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# Medical Marijuana in Arkansas: The Risks of Rushed Drafting

Carol Goforth\* & Robyn Goforth, Ph.D.\*\*

## ABSTRACT

Arkansas voters passed the Arkansas Medical Marijuana Amendment to the state constitution in late 2016.<sup>1</sup> Almost certainly, the vast majority of voters did so without reading or understanding the intricacies of the initiative, and instead voted simply to affirm their desire to permit the medical use of marijuana in the state. Among many other provisions, the amendment imposed a 120 day time limit (later extended by the Arkansas legislature to 180 days) within which the Arkansas Department of Health and other agencies were to adopt rules implementing the voter mandate.<sup>2</sup> While six months might seem like plenty of time in which to adopt appropriate legislation and regulations, the reality is that careful drafting is painstaking. Rushing through drafting produces writing that is unclear and inconsistent. It can result in requirements with which it is difficult (or impossible) to comply. The medical marijuana provisions contained an unfortunately large number of examples of the problems caused by rushed drafting. This article seeks to educate those who wish to use the constitutional amendment process in

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1. The Arkansas Medical Marijuana Amendment, also known as Ballot Issue 6, was voted on by Arkansans on November 8, 2016, as an initiated constitutional amendment to the state's constitution. It was approved, and went into effect, the following day. The amended text of Amendment 98 to the Arkansas Constitution of 1874, known as the "Arkansas Medical Marijuana Amendment of 2016," may be found online. See ARK. CONST. amend. XCVIII (West, Westlaw through Sept. 2018 amendments). In this Article, the amendment will be referred to as the Medical Marijuana Amendment or the Amendment.

2. John Lyon, *Bill filed to delay Arkansas' medical-marijuana program*, ARK. NEWS (Nov. 30, 2016), <http://www.arkansasnews.com/news/20161130/bill-filed-to-delay-arkansas8217-medical-marijuana-program> [<https://perma.cc/QE6F-GJXB>].

the future about the difficulty of clear drafting when particularly complex issues are involved. Ideally, the amendment process would not be used to accomplish this kind of task, but if the public deems it essential to act, more reasonable time-frames should be utilized. In addition, constitutional amendments should not restrict the state legislature's right to amend and update the amendment unless truly central to the amendment's purpose. Finally, this article also seeks to provide some guidance for persons with an interest in how the Medical Marijuana Amendment is implemented.

### I. INTRODUCTION: THE VOTERS SPEAK

On November 8, 2016, Arkansas voters delivered a mandate to the Arkansas legislature, passing Ballot Initiative 6, the Arkansas Medical Marijuana Amendment.<sup>3</sup> The formal title of the initiative alone consisted of 384 words, and the substance of the amendment dealt with a myriad of issues relating to the legalization of marijuana for medical purposes in the state.<sup>4</sup> Its complexity is hinted at in the 20 distinct definitions deemed to be necessary by the drafters,<sup>5</sup> and further suggested by the fact that

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3. The ballots prepared for the November 8, 2016 general election in Arkansas originally contained two medical marijuana proposals. In addition to the Medical Marijuana Amendment, which appeared as Issue 6, the ballot as printed contained the Arkansas Medical Cannabis Act as Issue 7. This was an initiated state statute rather than a state constitutional amendment, but because it was struck from the ballot before voting by the Arkansas Supreme Court, votes on the matter were not counted. The Medical Marijuana Amendment, however, was enacted by a vote of 581,259 (53.2%) to 511,977 (46.8%). *Arkansas Issue 6 — Medical Marijuana Amendment — Results: Approved*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/elections/results/arkansas-ballot-measure-6-medical-marijuana-con-amend> [<https://perma.cc/Q9PJ-RMZ4>].

4. See *The Arkansas Medical Marijuana Amendment of 2016*, UAEX, <https://www.uaex.edu/business-communities/voter-education/Issue%206%20-%20Full%20Text.pdf> [<https://perma.cc/7N5K-SYZ9>].

5. Medical Marijuana Amendment, *supra* note 1, § 2. To illustrate the complexity of some of the definitions, consider the definition of “Qualifying medical condition,” which means one or more of the following:

(A) Cancer, glaucoma, positive status for human immunodeficiency virus/acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Tourette's syndrome, Crohn's disease, ulcerative colitis, post-traumatic stress disorder, severe arthritis, fibromyalgia, Alzheimer's disease, or the treatment of these conditions;

(B) A chronic or debilitating disease or medical condition or its treatment that produces one (1) or more of the following: cachexia or wasting syndrome; peripheral neuropathy; intractable pain, which is pain that has not responded

the amendment to the state constitution (exclusive of the cumbersome title) consisted of a total of nearly 9,000 words and 23 substantive sections, most with multiple sub-parts.<sup>6</sup> It includes detailed descriptions of what is permitted<sup>7</sup> and who is permitted to act.<sup>8</sup> It has mandates for caregivers,<sup>9</sup> for physicians,<sup>10</sup> for persons operating or seeking to operate a facility dispensing permitted products,<sup>11</sup> for patients seeking permission to obtain legal access to marijuana,<sup>12</sup> and even more detailed provisions governing the cultivation of marijuana plants.<sup>13</sup> It also imposes a number of mandates upon the state's Department of Health

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to ordinary medications, treatment, or surgical measures for more than six (6) months; severe nausea; seizures, including without limitation those characteristic of epilepsy; or severe and persistent muscle spasms, including without limitation those characteristic of multiple sclerosis; and

(C) Any other medical condition or its treatment approved by the Department of Health under § 4 of this amendment.

*Id.* at § 2(13).

6. Medical Marijuana Amendment, *supra* note 1.

7. *See* Medical Marijuana Amendment, *supra* note 1, § 3 (detailing the available protections for the medical use of marijuana in the state) & § 6 (identifying limitations on the scope of the act and what is permissible).

8. Medical Marijuana Amendment, *supra* note 1, § 3 (providing general protections for the medical use of marijuana); Medical Marijuana Amendment, *supra* note 1, § 7 (listing affirmative defenses for patients and caregivers); Medical Marijuana Amendment, *supra* note 1, § 11 (listing while immunities for dispensaries and cultivation facilities).

9. Medical Marijuana Amendment, *supra* note 1, § 2(6) (defining who will qualify as a designated caregiver); other provisions relating to caregivers appear in §§ 3, 5, 7.

10. Medical Marijuana Amendment, *supra* note 1, § 2(12) (definition of who is an eligible physician), § 3(h) (authorizing physicians to provide a patient certification), § 5(a)(1) (requiring physician certification for patients seeking a registry identification card), & § 5(b)(1) (mandating certification to include risks and benefits of marijuana use). A later act by the Arkansas legislature has modified this last requirement. *See infra* notes 41-45 and accompanying text.

11. Medical Marijuana Amendment, *supra* note 1, §§ 8 – 12 (provisions relating to the licensing, registration, certification, inspection and review of dispensaries, as well as what dispensaries are and are not allowed to do).

12. *See* Medical Marijuana Amendment, *supra* note 1, § 2(14) (defining what is meant by a qualifying patient; there is separate definition for visiting qualifying patients at § 2(18)); Medical Marijuana Amendment, *supra* note 1, 3(a) – (c) (listing what such a patient may do or possess); Medical Marijuana Amendment, *supra* note 1, § 5( referring to rules to be established regarding what is required to obtain a registry identification card); § 6 (limiting what a patient may do); Medical Marijuana Amendment, *supra* note 1, § 7 (establishing defenses for medical use in the event of prosecution).

13. Medical Marijuana Amendment, *supra* note 1, §§ 8 – 11 & 13 (provisions relating to the licensing, inspection and review of cultivation facilities, as well as what facilities are and are not allowed to do) .

(DoH)<sup>14</sup> and the Alcoholic Beverage Control Division (ABC),<sup>15</sup> while splitting authority to regulate and oversee various parts of the law's implementation between these two agencies, as well as creating a new Medical Marijuana Commission (MMC).<sup>16</sup>

Arkansas was far from the first state to authorize the use of marijuana for medicinal purposes. In fact, at the time Arkansans voted on the proposal, 24 other states had already legalized marijuana for at least some purposes.<sup>17</sup> Many of those states reported a range of positive outcomes as a result of doing so. Most significantly, states that fully legalized marijuana have seen a tremendous economic benefit in terms of jobs and tax revenue,<sup>18</sup> but even legalization of medical marijuana has produced some economic benefits.<sup>19</sup> In addition, numerous studies have shown

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14. See Medical Marijuana Amendment, *supra* note 1, § 4 (requiring the DoH to administer and enforce rules governing patients, qualifying conditions, and caregivers, and to adopt rules to carry out the terms of the amendment); § 5 (requiring DoH to issue registered ID Cards, and to establish rules regarding the application for and grating of such cards, as well as the obligation to maintain records under the amendment).

15. See Medical Marijuana Amendment, *supra* note 1, § 8(a)(3) (requiring the ABC to administer and enforce regulations applicable to dispensaries and cultivation facilities), Medical Marijuana Amendment, *supra* note 1, § 9 (requiring the ABC to enforce rules regarding agents for both dispensaries and cultivation facilities).

16. Medical Marijuana Amendment, *supra* note 1, §§ 8, 19 (provisions relating to the creation of, and composition and role of the MMC).

17. *31 Legal Medical Marijuana States and DC - Medical Marijuana*, PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881&print=true> [<https://perma.cc/ADN5-NVDA>] (Last update 9/7/2018 11:04:32 AM). The states with legal medical marijuana before 2016 were Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. The earliest of those provisions dated back to 1998. *Id.* In addition to Arkansas, Florida, North Dakota, Ohio, Pennsylvania, and West Virginia also approved the use of marijuana for medicinal purposes in 2016. *Id.*

18. For example, Colorado reported the creation of more than 18,000 new jobs and \$2.4 billion to the state economy in 2015 following legalization of marijuana. Alan Pyke, *Marijuana's \$2.4 billion impact in Colorado is a lesson for 5 states considering legalization*, THINKPROGRESS (Oct. 28, 2016, 2:59 PM), <https://thinkprogress.org/5-states-weighing-marijuana-legalization-would-reap-enormous-economic-benefits-study-suggests-cb06831d154b> [<https://perma.cc/F6X8-K3BY>]. These gains do not include the decrease in expenses associated with lower arrest, prosecution, and incarceration rates.

19. For example data from Montana, which legalized the use of marijuana for medical purposes in 2004 suggests that "the marijuana industry has created over a thousand jobs in a depressed economy and led to millions of dollars in economic development." Michael Vitiello, *Why the Initiative Process is the Wrong Way to Go: Lessons we Should have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 76 (2012). In 2011, Colorado reportedly collected \$5 million in sales taxes from medical marijuana. Michael Cooper, *Struggling Cities Turn to a Crop for Cash*, N.Y. TIMES (Feb. 11, 2012),

that enforcement of marijuana laws comes at a tremendous cost from law enforcement, including police time, court expenses, and the cost of incarceration.<sup>20</sup> Eliminating some of those expenses is also a potential economic benefit associated with the legalization of marijuana, even if only medical marijuana is allowed.

These benefits are in addition to potential therapeutic considerations. There is a sizable body of literature regarding the potential use of marijuana in treating serious medical conditions. While the focus of this article is not to advocate for legalization or decriminalization of marijuana, it is abundantly clear that there is a wealth of evidence supporting its potential.<sup>21</sup> Dr. Joycelyn Elders, former Surgeon General of the United States concluded that:

The evidence is overwhelming that marijuana can relieve certain types of pain, nausea, vomiting and other symptoms caused by such illnesses as multiple sclerosis, cancer and AIDS—or by the harsh drugs sometimes used to treat them. And it can do so with remarkable safety. Indeed, marijuana is less toxic than many of the drugs that physicians prescribe every day.<sup>22</sup>

The range of symptoms and conditions that cannabis can treat is substantial.

Hundreds of scientific studies and thousands of testimonials from patients have established marijuana's effectiveness in controlling the nausea of cancer patients undergoing chemotherapy and/or radiation; in enhancing appetites for AIDS patients who suffer a wasting syndrome or who have adverse reactions to their HAART (highly active antiretroviral treatment)

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<http://www.nytimes.com/2012/02/12/us/cities-turn-to-a-crop-for-cash-medical-marijuana.html>[<https://perma.cc/4VB9-9CVS>].

20. Harry Bradford, *Marijuana Law Enforcement Cost States An Estimated \$3.6 Billion In 2010*: ACLU, HUFFINGTON POST (June 5, 2013), <http://www.cnn.com/id/100791442> [<https://perma.cc/WVV6-NZH4>]

21. For a collection of the scientific sources evaluating the efficacy and impact of marijuana, see John P. Morgan and Lynn Zimmer, *Exposing Marijuana Myths: A Review of the Scientific Evidence*, <http://www.bisdri.uni-bremen.de/boellinger/cannabis/08-zi-mo.pdf> [<https://perma.cc/98XS-4AML>](originally published as a monograph by The Lindesmith Center).

22. Joycelyn Elders, *Myths About Medical Marijuana*, THE PROVIDENCE J. (Mar. 26, 2004), <http://www.november.org/stayinfo/breaking2/Elders.html> [<https://perma.cc/4YN3-BBHY>]

medications; in reducing intraocular pressure for persons with glaucoma; in giving relief from spasms of muscular dystrophy; and for relieving pain from dozens of other serious diseases.<sup>23</sup>

Doctors on the ground in states that have permitted the legal dispensing of cannabis for various conditions confirm the therapeutic benefits. Dr. Philip Denney, MD, co-founder of a medical cannabis evaluation practice in California, offered the following testimony to the Arkansas legislature on November 17, 2005, in support of a bill that would have permitted medical marijuana in Arkansas at that time:

I have found in my study of these patients that cannabis is really a safe, effective and non-toxic alternative to many standard medications. There is no such thing as an overdose. We have seen very minimal problems with abuse or dependence, which at worst are equivalent to dependence on caffeine. While a substance may have some potential for misuse, in my opinion, that's a poor excuse to deny its use and benefit to everyone else.<sup>24</sup>

Although marijuana has not been subjected to the rigorous testing associated with most medicines available in the United States, the comparative safety of cannabis is also supported by experts who have examined the issue. One physician and associate professor at Harvard Medical School explained in testimony before the Crime Subcommittee of the Judiciary Committee in the U.S. House of Representatives that “cannabis is remarkably safe. Although not harmless, it is surely less toxic than most of the conventional medicines it could replace if it were legally available. Despite its use by millions of people over

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23. Jerry S. Mandel & Harvey W. Feldman, *Providing Medical Marijuana: The Importance of Cannabis Clubs*, 30(2) J. OF PSYCHOACTIVE DRUGS 179 (1998) [internal citations omitted].

24. Fred Gardner, *Dr. Denney in Arkansas*, COUNTERPUNCH (Nov. 26, 2005), <https://www.counterpunch.org/2005/11/26/dr-denney-in-arkansas/>[<https://perma.cc/XJ3N-XVC4>]. Similar opinions were expressed by Kate Scannell, MD, Co-Director of the Kaiser-Permanente Northern California Ethics Department. “From working with AIDS and cancer patients, I repeatedly saw how marijuana could ameliorate a patient’s debilitating fatigue, restore appetite, diminish pain, remedy nausea, cure vomiting and curtail down-to-the-bone weight loss.” Kate Scannell, *Medical Marijuana: Mr. Attorney General, Listen to the Doctors and Patients*, SF GATE (Feb. 16, 2003, 4:00 AM), <http://www.sfgate.com/opinion/article/MEDICAL-MARIJUANA-Mr-Attorney-General-Listen-2669856.php>. (last accessed Sept. 15, 2018).

thousands of years, cannabis has never caused an overdose death.”<sup>25</sup> And, of course, legalizing medical marijuana is not intended to remove other medical options.<sup>26</sup>

Despite voluminous evidence regarding the potential therapeutic potential of marijuana, there was sizeable resistance to the notion that medical marijuana should be authorized in Arkansas from state officials. The governor, Asa Hutchinson, was vocal in his opposition to the legalization of marijuana.<sup>27</sup> The State Department of Health also opposed medical marijuana.<sup>28</sup> Other agencies and public officials also objected to the idea.<sup>29</sup> In the face of such widespread resistance from elected representatives and state administrative agencies, proponents of medical marijuana may have felt they had few choices. While

25. Lester Grinspoon, *NORML's Testimony on Medical Marijuana Before Congress (1997)* Lester Grinspoon, MD, NORML (Oct. 1, 1997), <http://norml.org/library/item/norml-s-testimony-on-medical-marijuana-before-congress-1997-lester-grinspoon-md>. [ <https://perma.cc/54D2-SA4A>].

26. LYNN ZIMMER, & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS* (1st ed. 1977).

[T]he question is not whether marijuana is *better* than existing medication. For many medical conditions, there are numerous medications available, some which work better in some patients and some which work better in others. Having the maximum number of effective medications available allows physicians to deliver the best possible medical care to individual patients.

*Id.* at 24.

27. See John Lyon, *Hutchinson, Medical Officials Say Marijuana Not Medicine*, ARK. NEWS (Sept. 12, 2016, 1:45 PM), <http://www.arkansasnews.com/news/20160912/hutchinson-medical-officials-say-marijuana-not-medicine> [ <https://perma.cc/LGL3-PD7U>]; John Lyon, *Hutchinson: Legalizing Medical Marijuana Would Be Bad for Arkansas Business*, TIMES RECORD (Sept. 29, 2016, 12:01 AM), <http://www.swtimes.com/news/20160929/hutchinson-legalizing-medical-marijuana-would-be-bad-for-arkansas-business> [ <https://perma.cc/5BUK-EE7T>].

28. John Lyon, *State Health Department Opposes Medical-Marijuana Proposals*, ARK. NEWS (July 12, 2016, 5:49 AM), <http://www.arkansasnews.com/news/arkansas/state-health-department-opposes-medical-marijuana-proposals> [ <https://perma.cc/7NMM-TED5>].

29. In addition to Governor Asa Hutchinson and the Arkansas Department of Health, the following organizations and public officials had announced opposition to the initiative: Lt. Gov. Tim Griffin, U.S. Sen. John Boozman, Arkansas Surgeon General Greg Bledsoe, Arkansas Farm Bureau Federation, Arkansas State Chamber of Commerce, Arkansas Faith & Ethics Council, Arkansas Landlords Association, Arkansas School Nurses Association, Arkansas Association of Educational Administrators, Arkansas Advocates for Children and Families, American Academy of Pediatrics-Arkansas Chapter, Arkansas Association of Chiefs of Police, Arkansas Prosecuting Attorneys Association, FBI National Academy Associates-AR Chapter, and Arkansas Children's Hospital. See *Arkansas Medical Marijuana Amendment, Issue 6 (2016)*, BALLOTEDIA, [https://ballotpedia.org/Arkansas\\_Medical\\_Marijuana\\_Amendment,\\_Issue\\_6\\_\(2016\)#cite\\_note-2](https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment,_Issue_6_(2016)#cite_note-2) [ <https://perma.cc/3HK5-NEHL>].

originally there were two state proposals relating to medical marijuana, one was removed from the ballot by the Arkansas Supreme Court on October 27, 2016,<sup>30</sup> leaving voters in favor of approving the concept of legal marijuana with little choice unless they were willing to wait indefinitely.

## II. LEGISLATIVE AND REGULATORY REACTION

For those familiar with the brevity and generality of provisions in the federal constitution, the Arkansas Medical Marijuana Amendment (the “Amendment”) will doubtless seem incredibly complex and specific.<sup>31</sup> In fact, even given that the Arkansas state constitution is far more specific in its approach to subjects covered than the U.S. Constitution, the Amendment is quite detailed.<sup>32</sup> There is one provision, however, that deserves special comment.

Section 23 of the Amendment reserves to the General Assembly the right to amend the Amendment’s provisions “in the same manner as required for amendment of laws initiated by the people. . . .”<sup>33</sup> If it is assumed that people actually read this language, it could have created the impression that the drafters were concerned with the possibility that the state legislature would need authority to amend the law to make it “fit” within other provisions, or to make it function as intended. Of course, the state constitution already contained the right to amend initiated acts, and even constitutional amendments, by a supermajority vote of both houses.<sup>34</sup> The language in the Amendment about the state legislature’s right to amend the legal

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30. The Arkansas Supreme Court struck Issue 7 from the ballot on the basis of invalid signatures. *See Benca v. Martin*, 2016 Ark. 359, 15, 500 S.W.3d 742, 751-52.

31. *See supra* text accompanying notes 5-16 (describing the Medical Marijuana Amendment in some detail).

32. For comparison purposes, consider the difference between the Arkansas and U.S. constitutional amendments. As mentioned in the introduction to this Article, the Medical Marijuana Amendment contains nearly 9,000 words and includes 23 substantive sections. *See* Medical Marijuana Amendment, *supra* note 1. The amendment to the U.S. Constitution with the most sections is the Twentieth, with a total of six sections. *See* U.S. CONST. amend. XX. That amendment contains only 353 words, although the longest amendment to the U.S. constitution (the Fourteenth) has only 434 words. *See* U.S. CONST. amend. XIV & XX.

33. Medical Marijuana Amendment, *supra* note 1, § 23.

34. “No measure approved by a vote of the people shall be amended or repealed . . . except upon a roll call of two-thirds of all the members elected to each house of the General Assembly . . . .” ARK. CONST. of 1874, art. 5, § 1 at 8 (2015).

mandates in the Amendment therefore added nothing that was not already part of the law, except that it included an express limitation on the right of the state legislators to modify certain parts of the law.<sup>35</sup> In fact, the Amendment's section dealing with the right of the legislature to amend the provisions specifies that there are certain subsections that may *not* be amended in that fashion.<sup>36</sup> The provisions that the legislature is not permitted to amend are those giving patients and caregivers the right to possess limited amounts of marijuana for medicinal purposes and those requiring authorization of specific and very limited numbers of dispensaries and cultivation facility licenses.<sup>37</sup>

Ironically, while the first of these sections is likely to be one that citizens would not want the legislature to remove, the second is not. While it is unlikely that citizens voting in favor of Ballot Issue 6 were fully aware of it, the Amendment limits both the number of dispensaries and cultivation facilities.<sup>38</sup> In fact, the total number of dispensaries across the state is not to exceed 40, and the total number of cultivation facilities is limited to five.<sup>39</sup> Combined with regulations imposing very high fees<sup>40</sup> and capitalization requirements,<sup>41</sup> this essentially creates an oligopoly structure for the very wealthy. Citizens of ordinary means need not apply to be part of the distribution structure for legal marijuana in Arkansas.

The provisions which make it very difficult to amend these limitations essentially require another citizen vote to change the

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35. Medical Marijuana Amendment, *supra* note 1, § 23.

36. Medical Marijuana Amendment, *supra* note 1, § 23.

37. Medical Marijuana Amendment, *supra* note 1, § 23 (specifically prohibiting legislative amendment to sections 3(a), (b), or (c), or 8(h), (i) or (j)).

38. Benjamin Hardy, *Commission limits marijuana cultivation licenses to applicants with at least \$1 million in assets*, ARK. TIMES (Jan 3, 2017), <https://www.arktimes.com/ArkansasBlog/archives/2017/01/03/commission-limits-marijuana-cultivation-licenses-to-applicants-with-at-least-1-million-in-assets> [<https://perma.cc/N5Y3-H8YK>].

39. Wesley Brown, *5 marijuana cultivation facilities approved by Arkansas Medical Marijuana Commission*, TALKBUSINESS (Feb. 27, 2018), <https://talkbusiness.net/2018/02/5-marijuana-cultivation-facilities-approved-by-arkansas-medical-marijuana-commission/> [<https://perma.cc/W9NZ-6U6R>].

40. *Infra* note 203 (describing filing fees for persons applying for either cultivation facility license or a dispensary license are discussed).

41. *Infra* notes 207-09 and accompanying text. The capitalization requirements for one of the limited cultivation licenses were quite high.

state constitution.<sup>42</sup> This is unlikely to have been understood or desired by the voters, and it represents a very peculiar drafting choice. The state constitution already made it relatively difficult for a legislative action to make changes to a voter-initiated Constitutional provision; why make it even harder?

Certainly the Amendment has needed considerable tinkering to become workable. In fact, despite the “optics” of voting to amend an initiative directly approved by the voters, elected representatives were quickly forced to make more than two dozen modifications to the Amendment.<sup>43</sup> As of August 1, 2017, more than fifty bills had been proposed to impact medical marijuana in the state, and twenty-five had become law, each of those being enacted by super-majority votes in both houses.<sup>44</sup>

The first, and possibly most significant of the changes, related to the time frame in which the state was to act. As originally adopted, the Amendment gave the Department of Health (DoH), the Alcoholic Beverage Control Board (ABC), and the newly-created Medical Marijuana Commission (MMC) only 120 days after November 9 to adopt rules for implementing the terms of the amendment.<sup>45</sup> A bill, originally proposed by State Representative Douglas House, changed the 120-day deadlines to 180 days and delayed the original June 1 deadline for a month until July 1.<sup>46</sup> Douglas claimed that the Governor’s office had “asked him to file the bill because the agencies believe[d] they

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42. Medical Marijuana Amendment, *supra* note 1, § 23.

