# *SAFE STREETS ALLIANCE* & THE TENTH AMENDMENT: INTRASTATE CANNABIS MARKETS, INTERSTATE AUTHORITY & POLITICAL CONSEQUENCES

MICHAEL COOPER*

ABSTRACT

*The U.S. Court of Appeals for the Tenth Circuit decided Safe Streets* Alliance v. Hickenlooper *in the summer of 2017, opening a new front in the war being fought over the nation's most significant modern experiment in federalism: the ongoing national movement by states to legalize the use of marijuana for medicinal and recreational purposes despite its federal prohibition. The Safe Streets court held that private litigants could bring civil actions against state-legal marijuana operations under the federal Racketeering and Corrupt Organizations Act ("RICO"), with the state-licensed activity serving as the predicate federal violation. But even as legalization foes crowed about their newfound cudgel against the industry, a crucial question remained unaddressed. RICO and the predicate drug laws are federal statutes, and, accordingly, apply only to the extent permitted under the Congress' interstate commerce power. Does the state-licensed conduct at issue fall within reach of that interstate commerce power? Some assume, in cursory fashion, that the Supreme Court answered that question in* Gonzales v. Raich*. To the contrary, close scrutiny reveals that* Raich *does not merely fail to foreclose an as-applied challenge by a state-legal marijuana operator, it in fact suggests that such a challenge could succeed in light of the very significant differences between modern marijuana regulation and the regulation at issue in* Raich*—particularly as states further dynamically revise their marijuana laws in order to withdraw them from the ambit of the commerce power. This article includes a discussion of practical potential regulatory revisions that states may adopt in response to the threat of RICO liability for their licensed businesses.*

* Michael Cooper is Managing Member of MadisonJay Solutions LLC. A graduate of Harvard College and Harvard Law School, he previously practiced as General Counsel of MHW, Ltd. and at Cravath, Swaine & Moore LLP and served as a law clerk on the U.S. Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS



## INTRODUCTION

The promised frontal assault had not materialized. Despite breathless reports of an impending crackdown in the popular press, the pro-Tenth Amendment forces appeared to have battled anti-marijuana crusaders to a stalemate in July 2017. Supporters of the effort by eight states to legalize and regulate sales of adult-use (so-called "recreational") marijuana and twenty-nine states for medicinal purposes, arguably the grandest experiment in American federalism in generations, had reason for optimism. Not only did the rumored crackdown fail to materialize, but public opinion continued to move in favor of legalization. As a result, the political pathway for legalization foes appeared more politically fraught by the month. Indeed, a CBS News poll in April 2017 had found that 61% of respondents believed that the use of marijuana should be legal, and 71% of respondents (including 63% of self-identified Republicans) opposed "the federal government taking action to try to stop the sale and use of marijuana in these states."[1]

Even as a crackdown faced daunting political obstacles, anti-legalization forces received new hope through the courts. In June 2017, the US Court of Appeals for the Tenth Circuit reversed the lower court in *Safe Streets Alliance v. Hickenlooper*[2] and reinstated civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against a state-licensed cannabis producer. The court held that the plaintiffs had sufficiently stated a claim that the cultivation had diminished the value of the plaintiffs' neighboring property and

---

[1] Jennifer De Pinto et al., *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 11: 57 AM), https://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/. By October 2017, that figure had swelled further, with a record 64% of respondents favoring legalization. Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in the U.S.*, GALLUP NEWS (Oct. 25, 2017), http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx.

[2] 859 F.3d 865 (10th Cir. 2017).

that the state-legal act of cultivation sufficed as a RICO predicate. Though cannabis foes moved quickly to weaponize the decision—and the prospect of treble damages for a proven injury—a crucial question remained unanswered. Because RICO provides a federal cause of action (and the predicate here is a federal crime), does state-legal cannabis activity necessarily provide the requisite interstate nexus?[3]

It may ordinarily be true that cartels supplying the illegal national marijuana market have committed a *federal* racketeering offense, but it is far less clear that the federal government has the constitutional authority to criminalize cannabis-related activity that takes place for a purely intrastate marketplace that is regulated by a state government. To date, scholars examining the federalist standoff between state legal marijuana marketplaces and the federal law have largely focused on the scope of preemptory powers, rather than Tenth Amendment limitations. For example, Erwin Chemerinsky's analysis of the interplay between state marijuana regulation and the Controlled Substances Act ("CSA"), providing the RICO predicate offenses, begins with the premise that "[b]ecause Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA."[4] Accordingly, Chemerinsky focused on limitations on the federal government's power to preempt and commandeer.[5] This received wisdom is based upon the U.S. Supreme Court's 2005 holding in *Gonazales v. Raich*, in which the Court concluded that the commerce power permitted regulation of home-grown cannabis pursuant to California's then-effective medical marijuana laws.

Despite that common interpretation of the commerce power and *Raich's* holding, there is good reason to question it in the context of tightly regulated state adult-use marketplaces. And there is particular reason to question that interpretation in more tightly regulated state marketplaces that could be developed if RICO liability (or a federal crackdown) threatens these very popular state industries.

**Part I** of this article situates *Safe Streets* within the context of the national/federalist marijuana standoff. **Part II** discusses the framework of the *Safe Streets* decision and the under-addressed question of whether the state-legal conduct in question satisfied the interstate requirement. **Part III** provides a

---

[3] Because the Commerce Clause authorizes Congress to regulate commerce "among the several states," use of the commerce power requires a sufficient intrastate nexus. U.S. CONST. art. I, § 8, cl. 2.

