutes modified, the lesser the risk of unintended statutory consequences.

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Thank you for the opportunity to testify today. I am glad to answer your questions.

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[49] *See* South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."); *see generally* Return Mail, Inc. v. U.S. Postal Service, No. 17-1594 (U.S. June 10, 2019), slip op. 6-7 ("In the absence of an express statutory definition, the [Supreme] Court applies a 'longstanding interpretive presumption that "person" does not include the sovereign.'") (citation omitted).

[50] *Cf.* South Dakota v. Dole, 482 U.S. 203 (1987) (upholding against a Tenth Amendment challenge a federal law conditioning receipt of a small portion of federal highway funds on a state's adoption of a minimum drinking age).