43. See generally Summary of 2017 Arkansas Legislation Involving the Arkansas Medical Marijuana Amendment of 2016, (May 17, 2017), [https://static.ark.org/eeuploads/arml/Marijuana\\_Amendment\\_Legislation\\_and\\_Practical\\_Solutions-Handout\\_1.pdf](https://static.ark.org/eeuploads/arml/Marijuana_Amendment_Legislation_and_Practical_Solutions-Handout_1.pdf) [<https://perma.cc/J4FS-AM5P>] (a summary of 2017 legislation involving the Medical Marijuana Amendment)

44. “Fifty-one medical marijuana-related bills were filed in this year’s regular legislative session, according to an *Arkansas Democrat-Gazette* analysis. Twenty-five became law. Four have already gone into effect. The remaining 21 go into effect Tuesday.” Brian Fanney, *Some Arkansas Cities Say They Aren’t Ready for New Medical Marijuana Laws*, ARK. ONLINE (July 30, 2017), <http://www.arkansasonline.com/news/2017/jul/30/local-bans-a-medical-marijuana-snap-201/> [<https://perma.cc/NR2Q-JHMY>].

45. Medical Marijuana Amendment, *supra* note 1, § 4(b) (deadlines applicable to the DoH); Medical Marijuana Amendment, *supra* note 1, §§ 8(e), 9(c) (applicable to ABC); Medical Marijuana Amendment, *supra* note 1, §§ 8(d), 8(f) (applicable to the MMC); § 8(g) (provision requiring the MMC to begin accepting applications by June 1, 2017, now July 1, 2017).

46. 2017, 1, Ark. Adv. Legis. Serv., 10-14 (LexisNexis) (Act 4, approved Jan. 23, 2017).

[could not] meet the deadlines in the amendment.”<sup>47</sup> In addition, he said that “delaying the deadlines would ensure an opportunity for public participation and transparency in the process.”<sup>48</sup> The official legislative history also suggests a financial rationale for the delay in implementation, because the fiscal year for the state begins on July 1 of each year, and “[i]t is an unwise expenditure of public resources to enact the necessary appropriations, acts, and establish the necessary fiscal and regulatory provisions for a one-month period beginning on June 1, 2017;”<sup>49</sup>

A second modification to the Amendment removed the original requirement that a doctor recommending medical marijuana for a patient declare that the benefits of the drug are likely to outweigh the risks.<sup>50</sup> This amendment also added an exemption from the state’s Freedom of Information Act for any information contained in the certification.<sup>51</sup>

The other twenty-three changes that were in effect as of August 1, 2017, ranged from voluminous technical corrections,<sup>52</sup> to relatively simple changes to the listed allocations of tax revenue expected to be generated from the sale of medical marijuana.<sup>53</sup> Some of the changes were at least somewhat substantive,<sup>54</sup> some were necessary to address omissions or

47. John Lyon, *Bill Filed to Delay Arkansas’ Medical-Marijuana Program*, ARK. NEWS (last updated Nov. 30, 2016, 5:43 PM), <http://www.arkansasnews.com/news/20161130/bill-filed-to-delay-arkansas8217-medical-marijuana-program> [<https://perma.cc/PWT6-WUP8>].

48. *Id.*

49. See Act 4, *supra* note 46. (§ 1, 3 relating to timeframes applicable the Department of Health and §§ 4 -7 relating to the MMC and ABC).

50. 2017, 1, Ark. Adv. Legis. Serv., 15-16 (LexisNexis) (Act 5, approved Jan. 23, 2017). This act also inspired commentary in the state press. “In a 24-3 vote, the Senate approved and sent to the governor House Bill 1058 by Rep. Douglas House, R-North Little Rock. The bill would remove from the medical-marijuana amendment a requirement that a doctor recommending medical marijuana for a patient declare that the benefits of the drug are likely to outweigh the risks.” Ark. News Bureau, *Bill to Amend Arkansas’ Medical Marijuana Rules Goes to Governor*, TIMES RECORD (Jan. 24, 2017), <http://www.swtimes.com/news/20170124/bill-to-amend-arkansas-medical-marijuana-rules-goes-to-governor> [<https://perma.cc/HZ5H-ZFUX>].

51. See Act 5, *supra* note 50.

52. 2017 Ark. Ex. Sess. Act 1, § 1, approved May. 3, 2017.

53. 2017, 3, Ark. Adv. Legis. Serv., 889-94 (LexisNexis) (Act 670, approved Mar. 27, 2017).

54. Among the more substantive changes to the Medical Marijuana Amendment are laws that require licenses for cultivation facilities and dispensaries to be issued only to natural persons (2017, 3, Ark. Adv. Legis. Serv., 753 (LexisNexis) (Act 641, approved Mar. 24, 2017)); the addition of a special privilege tax applicable to all marijuana businesses in

ambiguities in the law,<sup>55</sup> and some appeared to be extremely minor.<sup>56</sup>

The rapidly changing legislative landscape did not make it easier for the administrative agencies to comply with the mandate to promulgate regulations and begin accepting applications within the narrow timeframes imposed by law. Nonetheless, the Arkansas DoH, ABC, and MMC produced voluminous regulations in what appears to have been a dedicated and good faith effort to comply with the requirements of state law.<sup>57</sup>

The DoH promulgated its rules and regulations effective May 8, 2017.<sup>58</sup> Both the ABC and MMC quickly followed suit.<sup>59</sup> The DoH rules consist of 22 sections of regulations governing registration, testing and labeling, while both the ABC and the MMC have voluminous rules and regulations governing cultivation facilities and dispensaries.<sup>60</sup> Ostensibly, the ABC oversees the operation of these facilities while the MMC deals with their licensing.<sup>61</sup> In reality, however, there is considerable

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the state (2017, 5, Ark. Adv. Legis. Serv., 995-98 (LexisNexis) (Act 1098, approved Apr. 7, 2017)); and relatively substantial changes to an employer's rights to penalize or even discharge employees who use marijuana (2017, 3, Ark. Adv. Legis. Serv., 546-51 (LexisNexis) (Act 593, approved Mar. 23, 2017)).

55. Included in the bills that were apparently enacted to address omissions or ambiguities in the law include a provision authorizing the collection of the specified fees and fines associated with the act (2017, 3, Ark. Adv. Legis. Serv., 748-49 (LexisNexis) (Act 639, approved Mar. 24, 2017); addition of importation of marijuana into the activities that will not be prosecuted in the state (2017, 5, Ark. Adv. Legis. Serv., 626 (LexisNexis) (Act 1022, approved Apr. 6, 2017); a dispensary's right to contract with a transporter, (2017, 3, Ark. Adv. Legis. Serv., 754-61 (LexisNexis) (Act 642, approved Mar. 24, 2017); and the addition of rules regarding advertising (2017, 3, Ark. Adv. Legis. Serv., 750-52 (LexisNexis) (Act 640, approved Mar. 24, 2017)).

56. Some of the more minor revisions include a provision allowing pro rata payment of licensing fees when less than a full year is sought (2017, 3, Ark. Adv. Legis. Serv., 552-53 (LexisNexis) (Act 594, approved Mar. 23, 2017); a prohibition against telemedicine for patient certification (2017, 2, Ark. Adv. Legis. Serv., 1144 (LexisNexis) (Act 438, approved Mar. 9, 2017); and permission for the ABC and MMC to share information with the State Insurance Department for limited purposes (2017, 5, Ark. Adv. Legis. Serv., 227-28 (LexisNexis) (Act 948, approved Apr. 5, 2017)).

57. See ARK. CODE R. §§ 007.16.4-I to 007.16.4-XXII (West 2018). These rules will be referred to as the DoH Rules. See ARK. CODE R. §§ 006.02.7-1 to 006.02.7-22 (West 2018). These rules will be referred to as the ABC Rules. See ARK. CODE R. §§ 006.28.1-I to 006.28.1-V (West 2018). These regulations will be referred to as the MMC Regs.

58. The DoH Rules were effective May, 8, 2017. See DoH Rules, *supra* note 57.

59. See ABC Rules and MMC Regs, *supra* note 57.

60. See ABC Rules, MMC Regs, and DoH Rules, *supra* note 57.

61. See ABC Rules, *supra* note 57. The MMC also prepared extremely complex and detailed application forms for persons wishing to obtain a license for a cultivation facility or

overlap in these rules,<sup>62</sup> leading to an incredibly complex and difficult set of rules governing an already complicated situation.

### III. WHAT THE VOTERS PROBABLY DID NOT REALIZE

It is highly unlikely that many voters understood or were even aware of the details of the Amendment. Widely available explanations focused on the objective of the Amendment (i.e., making marijuana available for medical purposes) rather than the details of its provisions. For example, the Public Policy Center at the University of Arkansas System Division of Agriculture published a guide to Arkansas ballot issues that were to be voted on during the general election of November 8, 2016.<sup>63</sup> It devoted a handful of pages to describing the Medical Marijuana Amendment, but the first three pages focused on the difference

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dispensary. See MMC Regs, *supra* note 57. The list of available forms on the MMC's website originally included the Application for Arkansas Medical Marijuana Cultivation License (application process to become a licensed cultivation center); Application for Arkansas Medical Marijuana Dispensary License (application process to become a licensed dispensary); Arkansas State Police Background Check Instructions and Application; Eight Zone Map For Dispensaries; Surety Bond Pre-Approval Cultivation Facility; Surety Bond Pre-Approval Dispensary; Performance Bond Cultivation Facility; and Performance Bond Dispensary. ARK. MED. MARIJUANA COMM'N, <http://www.mmc.arkansas.gov/application> [https://perma.cc/4LK7-TP3C] (some of these forms are no longer available for viewing). Once the time period for cultivation and dispensary licenses expired, the list removed the first two items from the list. *Id.* The Cultivation License Application was 27 pages long, and the Dispensary license form contained 23 pages. *Id.* Portions of the Dispensary and Cultivation submissions which still show parts of the form (with redacted information from the applicants) are still available. See ARK. MED. MARIJUANA COMM'N, <http://www.mmc.arkansas.gov/schedule-a-dispensary-and-cultivation-applications> [https://perma.cc/89BK-5HZL]. An easier way to look at the Cultivation Application is to review the draft of that form, which can still be accessed. See *Arkansas Medical Marijuana Cultivation License Request For Application*, ARK. CANNABIS INDUS. ASS'N, [http://arcannabis.org/wp-content/uploads/2017/01/2017-05-31-DRAFTCultivation-Application\\_Combined.pdf](http://arcannabis.org/wp-content/uploads/2017/01/2017-05-31-DRAFTCultivation-Application_Combined.pdf) [https://perma.cc/AH2X-HVLD]. This will be referred to as the "Cultivation Application (draft)."

62. For a more detailed description of the overlap between agencies and their regulations, see *infra* section IV.D. of this article.

63. *2016 Voter Guide to Arkansas Ballot Issues*, PUB. POL. CTR. AT THE UNIV. OF ARK. SYSTEM DIV. OF AGRIC. (Nov. 8, 2016), <https://www.uaex.edu/business-communities/voter-education/ArkansasBallotIssuesVoterGuide-2016-Final.pdf> [https://perma.cc/4RFZ-H7FD] (hereinafter *Voter Guide*).

between the two initiatives that were originally on the ballot,<sup>64</sup> the nature of marijuana, its properties and effects, other states with medical marijuana laws, and the fact that federal law still makes marijuana possession illegal.<sup>65</sup> The highlighted talking points in favor of the amendment included polls indicating substantial public support for medical marijuana, the tight regulation of where marijuana could be legally grown, the number of people whose suffering might be helped with medical marijuana, the potential benefit of new jobs, and the benefit of a for-profit system where different people own dispensaries and growing systems.<sup>66</sup> The points in opposition included a lack of scientific data, the existence of FDA approved alternatives for treatment, a suggestion that the proposal was “a brazen move funded by the alcohol industry to build an Arkansas marijuana monopoly,” the complaint that the language was so broadly written that it might allow marijuana to be available to virtually anyone, and a concern that the proposal could create hardships for business owners who want a drug-free workplace.<sup>67</sup> The “Quick Look” explanation for the Amendment indicated that supporting the initiative meant the voter was “in favor of changing the Arkansas Constitution to make the medical use of marijuana legal under Arkansas law and establishing a system for the cultivation, acquisition and distribution of marijuana for medical purposes.”<sup>68</sup> A vote against the ballot issue meant that the voter was opposed to that change.<sup>69</sup>

Buried in both the Amendment and the widely distributed guide were details such as the restrictive limits on the number of dispensaries and facilities to be authorized in state.<sup>70</sup> The materials lacked any warning about how incredibly expensive it would be to obtain one of the limited licenses, or an explanation of the complexities of how the state law would actually interact

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64. This included a discussion on the difference between an act and a constitutional amendment and the potential consequences if both were enacted. *Id.* at 30-31. It also has a table showing the differences between the two initiatives. *Id.* at 46-47.

65. *Id.* at 30-32.

66. *Id.* at 34.

67. *Id.*

68. *Voter Guide*, *supra* note 63, at 33.

69. *Id.*

70. Medical Marijuana Amendment, *supra* note 1, § 8; *Voter Guide*, *supra* note 63, at 34.

with federal law.<sup>71</sup> There was no suggestion in either document of the incredible detail and complexity likely to be required in the mandated regulations. Moreover, to the extent that voters might have been entranced by the potential economic benefits of legalized marijuana, the materials omitted an explanation of the extent to which economic information from states with substantially less restrictive regulations might be inapplicable under the Amendment.

The reality that voters almost certainly failed to appreciate the full complexity of what they were approving is one of the reasons why voter initiatives such as the Medical Marijuana Amendment are such a poor way of initiating change. Nonetheless, if the voters believe that state legislators are out of step on a particular issue, an amendment to the state constitution is a way to address this, short of replacing the elected officials.<sup>72</sup>

#### IV. ILLUSTRATING THE PROBLEMS WITH RUSHED DRAFTING

##### A. FAILURE TO ACCOUNT FOR INCONSISTENCES BETWEEN STATE AND FEDERAL LAW

One of the most complicated issues for states wishing to legalize marijuana, either for medicinal purposes only or across the board, is the fact that federal law continues to list marijuana as a Schedule I controlled substance.<sup>73</sup> This is certainly a huge issue for Arkansas.

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71. Although the Amendment itself suggests only that the authorized possession by appropriate persons and proper cultivation and dispensation of medical marijuana will not be illegal (see Medical Marijuana Amendment, *supra* note 1, §§ 8, 11), the *Voter Guide* did at least mention that “marijuana would remain illegal under federal law.” *Voter Guide*, *supra* note 63, at 32.

72. The Arkansas state constitution of 1874 was specifically designed to give the citizens of the state power to prevent abuses of power by legislators. In fact, the “pervasive distrust of government is expressed in almost every section” of the 1874 Constitution. Diane Blair & Jay Barth, *ARKANSAS POLITICS AND GOVERNMENT* 137 (2d Ed. 2005). For a detailed explanation of why and how the desire to restrict the authority of state governmental authorities came about, see Jerald A. Sharum, *Arkansas’s Tradition of Popular Constitutional Activism and the Ascendancy of the Arkansas Supreme Court*, 32 U. ARK. LITTLE ROCK L. REV. 33 (2009).

73. The Controlled Substances Act of 1970 regulates the manufacture, distribution, and possession of drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), codified as amended at 21 U.S.C. §§ 801-971.

Classification of controlled substances under federal law is based on perceived medicinal value, potential for abuse, and the psychological and physiological effects of the drug.<sup>74</sup> To illustrate the seriousness of being classified this way, Class I drugs include not only marijuana, but also drugs like heroin, ecstasy, and LSD.<sup>75</sup> Drugs such as cocaine and methamphetamines are regarded as Schedule II drugs,<sup>76</sup> which generally means they are less tightly regulated and may be legally obtained under certain circumstances.<sup>77</sup>

Penalties under the federal Controlled Substances Act can be severe.<sup>78</sup> While factors such as whether the offense involved only possession, or also growing or distribution, the amount of marijuana involved, and the offender's prior criminal history are all relevant, even simple possession of marijuana constitutes a misdemeanor under federal law, punishable by up to one year imprisonment and a minimum \$1,000 fine, plus court costs.<sup>79</sup> If it

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74. 21 U.S.C. § 811 (2012).

75. 21 U.S.C. § 812(b)(1) (2012); 21 C.F.R. §§ 1308.11 (2017).

76. 21 C.F.R. §§ 1308.12 (2017).

77. While theoretically marijuana may be legally obtained under federal law if the drug is obtained from a federally approved grow site, or in a research program approved by the Federal Drug Administration, there is only one federal approved grow site (which no longer takes applications), and a miniscule number of federally approved marijuana research projects. For a description of these efforts see Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, 714 CATO INST. POL'Y ANALYSIS 1, 6 (Dec. 12, 2012), <https://www.cato.org/publications/policy-analysis/limits-federal-supremacy-when-states-relax-or-abandon-marijuana-bans> [<https://perma.cc/VFJ2-PF49>]. Professor Mikos has written extensively about the interrelationship of federal and state marijuana laws.

78. *Id.* at 3.

79. 21 U.S.C. § 844(a) (2012). Admittedly, federal prosecutors have the statutory option of treating some cases of simple possession as civil rather than criminal offenses. 21 U.S.C. § 844(a) (2012). There are a host of problems with this, including the following. First, the choice to proceed with civil rather than criminal penalties is optional and up to virtually unlimited discretion of the prosecutor, which means that in an era of stricter penalties, the provision offers little comfort. See Joseph Tanfani & Evan Halper, *Sessions restores tough drug war policies that trigger mandatory minimum sentences*, LA TIMES (July 19, 2017), <http://www.latimes.com/politics/la-na-politics-sessions-drugwar-20170511-story.html> [<https://perma.cc/72WP-QVEL>]. For a discussion of the range of discretion given to prosecutors, see Jonathan J. Rusch, "Consistency is All I Ask": *An Exegesis of Section 6486 of the Anti-drug Abuse Amendments Act of 1988*, 41 ADMIN. L. REV. 415, 424 (1989). Second, the civil option is on available for possession of no more than a single ounce. 28 C.F.R. § 76.2(h)(6)(vii) (2017). Third, it is unavailable if the defendant has a prior drug conviction. U.S.C. § 844(c) (2012). Fourth, it carries an assessment that can be up to \$10,000. 21 U.S.C. § 844(a) (2012). Finally, because the assessment is considered a civil sanction, rights offered to criminal defendants (such as the right to appointed counsel, and a burden of

is not the first drug offense, conviction requires mandatory prison time of at least 15 days and a maximum prison sentence of two years, as well as a minimum fine of \$2,500 plus costs; another conviction requires at least 90 days imprisonment with a jail term of up to three years and a minimum fine of \$5000 plus costs.<sup>80</sup> For many offenders, an even harsher result can be the collateral sanctions, which can include loss of public assistance, student financial aid, ineligibility for certain professions, and deportation for immigrants.<sup>81</sup>

In the past few years, claims have been made in the press and elsewhere that the era of federal criminalization for marijuana was coming or had come to an end. One often-cited headline actually read “Congress quietly ends federal government’s ban on medical marijuana.”<sup>82</sup> The reality is that the situation is far more complicated than those proponents of marijuana claimed, and federal laws still criminalize the possession and use of marijuana.<sup>83</sup>

The confusion, or misinformation, might have started in December of 2014, when Congress approved an omnibus spending bill which included a rider prohibiting the Justice Department (including the Drug Enforcement Administration) from using funds appropriated by that bill to “prevent” states from “implementing” their medical marijuana laws.<sup>84</sup> This was hailed by some as evidence that Congress was on board with the

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proof beyond a reasonable doubt) do not apply. *See* 28 C.F.R. § 76.4 (2017) (detailing procedures for civil penalties).

80. 21 U.S.C. § 844(a) (2012).

81. *See* Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1444, 1466-70 (2005). *See also* Richard Glen Boire, *Life Sentences: The Collateral Sanctions Associated with Marijuana Offenses*, CTR. FOR COGNITIVE LIBERTY AND ETHICS, [http://www.cognitiveliberty.org/pdf/col\\_sane\\_pdfs/report\\_narrative.pdf](http://www.cognitiveliberty.org/pdf/col_sane_pdfs/report_narrative.pdf) [<https://perma.cc/932D-VNEL>](surveying collateral sanctions imposed by states for marijuana convictions and evaluating whether those consequences are severe, high, elevated, or moderate)

82. Evan Halper, *Congress Quietly Ends Federal Government’s Ban on Medical Marijuana*, LA TIMES (Dec. 16, 2014), <http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html> [<https://perma.cc/G9W5-QKTP>].

83. Marijuana is currently listed as a Schedule I drug under the federal Controlled Substances Act, placing it on a par with some of the most dangerous drugs in the country. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), codified as amended at 21 U.S.C. §§ 801-971 (2012).

84. Jacob Sullum, *Congress Did Not Legalize Medical Marijuana*, FORBES (Dec. 31, 2015), <https://www.forbes.com/sites/jacobsullum/2015/12/31/congress-did-not-legalize-medical-marijuana/#c0924053a4d8> [<https://perma.cc/U7BD-23AJ>].

legalization of the drug.<sup>85</sup> In reality, the rider (which has to be renewed annually), was never interpreted this broadly, even though it has been renewed each year.<sup>86</sup> Even under President Obama, federal prosecutors continued to pursue cases against medical marijuana providers.<sup>87</sup> Under President Trump, and especially Attorney General Jeff Sessions, the state of federal law is even less clear.<sup>88</sup> Certainly the federal Controlled Substances Act “continues to classify marijuana as a Schedule I substance with no legal uses.”<sup>89</sup>

The risk of federal prosecution exists:

Because marijuana is still prohibited by federal law, [and] people who grow and sell it, no matter the purpose and regardless of their status under state law, commit multiple felonies every day. If no one is trying to put them in prison right now, that is only thanks to prosecutorial forbearance that may prove temporary.<sup>90</sup>

Such concerns appear well founded given the anti-marijuana rhetoric being employed by the current administration. One account reported that “Trump has shocked the marijuana industry

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85. Halper, *supra* note 82.

86. “The same rider, sponsored by Reps. Dana Rohrabacher (R-Calif.) and Sam Farr (D-Calif.), was included in the omnibus spending bill approved by Congress this month.” Sullum, *supra* note 84. As for the 2016 budget, good through September of 2017, the same provision was still being added. “The Rohrabacher-Farr amendment, which prevents the U.S. Department of Justice from spending funds to interfere with state medical marijuana laws, was included in the budget resolution that was released last night.” Sara Brittany Somerset, *Federal Medical Marijuana Protections Extended Through September 2017*, HIGH TIMES (May 1, 2017), <http://hightimes.com/news/federal-medical-marijuana-protections-extended-through-september-2017/> [<https://perma.cc/JFX5-ULPV>].

87. One source reported that in the midst of Obama’s re-election campaign, in September of 2012, “the DEA tried to shut down more than seventy medical marijuana dispensaries in and around Los Angeles.” Mike Riggs, *Obama’s War on Pot*, THE NATION (Oct. 30, 2013), <https://www.thenation.com/article/obamas-war-pot/> [<https://perma.cc/K4SD-MKVC>].

88. The Department of Justice memoranda issued under President Obama had, in fact, given the marijuana industry “some assurance that if they were abiding by state laws, they were at small risk of federal prosecution.” Katy Steinmetz, *‘Right Now It’s Chaotic.’ Jeff Sessions’ Marijuana Move Is Jeopardizing the Pot Industry*, TIME (Jan. 4, 2018), <http://time.com/5088442/jeff-sessions-marijuana-legal/> [<https://perma.cc/TR2Y-A64S>]. In early January 2018, “Attorney General Jeff Sessions rescinded those memos, allowing federal prosecutors to enforce federal marijuana laws more aggressively and sending ripples of unease throughout the burgeoning industry.” *Id.*

89. Sullum, *supra* note 84.

90. *Id.*

into a state of high alert.”<sup>91</sup> As demonstrated by his rescission of the Obama-era memoranda de-emphasizing marijuana prosecution, Trump’s attorney general, Jeff Sessions, is a particularly vehement opponent of legalized marijuana.<sup>92</sup> He has claimed that it “is dangerous, not funny” and that “good people don’t smoke marijuana.”<sup>93</sup>

The complex legal relationships created by this situation have not gone unremarked in legal literature.