[4] Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102-03 (2015);

[5] *Id.*; *see also, e.g.*, Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1108 (2014) (a suit by the federal government "would lead to a showdown over the preemptive power of the CSA, an issue that has not been tested to date").

reconsideration of the applicability of *Raich* to state adult-use marijuana marketplaces. **Part IV** concludes by analyzing potential practical regulatory revisions states could consider to withdraw further from the ambit of Congress's commerce power.

## I. SITUATING *SAFE STREETS*

Prior to July 2017, opponents of legalization had pinned their hopes on recently appointed Attorney General Jeff Sessions. Even casual observers of cannabis knew of the Attorney General's opposition to cannabis, in all of its forms. Indeed, the Attorney General had previously urged the government to send the "message with clarity that good people don't smoke marijuana,"[6] and had even joked that he thought the Ku Klux Klan "were okay until I found out they smoked pot."[7] To that end, the Attorney General had directed his Task Force on Crime Reduction and Public Safety ("Task Force") to analyze the national Department of Justice's ("DOJ") marijuana policy. In July 2017, the news media had already begun breathlessly reporting that active preparations for a marijuana crackdown stemming from the Task Force report were underway.[8] A cursory analysis suggested that such a crackdown could sound a death knell for the nascent adult-use industry: Since the Controlled Substances Act ("CSA") makes possession and distribution of marijuana a federal crime, every state-licensed operator sits in theoretical jeopardy—a jeopardy heightened by its state license and state and federal tax returns, serving as a signed confession of the location and profits of marijuana transactions.[9]

But then nothing happened. Though non-marijuana crackdowns were announced by the Attorney General based on the very same Task Force's recommendations,[10] a deafening silence remained on cannabis. Until, that is, the Associated Press ("AP") reported a bombshell: After reviewing portions of the non-public Task Force report, the AP explained that "[t]he betting was that law-

---

[6] Christopher Ingraham, *Trump's Pick for Attorney General: "Good People Don't Smoke Marijuana,"* WASHINGTON POST (Nov. 18, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm_term=.790124110eb0.

[7] James Higdon, *Jeff Sessions' Coming War on Legal Marijuana*, POLITICO (Dec. 5, 2016), https://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501.

[8] Lydia Wheeler, *Trump's DOJ Gears Up for Crackdown on Marijuana*, THE HILL (July 23, 2017, 7:30 AM), http://thehill.com/regulation/administration/343218-trumps-doj-gears-up-for-crackdown-on-marijuana.

[9] 21 U.S.C. § 801 et seq. (2018).

[10] Pema Levy, *Sessions Claims a Mysterious Task Force Is Behind His Most Controversial Reforms*, MOTHER JONES (Aug. 2, 2017), https://www.motherjones.com/crime-justice/2017/08/sessions-claims-a-mysterious-task-force-is-behind-his-most-controversial-reforms/.

and-order Attorney General Jeff Sessions would come out against the legalized marijuana industry with guns blazing[, b]ut the task force Sessions assembled to find the best legal strategy is giving him no ammunition."[11] Apparently the Task Force essentially recommended maintenance of the status quo and further study.[12]

But during this summer of disappointment for the opponents of cannabis legalization, the Tenth Circuit bucked the trend. In *Safe Streets*,[13] the court appeared to provide a new path forward for cannabis opponents who had failed to block legalization at the ballot box and failed to induce the Attorney General to order the full-scale crackdown they coveted.[14] Specifically, the court reversed the district court's dismissal of the Colorado landowners' claims against a state-licensed marijuana facility for civil damages under RICO, 18 U.S.C. § 1964(c), concluding they had plausibly stated a claim for legal relief.[15] Though the court attempted to insist that this was a "narrow holding[]" and emphasized that it was "not suggesting that every private citizen purportedly aggrieved by another person, a group, or an enterprise that is manufacturing, distributing, selling, or using marijuana may pursue a claim under RICO,"[16] the plaintiffs' attorney in the case wasted little time boasting to the press that "[t]his is basically a road map for people who own property that is near (a marijuana facility) . . . for how to bring a federal suit to get relief."[17] Indeed, it should be noted that Attorney General Sessions' specter hangs over *Safe Streets* as well: the aforementioned plaintiffs' counsel were from the firm of Cooper & Kirk, PLLC, which included an appearance in the case by named partner Chuck Cooper.[18] As devotees of Republican politics know well, Chuck Cooper is personally close to Attorney General Sessions, and even represents the Attorney General in connection with the ongoing inquiries into Russian interference in the 2016 presidential election.[19]

---

[11] Sadie Gurman, *Huff, Puff, Pass? AG's Pot Fury Not Echoed By Task Force*, ASSOCIATED PRESS (Aug. 5, 2017), https://apnews.com/ad37624fcb8e485a8d57a013d48a227c.

[12] *Id.*

[13] 859 F.3d at 865 (10th Cir. 2017).

[14] Though Attorney General Sessions subsequently withdrew existing federal guidance on marijuana enforcement in January 2018 terming it "unnecessary," notably that withdrawal was not announced in conjunction with a more draconian policy.

[15] *Safe Streets*, 859 F.3d at 876-77.

[16] *Id.* at 891.

[17] Polly Washburn, *Talk Show Host Hugh Hewitt Lobbies Jeff Sessions to Pursue Federal Marijuana Crackdown*, THE CANNABIST (Oct. 26, 2017, 10:49 AM), https://www.thecannabist.co/2017/10/26/hugh-hewitt-marijuana-jeff-sessions-prosecution/90962/; *see also* Amanda Chicago Lewis, *How Anti-Mafia Laws Could Bring Down Legal Pot*, ROLLING STONE (Aug. 28, 2017), https://www.rollingstone.com/culture/features/how-anti-mafia-laws-could-bring-down-legal-pot-w499585 (observing that *Safe Streets* "could be a game-changer" and noting the commencement of a "major" copycat suit "[a]lmost immediately" after the ruling in *Safe Streets*).