The legal status of medical marijuana in the United States is something of a paradox. On one hand, the federal government has placed a ban on the drug with no exceptions. On the other hand, forty percent of states have legalized its cultivation, distribution, and consumption for medical purposes. As such, medical marijuana activity is at the same time proscribed (by the federal government) and encouraged (by state governments through their systems of regulation and taxation).<sup>94</sup>

This leaves persons wishing to benefit from Arkansas’ new medical marijuana law in a precarious and complicated legal position. Some persons might choose to accept the state law at face value, assuming that the federal government is likely to turn its attention to more important national issues. This is not an entirely irrational hope, as traditionally it is states that have been responsible for the bulk of drug law enforcement as it relates to marijuana.<sup>95</sup> One analysis has compiled data indicating that historically, federal agents account for less than 1% of all arrests for marijuana-related violations.<sup>96</sup> On the other hand, that still amounts to approximately 7,000 annual federal marijuana arrests, which certainly suggests that state actors will not be immune from the risk of federal prosecution.<sup>97</sup>

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91. Evan Halper, *Trump’s Justice Department May Crack Down on Thriving Pot Industry, but is it too big to jail?* LA TIMES (Feb. 2, 2017), <http://www.latimes.com/politics/la-na-pol-trump-marijuana-20170201-story.html> [https://perma.cc/JZ2Y-ZBXA].

92. *Id.*

93. *Id.*

94. Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 2 (2013)

95. *Id.* at 2.

96. Mikos, *supra* note 77, at 19, 37 (citing Bureau of Justice Statistic, U.S. Dep’t of Justice, *Drugs and Crime Facts* (August 17, 2009); Federal Justice Statistics Resource Center, *Persons Arrested and Booked by Offense*, 2007).

97. *Id.* at 19

Obviously, Arkansas is not free to amend federal law or to change federal policy, but if the time-frames in the Arkansas Medical Marijuana Amendment had not been so narrow, perhaps a compromise could have been worked out.<sup>98</sup> While there are definite issues with regard to the boundaries of federal authority to regulate intrastate activities, in promulgating the Controlled Substances Act Congress was careful to enumerate a number of inter-state considerations impacted by activities involving controlled substances that take place primarily in a single state.<sup>99</sup> In the Congressional findings and declarations relating to controlled substances,<sup>100</sup> Congress explicitly found that “[i]ncidents of the traffic [in controlled substances] which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce. . . .”<sup>101</sup> The offered rationale for this conclusion was that intrastate and interstate activities involving controlled substances were inextricably intertwined and could not feasibly be distinguished.<sup>102</sup>

As a result of all of this, we are now living in the world where Arkansas law purports to legalize marijuana possession while federal law continues to make it a crime. And as if the possibility of direct federal prosecution were not serious enough, there are also a number of potential collateral consequences stemming from the fact that federal law continues to criminalize marijuana.<sup>103</sup>

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98. New Jersey Senator Cory Booker is the most recent sponsor of a bill to legalize marijuana. See Christopher Ingraham, *Sen. Cory Booker Puts Marijuana Legalization at the Center of His New Racial Justice Bill*, THE WASH. POST (Aug. 1, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/08/01/cory-booker-puts-marijuana-legalization-at-the-center-of-his-new-racial-justice-bil/?utm\\_term=.101d9c9a735a](https://www.washingtonpost.com/news/wonk/wp/2017/08/01/cory-booker-puts-marijuana-legalization-at-the-center-of-his-new-racial-justice-bil/?utm_term=.101d9c9a735a) [<https://perma.cc/LFF8-L64A>].

99. 21 U.S.C. § 801 (2012 & Supp. I 2018)

100. 21 U.S.C. § 801 (2012).

101. 21 U.S.C. § 801(3) (2012)

102. 21 U.S.C. § 801(3)-(5) (2012).

103. While the DoJ has exclusive jurisdiction to prosecute federal crimes, it has been noted that current federal law “empowers other federal agencies to withhold benefits from and impose harsh civil sanctions on marijuana users.” Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633, 646-47 (2011) (citing Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997)). As originally proposed, the federal response to state action legalizing medical marijuana “expressly called upon a diverse

## B. COLLATERAL CONSEQUENCES OF FEDERAL CRIMINALIZATION OF MARIJUANA

The reach of that federal law is extended by virtue of the fact that many regulatory agencies have rules and regulations that penalize or create other problems for “illegal” operations, including acts that might not be illegal under state law.<sup>104</sup> As a result, even if the Department of Justice accedes to state law and declines to pursue direct prosecutions for possession of marijuana in accordance with state law, there are numerous other regulatory requirements that must be considered. Some of the potential civil consequences may amount to a huge nuisance, and some may be overwhelmingly burdensome.

For example, consider the Federal Tax Code. While businesses are normally entitled to a deduction for “reasonable business expenses,”<sup>105</sup> no deduction is allowed for expenses incurred in carrying on a trade or business consisting of trafficking in controlled substances such as marijuana.<sup>106</sup> This can create huge issues for marijuana operations, subjecting such businesses to tax rates of 70% or even more.<sup>107</sup> Businesses that

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array of federal agencies—including the DOJ, the Internal Revenue Service, Customs, the Postal Service, the Department of Transportation, the Department of Defense, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor, among others—to quash state medical marijuana programs.” *Id.* at n.62.

104. *Infra* notes 105-42 and accompanying text.

105. 26 U.S.C. § 162(a) (2012 & Supp. I 2017) (providing that (in general) “[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . .”).

106. 26 U.S.C. § 280E (2012 & Supp. I 2017) (stating that “[n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted”). *See also* Erica Meltzer, *Tax Time Presents Catch-22 for Medical Pot Businesses*, DAILY CAMERA NEWS (Apr. 14, 2011, 10:30 PM), [http://www.dailycamera.com/news/ci\\_17851500](http://www.dailycamera.com/news/ci_17851500)[<https://perma.cc/74Y9-TQZK>].

107. Thor Benson, *Feds Slap 70% Tax on Legal Marijuana Businesses*, THE DAILY BEAST (Feb. 18, 2016), <http://www.thedailybeast.com/feds-slap-70-tax-on-legal-marijuana-businesses> [<https://perma.cc/E4GB-BGNT>] (writing “[d]espite technically being illegal on the federal level, these businesses must file taxes to the Internal Revenue Service—and they may pay as much as 70 percent in taxes to the feds”). The 70% rate is often cited as the standard rate payable by marijuana businesses. *See* Will Yakowicz, *Marijuana Companies’ Biggest Battle Might be Against the IRS*, MONEYBOX (July 1, 2016, 1:00 PM), [http://www.slate.com/blogs/moneybox/2016/07/01/legal\\_cannabis\\_businesses\\_pay\\_taxes\\_](http://www.slate.com/blogs/moneybox/2016/07/01/legal_cannabis_businesses_pay_taxes_)

attempt to claim ordinary business deductions, even if they are reasonable and necessary expenses, are subject to audit and likely to find those usual deductions disallowed.<sup>108</sup> Case law confirms that the IRS interprets these rules as being applicable to marijuana businesses notwithstanding state law.<sup>109</sup>

Federal taxation of marijuana businesses is incredibly complicated, but in general terms section 280E of the Tax Code denies a taxpayer in the marijuana business deductions for any amount paid or incurred during the taxable year in carrying on that trade or business.<sup>110</sup> The legislative history of the relevant Tax Code provision makes it clear that Congress specifically intended the prohibition to apply to business expenses such as “telephone, auto, and rental expense.”<sup>111</sup> As a result, “a taxpayer engaged in the business of ‘trafficking’ in controlled substances, which includes a taxpayer operating a medical marijuana business, is subject to tax on its gross income rather than its net income, as would be the case for any other business, legal or illegal. Such a taxpayer may not deduct what are clearly business expenses, such as rent and employee salaries.”<sup>112</sup> Because of constitutional concerns regarding Congressional authority to

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under\_a\_code\_reserved\_for\_illegal\_drug.html [https://perma.cc/A2JX-HAJN] (noting “[m]arijuana businesses that are operating legally under state licenses across 25 states and Washington, D.C., pay effective tax rates of 70 percent under the tax code.”) Other authorities have cited rates that are even higher. Taylor West, who works for an association of 750 cannabis-related businesses in the U.S. has reported that most of her clients pay more than 70%, with some that are paying between 80 or 90%, and one that has an effective tax rate in excess of 100%. Katie Kuntz, *Marijuana Profits up in Smoke Under IRS Rules*, USA TODAY (last updated Nov. 5, 2014, 12:00 PM), <https://www.usatoday.com/story/news/nation/2014/11/03/irs-limits-profits-marijuana-businesses/18165033/> [https://perma.cc/U6DX-Y6NY].

108. See, e.g., Peter Hecht, *Millions at Stake in IRS Audit of Oakland Medical Marijuana Dispensary*, SACRAMENTO BEE (last updated Jan. 17, 2012, 3:48 PM), <http://www.sacbee.com/news/state/california/california-weed/article2573199.html> [https://perma.cc/SVJ8-8KV5] (discussing the IRS’ audit of the leading marijuana dispensaries in California).

109. For an analysis of several of these cases, see David Bronfein, *Maryland State Bank: The Responsible Solution for Fostering the Growth of Maryland’s Medical Cannabis Program*, 47 U. BALT. L. FORUM 28, 34-35 (2016).

110. 26 U.S.C. § 280E (2012 & Supp. I 2017).

111. S. Rep. No. 97-494(I), pt. 1, at 309 (1982), reprinted in 1982 U.S.C.C.A.N. 1050, 1050-51 WL 25047.

112. Edward J. Roche, Jr., *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAW. 429, 441 (2013).

impose taxes,<sup>113</sup> the Tax Code does provide a deduction for the “cost of goods sold.”<sup>114</sup> Very careful accounting and record-keeping is therefore important to make sure that appropriate amounts are claimed as the “cost of goods sold.”

Nor are the tax laws the only collateral problem for medical marijuana businesses. Federal banking laws also impose sizeable burdens on marijuana businesses by making banks extremely reluctant to deal with them.<sup>115</sup> In fact, a lack of access to banking services has been described as “the most urgent issue facing the legal cannabis industry today.”<sup>116</sup> A business that cannot have a bank account cannot pay its workers in anything other than cash, cannot accept any form of payment other than cash, cannot pay creditors except in cash, and will “spend an inordinate amount of time and resources on cash management.”<sup>117</sup>

Under current law, “if a bank takes money from a customer who operates within an industry that is considered illegal at the federal level, it could lead to a banking institution being found guilty of violating a federal anti-money laundering statute and, possibly, putting its charter in jeopardy.”<sup>118</sup> While the Obama Administration issued guidance suggesting that lawful marijuana businesses were not to be a priority,<sup>119</sup> there was never a guarantee that banks would not be prosecuted, and under President Trump, whatever level of comfort there might have been has disappeared. Moreover, there is a tremendously complicated set of procedures that must be followed by any bank that offers services to businesses whose income is derived from operations that are illegal under federal law, or that deal in large

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113. See *Californians Helping to Alleviate Med. Problems, Inc. v. Commissioner*, 128 T.C. 173, 182 (2007).

114. See S. REP. NO. 97-494(I), at 309.

115. Julie Andersen Hill, *Banks, Marijuana, & Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015).

116. *Id.* at 603.

117. *Id.* at 600-01.

118. Bronfein, *supra* note 109, at 39; accord Rachel Cheasty Sanders, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN ST. L. REV. 281 (2015) (noting financial institutions risk prosecution if they provide banking services to customers whose income is derived “illegally”).

119. FINCEN, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014), [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) [<https://perma.cc/U3U4-4XZJ>].

amounts of cash.<sup>120</sup> Both of these can be triggers for marijuana-based businesses. “These processes place major burdens on banks in addition to the already disconcerting lack of assurance against prosecution.”<sup>121</sup> The result is that “most financial institutions refuse to take the risk.”<sup>122</sup> The lack of banking options is a barrier to efficient operations of marijuana businesses, albeit not necessarily an insurmountable one.

Some of the collateral consequences for marijuana businesses may be imposed without the direct action of a federal agency. For example, it may be difficult to attract the services of competent legal counsel because of the existence of ethical rules imposed at the state level. The general rule applicable to lawyers in Arkansas (as well as most other states) is that they may not assist a client in “conduct that the lawyer knows is criminal.”<sup>123</sup> Under applicable rules of professional conduct lawyers in Arkansas may face sanctions up to disbarment for assisting a client in criminal conduct.<sup>124</sup> This places a substantial burden on attorneys asked to provide counsel to such clients in operating their business, and this may make it difficult for such business to obtain appropriate legal advice.<sup>125</sup>

In some states where state law on legality of marijuana conflicts with federal law, the state legal ethics rules have been modified to specifically allow legal representation of clients in the marijuana business. For example, the Colorado Supreme Court, in 2014, adopted a comment to the rule prohibiting a lawyer from assisting a client in criminal activities in order to address this

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120. Tyler T. Buckner, *Rocky Mountain High: The Impact of Federal Guidance to Banks on the Marijuana Industry*, 19 N.C. BANKING INST. 165, 175 (2015)

121. *Id.* at 175.

122. Sanders, *supra* note 103, at 281.

123. “A lawyer shall not counsel a client to engage, or assist a client in, conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” ARK. RULES OF PROF’L CONDUCT R. 1.2(d).

124. Chris Hildebrand, *Hazy Ethics: Access to Legal Counsel for Marijuana Businesses*, 28 GEO. J. LEGAL ETHICS 583 (2015); PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 17

125. For a more detailed discussion of this problem, see A. Claire Frezza, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 GEO. J. LEGAL ETHICS 537 (2012).

problem.<sup>126</sup> Under the new comment, it is permissible for attorneys to assist clients in conducting business which is lawful in the state even if it would violate federal law, although the status of federal law must also be discussed with clients.<sup>127</sup> California has issued a more confusing opinion, suggesting that lawyers in that state “may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law.”<sup>128</sup> Ideally, the Arkansas Supreme Court would either modify the current rules of professional conduct, or, like Colorado, issue interpretive guidance. However, as of the date this was written, the court has not acted, leaving lawyers in limbo and potentially leaving clients without competent legal counsel.

In addition to these problems, some of the collateral civil consequences stemming from the criminalization of marijuana possession at the federal level apply not to businesses, but to individuals who might be expected to be the clients for such businesses.<sup>129</sup> Some of those consequences can be quite severe.<sup>130</sup>

One consequence for individuals seeking to take advantage of “legal” medical marijuana may be denial of employment in certain professions.<sup>131</sup> For example, federal law bars anyone who uses illicit drugs from serving in various safety-sensitive transportation positions, ranging from bus driver to flight

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126. On March 24, 2014, the Colorado Supreme Court . . . adopted a comment to Rule 1.2, the rule that prohibits assisting or advising clients to engage in illegal conduct. The comment (which does not have the same authority as a rule, which makes some lawyers nervous) says lawyers may assist in conduct the lawyer reasonably believes to be lawful under state law. The comment goes on to say, “the lawyer shall also advise the client regarding related federal law and policy.”

Mark W. Gifford, *Colorado’s Pot Laws and Legal Ethics Is the Grass Really Greener on the Other Side of the State Line?*, 37 WYO. LAW. 12, 13 (2014).

127. *Id.*

128. Los Angeles County Bar Association Professional Responsibility and Ethics & Committee, *Opinion No. 527: Legal Advice and Assistance to Clients Who Propose to Engage or Are Engaged in the Cultivation, Distribution, or Consumption of Marijuana*, L.A. LAW. (Nov. 2015), at 60 (hereinafter referred to as L.A. Ethics Opinion).

129. *See infra* note 131-42 and accompanying text.

130. *Id.*

131. *See infra* note 132-134.

instructor.<sup>132</sup> Even if marijuana use by a particular individual is legal under state law, it is not legal under federal law, making it an “illicit” drug for these purposes.<sup>133</sup> It is unlikely that anyone in such a position could keep their job if they chose to use medical marijuana, because federal law specifically requires drug and alcohol testing of these “safety-sensitive transportation employees.”<sup>134</sup>

Federal housing assistance may also be denied to anyone who uses marijuana, even if it is legal under state law.<sup>135</sup> In fact, federal law prohibits anyone who uses illicit drugs from receiving such federal assistance.<sup>136</sup> The Department of Housing and Urban Development (HUD) guidelines require public housing agencies to deny admission to new applicants who violate federal drug policy.<sup>137</sup> Even existing tenants may be evicted for violating federal law, regardless of the dictates of state law.<sup>138</sup> Again, anecdotal evidence supports the conclusion that this is not just as speculative concern, as there are reports of such evictions having occurred.<sup>139</sup>

As a final example of potential adverse collateral consequences from becoming a medical marijuana user, federal law bars “unlawful user[s] of . . . any controlled substance” from possessing firearms, and illegality under federal law is enough to trigger this prohibition.<sup>140</sup> There is no exception for marijuana users who are in compliance with state law.<sup>141</sup> In addition, even if the DoJ chooses not to prosecute under this provision, there is at

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132. 49 U.S.C. § 5331 (2012).

133. 21 U.S.C. § 821(c) (10) (2012).

134. 49 C.F.R. § 40.151(e) (2017). The Department of Transportation’s regulations do not recognize medical marijuana as a valid medical explanation for a transportation employee’s positive drug test even if state law would legalize such use.

135. 42 U.S.C. § 13661 (2012).

136. 42 U.S.C. § 13661 (2012).

137. 24 C.F.R. § 5.854(b) (2017).

138. 24 C.F.R. § 5.858 (2017).

139. Holly Kramar, *Woman Evicted from Federally Subsidized Apartment for Using Medical Marijuana*, JACKSON CITIZEN PATRIOT (Jan. 13, 2011), [http://www.mlive.com/news/jackson/index.ssf/2011/01/woman\\_evicted\\_from\\_federally\\_s.html](http://www.mlive.com/news/jackson/index.ssf/2011/01/woman_evicted_from_federally_s.html) [<https://perma.cc/HJE7-GXSJ>] (reporting on the eviction of a Section 8 tenant from a private apartment for possession of marijuana which was lawful under state law).

140. 18 U.S.C. § 922(g)(3) (2012).

141. *See* United States v. Stacy, No. 09CR3695 BTM, 2010 U.S. Dist. WL 4117276, at \*6 (S.D. Cal. Oct. 18, 2010) (holding that § 922(g)(3) criminalizes possession of firearms, even by marijuana users who comply with state laws).

least some anecdotal evidence that some firearms dealers will not sell to users because the Bureau of Alcohol, Tobacco, Firearms, and Explosives could revoke their licenses for doing so.<sup>142</sup>

The fact that the Arkansas Medical Marijuana Amendment was adopted without resolving these (and other) issues creates tremendous uncertainty and risk. The short time frame in which the state was given to act made it virtually impossible to effectively resolve any of these issues prior to the state law's implementation.

### C. LEGAL CONCEPTS SUCH AS "PERSONHOOD" AND INCONSISTENT TERMINOLOGY

Regrettably, the issues caused by federal law continuing to treat the sale or even possession of marijuana as a crime are not the only problems surrounding the Amendment and the way in which it and implementing regulations have been drafted. Legislative drafting is not a simple process, and when there are complex issues and multiple agencies involved, the time required to make sure that rules are workable, consistent, and complete can be significant. Even some of the recent legislation that has been put in place to specifically make corrections or fill-in gaps in the law has failed to comport with basic principles of clear drafting, quite probably because of the very short time-frame within which this incredibly complicated change had to take place.

Consider these questions. How can a business own and operate a dispensary or cultivation facility when applicants must be individuals, and only applicants may be granted a license? Assuming a business is allowed to actually operate the applicable facility, whether it be for cultivation or a dispensary, what happens if the individual license holder wants to quit or the business wants to force the license holder out? How does a business operating a facility under the new regime add or remove managers? None of these questions have clear answers under Arkansas law, despite the fact that all of these scenarios are likely

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142. Scott Mobley, *Is it Legal for Medical Marijuana Patients to Buy Guns?*, RECORD SEARCHLIGHT (Feb. 20, 2010), <http://archive.redding.com/news/is-it-legal-for-medical-marijuana-patients-to-buy-guns-ep-377084677-355358991.html/> [<https://perma.cc/DQ2G-JA4M>] (reporting on one Redding, California gun dealer who refuses to sell firearms to medical marijuana patients because of federal law).

to arise. Perhaps a more detailed look at the relevant law and the language used in the amendment, implementing legislation, and regulations will illustrate how complicated these issues are as well as demonstrating some of the problems of rushed drafting.

The Amendment itself requires both dispensaries and cultivation facilities to have a license in order to operate in compliance with the law.<sup>143</sup> On the other hand, only “individuals” are allowed to have licenses.<sup>144</sup> This would appear to impose a requirement that only individuals may operate either a dispensary or cultivation facility. The reasoning would be as follows. Only an individual can be a license holder. Only license holders may operate such facilities. Therefore, all of such facilities must be operated by individuals. But the current laws governing dispensaries and cultivation facilities in the state clearly contemplate having business entities operating such facilities.<sup>145</sup>

Few citizens would be surprised by language that sometimes speaks in terms of persons and sometimes in terms of individuals, because, outside of the legal context, both words generally mean a human being. This is the classic Merriam-Webster definition of “person,”<sup>146</sup> and it is the first definition that pops up if you seek a definition of “person” through a Google search.<sup>147</sup> However, “person” has a much broader definition in the law, generally being understood as any natural person but also any organization or entity that has certain rights of personhood.<sup>148</sup> For this reason,

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143. Medical Marijuana Amendment, *supra* note 1, at §§ 2(4)(A)&(7). (defining “Cultivation facility” as an entity that [h]as been licensed by the Medical Marijuana Commission,” and “Dispensary” as “an entity that has been licensed by the Medical Marijuana Commission.”)

144. As of March 24, 2017, only “natural persons” may apply for a license to operate either a dispensary or a cultivation facility. *See* Act 641, *supra* note 54.

145. Medical Marijuana Amendment, *supra* note 1, at § 2(7) & (8).

146. Definition of Person: 1. Human, Individual, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/person> [<https://perma.cc/7MGP-M5KX>].

147. A google search of “definition of person” results in the explanation that this word is a noun meaning first “a human being regarded as an individual.” GOOGLE, <https://www.google.com/search?q=definition+of+person&oq=definiti&aqs=chrome.1.0j35i39j69i57j0l3.2816j0j7&sourceid=chrome&ie=UTF-8> [<https://perma.cc/7LPN-HET4>]

148. One prominent legal dictionary defines “person” as follows: “In general usage, a human being; by statute, however, the term can include firms, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in Bankruptcy, or receivers.” WEST’S ENCYCLOPEDIA OF AMERICAN LAW, (2d ed. 2008). Sometimes the two concepts are divided, so that it is clear “[t]here are two kinds of legal person: human beings and artificial persons such as corporations.” COLLINS DICTIONARY OF LAW (W.J. Stewart, 2006). FREE DICTIONARY, <http://legal->

statutory or regulatory provisions that use the terms like “individual” and “person” interchangeably can create significant confusion.<sup>149</sup>

Consider where the Amendment talks about facilities and individuals. Section 8 of the Amendment has a number of specific requirements relating to dispensaries and cultivation facilities. Subsection (c) specifies that the “individuals” who submit an application for a license and at least 60% of the owners of the operation must have been residents of the state for the previous 7 years.<sup>150</sup> The use of the word individual(s) clearly (and appropriately) suggests that the residence requirement of the Amendment applies to the human beings in question, while the reference to owners also indicates that the drafters of the Amendment understood that a business organization might be operating the dispensary or cultivation facility.<sup>151</sup> The regulations, however, do not clearly explain how the various requirements applicable to individuals relate to the fact that most likely it will be a business that operates either a dispensary or cultivation facility.

Admittedly, the regulations are complex, and various rules and regulations have been drafted by three different agencies. Under the terms of the Amendment, the MMC is charged with administering and regulating the licensing of such operations,<sup>152</sup> and the ABC is charged with enforcing the provisions concerning the operations.<sup>153</sup> Both the MMC and ABC were required to adopt rules to carry out their charges.<sup>154</sup> Originally, the Amendment

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dictionary.thefreedictionary.com/person [https://perma.cc/9BX4-WCHE] (Legal definitions collected from this source).

149. This duality in meaning has produced confusion in the past. Readers may recall the uncomfortable exchanges resulting from then-Presidential candidate Mitt Romney’s assertion that corporations are people too. Phillip Rucker, *Mitt Romney Says ‘Corporations Are People’*, WASHINGTON POST (Aug. 11, 2011), [https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html?utm\\_term=.662557b54211](https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html?utm_term=.662557b54211) [https://perma.cc/XVW4-FG65]. Given that Mr. Romney was speaking about the legal obligation to pay taxes, in a legal sense he was correct. Members of the public witnessing the speech, most of whom undoubtedly had no legal training, vehemently disagreed.

150. Medical Marijuana Amendment, *supra* note 1, at § 8(c).

151. That appears to be a logical assumption given the economic realities of business operation.

152. Medical Marijuana Amendment, *supra* note 1, at § 8(a)(1) & (2).

153. Medical Marijuana Amendment, *supra* note 1, at § 8(a)(3).

154. *Supra* note 45 and accompanying text.

gave the MMC and ABC each 120 days in which to promulgate rules regarding registration and licensing of dispensaries and cultivation facilities.<sup>155</sup> There are numerous requirements concerning the required regulations, relating to the oversight, record-keeping and operational requirements of dispensaries and cultivation facilities.<sup>156</sup> While the Arkansas legislature extended the deadline by two months,<sup>157</sup> even the extended time period within which the agencies had to act was quite short. In fact, both the MMC and ABC met the extended deadline, promulgating lengthy regulations prior to the end of June, 2017.<sup>158</sup> It is those regulations that introduce the most confusion and inconsistency regarding which obligations and rights relate to individuals and which apply to organizations.

For example, “applicant” is defined in the MMC’s regulations as “the natural person in whose name a license would be issued and any entity: (a) the natural person represents; or (b) on whose behalf the applicants is being submitted.”<sup>159</sup> If that is not sufficiently confusing as to whether a license is to be issued to the natural person alone or whether it was originally allowed to be issued to an entity, consider subsection IV.1. of those regulations. That provision is headed “License Required,” and specifies in subsection (a) that “[n]o person or entity shall operate a medical marijuana cultivation facility unless the person has a license issued by the commission pursuant to these rules.”<sup>160</sup> Subsection (b) then goes on to list various requirements for the “individual” who is to hold the license.<sup>161</sup>

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155. *Id.*

156. Medical Marijuana Amendment, *supra* note 1, at § 8(d)-(g).

157. *See supra* note 46 and accompanying text.

158. *See MMC Regs and ABC Rules, supra note 57.*

159. *See MMC Regs, supra note 57, § 0006.28.1-III (2).*

160. *See MMC Regs, supra note 57, § 0006.28.1-IV(1).*In its entirety, this section reads as follows:

I. License Required

a. No person or entity shall operate a medical marijuana cultivation facility unless the person has a license issued by the commission pursuant to these rules.

b. Each license for a cultivation facility shall specify:

- i. The name of the individual who holds the license;
- ii. The address of the individual who holds the license;
- iii. The effective dates of the license; and
- iv. The address of the licensed facility.

161. *See MMC Regs, supra note 57, § 0006.28.1-IV(1).*

There are a number of problems with this drafting. First, there is the use of the phrase “person or entity” in subpart a, which suggests that an entity may be operating the facility.<sup>162</sup> This phrase, however, is quickly followed by the use of the word “person,” suggesting that only a person may have the license.<sup>163</sup> The suggestion that person as used here was intended to mean only individuals is bolstered by subpart b, which talks about requirements for the individual who holds the license.<sup>164</sup> This raises the question of how an entity may operate a facility in compliance with subpart a, since only an individual person may apparently have the license.

The Arkansas legislature has tried to clarify what is meant by person, adopting a bill that explicitly requires licenses to be granted only to natural persons.<sup>165</sup> Unfortunately, the bill does not explain how a dispensary or cultivation facility operated by an entity can comply with the Amendment’s language which requires the person operating the facility to have the license.<sup>166</sup>

The legislature did attempt to address the issue of what happens if a license holder ceases to be associated with a particular marijuana business, by providing for the grant of temporary licenses to natural persons for dispensaries or cultivation facilities if the originally named natural person “ceases to be in actual control.”<sup>167</sup> This still does not clarify how the entity itself can operate the facility if it does not have the license, and the precise procedures for obtaining temporary licenses are also unsettled.

While the legislation makes it clear that only individuals may apply for and be granted a license, and further makes it appear that the license holder must be in control of the facility or risk having the MMC grant someone else a temporary license (under rules that have not yet been promulgated), there is no clarification of how an individual who is expected to be in control may nonetheless be acting on behalf of or as a representative for an entity. In a corporation, for example, shareholders have

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162. See MMC Regs, *supra* note 57, § 0006.28.1-IV(1).

163. See MMC Regs, *supra* note 57, § 0006.28.1-IV(1).

164. See MMC Regs, *supra* note 57, § 0006.28.1-IV(1).

165. See Act 641, *supra* notes 54, 144 and accompanying text.

166. *Id.*

167. 2017, 3, Ark. Adv. Legis. Serv., 531 (LexisNexis) (Act 587, approved Mar. 23, 2017).

virtually no direct “control” over the business, and directors generally act as a group rather than as a single individual.<sup>168</sup> Even the CEO or COO acts subject to the control of the board, which operates in a quasi-fiduciary role for the enterprise. If the licensing requirements of the Medical Marijuana Amendment are intended to mandate that corporations seeking to operate a dispensary or cultivation facility have a single director, they certainly have not been clear in doing so, and if that is the intent, it would remove the potential benefits of a diverse board.<sup>169</sup> In an LLC, similar issues arise with regard to members and managers, although this could potentially be drafted around in an operating agreement.<sup>170</sup> It is, however, not clear that this is what is contemplated or intended by the law. There certainly seem to be no logical business advantages to mandating a single “manager” model for an LLC seeking to operate a marijuana business.

It is also worth noting that there are related issues raised by the existing language of the medical marijuana regulations. For example, does the applicant or the entity on whose behalf the applicant is working need to meet the financial requirements of

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168. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 451 (2006)

169. For a particularly thoughtful examination of the composition of effective boards in close corporations, see Elizabeth Pollman, *Team Production Theory and Private Company Boards*, 38 SEATTLE U. L. REV. 619, 627 (2015). Most literature focuses on only one aspect of a diverse board—having at least some independent or outside directors. See Amir Alimehri, *The Dilution of the Freedom to Pick A Board in Private Companies Through “Best Practices”*, 13 RUTGERS BUS. L. REV. 1, 4 (2016) (suggesting that although close corporations should not be required to have a majority of independent directors, an “optimal board” should include at least some outside perspectives). *But cf.* Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377 (2014) (arguing that the benefits of diversity in the sense of increased minority representation on boards has “not been convincingly established,” but positing that some potential benefits might exist even for this kind of diversity, albeit in the context of public corporations).

170. Under current statutory rules, an LLC can be member-managed, or manager-managed, or can have a hybrid of the two where the articles provide one thing as to persons outside the enterprise and the operating agreement allocates roles differently among those who are a party to the agreement. See ARK. CODE ANN. § 4-32-301(2016) (presuming member-management unless the articles provide otherwise); ARK. CODE ANN. § 4-32-401(a)-(b) (setting up the possibility that the articles and operating agreement might differ in the assigned roles, and requiring that members be subject to the terms of the operating agreement.) The Arkansas LLC statute does not appear to limit the ways in which authority and power may be allocated among members and managers.

the regulation?<sup>171</sup> Does the applicant personally need to own the land or be the named leaseholder where the cultivation facility will be operated, as stated in the MMC's regulations?<sup>172</sup> If this is the case, how can the license be transferred to anyone else, who will presumably not be the named landowner or leaseholder?<sup>173</sup> Is this intended to mandate that deeds or leases include an obligation to accept a new owner or leaseholder if the original applicant and license holder ceases to "control" the business?

In fact, although it goes beyond the questions associated with the use of words like "person," "entity" and "applicant," there are similar problems that exist because the Amendment and regulations fail to consider exactly how these businesses are supposed to carry out their day-to-day operations. Consider the way in which the term "agents" is used in the regulations. The Amendment covers both "cultivation facility agents,"<sup>174</sup> and "dispensary agents,"<sup>175</sup> and both of those phrases are defined to include any "employee, supervisor, or agent."<sup>176</sup> The term "agent" is not further defined, and if one uses general agency law to provide a definition, the meaning is extremely broad, essentially including everyone with the power to affect the legal

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171. As written, the regulations appear to apply to the applicant rather than the business, although logically the business should be the party meeting the financial requirements of operating the cultivation facility or dispensary.

172. See MMC Regs, *supra* note 57, § 0006.28.1-IV(5)(d). This subsection requires that the applicant provide proof of authorization to occupy the property of the proposed cultivation facility, either by owning the land, leasing it, or having a written option for the applicant to purchase or lease it.

173. The MMC regulations talk about "the application for, issuance, and renewal of licenses," but do not provide much in the way of helpful guidance about transfers. See MMC Regs, *supra* note 57. There is a section in the regulations that says that licenses are only effective as to the individuals named in the original application; that licensees may not transfer or otherwise dispose of their license to another without the MMC's approval; that a transfer may only be to a natural person; and that denial of an application to transfer must be accompanied by written notice of an explanation of why the approval was denied. See MMC Regs, *supra* note 57, § 0006.28.1-IV(16). Oddly, subsection (d) of that provision says that "[a]n individual who holds a license through its individual agent shall not make any modification to the individual's ownership, board members, or officers as designated in the initial application without approval from the commission." See MMC Regs, *supra* note 57, § 0006.28.1-IV(16)(d). Not surprisingly, there is nothing in the regulation that explains how an individual can be owned or have a board directors or officers.

174. Medical Marijuana Amendment, *supra* note 1, at § 2(5).

175. Medical Marijuana Amendment, *supra* note 1, at § 2(8).

176. Medical Marijuana Amendment, *supra* note 1, at § 2(5)&(8).

relations of the principal.<sup>177</sup> This would not be a great problem, except for additional requirements imposed on agents of a marijuana business.

For example, cultivation facility and dispensary agents must register with the ABC, obtain identification cards, and comply with ABC regulations.<sup>178</sup> The Amendment contemplates an annual renewal and apparently annual criminal records checks.<sup>179</sup> Does this apply to every employee? Every attorney or consultant retained by the business? What about members of a scientific advisory board (assuming such individuals are not also equity participants in the business and assuming they do not have direct access to any marijuana plants or products)? The lack of clarity in defining to whom specific requirements apply is a problem that permeates the medical marijuana regulatory system.

This is not actually meant to suggest that the agencies responsible for working in this area have not been doing their best. The reality is that drafting incredibly complicated, technical, and detailed regulations within an unrealistically abbreviated time-frame, where even the governing laws are in transition and multiple agencies have shared responsibilities, is likely to produce these kinds of issues. The next section of this article describes in greater detail some of the problems that exist under the current set of laws, rules, and regulations, notwithstanding the good-faith efforts of state officials to comply with the requirements of the law.

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177. The Restatement (Third) of Agency defines an agent as any person who acts “on the principal’s behalf and subject to the principal’s control.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006). Comment b notes that in commercial settings, “agency” can include even relationships that do not always possess the attributes discussed in the Restatement, encompassing even relationships where there is no right of control but where “one person’s effort will benefit another or in which collaborative effort is required.” *Id.* at cmt (b). In fact, the comment explicitly notes that “[s]ome statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.” *Id.* This can mean that the use of the term “agent” without more in the marijuana laws can be very broad, indeed.

178. Medical Marijuana Amendment, *supra* note 1, at § 9(a) & (b).

179. Medical Marijuana Amendment, *supra* note 1, at § 9(d)(1),(f)(1),&(g)(1). . .

#### D. THE COMPLEXITY OF INTER-AGENCY COOPERATION IN THE STATE, AND PROBLEMS OF INCONSISTENT REGULATION

While no one intended it, the approval of the Medical Marijuana Amendment by Arkansas voters in late 2016 created an incredible legal morass. Not only are there the host of legislative changes that have been and are still being made to those provisions,<sup>180</sup> but there are also rules and regulations promulgated by three separate legal authorities. The MMC, the ABC, and the DoH each have authority over various aspects of medical marijuana in the state,<sup>181</sup> and rather than consistently worded, coordinated provisions, the state has rules that are complex, overlapping, and not always entirely consistent with each other. In addition and even more troubling, there are gaps in the rules, with requirements in place with which it is impossible to comply because other procedures are not yet in place.

There are a number of examples that can be found where there are multiple rules applicable to a single issue. For example, both the ABC and DoH define what constitutes a “batch” of marijuana.<sup>182</sup> One of them defines a batch as consisting of no more than five pounds,<sup>183</sup> and the other specifies that it may be no greater than ten pounds.<sup>184</sup> This single, seemingly minor inconsistency impacts testing and labeling, which in turn affects almost all aspects of product production.<sup>185</sup>

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180. See *supra* Part II of this article for a discussion of some of these amendments.

181. The general roles for each of these three agencies are set out in the Amendment itself. See Medical Marijuana Amendment, *supra* note 1 at §§ 4-5 (DoH role); § 8 (MMC responsibilities); & §§ 8(a)(3), 9-10 (ABC responsibilities).

182. Compare ABC Rules, *supra* note 57, at § 006.02.7-3(4), with DoH Rules, *supra* note 57, § 007.16.4-III(6).

183. ABC Rules, *supra* note 57, at § 006.02.7-3(4).

184. DoH Rules, *supra* note 57, at § 007.16.4-III(6).

185. For example, if a cultivation facility had to test in batches of one size for some purposes and another size for different purposes, this would have introduced an additional layer of needless expense. Similarly, duplicate labels (one in compliance with standards applicable to containers in the cultivation facility and another complying with standards for use in dispensaries when the product is made available for sale), this duplication would also add wasteful expense. See ABC Rules, *supra* note 57, at § 006.02.7-3(4); DoH Rules, *supra* note 57, at § 007.16.4-III(6).

Even rules governing things as seemingly inconsequential as the font required for product labels were originally different.<sup>186</sup> Because different agencies had responsibility for establishing guidelines overseeing the application and licensing process<sup>187</sup> as opposed to overseeing operations,<sup>188</sup> and because there was insufficient time for coordination, the original requirements were not consistent. This particular inconsistency has been resolved, but difference in regulatory requirements that originally existed is indicative of the kinds of disparities in requirements imposed when different agencies have overlapping authority and insufficient time for reflective coordination.

Sometimes the inconsistency in terminology appears within materials promulgated by or on behalf of a single agency. For example, the MMC, in its regulations, required that an applicant for a cultivation facility license (and all owners if an entity will run the facility) had to demonstrate a “good credit history.”<sup>189</sup> In the first guidance memorandum issued relative to that provision,<sup>190</sup> there was a specific question about how to “demonstrate . . . credit worthiness,” and the reply was that “[c]redit worthiness can be demonstrated by providing a current copy of your credit report and score from one or more of the three major credit bureaus: Equifax, TransUnion, and Experian.”<sup>191</sup> That would have been fine, but the application form required of any entity seeking to become a licensed cultivation facility in the state<sup>192</sup> had a different requirement. The Cultivation Application

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186. The Arkansas Beverage Control Board now defers to DoH standards. *See* ABC Rules, *supra* note 57, at 006.02.7-13(RR 13.1)(b)(iii). *See* DoH Rules, *supra* note 57, at § 007.16.4-V(D)(2)(c) (specifying “no smaller than 8 point Times New Roman, Helvetica or Arial font.”)

187. Licensing of dispensaries and cultivation facilities is required by the terms of the Amendment to be under the control of the MMC. *See* Medical Marijuana Amendment, *supra* note 1, at § 8(a).

188. Oversight of operations of medical marijuana businesses is under the control of the ABC. *See* Medical Marijuana Amendment, *supra* note 1, at § 8(e).

189. *See* MMC Regs, *supra* note 57, at § 006.28.1-IV(9)(b)(iv)(5).

190. MED. MARIJUANA COMM’N, Advisory Memorandum I for Potential Cultivation Facility and Dispensary Applicants (June 27, 2017), <https://www.arcannabis.org/wp-content/uploads/2017/01/ApplicationAdvisoryMemorandumI.pdf> [<https://perma.cc/BR8F-9JR4>]. This will be referred to as the *First Advisory Memorandum*.

191. *Id.* at 2.

192. Prior to the deadline the “Request for Application” and “Application for Medical Marijuana Cultivation Facility” were available online from the MMC. *See* Cultivation

asked for “[c]redit histories for the applicant and owners of the entity,”<sup>193</sup> which (depending on the number of owners involved) added literally hundreds of pages of highly confidential, personal information of relatively limited informational value over what would have been readily apparent from a credit score.

With regard to the second kind of issue, gaps left in the regulatory scheme that no agency has yet filled, there remain a number of very significant issues. Consider one obvious problem that will hit cultivation facilities immediately upon being licensed. How do these facilities get their plants or seeds in a legal fashion? One option for such facilities would be to transport plants or seeds across state lines from a state where marijuana is legal at the state level, but that does not explain how they get that stock to their facilities, since marijuana is not legal in Arkansas’ neighboring states<sup>194</sup> and because transporting marijuana remains illegal under federal law. That means that anyone attempting to import marijuana seeds or plants from another state, even one where those items are legal, would be violating both federal law and the state law of any states across whose borders they pass where marijuana remains illegal. Alternatively, facilities could buy illegal local stock but that also involves illegal marijuana and lacks the quality control that the legislation seeks to encourage. The bottom line is that there appears to be no way to get the seeds to start the crops legally. Is this state willing to look the other way on this issue (which appears to be what other states have done so far)? Neither the law nor regulations speak to this issue or give guidance to persons attempting to comply with the law.

Nor does this kind of problem disappear once the seeds and plants are in place. How does a cultivation facility obtain the kind of quality control testing mandated in multiple places in the regulations?<sup>195</sup> Obviously, there are established and experienced

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Application (draft), *supra* note 61. You can now look at those forms only by examining the redacted applications that were submitted or a draft of the Cultivation Facility Application.

193. *Id.* at Schedule 4.

194. For a map of places where marijuana is legal, see *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [https://perma.cc/K2CJ-Q5AS]. Note that Arkansas is surrounded by states that, as of March, 2018, do not legalize possession or transportation of marijuana.

195. Testing must be done by an “approved laboratory,” and the requirements to be an approved laboratory are not insignificant. “‘Approved Laboratory’ means a laboratory that is accredited by the National Institute on Drug Abuse (NIDA), the National Environmental Laboratory Accreditation Conference (NELAC), the International

laboratories in other states that presumably could do the necessary work,<sup>196</sup> but Arkansas facilities cannot legally transport samples to them. That is mainly a federal problem and a problem with the laws of others states that have not legalized marijuana, but the transportation issue exists even within the state.

Later in the life cycles of these businesses, other issues will arise. Over time, how does an entity that is operating either a cultivation facility or dispensary add new owners, managers or board members, or C level executives?<sup>197</sup> The application process required detailed information from and about each of the individuals originally in any of these roles. What happens if one or more of them should die or have financial difficulties necessitating their departure from the business? What happens if additional investors are needed to raise capital for expansion? What if a change in high level management becomes necessary or desirable for any reason? None of these issues are addressed in the current law or regulations.

The state is clearly aware of the issue of missing pieces in the regulatory patchwork puzzle.<sup>198</sup> For example, in the second

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Organization for Standardization (ISO) or similar accrediting entity as determined by the Department, and that has been approved by the Department specifically for the testing of usable marijuana.” See DoH Regs, *supra* note 57, at § 007.16.4-III(4). As of the end of February, 2018, no such facilities were listed on the DoH “Medical Marijuana Resources” webpage. *Arkansas Department of Health, Medical MARIJUANA RESOURCES*, <http://www.healthy.arkansas.gov/programs-services/topics/medical-marijuana-resources> [<https://perma.cc/4BZN-VB3R>].

196. There are accredited laboratories in other states, but that does not mean that they have been approved by the Arkansas DoH or that transporting the samples to and from such facilities would be considered legal, especially since Arkansas is surrounded by states that do not have legalized marijuana. See *State Marijuana Laws in 2018 Map*, *supra* note 194.

197. A “C level executive” is someone in senior management holding a position that would usually bear a title beginning with “chief”, such as chief executive officer (CEO), chief operating officer (COO), chief technology officer (CTO), or chief financial officer (CFO). See, *i.e.*, Allison Doyle, *What are C-Level Corporate Jobs?* THE BALANCE (May 8, 2017), <https://www.thebalance.com/what-are-c-level-jobs-2061934> [<https://perma.cc/SK6R-W8TP>].

198. Part of the problem, of course, is that there are still a number of missing pieces. By way of example, as of the date this article was written, Arkansas does not have a state tracking system or an in-state or legally accessible certified testing faculty. See, *e.g.*, *supra* note 195. On the other hand, as of the date this article was written, several issues had already been resolved and more efforts were underway. (For example, the inconsistency in font size originally required for labeling had been resolved. See *supra* note 186 and accompanying text.)

guidance memorandum issued by the MMC<sup>199</sup> this question is posed: “I am interested in acting as a distributor/transporter/processor. How can I obtain licensing for this?”<sup>200</sup> The answer candidly acknowledges the lack of a current option:

Act 642 of the 91st General Assembly modified the Amendment by creating licensure for distributors, transporters, and processors. Act 642 gave the MMC power to create rules for licensure. As of today, the MMC has not promulgated these rules. Please continue to monitor [mmc.arkansas.gov](http://mmc.arkansas.gov) for updates on these licenses.<sup>201</sup>

Similarly, the guidance memorandum acknowledges the absence of appropriate tracking systems: “The state of Arkansas is currently in the process of procuring a seed-to-sale tracking system for use across the entire medical marijuana program. Cultivation facilities and dispensaries will be required to use the selected seed-to-sale tracking system.”<sup>202</sup> While it is a positive step to know the state is working on filling in these holes, the absence of a complete regulatory framework is troubling. It is particularly problematic because of the non-refundable application fees that obligate any successful applicants to use systems that have not been finalized or disclosed as of the date applications were due.<sup>203</sup>

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199. MED MARIJUANA COMM’N, *Advisory Memorandum II for Potential Cultivation Facility and Dispensary Applicants* (Aug. 11, 2017), <http://www.mmc.arkansas.gov/Websites/mmsar/images/ApplicationAdvisoryMemorandumII.pdf> [<https://perma.cc/3J4V-BN3X>]. This will be referred to as the *Second Advisory Memorandum*.

200. *Id.* at 1.

201. *Id.*

202. *Id.* at 2.

203. Under the terms of the Amendment, the maximum cultivation facility application fee was set at \$15,000, and the maximum dispensary application fee was \$7,500. Medical Marijuana Amendment, *supra* note 1, at § 8(f)(2)(A) (the dispensary fee cap); *supra* note 1, at § 8(f)(2)(B) (the cultivation facility fee cap). Perhaps not surprisingly, the eventual fees were set at the maximum. See MMC Regs, *supra* note 57, at §§ 006.28.1-IV(7), 006.28.1V(7)(a) (\$15,000 application fee for cultivation facilities); MMC Regs, *supra* note 57, § V(7)(a); *Id.* at 27 (\$7,500 fee for dispensary applications). In addition, within 7 days after being notified that an application has been accepted, an additional fee of \$100,000 from cultivation facilities and \$15,000 for dispensaries is required, regardless of whether these other rules and procedures are in place. MMC Regs, *supra* note 57, at § 006.28.1-IV(10) (for cultivation facilities); MMC Regs, *supra* note 57, at § 006.28.1-V(10)(a) (for dispensaries). Additional bonds are also required at that time. MMC Regs, *supra* note 57, at §§ 006.28.1-IV(10)(c), 006.28.1-V(10)(c). These application fees do not count the extra

## E. THE PROBLEMS OF RUSHED DRAFTING OF TECHNICAL REQUIREMENTS

Some of the drafting issues present in the various laws, rules, and regulations applicable to Medical Marijuana in Arkansas are hard to classify as one kind of problem or another, but most probably stem primarily from the fact that under the terms of the Medical Marijuana Amendment, even as extended by the state legislature,<sup>204</sup> the time frames for implementation were very abbreviated.<sup>205</sup> This has resulted in provisions that are ambiguous or lacking in technical specificity. In addition, and again probably because of the required speed of enactment, there are regulations that are probably simply counter to public policy, not because of intent but because of a lack of time to work through the unintended potential consequences of the promulgated regulations.

Some of the issues simply involve ambiguous wording. To illustrate this, it is not necessary to look any further than the Cultivation Application.<sup>206</sup> One of the requirements for applicants

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expenses potential licensees incurred because of the delays in processing of applications. Licenses were originally supposed to be announced in December, 2017, but that was delayed until late February of 2018. As a result, applicants were probably all faced with increased costs for holding open leases or contracts for sale, employment agreements, and for extended timeframes under various contractual commitments that had to be secured as part of the licensing application process.