[18] *Safe Streets*, 859 F.3d at 875.

[19] Kevin Johnson, *Attorney General Jeff Sessions Retains Private Lawyer*, USA TODAY (June 20, 2017, 4:29 PM), https://www.usatoday.com/story/experience/beach/new-hampshire/2017/06/20/

## II. *SAFE STREETS* AND THE INTERSTATE NEXUS

The *Safe Streets* court emphasized that its "narrow holdings today do no more than apply the heavily fact-dependent standard Congress enumerated in [the RICO statute] to the allegations in this case."[20] As a result, the court's analysis of the fact-pattern deserves close scrutiny. The court explained that under RICO "'[i]t shall be unlawful for any person employed by or associated with any enterprise *engaged in, or the activities of which affect, interstate or foreign commerce*, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'"[21] Of course, plaintiffs bringing such a suit are limited to federal racketeering offenses because state law provides no bar to the underlying cannabis-related conduct. But that introduces an additional constitutional requirement. To use a federal racketeering offense to support the racketeering activity requirement, a plaintiff must sufficiently plead the requisite interstate nexus of the underlying offense as well.[22] In holding that there was a sufficient interstate nexus pled in *Safe Streets*, the court essentially held without discussion that a marijuana-related offense is *ipso facto* an *interstate* marijuana-related offense. As will be discussed *infra* **Part III**, there is good reason to question that conclusion.

The factual record makes the *Safe Streets* plaintiffs' political goals plain. The plaintiffs were a husband and wife ("Reillys") and Safe Streets Alliance, an interest group "'devoted to reducing crime and illegal drug dealing . . . particularly the enforcement of federal law prohibiting the cultivation, distribution, and possession of marijuana.'"[23] At the time of the litigation, the Reillys were the only known members of Safe Streets.[24]

The Reillys, but not Safe Streets, owned a parcel of land ("Parcel") that was undeveloped save for "'two agricultural buildings.'" In their complaint, they alleged that they used the property periodically for outdoor recreational activities with friends and family.[25] The defendants in the action owned and operated a state-regulated cannabis cultivation facility ("State Legal Cultivation") on the

---

attorney-general-jeff-sessions-retains-private-lawyer/103046234/. In addition to those informal links, Chuck Cooper reportedly almost joined the Trump Administration as Solicitor General. Eliana Johnson & Tara Palmeri, *Cooper Withdraws from Solicitor General Consideration*, POLITICO (Feb. 9, 2017, 5:41 PM), https://www.politico.com/story/2017/02/chuck-cooper-solicitor-general-withdraws-consideration-234869.

[20] *Safe Streets*, 859 F.3d at 891.

[21] *Id.* at 882 (quoting 18 U.S.C. § 1962(c)) (emphasis added).

[22] *See, e.g.*, Meier v. Musburger, 588 F. Supp. 2d 883, 907 (N.D. Ill. 2008) ("But the parties were all in the Chicago area. Wire fraud must involve interstate communications. . . . [T]here are not a sufficient number of predicate acts to support [plaintiff's] RICO claims.").

[23] *Safe Streets*, 859 F.3d at 879.

[24] *Id.*

[25] *Id.*

land directly adjacent to the Parcel.[26] In support of their RICO claims, the Reillys (but not Safe Streets) alleged that the State Legal Cultivation injured them in two ways: (1) the State Legal Cultivation diminished the value of their Parcel because the presence of a cannabis cultivation facility made potential purchasers less likely to "'want to keep horses or build homes'" on the Parcel and (2) the State Legal Cultivation created a "'noxious odor'" that interfered with the Reillys' use and enjoyment of the property.[27] The district court dismissed the RICO claims predicated on those injuries, holding that the plaintiffs had failed to plead a plausible injury proximately caused by the defendants' actions.[28]

The Tenth Circuit reversed in part, holding that the Reillys had adequately pled their RICO claims to survive a motion to dismiss. The court's explicit discussion of RICO's interstate commerce requirement occurs in a single sentence, observing that the defendants "allegedly have long worked in concert to achieve market efficiencies toward their common aim of cultivating, distributing, and selling marijuana, *which undisputedly affects interstate commerce*."[29] The sole citation for that proposition is to *RJR Nabisco, Inc. v. European Community*, which involves the extraterritorial application of RICO and has nothing to do with the cultivation, distribution, or sale of marijuana.[30] Notably, by law, all of the marijuana grown at the State Legal Cultivation would have been sold to intrastate licensed businesses, and not sold into the interstate or foreign markets.[31] Nevertheless, the court concluded that the cultivation of marijuana (even for the intrastate market) "undisputedly" and necessarily impacts interstate commerce.

The court's treatment of the predicate federal racketeering offense was similarly cursory. It noted that "racketeering activity" under RICO "includes 'any offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical' as defined in the CSA, that is '*punishable under any law of the United States*.'"[32] But the court offered no analysis of whether a federal law, including its jurisdictional prerequisites, had been broken, simply holding that "cultivating marijuana for sale—which the [defendants] admit they agreed to do and they allegedly began and are continuing to do—is by definition racketeering activity."[33] Accordingly, the court appeared to predicate its holding on the

---

[26] *Id.*
[27] *Id.*
[28] *Id.* at 880.
[29] *Id.* at 883 (emphasis added).
[30] *Id.* (citing 136 S. Ct. 2090, 2106 (2016)).
[31] 1 COLO. CODE REGS. § 212-2.501(D) (2018).
[32] *Safe Streets*, 859 F.3d at 882 (quoting 18 U.S.C. § 1961(1)(A)) (internal ellipsis omitted) (emphasis added).
[33] *Id.*

presumption that *all* marijuana-related cultivation for sale has the requisite interstate nexus to be punishable under federal law.