204. As mentioned earlier, the state legislature extended the time in which the state was required to act to implement the Medical Marijuana Amendment from 120 days to 180 days. *See Act 4, supra note 46. See supra notes 152-56 and accompanying text (providing a more detailed explanation of this process).*

205. To a voter simply interested in seeing that the state decriminalize the use of marijuana for medicinal purposes, it may not appear that the state would need more than six months to implement the law. However, there were incredibly detailed regulations needed to describe the application process, and to begin setting up the operational framework for new businesses. Guideline for everything from facilities, to plant selection, to cultivation of crops, to testing and processing of useable products, to labeling, to storage of marijuana and related products, to physician certification, to employee requirements, and much more needed to be considered and reduced to writing. The time frame within which the state had to act was actually incredibly short, and most persons involved in the process would probably say too short. *See Act 4, supra note 46.*

206. *See generally* Cultivation Application (draft), *supra note 61*. One huge issue with the application related to scoring. For example, while points were to be awarded for a variety of things, the announced procedures never discussed how ties would be handled. In addition, some of the points were to be awarded for complying with requirements that were essentially meaningless because they were not worded carefully enough. For example, bonus points for “ownership” by a protected group was not defined to include any meaningful right of control.

was to provide proof of solvency.<sup>207</sup> This could be done with proof of sufficient assets or a surety bond. But consider the wording of the application in considering the amount of assets required. The application required “[p]roof of assets or a surety bond in the amount of \$1,000,000, and proof of at least \$500,000 in liquid assets.”<sup>208</sup> Did this mean that if an applicant had proof of \$1,000,000 of which at least \$500,000 was in the form of liquid assets it was in compliance? Or did the language mean that applicants were required to have a total of \$1.5 million, with \$500,000 of that being in liquid assets? While the MMC apparently interpreted the language as requiring at least \$1.5 million in assets in order to avoid the need to have a surety bond, the language was certainly far from clear and could well have served as a needless trap for the unwary or less sophisticated applicant.<sup>209</sup>

Nor was that the only issue in interpreting the Cultivation Application document. Applicants and owners, and various other persons as well, were required to send copies and/or certified copies of various documents as exhibits.<sup>210</sup> In order to establish citizenship, for example, the application required certain persons to submit documents such as a “[c]ertified copy of a birth certificate”<sup>211</sup> and a “[v]alid, unexpired U.S. passport.”<sup>212</sup> Obviously, no one would want to send in their actual passport, and the application specifically stated that “[c]opies of items

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*Id.* at Schedule 6b. It also did not provide for an applicant to show that the total ownership by different groups (such as women and veterans, or minority groups and women) exceeded the minimums. *Id.* Finally, the consideration process resulted in the MMC “depersonalizing” applications without the time or opportunity for applicants to participate. Thus, identifying information that could be necessary to indicate how an applicant met the requirement of being highly qualified. *Id.* at Schedule 1. (The completed Cultivation Application also included all of this information, but because it is harder to access, references here are to the draft form which is still online.)

207. We use the past tense in this paragraph because the deadlines for applications is now passed. *See* Cultivation Application (draft), *supra* note 61, noting that the “[d]eadline for receipt of applications” was 4:30pm Central Time, on September 18, 2017. These problems are therefore not raised here in the hopes that they can be fixed at this stage, but to illustrate the kinds of issues created when administrative officials are given an unrealistically abbreviated time frame in which to work.

208. *Id.* at 4. (The information was requested on page five of the final form.)

209. *See* MMC Regs, *supra* note 57, at § 006.28.1-IV(4)(c).

210. *See* Cultivation Application (draft), *supra* note 61, at 12-14.

211. *Id.* at 12.

212. *Id.*

required to show proof of age, citizenship, and residency will be accepted.”<sup>213</sup> This would appear to mean that a copy of a certified copy would have been acceptable, but again, the requirement was poorly worded. A cautious applicant would probably have provided certified copies where available and copies or originals if no certification was possible, but this could also have served as an unintended stumbling block during the application process.

Various state officials worked to provide guidance along the way,<sup>214</sup> but even those efforts were not always completely successful. For example, consider the issue of who was required to submit to a background check, and in particular whether members of a scientific advisory panel lacking an ownership interest were subject to that requirement. This precise question was “addressed” in the second advisory memo issued by the MMC, and this is the direction that was given:

During the application phase, the applicant must provide proof that no “owner, board member, or officer” has been convicted of an excluded felony offense. Only individuals who will have ownership interest or power to participate in operational decision-making will be required to submit a background check during the application phase. Individuals serving in only an advisory capacity will not be required to undergo a background check during the application phase.<sup>215</sup>

Is this limited to directors and the highest of C-level executives such as the CEO, COO, and/or CFO? Does it include Chief Scientific Officers? Would it be enough to specify in a business’s operating documents that only certain individuals possessed the power to make “operational decisions”?

The “guidance” did not provide a clear answer on who needed to submit this information, and that meant that cautious applicants probably had to submit a lot of excess paperwork. From a practical standpoint, there was only one set of paperwork for these individuals, and it asked all of them to include proof of 7-years of residency in Arkansas, clearly something relevant only

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213. *Id.*

214. The MMC issued two separate Application Advisory Memoranda, one dated June 27, 2017 and one dated August 11, 2017. See *First Advisory Memorandum*, *supra* note 190 and *Second Advisory Memorandum*, *supra* note 199.

215. *Second Advisory Memorandum*, *supra* note 199, at 3.

for owners.<sup>216</sup> The absence of distinct forms for owners and others required to submit such background information complicated and lengthened the application process, and undoubtedly made sorting through the voluminous applications even more time-consuming.

The application itself also seemed to deviate from some of the varied requirements in the rules and regulations. For example, one of the many MMC regulations specified that where an individual applicant was acting on behalf of an entity, the “Documentation and Information for Applicant” was to include a “[s]tatements of individual’s authority to act on behalf of an entity, if applicable.”<sup>217</sup> The application form itself provided no space for this statement of authority and did not reference any such requirement.<sup>218</sup> Was such a statement mandatory or unnecessary? Applicants and the public still do not know if this kind of information was considered relevant by the MMC commissioners during the application scoring process, which has not been fully explained.

Yet another kind of problem which crops up from time to time in the rules and regulations is a lack of clarity or technical specificity. For example, the Cultivation Application required information about the “types of medical marijuana strains”<sup>219</sup> to be cultivated. While “strains” might sound reasonable to someone lacking a strong background in horticulture, the concept is more complicated than might appear at first. In some contexts, the word “strain” (as applied to cannabis) simply refers to whether the plant is *Indica* or *Sativa*.<sup>220</sup> Other sources list hundreds of “strains” of

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216. Cultivation Application (draft), *supra* note 61, at 14.

217. See MMC Regs, *supra* note 57, at § 006.28.1-IV(5)(a)(viii) . The rules and regulations did not explain how this would work in the future if there any changes in ownership.

218. See, e.g., Cultivation Application (draft), *supra* note 61.

219. *Id.* at 20.

220. For example, one online explanation about the different kinds of marijuana plants talks about *Indica* and *Sativa* as the two main types, with each strain having different properties. The Pease Naturals Project, *Indica vs Sativa: Understanding the Difference Between the Two Cannabis Plants*, PEACE NATURALS, [https://peacenaturals.com/indica-vs-sativa-understanding-the-differences-between-the-two-cannabis-plants/\[https://perma.cc/23JS-YEKJ\]](https://peacenaturals.com/indica-vs-sativa-understanding-the-differences-between-the-two-cannabis-plants/[https://perma.cc/23JS-YEKJ]). The same source also talks about hybrid possibilities. “Cannabis strains range from pure *Sativa* to pure *Indica* and hybrid strains consisting of both *Indica* and *Sativa* (30% *Indica* – 70% *Sativa*, 50% – 50% combinations, 80% *Indica* – 20% *Sativa*.)” *Id.*

the plant, each with unique properties.<sup>221</sup> So does the requirement in the form refer to specifying whether plants will be indica, sativa and/or hybrid of the two or it is asking for something different from that, and if so, what?

This is not meant to suggest that the Cultivation Application is the only document with odd ambiguities or internal inconsistencies. For example, a cultivation facility is prohibited from advertising “through any public medium or means designed to market its products to the public.”<sup>222</sup> There is, however, no explanation of what this means. Does it preclude a general press release stating that a particular group has been awarded one of the five available state cultivation licenses? Does it limit a general solicitation for employees that might reach persons interested in buying marijuana (regardless of a cultivation facility’s intention not to sell to members of the public)? The absence of clarifying statements is not surprising given the short time frames within which the MMC, ABC and DoH have had to operate, but this does not make compliance any simpler for companies wishing to act in compliance with the law.

Another example of an ambiguity appears with regard to the DoH guidelines about what happens when useable marijuana fails potency testing. According to the rules, such marijuana “may be repackaged in a manner that enables the item to meet the standard in §§ XVI(B)(1) or (C)(1).”<sup>223</sup> The problem is that there was no section XVI(C)(1) with which to comply.<sup>224</sup>

The building requirements demonstrate a different issue—the lack of technical sophistication on the part of the drafters of the regulations. In this case, the ABC adopted very precise requirements for greenhouses to be used by marijuana cultivation facilities.<sup>225</sup> Such greenhouses must have “a foundation, slab, or equivalent base to which the floor is securely attached.”<sup>226</sup> These standards, which are also applicable to and were likely borrowed

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221. *Cannabis Strain Explorer*, LEAFLY, <https://www.leafly.com/explore/sort-alpha> [https://perma.cc/SNQ3-RAF2].

222. See ABC Rules, *supra* note 57, at § 006.02.7-17(1)(a)(i).

223. See DoH Rules, *supra* note 57, at § 007.16.4-XVIII(H)(1).

224. See, e.g., DoH Rules, *supra* note 57, at § 007.16.4-XVI.

225. See ABC Rules, *supra* note 57, at § 006.02.7-6(2)(a)(iii).

226. See ABC Rules, *supra* note 57, at § 006.02.7-6(2)(a)(iii).

from the regulations governing the dispensaries,<sup>227</sup> are not common for greenhouses.<sup>228</sup> Such a structure is a massive overbuild for a crop facility, which typically would have a perimeter type slab. Of course it is possible to comply with any such requirements as this is not an ambiguity problem at all. Instead it becomes an issue of expense. Requirements such as these that make little sense in the context of greenhouses will substantially increase both construction and operational costs. As a result, this will raise consumer costs. It will also make expansion to meet the anticipated demand within the state substantially more expensive. With the extremely limited number of cultivation facilities that are to be licensed<sup>229</sup>, this could be a significant problem in the long run.

While marijuana opponents might temporarily rejoice at the increase in expense, in reality the result is that legal marijuana may be pricing itself out of most of the market. If the price of legal marijuana is too high, consumers will likely choose to smoke street pot instead, which is legal to possess for persons having documentation entitling them to be a medical marijuana user.<sup>230</sup> This means that the anticipated benefits of having regulated, safe, quality-controlled, appropriately-handled, labeled, and taxable legal marijuana are actually minimized if the legal alternative is too expensive for much of the market.<sup>231</sup>

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227. Identical standards for buildings out of which dispensaries are to operate can be found in ABC Rules. *See* ABC Rules, *supra* note 57, at § 006.02.7-7(2).

228. Discussions of appropriate building codes and standards for greenhouses generally talk about things such as wind and snow loads, not foundation requirements that are more suitable for buildings not intended for cultivation operations. *See, i.e.*, Craig Humphrey, *Building Codes and Greenhouses*, GREENHOUSE MANAGEMENT (July 26, 2010), <http://www.greenhousemag.com/article/gmpro-0710-building-codes-greenhouses-state-of-industry/> [<https://perma.cc/DXN6-D8VL>]. Similarly, at least one detailed list of consideration for the design and layout of commercial greenhouses does not even break out a discussion of foundation, although the desirability of paved parking is mentioned. *Design and Layout of a Small Commercial Greenhouse Operation*, U Mass Amherst, CENTER FOR AG. FOOD & THE ENVT., <https://ag.umass.edu/greenhouse-floriculture/fact-sheets/design-layout-of-small-commercial-greenhouse-operation> [<https://perma.cc/NJT7-7D9X>].

229. *See* Cultivation Application (draft), *supra* note 61.

230. *See* Medical Marijuana Amendment, *supra* note 1, at § 3(a)(authorizing a “qualifying patient or designated caregiver” to possess up to 2.5 ounces of useable marijuana with no requirement that the drug have been obtained through “legal” sources) & § 7 (detailing the affirmative defense to a state law possession charge similarly has no mention of a requirement that the marijuana have been obtained from a licensed dispensary).

231. This is a function of basic economics. As the cost of supplying a product increases, the cost that a consumer will have to pay also rises. Because compliance with

## F. UNINTENDED CONSEQUENCES

Finally, when complicated rules are drafted in a hurry, unintended consequences are likely to creep in. This certainly seems to be the case with some of the requirements that have been adopted with regard to medical marijuana. In addition to the issues created by the expense of buildings that are poorly suited to serve as greenhouses (regardless of how well the standards might apply to other structures such as pharmacies), the medical marijuana rules include a number of requirements that, on reflection, simply do not make much sense from a policy standpoint.

One example taken from the process required of persons wishing to obtain a license to operate a cultivation facility relates to performance bonds.<sup>232</sup> As currently written, within seven days of being granted a license to operate a cultivation facility, the applicant is required to obtain a performance bond in the amount of \$500,000.<sup>233</sup> The amount required is not the problem; the problem is created by the state-mandated procedure requiring a

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regulations is expensive, so called “black-market weed” is likely to be much cheaper. For example, suppliers of legal marijuana will have to pass on taxes of building more secure growing facilities, perform expensive tests for impurities, invest in costly detailed labelling and packaging, and pay taxes and fees. For a discussion of how this could impact consumer prices, and drive potential buyers back to marijuana that does not meet the stringent state regulatory requirements or increase state taxes, see Chloe Harper Gold, *Will California’s Legal Marijuana Cost More Than Black-Market Weed?*, HIGH TIMES (Sept. 20, 2017), at <https://hightimes.com/news/will-californias-legal-marijuana-cost-more-than-black-market-weed/> [<https://perma.cc/9PUB-7YH9>]. A comparison of how much more expensive legal marijuana is than its black-market alternative suggests that the more stringent the regulatory framework and the smaller the number of growers, the greater the price disparity and the greater the incentive for the public to turn back to illegal product. See Perfect Price, *Is It Cheaper to Buy Weed on the Street or at a Dispensary?*, PRICEONOMICS (Feb. 3, 2016) <https://priceonomics.com/the-most-expensive-and-cheapest-cities-to-buy/> [<https://perma.cc/55F7-DC3D>]. Arkansas, with its constitutionally mandated restriction on the number of growing facilities and its complex and convoluted regulatory requirements, is likely to be quite expensive, meaning that black market weed could be a considerable problem. Current street prices for marijuana in Arkansas are reported to range from \$250 to \$300 per ounce, and in other states, patients have been willing to pay up to 18% more for “legal” marijuana. See Erika Ferrando, *Expectations for growing, selling medical marijuana in Arkansas*, KTVH 11 (Feb. 28, 2017), <https://www.thv11.com/article/news/local/expectations-for-growing-selling-medical-marijuana-in-arkansas/416273586> [<https://perma.cc/2UW7-CVYB>] [Hereinafter *Expectations*].

232. See MMC Regs, *supra* note 57, at § 006.28.1-IV(10)(c).

233. See MMC Regs, *supra* note 57, at § 006.28.1-IV(10)(c).

performance bond, which means that the applicant must pay a hefty fee to the bonding company in order to comply, no matter how much the applicant or business has in liquid assets.<sup>234</sup> If applicants at least had the option to deposit the funds with the state to guarantee performance under the terms of the application, this would avoid the bonding company fee and would also give the state the use of the funds unless and until the performance bond was called or performance completed. It might not make sense to offer as an alternative the option of depositing that amount with anyone else because of the risk that the federal government might treat that as “drug money” subject to forfeiture,<sup>235</sup> but deposit with the state itself should avoid that risk. No such option appears to have been contemplated, and it certainly does not appear in the regulations.

Another costly measure that probably was not well thought-out involves the ABC rules regarding storage of plant material.<sup>236</sup> As currently written, those rules specify that “[h]arvested marijuana and any product processed from harvested marijuana shall be stored in one of the . . . [specified] types of secured areas.”<sup>237</sup> Under the ABC rules, every part of a marijuana plant is regulated as “medical marijuana,” even if it contains only trace amounts of THC or other psychoactive compounds.<sup>238</sup> That is a tremendous amount of material that has to be stored in a vault.<sup>239</sup> Plant by-products cannot be placed in a regular safe, because they

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234. While exact rates are proprietary and based on a number of individual factors, surety bonds in Arkansas can cost up to 15% of the bonded amount. See JW Surety Bonds, *Arkansas Surety Bond Guide*, <https://www.jwsuretybonds.com/states/arkansas-surety-bond> [<https://perma.cc/HMD8-VMUJ>].

235. For a discussion of the problems created by the current federal regime which criminalizes use, possession, or cultivation of marijuana, see *supra* part IV.A. of this article.

236. See ABC Rules, *supra* note 57, at § 006.02.7-18(1)(a) (While this section is entitled “Disposal of Medical Marijuana,” it also covers “all medical marijuana waste,” requiring it all to be stored in “a secure, limited access area on the premises.”)

237. See ABC Rules, *supra* note 57, at § 006.02.7-6(3)(a).

238. THC, or tetrahydrocannabinol, is the chemical that causes most of marijuana’s psychological effects. See Alina Bradford, *What is THC?* LIVE SCIENCE (May 18, 2017), <https://www.livescience.com/24553-what-is-thc.html> [<https://perma.cc/7TYA-S628>].

239. The plant roots, stalk, stems, and seeds would all be subject to these requirements, despite lacking the concentration of THC found in the buds and flowers, which are the parts that are traditionally smoked. Leaves, which may or may not have suitable concentrations of THC must also be stored in this way. See Jennifer McLaren et al., *Cannabis potency and contamination: a review of the literature*, 103 ADDICTION 1100, 1101-02 (2008), <https://doi.org/10.1111/j.1360-0443.2008.02230.x> [<https://perma.cc/S3YY-M3Q6>].

would mold, creating health issues for employees. Therefore, cultivation facilities will need careful humidity and temperature controls over waste products, which means they will be required to have very large climate-controlled vaults to store waste products. From every logical standpoint, the same positive security benefits could have been obtained with regulations requiring storage of dried product and extracts, or plant by-products with a THC content above a specified percentage. As written, the regulations essentially require the storage of trash in a humidity and temperature-controlled vault, until it can be mixed fifty-fifty with mixed waste, such as cardboard (by volume not weight).<sup>240</sup> The reason that this is such a problem is that this unnecessarily increases the cost of doing business as a cultivation facility, which will raise the price of legal marijuana. As explained above, this means that the benefits to the state of legalizing the drug, such as higher quality control and an increase in tax revenue, are less likely to materialize.<sup>241</sup>

Consider also the preference given to facilities that are to be located in economically disadvantaged counties.<sup>242</sup> While the goal of spreading economic development opportunities across the state is laudable, this particular requirement ignores other critical factors, such as the availability of a qualified work force, adequate transportation options and infrastructure, and proximity to dispensaries. Failure to account for these kinds of issues means that a facility may be awarded points for choosing a location that compromises economic viability, qualifications of the available workforce, and security of the facility and of the marijuana during transport.

Another aspect of the current regime that seems to actually undermine the public policies ostensibly being advanced by the rules and regulations relates to the priority given to applications with certain kinds of minority interests.<sup>243</sup> The state recognized that there are societally important reasons to incentivize ownership by certain groups, and therefore chose to give extra consideration to applications by members of racial minorities,

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240. See ABC Rules, *supra* note 57, at § 006.02.7-18(1)(f).

241. See *supra* notes 230-31 and accompanying text.

242. See Cultivation Application (draft), *supra* note 61, at Schedule 6a.

243. *Id.* at Schedule 6b.

veterans, and women.<sup>244</sup> To qualify, a business would have needed at least a 51 percent ownership stake in the hands of women, or veterans, or members of racial minorities.<sup>245</sup> The regulations simply did not contemplate the benefits of a business that would be owned or substantially run by a group of veterans and women, or members of racial minorities and veterans, or a mixed group from all three under-represented groups. The public policy benefits of encouraging investment and ownership by such groups would be recognized just as much with such a set of rules, but again, this simply appears to have been overlooked because there was such a rush to promulgate regulations within the time permitted.

It is also worth emphasizing that one of the most illogical things about the Arkansas medical marijuana laws is not in the rules and regulations at all, but rather in the original Amendment itself. As mentioned earlier, the Amendment includes certain provisions which are not subject to revision by the legislature.<sup>246</sup> Among the provisions not subject to change (except by future constitutional amendment) is the limited number of dispensaries and cultivation facilities.<sup>247</sup> As adopted, the total number of dispensaries across the state is not to exceed 40, and the total number of cultivation facilities is limited to eight.<sup>248</sup> Those numbers cannot be changed except by future constitutional amendment. It might be understandable if the citizenry had wanted to prohibit elected officials from reducing the numbers below that, but that is not the way the Amendment is worded. Certainly, there does not seem to be a significant public policy

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244. The Arkansas Medical Marijuana Commission acted promptly to remove the application forms for cultivation facilities once the submission deadline was passed, but the reference to ownership by minority groups, veterans and women is also mentioned as a “merit factor.” See MMC Regs, *supra* note 57, at § 006.28.1-IV(9)(c)(ii) (as to cultivation facilities) & § 006.28.1-V(9)(c)(ii) (as to dispensaries).

245. The applicable instructions specified that an application indicating diversity of ownership would be given “bonus points” during the selection process, with points awarded if the was “[a]t least 51% ownership in the cultivation facility by a minority group as defined in Ark. Code Ann. § 15-4-303; At least 51% ownership in the cultivation facility by veterans; or At least 51% ownership in the cultivation facility by women.” See Cultivation Application (draft), *supra* note 61, at Schedule 6b.

246. See *supra* notes 34-37 and accompanying text.

247. Medical Marijuana Amendment, *supra* note 1, at § 8(h)-(j). Under the initial licensing process, only five licenses were awarded. See *infra* note 252 and accompanying text.

248. Medical Marijuana Amendment, *supra* note 1, at § 8(h)-(j).

reason for institutionalizing such a limited number of facilities of either type, and in fact, it appears contrary to the usual goal of promoting equitable economic development and growth by opening business opportunities widely.

## V. THE COURTS GET INVOLVED

Even with all of these problems, 95 applications for cultivation facility licenses were filed by the deadline.<sup>249</sup> At a December 1, 2017 meeting, the MMC announced a timetable for the scoring of the 95 completed cultivation facility license applications, setting December 15, 2017 as the date on which commissioners would receive and begin scoring applications; February 20, 2018 as the date by which applications were to be scored; and February 27, 2018 as the date on which to announce the top five scores.<sup>250</sup> Most commissioners apparently began scoring the applications on or about the announced schedule, and the top five scores were announced on time.<sup>251</sup> On March 2, 2018, the MMC posted the cultivation facility application score breakdowns, announcing the top five scores.<sup>252</sup> Demonstrating the tangle in which Arkansas found itself as a result of the rush to comply with the time-frames in the Amendment, myriad complaints began to surface almost immediately after the MMC made its announcement.<sup>253</sup> The complaints were so widespread that the process ground to a halt, with dispensary applications being placed on hold.<sup>254</sup>

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249. Price McKeon, *Timeline Set for AR Medical Marijuana*, KARK (Dec. 1, 2017, 10:29 PM), <https://www.kark.com/news/local-news/timeline-set-about-ar-medical-marijuana-cultivation-licenses/873203263> [https://perma.cc/9FVD-RG24].

250. *Id.*

251. See *infra* note 257 and accompanying text for a notable exception to this.

252. *Cultivation Facility Score Breakdown*, ARK MED MARIJUANA COMM'N (Mar. 2, 2018), <http://www.mmc.arkansas.gov/cultivation-facility-score-breakdown> [https://perma.cc/5EPZ-RUDY].

253. The chaos that resulted had, naturally, been predicted. See, e.g., *infra* note 256 and accompanying text; Max Brantley, *Medical marijuana madness unfolds Tuesday*, ARK. TIMES: ARK. BLOG (Feb. 26, 2018), <https://www.arktimes.com/ArkansasBlog/archives/2018/02/26/medical-marijuana-madness-unfolds-tuesday> [https://perma.cc/UD2B-9984].

254. See Andrew DeMillo, *Arkansas Pauses Marijuana Dispensary Applications' Review*, SEATTLE TIMES (Apr. 11, 2018), <https://katv.com/news/local/arkansas-pauses-marijuana-dispensary-applications-review> [https://perma.cc/G79R-D32T]. Originally, the dispensary applications were supposed to have been processed within three months of the award of the cultivation facility licenses. See McKeon, *supra* note 249. This did not happen.

First, concerns were expressed about a possible conflict of interest between Commissioner Travis Story, a Fayetteville lawyer who had previously represented Jay and Mary Trulove, the sole owners of one of the winning cultivation licenses.<sup>255</sup> This was followed two days later by reports of ethics charges filed against that commissioner.<sup>256</sup>

Reports also surfaced that “[a]t least one Arkansas medical-marijuana commissioner missed the board’s self-imposed deadline to grade applications for the state’s first cannabis-growing facilities, and others tweaked their evaluations after submitting them . . . .”<sup>257</sup> One commissioner admitted that he had not even received the last application until five days after the scoring deadline.<sup>258</sup>

The next story to surface involved reports that some of the top five rated applicants were not in compliance with rules regarding tax delinquencies.<sup>259</sup> A day later, an “unsuccessful applicant filed a letter of protest with the Arkansas Medical

255. Max Brantley, *Past Associations Raise Questions on Marijuana Permit Awards*, ARK. TIMES: ARK. BLOG (Mar. 8, 2018), <https://www.arktimes.com/ArkansasBlog/archives/2018/03/08/past-associations-raise-questions-on-marijuana-permit-awards> [<https://perma.cc/UTG6-QXDT>].

256. See Hunter Field, *Ethics Filing Claims Bias by Arkansas Medical Marijuana Commissioner*, ARK. DEMOCRAT GAZETTE (Mar. 10, 2018), <http://www.arkansasonline.com/news/2018/mar/10/ethics-filing-claims-bias-by-pot-grower/> [<https://perma.cc/7WQY-KQVS>] (noting that “[a]n unsuccessful medical marijuana growing facility applicant filed an ethics complaint Friday alleging one of the commissioners tasked with grading the applications had a conflict of interest”).

257. See Hunter Field, *Text Messages Shed Light on Inner Workings of Arkansas Medical Marijuana Commission*, NW. ARK. DEMOCRAT-GAZETTE (Mar. 9, 2018), <http://m.nwaonline.com/news/2018/mar/09/text-messages-shed-light-on-inner-worki/> [<https://perma.cc/MVV9-BPGU>]. The source for this claim was records obtained under the state’s Freedom of Information Act. *Id.*

258. *Id.*

259. See Hunter Field, *Challenges to Arkansas’ 5 Picks for Medical Marijuana Growers Pour in*, ARK. DEMOCRAT GAZETTE (Mar. 13, 2018, 4:30 AM), [http://www.arkansasonline.com/news/2018/mar/13/challenges-to-state-s-5-rx-pot-grower-p/?utm\\_medium=email&utm\\_campaign=breaking-tillerson&utm\\_content=breaking-tillerson+CID\\_2fbfddd1477dff2792a3a01b3ea84fb&utm\\_source=Email%20Marketing%20Platform&utm\\_term=Challenges%20to%20Arkansas%205%20picks%20for%20medical%20marijuana%20growers%20pour%20in](http://www.arkansasonline.com/news/2018/mar/13/challenges-to-state-s-5-rx-pot-grower-p/?utm_medium=email&utm_campaign=breaking-tillerson&utm_content=breaking-tillerson+CID_2fbfddd1477dff2792a3a01b3ea84fb&utm_source=Email%20Marketing%20Platform&utm_term=Challenges%20to%20Arkansas%205%20picks%20for%20medical%20marijuana%20growers%20pour%20in) [<https://perma.cc/GT3D-8C7A>]. The source for this information was a state Department of Finance and Administration official who reportedly said on Monday, March 12, 2018 that the agency was reviewing the tax status of those associated with the winning applicants after questions were raised about possible tax delinquencies among the future cannabis growers. *Id.*

Marijuana Commission, requesting that it refrain from issuing cannabis cultivation licenses to the five highest-scoring applicants because the scoring process was flawed.”<sup>260</sup>

Perhaps not surprisingly, given the widespread criticism about how the review process had been conducted, as well as the amount of money involved, a lawsuit was filed in Pulaski County.<sup>261</sup> As a result of that complaint, on Wednesday, March 14, 2018, Judge Wendell Griffen issued a temporary restraining order, preventing the MMC from formally issuing cultivation licenses.<sup>262</sup> According to the attorney for the unsuccessful applicant who had filed the lawsuit, the process had been tainted by all “manners of inconsistencies, failure to follow their own rules, and . . . a process that wasn’t fair for the applicants themselves and ultimately the patients.”<sup>263</sup> On March 21, 2018, the original TRO was replaced with an injunction preventing the MMC from issuing the cultivation facility licenses.<sup>264</sup>

The allegations in the complaint and the ultimate findings of the court were extensive. They included a number of specific challenges to the procedures employed by the MMC.<sup>265</sup> Although the court disregarded some of the allegations, it agreed that the application form improperly omitted the requirement that a business prove it had not had its business license revoked.<sup>266</sup> It also found that the MMC had failed to take steps to verify compliance with the explicit requirement that a cultivation facility be at least “3,000 feet from a public or private school, church or daycare center.”<sup>267</sup> Finally, the court was convinced by proof of

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260. *Id.*

261. See generally *Memorandum Order Entering Preliminary Injunction & Declaratory Judgment, Naturalis Health, LLC v. Ark. Dep’t of Fin. & Admin.*, No. 60CV-18-1559 (Mar. 21, 2018), <https://www.arktimes.com/media/pdf/wendell-2.pdf> [<https://perma.cc/YB7Q-XQWG>] [hereinafter *Naturalis Mem. Order*] (describing action and resulting determinations by Judge Wendell Griffen).

262. Erika Ferrando, *Arkansas Judge Blocks State from Licensing Medical Marijuana Growers*, THV11 (Mar. 14, 2018, 6:06 PM), <http://www.thv11.com/article/money/arkansas-judge-blocks-state-from-licensing-medical-marijuana-growers/91-528518377> [<https://perma.cc/SRVD-FHRL>].

263. *Id.*

264. *Naturalis Mem. Order*, *supra* note 261, at 27.

265. *Id.* at 11-25.

266. *Id.* at 14. This requirement was part of the regulations, but the MMC did not check to see if applicants were in compliance with the ostensibly mandatory requirements. *Id.*

267. *Id.* at 15-18.

conflicts of interest and apparent bias on the part of two members of the MMC, which the order described as having been more than merely “nebulous, hypothetical, or fanciful.”<sup>268</sup> After noting that agencies must avoid “the appearance of bias” as well as actual bias in order to survive a due process challenge, the court concluded that these conflicts impermissibly tainted the MMC’s decisions.<sup>269</sup> As a result, Judge Griffen held that “the Medical Marijuana Commission and Alcoholic Beverage Control Division have proceeded in a manner that defies due process and the rule of law, rather than in a manner that respects it.”<sup>270</sup> The conclusions of the MMC were found to be “arbitrary and capricious,” and the MMC was enjoined from issuing licenses based its original findings.<sup>271</sup>

Not surprisingly, Arkansas Attorney General Leslie Rutledge objected to the order on behalf of the MMC and other agencies, filing a 630-page appeal.<sup>272</sup> After expediting its review of the order, on June 21, 2018, the Arkansas Supreme Court reversed Judge Griffen’s injunction on jurisdictional grounds.<sup>273</sup> In its opinion in *Naturalis Health*, the court determined that the agency had not conducted “an adjudication” in its decision over which applications to grant, and therefore there was “no reviewable agency action” by the MMC.<sup>274</sup> The Arkansas Supreme Court disagreed with the trial court’s position that the agency determination was “quasi-judicial” and therefore appealable.<sup>275</sup> It also found that because the agency had yet to issue final denial letters to unsuccessful applicants under the terms of its own rules, any claims that they might have were not ripe.<sup>276</sup> In a particularly salient concurrence by Chief Justice Kemp, however, the MMC was cautioned that it has “a

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268. *Id.* at 20.

269. *Naturalis Mem. Order*, *supra* note 261, at 22.

270. *Id.* at 26.

271. *Id.* at 27.

272. Wesley Brown, *Arkansas Attorney General Files Appeal In Medical Marijuana Proceedings*, KUAR PUB. RADIO (May 11, 2018), <http://ualrpublicradio.org/post/arkansas-attorney-general-files-appeal-medical-marijuana-proceedings> [https://perma.cc/WLS7-WU3C].

273. *Arkansas Dep’t of Fin. and Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 10, 549 S.W.3d 901, 908..

274. *Id.* at 7, 549 S.W.3d at 906.

275. *Id.* at 7-8, 549 S.W.3d at 906.

276. *Id.* at 10, 549 S.W.3d at 907-08.

constitutional duty to adopt rules necessary for its ‘fair, impartial, stringent, and comprehensive administration’ of the Arkansas Medical Marijuana Amendment.”<sup>277</sup>

The cautionary advice from Chief Justice Kemp seems to be well deserved. Allegations of additional irregularities, beyond those covered in the *Naturalis* Memorandum Order,<sup>278</sup> are still being made. One of the most troubling involves the offer a bribe to on the commissioners.<sup>279</sup> Hours after the hearing on the *Naturalis* injunction, and before the court issued its ruling, the Arkansas Supreme Court unsealed a letter in which state Attorney General Leslie Rutledge revealed that an unnamed MMC Commissioner (later identified as Dr. Carlos Roman) had been offered a bribe by one of the cultivation permit applicants, Natural State Agronomics.<sup>280</sup> Ramos denied having accepted the bribe,<sup>281</sup> but nonetheless failed to report it<sup>282</sup> and scored that application

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277. *Id.* at 11, 549 S.W.3d at 908 (the Court also urged “the MMC to review its rules and procedures and to cure any deficiencies.”).

278. See *Naturalis* Mem. Order, *supra* note 261 and accompanying text..

279. *Arkansas AG Letter: Arkansas Medical Marijuana Commission Member Claims He Was Bribed*, FOX NEWS 16 (June 7, 2018, 7:51 PM), <https://www.fox16.com/news/breaking-news/arkansas-ag-company-tried-to-bribe-arkansas-medical-marijuana-commission-member/1224849860> [<https://perma.cc/97DP-6R5W>].

280. *Id.*

281. In the unsealed letter, Arkansas Attorney General Leslie Rutledge reported that “[a] commissioner has said that he was offered a bribe by an applicant and that he did not report it.” The letter then identified the applicant, but not the name of the commissioner. See *Letter from Attorney General to the Arkansas Supreme Court*, ARK. DEMOCRAT-GAZETTE (June 5, 2018), <http://www.arkansasonline.com/6718letter/> [<https://perma.cc/T8MR-8EXG>] [hereinafter *Letter*]. Carlos himself later called the lawsuits “fantastical.” See Hunter Field, *Arkansas Medical Marijuana Commission Rethinks Hiring Expert*, ARK. DEMOCRAT-GAZETTE (July 13, 2018, 3:19 PM), <https://www.arkansasonline.com/news/2018/jul/13/cannabis-panel-rethinks-expert-20180713/> [<https://perma.cc/D2JB-3AKT>] [hereinafter Field, *Rethinks*].

282. Rutledge also specifically noted in the letter that the state had “no evidence that the commissioner took the bribe or based his scoring on the offer,” while opining that there is “no specific law or regulation requiring a commissioner to report a bribe attempt.” *Letter*, *supra* note 281. While it is true that the regulations and the public corruption statutes do not specifically address how a commissioner is to handle the offer of a bribe, it certainly seems intuitive that any attempt to bribe a commissioner should have been reported. It has been stated that “[a] public official already has a moral duty (and, in some states, a legal duty) to report anyone who offers a bribe.” Charles J. Stiegler, *Offering Monetary Rewards to Public Whistleblowers: A Proposal for Attacking Corruption at Its Source*, 9 OHIO ST. J. CRIM. L. 815, 816 (2012) (citing ALASKA STAT. § 11.56.124 (2010); CONN. GEN. STAT. § 53a-148a (2011)). While Arkansas statutes do not explicitly obligate public officials to report bribes, an offer to pay a bribe to a public official in Arkansas is a crime, increasing in severity

considerably higher than any other commissioner, giving it his second-highest score.<sup>283</sup>

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depending on the amount of the bribe. *See* ARK. CODE ANN. § 5-52-101 (Supp. 2017). In addition, Arkansas Code § 5-52-107, entitled Abuse of Office, makes it unlawful for a “public servant” to omit “to perform a duty imposed on him or her by law or clearly inherent in the nature of his or her office.” *See* ARK. CODE ANN. § 5-52-107 (Supp. 2017). While not as clear as a statutory provision including an express obligation to report bribery attempts, this at least raises the issue of whether the duty to report bribery attempts should be seen as a duty clearly inherent in the position of MMC Commissioner. In addition, the federal honest services doctrine may be implicated by a public official who is offered a bribe, fails to report it, and then proceeds to grant the party offering the bribe everything that was requested. *See* 18 U.S.C. § 1346 (2012), *discussed* in Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 491 n. 452 (1989). This doctrine reaches behavior by state officials who act “to deprive the people of their intangible rights to the official’s honest and impartial services.” Ellie Neiberger, *Honest Services Fraud: Federal Prosecution of Public Corruption at the State and Local Levels*, FLA. B.J., June 2010, at 82. *See also* *Skilling v. United States*, 561 U.S. 358, 408 (2010) (noting that “there is no doubt that Congress intended § 1346 to reach at least bribes and kickbacks.”)

A public official’s fraud on the public may clearly fall within the meaning of honest services fraud where dishonest conduct by the public official directly implicates the functions and duties of that official’s public office. Moreover, public officials may be held to a higher standard of public trust due to concerns that conflicts of interest may harm the public merely by giving the illusion of unfairness.

*United States v. Espy*, 989 F. Supp. 17, 25-26 (D.D.C. 1997) (internal citations omitted). Given that Commissioner Roman failed to disclose the bribe and then proceeded to award the party offering the payment his second-highest rating (a score that was out of line with every other commissioner’s assessment), there is at least the possibility that the state has not received the commissioner’s full “honest services.” For a consideration of Commissioner Roman’s actual scoring of the license application from the party that offered a bribe, and how that scoring compares to treatment by the other commissioners, see SCORE BREAKDOWN, *infra* note 283.

Obviously, the determination of whether a crime was committed by anyone in connection with the MMC licensing process is far beyond the scope of this paper, but the assertion by Rutledge that there is no “specific” law or regulation requiring that the attempted bribe be reported seems potentially misleading.

283. Possibly the best way to demonstrate the appearance of impropriety is to consider how Roman and the other MMC commissioners scored the applicant reported to have offered Roman the bribe. All of the following data can be viewed online. *See* ARK. MED MARIJUANA COMM’N, CULTIVATION FACILITY SCORE BREAKDOWN (2018), <https://www.mmc.arkansas.gov/Websites/mmsar/files/Content/6244175/CultivationFacilityScoreBreakdown.pdf> [<https://perma.cc/2CWB-NB3B>] [hereinafter MMC, *Score breakdown*]. The scoring information from Roman appears in the following table in bold font.

A second and particularly egregious impropriety, given that it was by one of the five winning applicants, Delta Medical Cannabis Co., involves allegations that it “copied key portions of its application from a competing company that didn’t score well enough to receive a license.”<sup>284</sup> Where did Delta Medical obtain

Scoring Position	Name	Miller	Roman	Henry-Tillman	Carroll	Story
1	Natural State Medicinals Cultivation	99	98	98	98	93
2	Bold Team, LLC	95	67	98	97	87
3	Natural State Wellness Enterprises	88	68	94	99	89
4	Natural State Wellness Enterprises	88	68	94	99	89
5	Osage Creek Cultivation	97.5	52.5	92.5	95.5	94.5
6	Delta Medical Cannabis Company, Inc.	88	63	92	92	97
7	River Valley Relief Cultivation	92.5	64.5	78.5	97.5	94.5
8	New Day Cultivation	90.5	77.5	97.5	91.5	70.5
9	Southern Roots	92.5	69.5	90.5	95.5	78.5
10	Delta Cannabinoid Corp.	87	60	93	93	89
54	Natural State Agronomics	67	90	66	77	73

It is also worth noting that the scoring was not a result of Roman simply scoring all applicants relatively highly. His third highest score was considerably below the points he awarded to Natural State Agronomics, as demonstrated in the following table, from the same source.

Roman Scoring Position	Composite Scoring Position	Applicant Name	Roman Numerical Score
# 1	# 1	Natural State Medicinals Cultivation	98
# 2	# 54	Natural State Agronomics	90
# 3	# 8	New Day Cultivation	77.5

Thus, when Rutledge says that there was “no” evidence that a bribe had influenced the commissioner’s scoring, at the very least the startling differential in relative ranking of that applicant’s proposal appears to muddy the waters.

284. Hunter Field, *Pot License Irregularities Uncovered*, ARK. DEMOCRAT-GAZETTE (June 30, 2018, 4:32 AM), <http://m.arkansasonline.com/news/2018/jun/30/pot-license-irregularities-uncovered-20-1/> [<https://perma.cc/F3MM-J8DA>].

the plagiarized material? Electronic evidence contained on Delta Medicals documents and emails, provided by sources to an Arkansas reporter, show that the origins of the copied provisions are accounts linked to Michael Langley, the former director of the Arkansas Alcoholic Beverage Control Division, who had also previously worked as attorney for the unsuccessful applicant whose wording had been copied.<sup>285</sup>

The Arkansas Democrat-Gazette has also reported on problems with the scoring rubrics used by the different members of the MMC.<sup>286</sup> The paper, “using records obtained under the Arkansas Freedom of Information Act, found that the five commissioners used different scoring sheets to evaluate the 95 growing permit applications. The format of the rubric each commissioner used impacted how the cultivation facility proposals were scored.”<sup>287</sup>

Other complaints have also been raised, including allegations of fraudulent misrepresentations of credentials.<sup>288</sup> As one observer has noted, taken together this amounts to “a mountain of scoring inconsistencies, missed application problems and other flaws in the process.”<sup>289</sup> Another commentator compared the number of complaints to a “flood.”<sup>290</sup>

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285. Hunter Field, *Parts of Application from Firm Awarded Medical-Pot Growing License Nearly Identical to 1 rival group’s material*, ARK. DEMOCRAT-GAZETTE (June 27, 2018, 4:30 AM), <http://m.arkansasonline.com/news/2018/jun/27/scrutiny-reveals-2-like-pot-filings-201/> [<https://perma.cc/4HTY-S7F3>].

286. See Field, *supra* note 284.

287. *Id.*

288. Laura Simon, *Local Company Files Complaint Against Medical Marijuana Licensee*, 5NEWS (Mar. 13, 2018, 6:11 PM), <https://5newsonline.com/2018/03/13/local-company-files-complaint-against-medical-marijuana-licensee/> [<https://perma.cc/E7DL-YMEQ>] (alleging that Delta Medical Cannabis Company’s listed operations specialist lied “about his medical marijuana industry experience and qualifications.”). For a listing of some of the complaints that have been made, see Hunter Field, *Challenges to Arkansas’ 5 picks for medical marijuana growers pour in*, ARK. DEMOCRAT-GAZETTE (Mar. 13, 2018, 4:30 AM), <http://www.arkansasonline.com/news/2018/mar/13/challenges-to-state-s-5-rx-pot-grower-p/> [<https://perma.cc/92VD-9E6M>].

289. Max Brantley, *More Smells Arise from MarijuanaP. Bottom line: Do it Over.*, ARK. TIMES BLOG (June 27, 2018, 7:49 AM), <https://www.arktimes.com/ArkansasBlog/archives/2018/06/27/more-smells-arise-from-marijuana-permitting-bottom-line-do-it-over> [<https://perma.cc/P92G-2L5J>].

290. Hunter Field, *Pot Panel to Peruse Dispensary Requests*, ARK. DEMOCRAT-GAZETTE (June 30, 2018, 5:30 AM), <https://www.arkansasonline.com/news/2018/jun/30/pot-panel-to-peruse-dispensary-requests-1/> [<https://perma.cc/2J6Q-KGL9>].

Notwithstanding the array of complaints and irregularities that appear to have permeated the review and selection process, on July 10, 2018, the first medical marijuana growers were officially licensed in the state.<sup>291</sup> The licenses went to the five applicants originally announced: Natural State Medicinals Cultivation, BOLD Team, Natural State Wellness Enterprises, Osage Creek Cultivation, and Delta Medical Cannabis Company.<sup>292</sup> When originally announced, the formal award of licenses had been scheduled for March 14, 2018.<sup>293</sup> Judge Griffen’s injunction temporarily prevented that from occurring.<sup>294</sup>

As for the alleged procedural and substantive issues, a spokesman for the Finance Department reported that the “host of allegations and irregularities in the process for scoring the 95 applications. . . will be investigated by the Alcoholic Beverage and Control Division.”<sup>295</sup> The MMC also scheduled meetings to consider the “next steps regarding unsuccessful cultivation application.”<sup>296</sup> This took place despite reports from industry

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291. Hunter Field, *Arkansas Awards Five Licenses for Companies to Grow Medical Marijuana*, NW. ARK. DEMOCRAT-GAZETTE (July 10, 2018, 4:32 PM), [http://www.nwaonline.com/news/2018/jul/10/arkansas-awards-five-licenses-companies-grow-medic/?utm\\_medium=email&utm\\_campaign=Arkansas%20awards%20five%20licenses%20for%20companies%20to%20grow%20medical%20marijuana&utm\\_content=Arkansas%20awards%20five%20licenses%20for%20companies%20to%20grow%20medical%20marijuana+CID\\_6c825e5955548d9e214f6e13936959b5&utm\\_source=Email%20Marketing%20Platform&utm\\_term=Read%20More](http://www.nwaonline.com/news/2018/jul/10/arkansas-awards-five-licenses-companies-grow-medic/?utm_medium=email&utm_campaign=Arkansas%20awards%20five%20licenses%20for%20companies%20to%20grow%20medical%20marijuana&utm_content=Arkansas%20awards%20five%20licenses%20for%20companies%20to%20grow%20medical%20marijuana+CID_6c825e5955548d9e214f6e13936959b5&utm_source=Email%20Marketing%20Platform&utm_term=Read%20More) [https://perma.cc/YE7C-MKN8].

292. *Id.* Compare with list originally announced in late February, 2018. *See Arkansas names 5 companies picked to grow medical marijuana*, WREG NEWS CHANNEL 3 (Feb. 28, 2018, 7:20 AM), <https://wreg.com/2018/02/28/arkansas-names-5-companies-picked-to-grow-medical-marijuana/> [https://perma.cc/HQK2-E2XR]. For a discussion of publicly available information about the winning applicants, *see* Wesley Brown, *Arkansas Delta is Home to Top Cannabis Cultivators in Emerging Industry*, TALK, BUS. & POL. (Feb. 28, 2018, 7:19 PM), <https://talkbusiness.net/2018/02/arkansas-delta-is-home-to-top-cannabis-cultivators-in-emerging-industry/> [https://perma.cc/DW68-6HR4].

293. *See* Brown, *supra* note 292.

294. Naturalis Mem. Order, *supra* note 261, at 27.

295. *See* Field, *supra* note 291.

296. *See Arkansas Panel Awards 5 Licenses for Companies to Grow Medical Marijuana*, ARK. DEMOCRAT-GAZETTE (July 10, 2018, 3:53 PM), [http://www.arkansasonline.com/news/2018/jul/10/arkansas-awards-5-licenses-companies-cultivate-med/?utm\\_medium=email&utm\\_campaign=afternoon\\_update\\_071018&utm\\_content=afternoon\\_update\\_071018+CID\\_13794748d87dd37f3194d03acdce14a&utm\\_source=Email%20Marketing%20Platform&utm\\_term=Arkansas%20awards%205%20licenses%20for%20companies%20to%20grow%20medical%20marijuana](http://www.arkansasonline.com/news/2018/jul/10/arkansas-awards-5-licenses-companies-cultivate-med/?utm_medium=email&utm_campaign=afternoon_update_071018&utm_content=afternoon_update_071018+CID_13794748d87dd37f3194d03acdce14a&utm_source=Email%20Marketing%20Platform&utm_term=Arkansas%20awards%205%20licenses%20for%20companies%20to%20grow%20medical%20marijuana) [https://perma.cc/ZJ7M-CA8S].

attorneys that “more legal challenges are coming.”<sup>297</sup> As David Couch, the attorney responsible for drafting the original Amendment to the Arkansas Constitution that legalized medical marijuana as well as being a member of an enterprise which unsuccessfully applied for a cultivation license acknowledged, “[t]his is going to be tied up in court for years.”<sup>298</sup>

Nor is this the end of the story. The foregoing “mountain” of complaints relates only to the cultivation facility license application process. There are now about 230 dispensary applications that must be considered.<sup>299</sup> Perhaps learning from some of its mistakes, the MMC quickly announced plans to consider the hiring of a consultant to assist with the dispensary license application review process.<sup>300</sup> There were initially some concerns that hiring a consultant would “delay the launch of medical marijuana initiative,” and the commission was also aware that outside experts could also “help allay public concerns following allegations of impropriety which arose during a previous licensing process.”<sup>301</sup> Commissioner Story, during the July 2, 2018 MMC meeting at which the possibility of a consultant was first discussed, expressed reservations, explaining that in his view the MMC was required to try to move as quickly as possible.<sup>302</sup> In his words, “[w]e don’t want to end up with a yearlong process hiring somebody outside, and in that time we could get it done.”<sup>303</sup> On the other hand, ABC Division Director reminded the MMC that “the ‘sheer volume’ of applications alone likely warranted an independent party’s help, as two of the

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297. Hunter Field, *Arkansas Growers Gain Licenses for Medical Pot*, ARK. DEMOCRAT-GAZETTE (July 11, 2018, 4:30 AM), [http://www.arkansasonline.com/news/2018/jul/11/growers-gain-licenses-for-medical-pot-2/?utm\\_medium=email&utm\\_campaign=morning-7-11-18&utm\\_content=morning-7-11-18+CID\\_674f9a5cbbd72bb45b09c0b3914f539d&utm\\_source=Email%20Marketing%20PIatform&utm\\_term=Arkansas%20growers%20gain%20licenses%20for%20medical%20pot](http://www.arkansasonline.com/news/2018/jul/11/growers-gain-licenses-for-medical-pot-2/?utm_medium=email&utm_campaign=morning-7-11-18&utm_content=morning-7-11-18+CID_674f9a5cbbd72bb45b09c0b3914f539d&utm_source=Email%20Marketing%20PIatform&utm_term=Arkansas%20growers%20gain%20licenses%20for%20medical%20pot) [https://perma.cc/N7BW-2PQT] [hereinafter *Growers gain*].