## III. THE SCOPE OF FEDERAL POWER & *RAICH*

In some respects, it is not surprising that the *Safe Streets* court appeared to assume with little discussion that all marijuana-related conduct bears a sufficient interstate nexus. It is often assumed that *Raich* foreclosed the argument that the CSA might not reach state-regulated marijuana markets for adult use because it held that the commerce power was sufficient to permit federal regulation of a state medical marijuana marketplace,[34] and analogously would foreclose the argument that such conduct cannot support RICO liability.[35] But upon closer scrutiny, it becomes apparent that *Raich* not only does not compel the conclusion that adult-use state marijuana marketplaces are within the ambit of the federal commerce power, but actually provides further support for the conclusion that either (1) current modern adult-use marketplaces are beyond the reach of the commerce power or (2) adult-use marketplaces could be crafted to move beyond the reach of the federal commerce power.

*First*, close scrutiny makes plain that *Raich* is distinguishable from a challenge brought by a participant in a modern adult-use marketplace, and accordingly does not foreclose such a challenge. To understand *Raich*'s reach, one must begin with the nature of that dispute and the Court's framing of the question at issue. The plaintiffs in that case were California residents who grew and consumed marijuana for medicinal purposes pursuant to California's then-applicable medical marijuana law, the Compassionate Use Act of 1996.[36] Plaintiffs sought injunctive relief against the United States Attorney General to preclude the plaintiffs' prosecution under the CSA for the same.[37] Ultimately, the Court concluded that the commerce power was sufficiently broad to reach the plaintiffs' conduct.[38]

As characterized by the *Raich* Court, the challenge itself was relatively narrow. Indeed, the majority was explicit on the scope of the as-applied challenge before the Court: "[R]espondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition on the manufacture and possession of

---

[34] *See, e.g.*, Chemerinsky et al., *supra* notes 4-5.

[35] The jurisdictional requirements under RICO are construed liberally. *See, e.g.*, Falco v. Bernas, 244 F.3d 286, 309 (2d Cir. 2001). Of course, even a liberally construed statutory jurisdictional requirement cannot exceed the outer bounds of Congress' constitutional authority to enact that statute. For simplicity of presentation, and in light of the liberal construction of RICO's jurisdictional requirements, this article discusses only the constitutional jurisdictional requirement that is shared in common by RICO and the CSA.

[36] Gonzales v. Raich, 545 U.S. 1, 6-7 (2005).

[37] *Id.* at 7.

[38] *Id.* at 22.

marijuana *as applied to the intrastate manufacture and possession of marijuana for medicinal purposes pursuant to California law* exceeds Congress' authority under the Commerce Clause."[39] Thus, the crux of the challenge was whether intrastate manufacture and possession of medicinal marijuana pursuant to the applicable California law was within the reach of the federal government's commerce power. Accordingly, the Court established that the Compassionate Use Act of 1996 did not remove plaintiffs from the reach of federal power. However, further inquiry into the factual posture and holding of *Raich* is necessary to determine whether *Raich* would, in fact, control in establishing the predicates of a civil RICO offense or in an as-applied challenge by an individual prosecuted for conduct pursuant to a modern, adult-use regulatory regime.

In fact, there are very significant, salient factual distinctions between the situation of the *Raich* plaintiffs and the positioning of an individual operating under a modern adult-use framework who could challenge the sufficiency of her interstate conduct to support a CSA or RICO charge.

The *Raich* Court considered what can only be charitably termed a light touch regulatory regime. The law in question amounted to four subsections of the California Health and Safety Code.[40] Of the four subsections, three had no operational impact on the *Raich* plaintiffs: providing definitions,[41] immunizing marijuana-recommending physicians from penalty by professional licensing boards,[42] and authorizing the University of California to undertake research into the efficacy of medical marijuana.[43] The only relevant subsection of the California Code under review simply stated—in less than a page of text—that the California provisions "relating to the possession of marijuana" and "relating to the cultivation of marijuana, shall not apply" to those acting on the "recommendation or approval of a physician."[44] The limited scope of California's medical marijuana regulation was a well-known feature of its marketplace: This remained the case as recently as 2014, when then-Deputy Attorney General James Cole—author of the DOJ marijuana guidance that was not revoked in July 2017—asserted that California lacked basic controls on its medical marijuana market and "[i]f you don't want us prosecuting [marijuana users] in your state, then get your regulatory act together."[45]

---

[39] *Id.* at 15 (emphasis added).

[40] *See id.* at 5 n.3.

[41] CAL. HEALTH & SAFETY CODE § 11362.7 (West 2018).

[42] *Id.* § 11362.8.

[43] *Id.* § 11362.9.

[44] *Id.* § 11362.5(d).

[45] Timothy M. Phelps, *California Needs Stronger Marijuana Regulation, Federal Official Says*, L.A. TIMES (Oct. 16, 2014, 7:10 PM), http://www.latimes.com/local/la-me-attorney-general-marijuana-20141017-story.html.