298. *Id.*

299. *See Arkansas Panel Awards 5 Licenses for Companies to Grow Medical Marijuana*, *supra* note 296.

300. Hannah Grabenstein, *Medical Marijuana Commission to Explore Hiring Consultant*, AP (July 3, 2018), <https://www.apnews.com/8e5ab2eabd43eba0fbaa9d37824d54/Medical-Marijuana-Commission-to-explore-hiring-consultant> [https://perma.cc/XV3Q-HEDQ].

301. *Id.*

302. *Id.*

303. *Id.*

commissioners' terms expire at the end of November."<sup>304</sup> Ultimately, the commissioners unanimously voted to explore the possibility of looking for an outside consultant.<sup>305</sup>

Less than two weeks later, at a follow-up meeting, the MMC unanimously voted to seek legislative approval for a rule change allowing "the panel to outsource dispensary application scoring."<sup>306</sup> Commissioners, during the hearing, seemed to focus on the question of whether a consulting company would be able to finish scoring the dispensary applications faster than the commissioners.<sup>307</sup> In addition, however, a staff attorney also explicitly stated that "hiring a consultant would likely shield the process from legal challenges."<sup>308</sup>

References to the possibility of a year-long process, and concern over the fact that some MMC members' terms expire in a matter of months, do not provide any assurance that the issue of which dispensary applications will be accepted can be resolved any time soon.<sup>309</sup> If the MMC does decide to rely on outside consultants, it is unlikely to be able to begin the process to hire the experts for a few months because of the time required for even an emergency rule change.<sup>310</sup> It will need to set requirements for the consultants, set a bidding process and time-frame for those requirements, and then evaluate applications. In addition, once any such consultant or team is hired, the actual review process will still have to take place, and there is still the risk that the process itself might involve the same kind of problems that have plagued the cultivation facility application review process. The overly optimistic assertion from the ABC in December of 2017 that "medical marijuana could be on the shelves by the middle of 2018"<sup>311</sup> has proven to be wishful thinking.

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304. *Id.*

305. Erika Ferrando, *Arkansas's Medical Marijuana Commission to Consider Hiring Consultant*, KTHV (July 2, 2018, 10:12 PM), <https://www.thv11.com/article/news/local/arkansass-medical-marijuana-commission-to-consider-hiring-consultant/91-570147418> [<https://perma.cc/HLR4-RMHX>].

306. *See* Field, *Rethinks*, *supra* note 281. .

307. *Id.* One of the commissioners, Dr. Carlos Ramos, specifically opined that "[f]rom a time standpoint, it sounds like [hiring a consultant] is the quickest way there." *Id.*

308. *Id.*

309. *Id.*; *see supra* note 305 (statements made in source video expressing concern over the brevity of some MMC members' remaining terms).

310. *See* Field, *Rethinks*, *supra* note 281.

311. McKeon, *supra* note 249.

## VII. FIXING SOME OF THE MOST GLARING PROBLEMS

### A. FEDERAL HELP

Putting aside for the moment the issue of how to deal with the manner in which cultivation facility license applications have been handled, the easiest, most obvious, and most helpful change in order to make medical marijuana work as Arkansas voters intended, as well as accomplishing the same result in other states that have also approved legalized marijuana, would be for the federal government to remove the drug from the Controlled Substances Act.<sup>312</sup> If possession, cultivation, and distribution of marijuana were not federal crimes, an entire panoply of potential issues that are problematic for marijuana businesses would disappear. Not only would persons involved in the cultivation, dispensing, prescribing, or use of medical marijuana in Arkansas be free from worry about the risk of federal prosecution for actions that are “legal” under state law,<sup>313</sup> but an entire range of negative collateral consequences would also disappear.

Marijuana businesses authorized by state law would no longer be penalized by the federal tax code, and would be entitled to claim usual and ordinary business expenses as deductions.<sup>314</sup> The problems faced by banking institutions would also disappear,<sup>315</sup> which would mean that marijuana businesses would no longer face the potential problems of being a cash-only business. Legal advice could be easier to obtain.<sup>316</sup> Other professionals, who might also be leery of the risk of being held

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312. As mentioned earlier, Marijuana is currently listed as a Schedule I drug under the federal Controlled Substances Act, placing it on a par with some of the most dangerous drugs in the country. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), codified as amended at 21 U.S.C.A. §§ 801-971 (2012).

313. For a discussion of the risks of federal prosecution under the current regime, *see supra* notes 78-81 and accompanying text.

314. For a discussion of the problems faced by marijuana businesses under the current Tax Code, *see supra* notes 105-14 and accompanying text.

315. For a discussion of how federal criminalization of marijuana impacts banks and the availability of banking services for marijuana businesses, *see supra* notes 115-22 and accompanying text.

316. The risks to legal professionals who may be found to be assisting in the commission of a crime if they aid marijuana businesses are discussed. *See supra* notes 123-128 and accompanying text.

accountable for conspiracy or aiding and abetting conduct that is illegal under federal law, might also be more willing to provide effective assistance to marijuana businesses.<sup>317</sup> Even the potentially adverse collateral impacts on consumers of “legal” marijuana could be mitigated if the federal government acted to remove marijuana from the Controlled Substances Act.<sup>318</sup>

The obvious problem with this “solution” is that it appears exceedingly unlikely, at least under the current administration.<sup>319</sup> Despite widespread support among potential voters,<sup>320</sup> it does not even appear likely that marijuana will be removed from Schedule 1 or 2, meaning that penalties for its possession and use are likely to remain high.

Equally obviously, amending the Federal Controlled Substances Act to take marijuana out of the list of proscribed drugs does not remove all practical problems. Beyond the problem of federal laws, laws in our neighboring states also proscribe and in most cases criminalize possession of marijuana, in addition to regulating its sale or possession with an intent to distribute.<sup>321</sup> This means that Arkansas businesses would still

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317. The potential for liability for professionals who “assist” in a marijuana business that is ostensibly legal under state law has been commented on by others. The potential for liability includes the risk of engaging in a “federal criminal conspiracy in violation of 18 U.S.C. § 371 (which would result in the member’s culpability for the wrongdoing of all others within the scope of the entire conspiracy), aiding and abetting the client in violation of 18 U.S.C. § 2, and misprision of felony in violation of 18 U.S.C. § 4 (concerning the knowing concealment of a felony and failure to inform law enforcement).” See L.A. Ethics Opinion, *supra* note 128, at 64.

318. These potential adverse collateral consequences for individuals include the potential loss of transportation jobs, discussed *supra* at notes 132-34 and accompanying text; jeopardizing the availability of federal housing assistance, discussed *supra* at notes 135-39 and accompanying text; and potential impact on the ability of consumers to exercise their Second Amendment rights to buy firearms, discussed *supra* at notes 140-42 and accompanying text.

319. For an assessment of the current administration’s attitudes towards marijuana, see *supra* notes 87-93 and accompanying text.

320. A Gallup poll from October of 2017 indicated that 64% of Americans supported legalization of marijuana, with the numbers including a majority of Republicans surveyed. See Louis Nelson, *Poll: Growing Number of Americans Support Marijuana Legalization, Including Republicans*, POLITICO (Oct. 25, 2017, 11:23 AM), <https://www.politico.com/story/2017/10/25/poll-americans-support-marijuana-legalization-244155> [<https://perma.cc/5U5V-TJ9A>].

321. For example, in Missouri and Oklahoma, possession, sale and trafficking are all prohibited. See MO. ANN. STAT. §§ 579.015 to 579.040, 579.065 to 579.068 (West 2018); OKLA. STAT. ANN. 63 §§ 2-402, 2-406 (West 2018).. Both possession and sale are prohibited in Tennessee and Texas. See TENN. CODE ANN. § 39-17-417 (West 2018); TEX. HEALTH &

have the problem of deciding how to import seeds or root stock legally from other jurisdictions, as well as the additional problem of sending materials out of state to be tested for quality control purposes, at least while there are no qualified in-state labs performing such services.<sup>322</sup> Although expensive, it might be possible to fly everything in and out of the state, but that raises issues of security and control over the samples as well as being substantially more expensive than transportation via truck, even if the truck needed to be secured or armored.<sup>323</sup>

Of course, other changes of the federal law might also help alleviate some of the preceding issues. For example, the Tax Code does not have to eliminate ordinary business deductions for the sale of marijuana.<sup>324</sup> It would probably take Congressional action, but the Code could be amended to clarify that the limitation on deductions for drug trafficking businesses does not include marijuana businesses that are in compliance with applicable state law.<sup>325</sup>

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SAFETY CODE ANN. §§ 481.120-121 (West 2018).. Since 2016, Louisiana has allowed certain residential patients to possess small amounts of medicinal marijuana, but there are apparently no legal sources of marijuana in that state. Jacqueline Paumier, *Is Cannabis Legal in Louisiana*, CIVILIZED (June 11, 2017), <https://www.civilized.life/articles/is-cannabis-legal-in-louisiana/> [<https://perma.cc/VU2E-GNYH>]. Mississippi has decriminalized possession of small amounts of marijuana (defined as less than 30 grams), but it is still prohibited, with possession of larger amounts carrying substantially greater penalties. *See* MISS. CODE ANN § 41-29-139(c)(2)(A) (West 2018).

322. As mentioned earlier in this article, as of the date this was written there were no testing facilities available in the state of Arkansas. The Arkansas Department of Health is supposed to list laboratories approved to test medical marijuana, but as of March, 2018, no such facilities were listed on the DoH site. *See Medical Marijuana Resources*, Ark. Dep't of Health, <http://www.healthy.arkansas.gov/programs-services/topics/medical-marijuana-resources> [<https://perma.cc/69ET-PPSK>]. The site does have a link to "Testing Laboratory Application Form." *See* ARK. DOH, *Medical Marijuana Testing Laboratory Information*, [http://www.healthy.arkansas.gov/images/uploads/pdf/Lab\\_Form\\_20170706.pdf](http://www.healthy.arkansas.gov/images/uploads/pdf/Lab_Form_20170706.pdf) [<https://perma.cc/8HXX-WDHV>]. This suggests that progress is being made, although prospective cultivation facilities still have no way of knowing where such facilities may ultimately be located, or what they plan on charging for their services.

323. For a consideration of the problems of medical marijuana being too expensive to compete, *see supra* notes 229-31 and accompanying text.

324. As currently written, the Internal Revenue Code disallows business expense deductions for businesses engaging in the trafficking in controlled substances within the meaning of Schedules I and II of the Controlled Substances Act. *See* 26 U.S.C. § 280E (2012). *See also supra* notes 110-14 and accompanying text for a discussion of the federal taxation of marijuana businesses.

325. Currently, the Tax Code disallows ordinary business deductions for a business that involves "trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State

Similarly, the banking regulations could be amended to remove from marijuana businesses the additional reporting obligations and other requirements that are imposed when a bank accepts deposits from such a business.<sup>326</sup> Under current rules, it can be very difficult for marijuana businesses to obtain access to regular banking services.<sup>327</sup> Aside from the admittedly remote possibility that financial institutions could be prosecuted for aiding and abetting or otherwise impermissibly assisting a marijuana business in the commission of a federal crime,<sup>328</sup> banks “risk losing money as a result of criminal and civil forfeiture laws allowing federal officials to seize marijuana-related property, including bank accounts.”<sup>329</sup> In addition, financial institutions are expected to watch for, discover, and report illegal activity, including activity connected with trafficking in controlled substances.<sup>330</sup>

For example, the Money Laundering Act<sup>331</sup> imposes criminal sanctions on persons who knowingly conduct financial transactions “designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds . . . or to avoid a transaction reporting requirement” where the proceeds were derived from distribution

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in which such trade or business is conducted.” *See* 26 U.S.C. § 280E (2012). From the perspectives of a business operating in compliance with state law, the limitation could be avoided if the Code provision required the sale to be illegal under both federal law and the state in which the trade or business is conducted. Alternatively, removing the drug from Schedule I or II of the Controlled Substances Act would also accomplish this result.

326. *See supra* notes 115-122 and accompanying text.

327. “It is well documented that marijuana-related entities in states where marijuana is legal have difficulty obtaining banking services.” *See Hill, supra* note 115, at 600 (citing Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 47 (2014)). *See also supra* notes 115-22 for a discussion how lack of access to banking services impacts marijuana businesses.

328. Federal law imposes liability on anyone who “aids, abets, counsels, commands, induces or procures” the commission of “an offense against the United States.” *See* 18 U.S.C. § 2 (2012). The risk of aiding and abetting liability is therefore not insignificant given marijuana’s classification as a Schedule I drug under federal law.

329. *See Hill, supra* note 115 at 610. As support for her conclusions, Hill cites “21 U.S.C. §§ 853, 881(a)(6) (2012) (providing for criminal and civil forfeitures) and Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 815-18 (2004) (discussing the use of federal criminal and civil forfeiture statutes in the enforcement of federal drug laws).” *Id.* at 610.

330. *Id.* at 610-16.

331. *See generally* 18 U.S.C. §§ 1956-57 (2012 & Supp. V 2017).

of controlled substances such as marijuana.<sup>332</sup> In addition, the Act also says that “knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property of a value greater than \$10,000” is money laundering.<sup>333</sup> Under both the Bank Secrecy<sup>334</sup> and USA Patriot Act,<sup>335</sup> financial institutions are required to have programs specifically designed to prevent money laundering.<sup>336</sup> For businesses with a greater likelihood of being involved in money-laundering, like businesses that are “cash-intensive” (such as marijuana-based enterprises), “financial institutions must know the purpose of each account, the source of funds in the account, and the customer’s primary trade area.”<sup>337</sup> Currency reports are required for any transaction involving more than \$10,000 in cash,<sup>338</sup> or more than \$5,000 if the bank even suspects that the amounts are proceeds “from illegal activities.”<sup>339</sup> A regulatory exemption from the detailed reporting requirements if the financial institution reasonably believes that the proceeds are from a marijuana business that is legal under state law would again go a very long way in limiting the burdens on financial institutions, which in turn would make it more likely that marijuana business could obtain reasonable banking services.<sup>340</sup>

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332. *Id.* § 1956(a)(1)(B). The statute talks in terms in “specified unlawful activity,” but the “manufacture, importation, sale, or distribution” of controlled substances such as marijuana are expressly included within the definition of that phrase. *Id.* §§ 1956(c)(7); *id.* § 1957(f)(3).

333. *Id.* § 1957(a).

334. *See generally* Bank Secrecy Act (BSA) of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered titles of the U.S.C.).

335. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

336. For example, the Bank Secrecy Act requires financial institutions to have “internal [anti-money laundering] policies, procedures, and controls,” a “compliance officer,” “ongoing employee training,” and “an independent audit function to test programs” all designed to prevent money laundering. 31 U.S.C. § 5318(h) (2012); 31 C.F.R. § 1020.220 (2017).

337. *See Hill, supra* note 115, at 612-23.

338. 31 U.S.C. § 5313(a) (2012); 31 C.F.R. § 1010.311 (2017).

339. 31 C.F.R. § 1020.320(a)(2) (2017).

340. This is also a concern that goes beyond merely making it “easier” for a marijuana business to succeed. As one commentator noted, “[a]ll-cash income streams inevitably attract criminal activity, make state and federal tax enforcement difficult, and leave revenue and commodities produced by the industry outside of the larger marketplace where they could serve to foster economic viability on a greater scale.” Tyler T. Buckner, *Rocky Mountain High: The Impact of Federal Guidance to Banks on the Marijuana Industry*, 19 N.C. BANKING INST. 165, 181 (2015); accord Elizabeth Dolan McErlean, *The Real Green Issue*

It should also be possible to amend other federal rules and regulations imposing collateral consequences as a result of possessing, cultivating, or using marijuana in a manner that is legal under state law, regardless of whether it is removed from Schedules I or II of the Controlled Substances Act. Short of that, it would even be possible to reinstate a number of Obama-era policies suggesting that enforcement of federal anti-marijuana laws would be a low priority.<sup>341</sup> All of these actions, however, appear to be relatively unlikely at the current time, as well as being outside of the control of the state.

The best the state can do for these kinds of issues (other than to work for gradual change at the federal level) is to create in-state “work-arounds” and to work as quickly as possible to bring all required activities into the state. What sort of “work-arounds” are possible? Certainly, Arkansas could decline to enforce federal criminal sanctions that conflict with state law and priorities. The state could adopt professional standards that permit the activities in question. Arkansas could perhaps negotiate with neighboring states to permit transportation, testing, or importation of marijuana under certain conditions. Of course, those really are work-arounds, and the best solution to problems created by federal law is to wait for the amendment of federal law. This was not possible given the short time frame mandated by the Arkansas Constitutional amendment, but one cost of the abbreviated time frame is a set of rules and regulations that are clearly not in compliance with federal law.

In addition to those kinds of concerns, all of which are really created by laws outside of Arkansas over which this state has little control, there are still a number of issues with the current Arkansas medical marijuana rules and regulations. These need to be addressed as soon as possible and include things like addressing in-state transportation of marijuana, approval of in-state testing facilities, clarifying standards for the transfer of licenses, reconsidering rules regarding simple changes in

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*Regarding Recreational Marijuana: Federal Tax and Banking Laws in Need of Reform*, 64 DEPAUL L. REV. 1079, 1081 (2015) (noting that “[w]ithout access to banking services, marijuana businesses are required to hold onto large amounts of cash, making them vulnerable to theft and difficult to regulate.”).

341. This would require undoing Attorney Jeff Sessions’ recent decisions in this regard. *See supra* notes 88, 91, 93 and accompanying text.

ownership or board/manager positions that implicate business governance, clarifying rules of professional conduct for professionals such as lawyers rendering legal advice or physicians offering medical referrals. These kinds of issues were clearly caused by the short time period in which state officials were required to act, presumably a consequence of voters' (and the drafters of the constitutional amendment) failure to understand how much time this kind of initiative would require for complete and coherent implementation.

A secondary level of concern exists with regard to unreasonably expensive requirements that limit the potential for the new laws to provide the anticipated benefits to the state.<sup>342</sup> Requirements such as appropriate storage of waste materials from cut marijuana plants and the stringent building requirements for cultivation facilities (which is potentially a huge issue if and when expansion is needed) should be reconsidered.

The reality is that many of these issues should have been considered in advance, as part of a cohesive legal and administrative plan to legalize medical marijuana. Instead, the incredibly short time frame mandated by the constitutional amendment made a smooth transition virtually impossible. Perhaps worst of all, one of the most troubling aspects of the current rules (the extremely limited number of facilities authorized) was not only mandated by the voters in the constitutional amendment process, but cannot be legislatively adjusted because the amendment has placed the power to amend those numbers in the hands of the public.<sup>343</sup>

## B. WHAT TO DO ABOUT THE APPLICATION PROCESS

Obviously, the state is not in a position to go back, change the Amendment, adopt different rules and procedures, or retroactively change how the cultivation facility license applications were handled.<sup>344</sup> Whatever errors, deficiencies,

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342. See *supra* note 231.

343. Medical Marijuana Amendment, *supra* note 1, §§ 8(h)–(j), 23(b) (prohibiting amendments to limitations on the amount of issued *dispensary* licenses but not on *cultivation* licenses).

344. Nor is it clear that there would be universal agreement on what changes might have been made. Aside from the obvious conclusion (in hindsight, particularly) that it would

problems, and irregularities occurred during the application and review process, the parties involved now need to move forward. The real question is how to best do that. In addressing this issue, there are a number of different constituents to think about. There are the members of the public interested in access to legal (within the state at least) medical marijuana;<sup>345</sup> various regulators (including the DoH, ABC, and MMC, and their members to the extent they are involved in medical marijuana);<sup>346</sup> the cultivation facility license applicants;<sup>347</sup> and the dispensary license applicants.<sup>348</sup> Each of those groups have very different interests to consider.

As of September 14, 2018, there were 6,028 approved medical marijuana ID cards in Arkansas,<sup>349</sup> although none have

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have been preferable to act somewhat more slowly and with more deliberation in the evaluation process, various commissioners have defended how the MMC has acted to date. *See* Field, *supra* note 281. Chairwoman Dr. Ronda Henry-Tillman, for example, expressed an opinion that she did not believe there was a problem with the scoring, and that the commission had been completely unbiased. *Id.*

345. Persons eligible to use and possess medical marijuana in the state are outlined in the Amendment. *See* Medical Marijuana Amendment, *supra* note 1, §§ 2(13)–(14), (18), 5 (defining a designated caregiver in section 2(6); defining a qualifying patient in section 2(14); listing the qualifying medical conditions in section 2(13); and establishing the patient registration requirements in section 5)

346. The Arkansas Department of Health has information on its website. *Medical Marijuana*, ARK. DEP'T OF HEALTH, <https://www.healthy.arkansas.gov/programs-services/topics/medical-marijuana> [<https://perma.cc/RV3R-RWV6>] [hereinafter *Medical Marijuana*, Ark. Dep't of Health]. The ABC also has relevant information on its website, *Alcoholic Beverage Control*, ARK. DEP'T OF FINANCE AND ADMIN., <https://www.dfa.arkansas.gov/alcoholic-beverage-control/> [<https://perma.cc/B4AG-PDQR>] and lists the Board Members, *ABC Board Members*, ARK. DEP'T OF FINANCE AND ADMIN., <https://www.dfa.arkansas.gov/alcoholic-beverage-control/abc-board-members/> [<https://perma.cc/9TDB-9RCW>]. Additionally, the Medical Marijuana Commission's website contains relevant information. *MED MARIJUANA COMM'N*, <https://www.mmc.arkansas.gov/> [<https://perma.cc/9T5Z-JT47>]. There is also a general information site on medical marijuana maintained by the State of Arkansas. *Medical Marijuana*, ARK.GOV, <https://portal.arkansas.gov/pages/medicalmarijuana/> [<https://perma.cc/JD2W-38TG>].

347. The list of 95 cultivation facility license applicants may be found online by looking at the score breakdowns. *See* MMC, *Score breakdown*, *supra* note 283.

348. The 227 dispensary applications are available in a very heavily redacted and unorganized format. ARK. MED. MARIJUANA COMM'N, *DISPENSARY AND CULTIVATION APPLICATIONS* (2018), <https://www.mmc.arkansas.gov/schedule-a-dispensary-and-cultivation-applications>. [<https://perma.cc/Z6R3-6JHH>].

349. The marijuana ID cards are available online. *See* *Medical Marijuana*, ARK. DEP'T OF HEALTH, *supra* note 346.

yet been printed.<sup>350</sup> Patient groups have generally complained about the many delays in the process.<sup>351</sup> It had been widely expected that the first medical marijuana dispensaries would open within a year of the adopting the Amendment which sought to make the drug available on a legal basis in the state.<sup>352</sup> While the Amendment already makes it legal for qualifying patients and their caregivers to have up to two and one-half ounces of marijuana in their possession,<sup>353</sup> until the dispensaries are up and functioning there is still no legal supply of marijuana in state. This means that patients can either wait until such time, which is still many months in the future, or they can obtain their marijuana from illegal sources.<sup>354</sup> Once the drug is in a qualified patient's possession, they have an affirmative defense against any state prosecution for possession,<sup>355</sup> but there is no quality control or assurance that a patient is buying an appropriate strain of the plant.<sup>356</sup>

In reality, the public's options are limited. A person who would be eligible for legal medical marijuana in the state cannot obtain it until the cultivation facilities are up and running, the marijuana is available for sale, and the dispensaries open. The reality is that this is, even in a best case scenario, many months away.<sup>357</sup> Complaints to the MMC may be cathartic, but are

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350. *Id.* (noting that the cards will not be printed until a month before dispensaries begin to operate).