California's prior marijuana regulation stands in stark contrast to the voluminous state regulations applicable to modern state adult-use marijuana markets.[46] These regulations are far closer to the regulatory scheme that Deputy Attorney General Cole sought: they establish license rules for owners,[47] including mandatory background checks,[48] licensing rules for employees at marijuana establishments,[49] government review of the physical layout of the proposed marijuana establishment and preapproval of alterations[50] and minimum security standards and cameras;[51] require mandatory use of an inventory tracking system to track individual marijuana plants throughout their lifecycle;[52] place limits on transportation of marijuana between licensees;[53] require maintenance of business records for "on-demand" review by regulators;[54] and place strict limits on labeling[55] and advertising,[56] with a particular emphasis on precluding the targeting of minors. These regulations act to significantly tighten government oversight and control over the product and production chain, diminishing the supply for potential diversion, and reducing the product's attractiveness to illicit purchasers thereby diminishing the demand for potential diversion. Consider California, home to the *Raich* plaintiffs, as an example. Excluding statutory text and looking only to administrator-crafted regulations, today there are more than 275 pages of rules for licensed operators to follow.[57] Thus, a challenge to the sufficiency of interstate effects felt from a modern adult-use marketplace would involve a very different as-applied challenge than the challenge in *Raich*.

*Second*, *Raich* does not merely fail to foreclose a challenge that state-legal marijuana conduct falls within the ambit of the commerce power. It actually offers good reason to believe that such conduct may fall outside the reach of federal power. The Court started with first principles by outlining the limits of Congress' interstate commerce power. It explained there are three federal commerce powers that could potentially reach marijuana cultivation: (1) regulation of the channels of interstate commerce, (2) regulation of the

---

46 *See, e.g.*, ALASKA ADMIN. CODE tit. 3, § 306 (West 2018); 1 COLO. CODE REGS. § 212-2 (LexisNexis 2018); OR. ADMIN. R. 845-025 (West 2018); WASH. REV. CODE ANN. § 69.50 (West 2018).

47 *E.g.*, 1 COLO. CODE REGS. § 212-2 R. 204.

48 *E.g.*, *id.* at R. 205.

49 *E.g.*, *id.* at R. 231(E).

50 *E.g.*, *id.* at R. 303.

51 *E.g.*, *id.* at R. 305-06.

52 *E.g.*, *id.* at R. 309.

53 *E.g.*, *id.* at R. 801.

54 *E.g.*, *id.* at R. 901.

55 *E.g.*, *id.* at R. 1001.

56 *E.g.*, *id.* at R. 1104.

57 16 CAL. CODE REGS. tit. 16, § 5000-5814 (2018); *id.* § 8000-8606; 17 CAL. CODE REGS. tit. 17, § 40100-40601 (2018).

instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) regulation of activities that substantially affect interstate commerce.[58]

Upon reviewing the *Raich* plaintiffs' conduct, the Court concluded that the third category permitted regulation even if the first two categories did not. It did so by holding that Congress had a rational basis for concluding that such non-commercial, intrastate cultivation would affect the interstate market and price for marijuana.[59] In reaching that conclusion, the Court highlighted two aspects of the plaintiffs' conduct that threatened the marijuana market outside of California's borders: (1) "the enforcement difficulties that attend distinguishing marijuana locally cultivated and marijuana grown elsewhere" and (2) "concerns about diversion into illicit channels."[60] That is, if the CSA could not reach homegrown marijuana, the courts would not be able to distinguish the immunized homegrown marijuana from illicit marijuana purchased from a drug dealer. Thus, immunized homegrown marijuana could be easily diverted into illegal channels. As a result, the Court held that the *Raich* plaintiffs' conduct fell within the reach of the commerce power because failure to regulate it could subvert interstate interdiction efforts.

But the *Raich* plaintiffs and those similarly situated operated in a relative regulatory vacuum. No regulator tracked the marijuana they grew or conducted inspections to confirm compliance. No records existed to document how cultivators disposed of their crop yields, whether sold to a California resident with a doctor's recommendation or placed in a truck and driven across state lines. As discussed above, unlike the sparse regulation in the Compassionate Care Act, modern adult-use regulations include detailed regimes specifically to obviate those concerns. With respect to the challenge of determining the source of marijuana, adult-use regulations create a chain of custody requirement to track a plant electronically from a licensed entity to a licensed entity to the end consumer. These regulations require that all marijuana be placed in sealed packaging that, pursuant to labeling requirements, list the producer's license number and the batch date for marijuana contained therein.[61] Cultivators of adult-use marijuana are subject to seed-to-sale electronic tracking requirements as well as spot inspections, mandatory record retention policies, and a requirement that they only sell that marijuana to other licensed entities.[62] These measures make diversion far more challenging than under the *Raich* regulatory regime.

With that prologue, the congressional findings relied upon by the *Raich* Court warrant further scrutiny. The Court pointed to Congress's specific findings

---

[58] Gonzales v. Raich, 545 U.S. 1, 16-17 (2005).

[59] *Id.* at 19.

[60] *Id.* at 22.

[61] *E.g.*, 1 COLO. CODE REGS. 212-2 R. 1002.5(b)(1) (LexisNexis 2018).

[62] *E.g.*, *id.* at 501(d).

that intrastate application of the CSA was "essential to the effective control" of the interstate drug market because (1) "after manufacture, many controlled substances are transported in interstate commerce," (2) controlled substances "usually have been transported in interstate commerce immediately before their distribution," (3) controlled substances "commonly flow through interstate commerce immediately prior to [their] possession," (4) "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances," and (5) "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate."[63]

Yet these findings are either irrelevant or addressable by a state regulatory regime. Congressional findings (1) through (3) are plainly inapplicable to a challenge brought by a law-abiding participant in a modern regulatory system because all such cannabis is cultivated, distributed, and sold by licensed entities within a single state.[64] The fourth and fifth findings turn on the same diversion and enforcement challenges that the Court emphasized in its *Raich* holding. The fourth finding, that intrastate distribution and possession "swell[s]" the interstate market, essentially turns on diversion from the regulated market. After all, in order for intrastate cannabis to "swell[] the interstate traffic in such substances," it must be taken outside of the controlled intrastate market. Cannabis sold throughout the chain of regulated businesses would not travel outside of the intrastate market.

The fifth finding appears to be one of enforcement challenges: How, Congress asked, could law enforcement tell that cannabis was "manufactured and distributed" in a state-legal market and had not been imported across state lines? But modern state-legal markets function as closed loops: a licensed cultivator or distributor can only sell to another intrastate licensed entity, and must document those transactions in a state database. So, for instance, if the DEA were to raid a state-licensed business, they could compare the inventory on hand to the transactions the business had entered into the state's tracking database, and mandatory records including shipping manifests.[65] The DEA would therefore be able to determine where within the state the marijuana was cultivated, and the dates of its transportation, including the route used. Indeed, the absence of that information seemed particularly concerning to the Court in *Raich*. It observed that "[o]ne need not have a degree in economics" to conclude that personally cultivated marijuana "which presumably would include use by friends, neighbors, and family members" could have a "substantial impact on the interstate market

---

63 *Raich*, 545 U.S. at 54; *see also id.* at 13 n.20.

64 *E.g.*, CAL. CODE REGS. tit. 16, § 5406(a) (2018).

65 *E.g.*, *id.* §§ 5048-49, 5051.

for this extraordinarily popular substance."[66] That is essentially a concern regarding the risk of diversion and the lack of controls to prevent it. But regulations have been crafted to address those concerns. And as Justice Thomas rejoined in dissent, "We normally presume that States enforce their own laws."[67]

Thus, while the Court may have concluded that Congress had a rational basis to regulate activity under the California law in *Raich*, modern regulation of adult-use marijuana is far more comprehensive than the regulation at issue in *Raich*, distinguishing the cases. And the Court's holding in *Raich* will be rendered more distinguishable still, to the extent states adopt more draconian regulations.

To reach these more tightly regulated markets would require a significantly broader interpretation of the commerce power than in *Raich*. As an initial matter, it is worth noting that it was not only the three members of the Supreme Court in dissent who concluded that the lightly regulated California medical marijuana market in *Raich* fell outside the bounds of the interstate commerce power. Even the limited regulation at issue in *Raich* had led the U.S. Court of Appeals for the Ninth Circuit to enjoin application of the CSA against the *Raich* plaintiffs.[68]

Expanding the commerce power to regulate such intrastate conduct would have significant ancillary effects. Certainly, the dissenters in *Raich* had those concerns at the forefront of their minds. In the opening sentence of her dissent, Justice O'Connor emphasized the threat that an unchecked commerce power posed to American federalism. In Justice O'Connor's words, "We enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."[69] Notably, that concern has reappeared in more recent decisions by the Roberts Court.[70] Likewise, the *Raich* dissenters highlighted the particular significance of federal encroachment on intrastate marijuana regulation. Justice O'Connor wrote: "The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."[71] Indeed, both Justice O'Connor's dissent—joined by Chief Justice Rehnquist and Justice Thomas—and Justice Thomas'

---

66 Raich, 545 U.S. at 28.

67 *Id.* at 63 (Thomas, J., dissenting).

68 *Id.* at 9.

69 *Id.* at 42 (O'Connor, J., dissenting).

70 *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2091 (2014) ("[M]aintaining that constitutional balance is not merely an end unto itself. Rather, '[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'").

71 *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

separate dissent offered a parade of horribles that could result from extending the majority's logic.[72] Both dissents concluded that such an expansion of federal power was irreconcilable with the Founders' understanding of American government, pointing specifically to "Madison's assurance to the people of New York that the 'powers delegated' to the Federal Government are 'few and defined,' while those of the States are 'numerous and indefinite.'"[73]

However, to conclude that *Raich* may be distinguished from potential future as-applied challenges in modern adult-use regulatory cases requires consideration of that case's footnote 38. In that footnote, the majority explained that even assuming that California had imposed "effective" controls on medical marijuana (a term the majority did not define), the commerce power still permitted the CSA to regulate that market. It explained that a state's decision after the federal government passes a law "cannot retroactively divest Congress of its authority under the Commerce Clause," a proposition that "would require Congress to cede its constitutional power to regulate commerce whenever a state opts to exercise its 'traditional police powers.'"[74]

Footnote 38 is open to a number of substantive criticisms.[75] For example, William Baude contends footnote 38 is flatly inaccurate. In his view, commerce powers are akin to the foundation of a house that "can erode over time because of subsequent events. And if it does erode, part of the law, like part of the house, must fall down."[76]

But in a future as-applied challenge in the adult-use context, such a sweeping argument is not necessary. Footnote 38 is defanged on its own terms. First, one must address the limited nature of the controls that the Court assumed were "effective." As discussed above, the applicable statutory language in *Raich* was limited. It merely stated that the California provisions "relating to the possession of marijuana" and "relating to the cultivation of marijuana, shall not apply" to those acting on the "recommendation or approval of a physician."[77]

---

[72] *Id.* at 49 (warning that the Court "threatens to sweep all of productive human activity into federal regulatory reach"); *id.* at 69 (Thomas, J., dissenting) ("If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States").

[73] *Id.* at 69; *see also id.* at 70 ("[T]he Framers understood what the majority does not appear to fully appreciate . . . ."); *see also id.* at 57 (O'Connor, J., dissenting).

[74] *Raich*, 545 U.S. at 29 n.38.

[75] As an initial matter, footnote 38 is apparent dicta, as the majority had previously explained its concerns with "diversion into illicit channels" that would "leave a gaping hole in the CSA." *Id. at 22*; *see also id.* at 30 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition."). Accordingly, it would not control in a future adjudication. Central Va. Comm. Coll. v. Katz, 546 U.S. 356, 363 (2006).

[76] William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 532 (2015).

[77] CAL. HEALTH & SAFETY CODE § 11362.5 (West 2018).

Without any regulatory controls designed to track or control the flow of marijuana, even if one assumes, *arguendo*, the "effectiveness" of the California law, it still would not impact the intra/interstate nature of the marijuana cultivated, possessed, and used pursuant to that provision. Rather, the "effectiveness" of the regulation would simply mean that marijuana was exclusively cultivated and possessed by individuals for appropriate medical purposes pursuant to the California code.

Moreover, to read footnote 38 as foreclosing an as-applied challenge by participants in a market with "effective" regulations delimiting the market to a single state renders footnote 38 in fundamental tension with the rest of the majority opinion and inherently circular. The majority in *Raich* recognized that the commerce power is not limitless.[78] The majority held that the commerce power was implicated because the plaintiffs' conduct was part of a class of activity that substantially affected interstate commerce.[79] And while jurists might debate whether this class substantially affected interstate commerce—the members of the *Raich* Court did—that ruling does not foreclose a potential challenge that licensees in different, more tightly regulated adult-use cannabis jurisdictions are not engaged in conduct that brings them within the reach of the interstate commerce power.

Rather, the confusion over the reach of footnote 38 stems from the Court's statements that "state action cannot circumscribe Congress' plenary commerce power" and California "cannot retroactively divest Congress of its authority under the Commerce Clause."[80] On one reading, the majority appears to conclude that either state action is never relevant to the scope of the commerce power ("state action cannot circumscribe. . .") or it cannot be relevant if the state law did not exist at the time Congress acted ("cannot retroactively divest. . ."). But that elides the key question: Did Congress have the power to regulate the conduct in question in the first place?

In short, timing of the enactment of the state law is a red herring, merely bringing into relief the limitation that always existed on congressional power. Indeed, it would be a bizarre result if the constitutionality of a provision turned on whether a plaintiff could bring the requisite as-applied challenge at the time of enactment—effectively granting Congress a blank check to exceed the bounds of the Constitution so long as no as-applied challenge could be perfected at the time of statutory enactment. Rather, footnote 38's far more modest scope is made clear by the authority relied upon by the majority for this principle. The majority relied upon *United States v. Darby*,[81] a case in which the Court upheld the Fair Labor

---

78 *Raich*, 545 U.S. at 16-17.

79 *Id.*

80 *Id.* at 29.

81 312 U.S. 100 (1941).

Standards Act's ("FLSA") application to workmen producing goods in Georgia for shipment in *interstate* commerce.[82] The plaintiff challenged the FLSA, asserting that Georgia had chosen not to impose such regulations and it was "contrary to the policy of the state" to regulate the manufacture of the goods. The Court rejected the contention that Georgia's decision to refrain from regulating could preclude the federal government from promulgating regulation affecting interstate commerce.[83] That is, a state's decision to act or refrain from acting had no impact on Congress' ability to regulate *interstate* commerce. But the predicate question still must be answered: does a given market come into sufficient contact with interstate commerce to be regulated in the first place.

## IV. POTENTIAL FURTHER INTRASTATE CONTROLS OF STATE MARKETPLACES

As discussed *supra*, modern recreational state cannabis marketplaces are subject to stringent regulations to limit the flow of marijuana into illicit interstate black markets. Nonetheless, state policymakers still have a number of arrows left in their regulatory quiver and could draw on models from other industries, if necessary, to further limit the interstate impact of these marketplaces.

To be clear, this is not to suggest that such regulations would necessarily be beneficial, advisable, or "fair." Indeed, at least some of these potential options could introduce inefficiencies and costs to the marketplace. Nonetheless, they highlight state lawmakers' continued ability to introduce ever-tighter restrictions to further diminish any residual interstate impact of a state-specific marijuana marketplace. These state prerogatives provide the backdrop for dynamic political decision-making on cannabis regulation at the state and federal levels.

These efforts could be targeted across the industry and at each level of the tiered system. Broadly speaking, these reforms could target the production tiers of the industry (cultivation, manufacturing of, for example, edibles and topicals, and distribution), the retail tier, or both. For example, at the production tiers the greatest residual threat is diversion out of the regulated system and into the interstate marketplace. As discussed *supra*, modern regulatory regimes already directly target this risk by combining plant-level tracking with robust inspection procedures and mandatory recording policies. Of course, at the most basic level, states could simply increase the frequency of their inspections of such facilities or the frequency of mandatory inventory reconciliations by licensees. Doing so would further diminish the residual risk that any cannabis would fall outside of the tracking system.

---

82 *Id.* at 113-14.

83 *Id.*

Likewise, regulators could increase the traceability of cannabis payments. One of the most distinctive features of the modern recreational cannabis markets is participants' limited access to banking and reliance on cash transactions.[84] Of course, cash transactions are harder to trace and create the prospect for mischief.[85] Some policymakers, for instance California Lieutenant Governor Gavin Newsom, have discussed the possibility of state banks for cannabis businesses.[86] If banking services were made more readily available to the cannabis industry, policymakers could then prohibit cash transactions between licensed entities. This would create a clear record of each transaction, and would create a red flag for the disposition of any inventory that did not appear to have been transacted at market prices.

Moreover, initiatives targeting the production tiers would not be limited to direct government intervention but could also involve regimes to bolster market incentives to ensure compliance. For example, states could adopt a system that draws upon the three-tier alcohol regulatory model, which includes prohibitions on vertical integration and places distributors in a position to monitor producers and retailers. In the three-tier system, one licensed tier produces alcohol before being mandated to sell to a separate second tier, a licensed distributor. The licensed distributor is the only type of licensed entity that can sell alcohol to the third tier, licensed retailers.[87] Such a system would not be wholly foreign to the world of recreational cannabis—some states already have considered such a model, explicitly likening its regulation to that of alcohol.[88] By placing an independent licensed business between producers and retailers, the alcohol regulatory system harnesses market forces to ensure that all alcohol produced is sold in the legitimate marketplace and that any alcohol for sale by a retailer comes from a licensed producer and distributor.[89] After all, since distributors make all of their profits in the step between production and retail sale, they have a strong market incentive to prevent any black market sales, whether through diversion from the production tiers or sale of black market alcohol by retailers.

States could also introduce more draconian restrictions on retail purchases. For instance, subject to sufficient privacy protections, would-be

---

[84] *E.g.*, Chemerinsky, *supra* note 4 at 92 ("marijuana businesses are much more difficult to regulate and tax if they are operating on a cash basis").

[85] *See e.g., id.* at n.64.

[86] James Rufus Koren, *Should California Start Its Own Bank to Serve Marijuana Companies? It Wouldn't Be Easy*, L.A. TIMES (July 27, 2017, 12:05 AM), http://www.latimes.com/business/la-fi-public-bank-marijuana-20170727-htmlstory.html.

[87] *See e.g.*, Mike Reiss, *Beer Issues: What's Up With the Three-Tier System?*, SERIOUS EATS, https://drinks.seriouseats.com/2014/01/craft-beer-three-tier-system-pros-cons-distributor-retailer-debate.html.

[88] NRS 453D.

[89] *See e.g.*, National Beer Wholesalers Association, "What Is a Beer Distributor?" https://www.nbwa.org/about/what-beer-distributor (last visited April 8, 2018).

purchasers of recreational cannabis could be required to register with the relevant state regulatory agency and issued ID cards to be scanned at the point of sale. Such a registry could be used to place a cap on daily and monthly purchases, and to generate red flags based on suspicious purchase patterns. Such a tracking system is familiar to individuals who have attempted to purchase cold medicine in the United States in the recent years in one of many states that have adopted the so-called National Precursor Log Exchange to track an ingredient used to produce methamphetamine.[90] This type of regulation could be paired with a state cannabis bank to require that retail customers establish accounts with the bank—confirming their state residence—and then electronically debit those accounts when purchases are made by the holder of the account at licensed retail locations. While such a system would require robust privacy protections,[91] it could red-flag individuals who purchase what the state determines to be a suspicious quantity of cannabis or through a suspicious pattern of purchases.

States could also experiment with a variant of the "control state" model in alcohol sales. In "control states," state-operated stores exclusively handle retail distribution.[92] This would put government officials in a position to control all aspects of retail sales, and to increase oversight as necessary. Since all sales would be made through a limited number of affiliated outlets, purchase patterns would be relatively easy to track. In fact, some policymakers in control states have not merely called for their states to adopt a parallel distribution for cannabis, but have called for sales to occur in the very same state-liquor outlets.[93]

Perhaps the most comprehensive retail-level regulation would be to restrict adult-use marijuana consumption to on-premise locations. Retailers would function similarly to bars. At a bar, alcohol is purchased and consumed on the premises. And as with a bar, there is no "takeaway" option. Enforcement would be simplified. In *Raich*, the Court highlighted congressional findings relating to the risks of diversion or local cannabis that could not be distinguished from that cultivated in another state.[94] Those concerns are obviated in this context. Investigators could easily confirm the provenance of cannabis at a licensed facility. If cannabis were found outside of a licensed cultivation, production, storage, or on-premise consumption facility, and not in the possession of a

---

[90] McKenzie Nelson, *Missouri Pharmacies Use System to Track Sale of Meth Ingredients*, KSHB KANSAS CITY (June 16, 2017, 4:34 PM), https://www.kshb.com/news/nplex-system-aims-to-blocks-sales-of-meth-ingredients.

[91] For instance, protections would need to be put in place to assure consumers that the database would not be "weaponized" in a federal crackdown.

[92] It should be noted that such a model would be most likely to be explored in a newly-legalizing state, rather than a state effectively assuming the role previously filled by licensed businesses.

[93] *E.g.*, *Mayor Kenney on the Radio: Pot Should Be Legal, Sold at State-Run Liquor Stores*, ABC6 (May 11, 2017), http://6abc.com/news/kenney-on-radio-pot-should-be-legal-sold-at-state-run-liquor-stores/1980293/.

[94] *Raich*, 545 U.S. at 22.

licensed distributor/transporter with a manifest from the electronic track-and-trace system for each package of cannabis in her possession, a violation would be unambiguously established. Coupling such on-premise consumption with robust anti-diversion regulations would leave only an extremely attenuated, if any, residual interstate impact and would require an exceptionally aggressive expansion of commerce power to reach it. It should be reiterated there would be real costs to such restrictions. But regardless of the wisdom of these limitations from a social good or market efficiency perspective, the key legal takeaway is that state regulations exist that could withdraw these state markets from the constitutional reach of the federal government.[95]

## CONCLUSION

As befits such a significant test of American federalism, a policy war with regards to marijuana is being fought on multiple fronts. If legalization foes hope to press their nascent civil litigation advantage, however, they will need to convince the courts to further expand the scope of Congress's interstate commerce power. Moreover, they will need to convince the courts to continue to expand that power as states dynamically alter their regulatory regimes to further attenuate any residual interstate nexus. Of course, even if legalization foes maintain their advantage in the courts against dynamically changing state regulation, they still must overcome a political challenge: As public support for legalization continues to grow to record heights and as more states reform their laws, federal law may not remain static if it threatens to destroy this ever more popular industry.

[95] As with a potential transition to a control state model, any states with existing retail licensees would need to undertake significant efforts to aid such licensees with the transition.