351. See, Hunter Field, *Medical Cannabis Delays Vexing to Patients in State*, ARK. DEMOCRAT-GAZETTE (July 12, 2018, 4:30 AM), <http://m.arkansasonline.com/news/2018/jul/12/medical-cannabis-delays-vexing-to-patie/> [<https://perma.cc/3ESP-JLSS>] [hereinafter Field, *Vexing*].

352. *Id.*

353. Medical Marijuana Amendment, *supra* note 1, §§ 3(a), at 7. This section of the Amendment lists protections for persons using medical marijuana, but by its terms requires the patient to have in his or her possession a registry identification card. *Id.* Which according to the MMC “will not be available for printing until 1 month prior to Medical Marijuana availability in Arkansas dispensaries.” *Medical Marijuana*, ARK. DEP'T OF HEALTH, *supra* note 346. However, section 7 offers an affirmative defense to possession pursuant to which the qualifying patient need not have physical possession of the card. Medical Marijuana Amendment, *supra* note 1, § 7(c).

354. Field, *Vexing*, *supra* note 351.

355. See *supra* note 353.

356. These very concerns were recently expressed by an anonymous patient who has elected to obtain her medicine illegally. Field, *Vexing*, *supra* note 351.

357. Reports are that “industry experts expect the drug to be available in Arkansas sometime in 2019.” Field, *Rethink*, *supra* note 281 (emphasis added). Given the history to date with medical marijuana in Arkansas, as well as the fact that this assumes no further legal

unlikely to produce real change.<sup>358</sup> This leaves qualified patients with the option of waiting, acquiring the marijuana from illegal sources, seeking alternative treatments,<sup>359</sup> or relocating to other states where marijuana is more widely and legally available.<sup>360</sup>

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action interfering with the process, this could be optimistic. An 18-month time frame is especially questionable given that it is dependent upon the legislature accepting the MMC's proposed rule changes and also requires a period of time in which the MMC would need to decide upon the qualifications of persons from whom to solicit bids, conduct the bid solicitation process, and then wait for the necessary time period in which any selected consultants would actually evaluate and score the pending applications.

358. For example, during the July 12, 2018 MMC meeting, which was open to the public, “[p]atients and hopeful applicants at times could be heard in the audience murmuring in disapproval of the commission.” Field, *Rethink*, *supra* note 281. This only prompted the commissioners to defend their actions and did not result in significant changes to the process. Little Rock attorney David Couch, the author of Issue 6 (which eventually became Amendment 98) had complained that the entire process had “lost its patient focus.” Field, *Vexing*, *supra* note 351. He had been seeking to have the MMC scrap its merit-based system in favor of a lottery similar to liquor permitting. *Id.* This would actually have delayed matters as new regulations would have had to be drafted and implemented, and likely challenges from the top-scoring five applicants would have had to be addressed. In addition, Couch was interested in the outcome, as he “is also a member of Boll Weevil Farms of the Delta, which applied unsuccessfully for a cultivation license.” Field, *Growers gain*, *supra* note 297. The public might move forward with alternative ballot initiatives, such as one that would allow “qualified patients” to grow their own marijuana, perhaps so long as they were limited to a single plant of a maximum size. However, outside of such a relatively unlikely option, which would take just as much if not more time, there is nothing to do but wait.

359. In addition to conventional medication, one alternative is cannabidiol, or CBD, a chemical found in marijuana and hemp “which several proponents and customers say can ease such ailments as pain and anxiety without the high or hassle of marijuana.” Dan Holtmeyer, *Hemp-derived CBD takes off in Northwest Arkansas as Medical Marijuana Lags*, *NW. ARK. DEM. GAZETTE* (July 15, 2018, 1:07 AM), [http://www.nwaonline.com/news/2018/jul/15/hemp-derived-cbd-takes-off-in-northwest/?utm\\_medium=email&utm\\_campaign=NWADG%20Morning%20Update%207-15&utm\\_content=NWADG%20Morning%20Update%207-15+CID\\_a596285fc37f003dbddb8b6c75c4d3de&utm\\_source=Email%20Marketing%20Platform&utm\\_term=A%20component%20of%20the%20marijuana%20plant%20is%20taking%20off%20in%20popularity%20around%20Northwest%20Arkansas%20sellers%20say%20though%20two%20doctors%20warned%20the%20substance%20isnt%20the%20cure-all%20some%20might%20suggest](http://www.nwaonline.com/news/2018/jul/15/hemp-derived-cbd-takes-off-in-northwest/?utm_medium=email&utm_campaign=NWADG%20Morning%20Update%207-15&utm_content=NWADG%20Morning%20Update%207-15+CID_a596285fc37f003dbddb8b6c75c4d3de&utm_source=Email%20Marketing%20Platform&utm_term=A%20component%20of%20the%20marijuana%20plant%20is%20taking%20off%20in%20popularity%20around%20Northwest%20Arkansas%20sellers%20say%20though%20two%20doctors%20warned%20the%20substance%20isnt%20the%20cure-all%20some%20might%20suggest) [https://perma.cc/6Q2Q-QFXT]. Marketed as an herbal supplement, CBD is not regulated as a medicine and, therefore, lacks quality control normally associated with legal medication. *Id.* In addition, at least one representative from the U.S. Drug Enforcement Administration has said that “the agency considers CBD illegal despite its wide sales and its lack of THC, the compound that creates marijuana’s high.” *Id.*

360. While it may seem unlikely that someone would relocate simply for a change to legally access marijuana, some have claimed that this is indeed happening. Cory Hunt has long been an advocate for legal marijuana in the state and is currently an applicant for a dispensary license. Ferrando, *Expectations*, *supra* note 231. According to Hunt, “People are fleeing Arkansas . . . They’re going to Colorado, California to get access to this medicine.” *Id.*

With regard to the members of the ABC, DoH, and MMC, there is certainly some good news with regard to the issue of whether any of the individuals involved are likely to face personal liability in any civil action against them. In this regard, the probable answer is a straightforward “no.” In 2016, the Arkansas Supreme Court emphasized that “[s]overeign immunity for the State of Arkansas arises from express constitutional declaration,”<sup>361</sup> perhaps hinting at the direction it would take less than two years later in *Board of Trustees of the University of Arkansas v. Andrews*.<sup>362</sup> In *Andrews*, the highest court in Arkansas concluded that Article V, Section 20 of the Arkansas Constitution, which reads that: “[t]he State of Arkansas shall never be made defendant in any of her courts,”<sup>363</sup> means that the even the legislature lacks the authority to waive sovereign immunity against the state.<sup>364</sup> The actual defendants in *Andrews* were not actually the state, but rather the Board of Trustees of the University of Arkansas.<sup>365</sup> This is, however, not at all surprising since it is well established that sovereign immunity extends to other state actors.<sup>366</sup> Indeed, the constitutional grant of sovereign immunity to the state is “a general prohibition against awards of money damages in lawsuits against the State of Arkansas *and* its institutions.”<sup>367</sup>

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361. *Johnson v. Butler*, 2016 Ark. 253, 7, 494 S.W.3d 412, 417.

362. *See generally* Bd. of Tr. of Univ. of Ark. v. *Andrews*, 2018 Ark. 12, 535 S.W.3d 616.

363. ARK. CONST. art. 5, § 20.

364. *Andrews*, 2018 Ark. at 11, 535 S.W.3d at 623 (concluding that “the General Assembly cannot waive the State’s immunity”).

365. *Id.* at 1, 535 S.W.3d at 617 (stating that it was also the Board of Trustees that filed the interlocutory appeal).

366. *Page v. McKinley*, 196 Ark. 331, 118 S.W.2d 235, 237-38 (Ark. 1938) (finding that sovereign immunity protects officers of the state and state agencies even if the state is not specifically named). *Accord* HOWARD W. BRILL & CHRISTIAN H. BRILL, *Actions against the State of Arkansas*, 1 ARK. L. OF DAMAGES § 22:1 (6th ed. Nov. 2017 Update) (“Immunity applies even if the named defendants are individuals”).

367. Brill & Brill, *supra* note 366, § 22:1 (emphasis added) (citing *Weiss v. McLemore*, 371 Ark. 538, 268 S.W.3d 897 (2007); *Cross v. Ark. Livestock & Poultry Comm’n*, 328 Ark. 255, 258, 943 S.W.2d 230, 232, (1997)).

This doctrine applies only to civil actions<sup>368</sup> seeking monetary damages,<sup>369</sup> and it is still possible to have suits seeking to halt actions that would be beyond the agency's or officer's legal power or authority.<sup>370</sup> Similarly, sovereign immunity would not bar litigation seeking to prevent actions that "illegal, arbitrary or capricious."<sup>371</sup> The complaint that was considered by Judge Griffen in his memorandum order enjoining the MMC from granting the cultivation facility licenses had relied on these very claims.<sup>372</sup> Although sovereign immunity for the state will not insulate the officials from any crimes committed during the course of their official duties, and may not bar suits to enjoin certain actions by the agencies, it certainly offers a measure of reassurance to individual commissioners and agency members regarding their potential legal liability if civil actions are brought criticizing agency and commission decisions. This reality may be particularly important because additional litigation is seen as being quite likely.

Following the final award of cultivation facility licenses, speculation was rampant that additional lawsuits would soon follow.<sup>373</sup> "Alex Gray, an attorney for the Arkansas Medical Marijuana Association, said Tuesday that he expects more lawsuits to be filed against the commission. . . ."<sup>374</sup> In addition, ABC staff members providing support to the MMC have

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368. Criminal prosecutions are not barred under the doctrine. Even criminal contempt actions are possible. "Arkansas courts have recognized the power to punish criminal contempt as an inherent judicial power and have recognized, at least in *dicta*, criminal contempt as an exception to the sovereign immunity doctrine." Jeff Broadwater, "*Too Plain to Be Misunderstood: Sovereign Immunity in Arkansas*," ARK. LAW., Summer 1999, at 16, 17.

369. An injunction to bar a state from proceeding with an illegal action or without complying with the requirements of law is not proscribed by the doctrine of sovereign immunity. *Bryant v. Ark. St. Hwy. Comm'n*, 233 Ark. 41, 342 S.W.2d 415 (1961) (stating that "an injunction, restraining the commissioners from acting illegally, was not regarded as a prohibited suit against the State.")

370. See Brill & Brill, *supra* note 366 at § 22:1 (citing *Key v. Curry*, 2015 Ark. 392, 473 S.W.3d 1, 325 Ed. Law Rep. 549 (2015) (actions of State Board of Education in taking over Little Rock School District were permitted by statute and were not ultra vires); *Fitzgiver v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234, 305 Ed. Law Rep. 566 (2013) (actions of State Department of Education were permitted by statute)).

371. Brill, *supra* note 366 at § 22:1 (citing *Villines v. Lee*, 321 Ark. 405, 902 S.W.2d 233 (1995); *Solomon v. Valco, Inc.*, 288 Ark. 106, 702 S.W.2d 6 (1986)).

372. See *supra* notes 261-71 and accompanying text.

373. Field, *Growers gain*, *supra* note 297.

374. *Id.*

confirmed receipt of “about a dozen protest letters from unsuccessful applicants,” which will have to be investigated in order to determine where “any growing licenses should be revoked.”<sup>375</sup> None of those, however, implicate the work of or potential liability of individual MMC commissioners.

Aside from these ongoing investigations, and pending any further litigation seeking to meet the standards announced by the Arkansas Supreme Court in the *Naturalis Health*,<sup>376</sup> the best advice for the MMC is simply to move forward. The three rule-changes proposed at the MMC’s July 12, 2018 meeting appear to be positive steps in this direction.<sup>377</sup> The first, mentioned above, would allow the appointment of outside experts to review dispensary applications.<sup>378</sup> The next proposed change “would allow the commission to maintain unsuccessful applications for growing and selling licenses for two years, so that the next highest-scoring company could be selected for a permit if a top-company’s license is revoked,” and the final rules would authorize “a double-blind lottery to determine the winner of license in case of a tie.”<sup>379</sup> Both of these changes are likely to speed the process along, while any retroactive changes to the rules (and certainly any modification to the scoring rubric) would have encouraged the five successful cultivation facility applicants to

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375. Field, *Rethink*, *supra* note 281.

376. Ark. Dep’t of Fin. & Admin. v. *Naturalis Health*, 2018 Ark. 224, 549 S.W.3d 901; *see supra* notes 273-277 and accompanying text.

377. Field, *Rethink*, *supra* note 281. The attorney for the Arkansas Medical Marijuana Association, in conversations with an Arkansas reporter covering the medical marijuana situation in the state, specifically noted the MMC’s desire to avoid delays, explaining that in his opinion, the MMC had “awarded growing permits because commissioners last week said they wanted to move the process forward.” Field, *Growers gain*, *supra* note 297.

378. Field, *Rethink*, *supra* note 281.

379. *Id.* Depending on how the first of those two changes is worded, there might be the potential to avoid litigation if the MMC is allowed to retain unsuccessful applications for an extended period. In *Naturalis Health*, the Arkansas Supreme Court found that complaints by disappointed applicants were not “ripe,” because the complaining parties “have not been issued denial letters subsequent to an adjudication.” 2018 Ark. 224, 10, 549 S.W.3d 901, 907-08. Under current regulations, the MMC is to “remove all unselected applications from its list of reserved applications and notify all applicants” at such time as “all available licenses within each application period have been issued.” *See* MMC Regs, *supra* note 57, § 006.28.1-IV(9)(g). If the amendment to the rules means that the MMC need not remove unselected applicants and “notify them” for two years, that might substantially delay any litigation. As to whether the Arkansas courts would defer complaints for such an extended period on grounds of ripeness, only time will tell. *Id.*

initiate legal proceedings, as well as causing delays for any necessary re-scoring.<sup>380</sup>

While it is undoubtedly accurate to say that the MMC should proceed carefully in its future actions, at this point little can be done to remedy any past errors in the scoring of cultivation facility applications. Short of a determination by the ABC that a license should be revoked<sup>381</sup> or court order mandating different results, the MMC seems to be doing the best that it can in very trying circumstances.

When it comes to the interests of cultivation facility applicants, there are actually two distinct groups: those who received a license, and those whose applications have been putatively denied. With regard to the five successful applicants,

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380. Field, *Rethink*, *supra* note 281. *See also* Field, *Growers gain*, *supra* note 297 (quoting Gray, attorney for the Arkansas Medical Marijuana Association, as saying that “[f]ormulating some new procedure for scoring cultivation applications would result in lawsuits by the five successful applicants, and it would result in additional delays while the commission determines what that new process is. . . .”)

381. While the MMC rules and regulations do not currently expressly provide for the revocation of a license, licenses are only valid for one year, and expire on June 30 of each calendar year. *See* MMC Regs, *supra* note 57 § 006.28.1-IV(11)(a). There is a provision governing circumstances under which a facility may be denied an application for renewal. *See* MMC Regs, *supra* note 57, § 006.28.1-IV(12)(a)(i)-(viii). Included in this rule are the following grounds for denying renewal:

- i. Failure to provide the information required in these rules;
- ii. Failure to meet the requirements set forth in these rules or the rules of the Arkansas Department of Health or Arkansas Alcoholic Beverage Control Division;
- iii. Provision of misleading, incorrect, false, or fraudulent information;
- iv. Failure to pay all applicable fees as required;
- v. Failure to post a performance bond naming the state as the secured party. . . ;
- vi. Receipt of an application evaluation score lower than the successful applicants for a cultivation facility in the pool period for which the applicant applied;
- vii. An applicant, owner, board member, or officer has a background history that indicates the applicant does not have a reputable and responsible character or would pose a risk to the health, safety, or welfare of the public or qualifying patients; or
- viii. Any other ground that serves the purpose of these rules or the rules of the Arkansas Department of Health or Arkansas Alcoholic Beverage Control Division.

MMC Regs, *supra* note 57, § 006.28.1-IV(12)(a)(i)-(viii). Under these procedures, the earliest that one of the top five-scoring applications could find themselves without a cultivation license would be July, 2019. MMC Regs, *supra* note 57, § 006.28.1-IV(11)(a).

representatives from three of the groups have already made an announcement about how they intend to proceed. A stakeholder in and attorney for Natural State Wellness Enterprises, which received the third highest overall ranking from the MMC,<sup>382</sup> issued a statement for the group.<sup>383</sup> He reported that “his group was eager to get started,” and he was quoted as promising that they would “get to work immediately and waste no time.”<sup>384</sup> The Bold Team, which was ranked second overall,<sup>385</sup> issued a more formal statement, indicating that “BOLD is excited to move forward and implement the will of the people to serve patients in the State of Arkansas. . . . This will allow BOLD to provide medical cannabis to qualifying patients in the summer of 2019 and for many more years to come.”<sup>386</sup> Don Parker, in his capacity as both stakeholder and attorney for Delta Medical Cannabis, the last of the applicants to be granted a license,<sup>387</sup> pledged to “immediately proceed with continuing its medical marijuana cultivation efforts.”<sup>388</sup> The other two successful applicants could not be reached for comment.<sup>389</sup>

The commission’s current rules state that unsuccessful applicants are disqualified after the licenses have been formally issued, which took place on July 10, 2018.<sup>390</sup> While the MMC is seeking a rule change to allow it to “maintain” unsuccessful applications for two years “so that the next highest-scoring

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382. See MMC, *Score breakdown*, *supra* note 283. . The scores for Natural State Wellness Enterprises ranged from a low of 68 from Commissioner Roman to a high of 99 from Commissioner Carroll. *Id.* The other three commissioners all gave Natural State Wellness Enterprises a score of 88-94. *Id.*

383. Field, *Growers gain*, *supra* note 297.

384. *Id.*

385. MMC, *Score Breakdown*, *supra* note 283. Bold Team, LLC, received a wider range of scores than the top scoring application. Roman gave this group a score of 67; Story awarded them a score of 87; the other three commissioners rated them from 95-98. *Id.*

386. Field, *Growers gain*, *supra* note 297.

387. Delta Medical was actually ranked sixth by the commissioners. See MMC, *Score Breakdown*, *supra* note 283. However, two of the highest scoring applications were from the same group, Natural State Wellness Enterprises, and because they were only allowed to run a single facility, Delta was awarded the fifth spot. See *Arkansas names 5 companies picked to grow medical marijuana*, *supra* note 292 (noting that while Natural State Wellness “had two applications among the top five . . . [it was] prohibited from opening more than one facility.” See MMC Regs, *supra* note 57, § 006.28.1-IV(2)(d) (specifying that “[n]o individual shall have interest in more than one (1) Arkansas cultivation facility. . . .”).

388. Field, *Growers gain*, *supra* note 297.

389. *Id.*

390. *Id.*

company could be selected for a permit if a top-company's license is revoked,"<sup>391</sup> the MMC's regulations do not actually provide any scenario in which a company's license may be revoked.<sup>392</sup> This seems to leave little hope that unsuccessful applicants will now supplant one or more of the top five applicants, unless one or more of the successful cultivation facilities elects to surrender its license.<sup>393</sup> An applicant that is reasonably satisfied that it has not committed an infraction that would justify the MMC in declining to renew the license<sup>394</sup> should probably feel safe in proceeding, and it appears that a majority and perhaps all of the winning applications are doing exactly this.

This leaves the much larger group of cultivation facility applicants who were not awarded one of the coveted five licenses. Notwithstanding the multitude of bothersome legal issues facing marijuana businesses,<sup>395</sup> it is generally believed that successful cultivation facilities stand to make millions of dollars. With estimates of annual marijuana sales in Arkansas being as high as \$30 to \$60 million dollars, it is easy to understand the fervor with which some applicants have pursued and continue to the possibility of obtaining a license.<sup>396</sup> Moreover, "[m]any companies also believe that holding a medical marijuana license will give them an advantage over other companies in several years when they expect cannabis to be legalized for recreational use."<sup>397</sup>

When the Arkansas Supreme Court ruled in *Naturalis Health* that that MMC could proceed with the awarding of the cultivation facility licenses,<sup>398</sup> the majority opinion offered little in the way of guidance for unsuccessful applicants. Chief Justice Kemp, however, wrote a short concurrence in which he emphasized the rule that the court would not substitute its judgment for that of the

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391. Field, *Rethink*, *supra* note 281.

392. *See supra* note 381 and accompanying text (discussing this issue briefly).

393. The MMC regulations do allow a cultivation facility to surrender its license. *See* MMC Regs, *supra* note 57, § 006.28.1-V(14).

394. *See supra* note 381 (setting out the grounds on which a license may not be renewed).

395. *See supra* Part IV.B. for a discussion of some of these problems.

396. *See Arkansas medical cannabis sales expected to launch in 2018*, CANNABIS BUS. PLANS, at <https://cannabusinessplans.com/arkansas-cannabis-market/> [<https://perma.cc/6A7B-PJHV>].

397. Field, *Growers gain*, *supra* note 297.

398. 2018 Ark. 224, 549 S.W.3d 901; *see supra* notes 274-77 and accompany text for a description of the opinion.

MMC.<sup>399</sup> On the other hand he also explained that an agency decision could be revoked “if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are in violation of constitutional provisions or made upon unlawful procedure.”<sup>400</sup> He concluded with the observation that the MMC has a duty to be “fair, impartial, stringent, and comprehensive administration” in carrying out its duties.<sup>401</sup>

With this in mind, what are the options for unsuccessful cultivation facility applicants? Realistically, for those far down on the list, there is little reason to expect or even hope that a license will be forthcoming. There is too much potential money to anticipate that a majority of applicants will simply go away or disappear, and no evidence that rescoring will result in huge shifts in position for most of the applicants. On the other hand, for the next several after the top five, especially those who have evidence of misconduct and who are certain that their own applications are compliance with MMC rules and all of the dictates of good faith and fair dealing, there is at least a window open. Some unsuccessful applicants may therefore elect to go back to court. Others may choose to wait, hoping that future developments simply work out in their favor.

The ABC is already investigating numerous complaints.<sup>402</sup> Serious allegations of misconduct by both applicants<sup>403</sup> and commissioners<sup>404</sup> have been alleged albeit not yet proven. It is not beyond the realm of possibility that there could be some change in who winds up with a license,<sup>405</sup> although this is far from

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399. Ark. Dep’t of Fin. & Admin. v. Naturalis Health, 2018 Ark. 224, 549 S.W.3d 901.

400. *Id.* at 2018 Ark. 224, at 11 549 S.W.3d at 908.

401. *Id.*

402. *See supra* note 375 and accompanying text.

403. One successful applicant reportedly lifted entire sections of its applications from another applicant’s materials. *See supra* notes 284-85 and accompanying text. Another applicant is reported to have offered a bribe to one of the commissioners. *See supra* note 281 and accompanying text.

404. Commissioner Story, for example, was alleged to have a conflict of interest that should have disqualified him. *See supra* notes 255-56 and accompanying text. Commissioner Ramos is alleged to have received the offer of a bribe which, at the very least, he failed to disclose. *See supra* notes 282-283 and accompanying text.

405. A license holder might surrender its license, or in a year could be denied renewal. This would, presumably, open a slot, and one of the MMC’s proposed rule changes does seem to address this kind of possibility. *See Field, Growers gain, supra* note 297.

certain. In the meantime, unsuccessful candidates will need to carefully consider the extent to which it is worth maintaining their readiness to proceed. It may be expensive to keep experienced consultants and advisors waiting in the wing for any opportunity that may never materialize or, at best, is likely to be months away. It may not be practical to keep leases current or even to continue to hold real estate in readiness for potential future developments. These kinds of costs will have to be assessed on an individual basis.

Finally, there is the entire pool of dispensary applicants who are waiting to hear if they will receive one of the 32 available dispensary licenses.<sup>406</sup> Given that it is abundantly clear that the courts will not interfere with the MMC prior to any final determination on the awarding of licenses,<sup>407</sup> there is not much that the dispensary hopefuls can do at this point. The MMC will proceed with its process, one way or another based on whether the legislature gives its approval to the commission's proposed hiring of outside consultants, and then the applications will be reviewed. Hopefully, hiring an outside consultant will avoid many of the alleged problems that plagued the cultivation facility licensing process.

The ultimate conclusion is that there is very little that can be done at this point to streamline or untangle the mess that surrounds medical marijuana in this state. Although it offers little comfort for the parties embroiled in the Arkansas medical marijuana saga, one of the primary motivations behind this article is to urge attorneys and those educated about drafting issues to avoid constitutional amendments to effectuate or micromanage complicated regulatory change. If that is not realistic because legislators refuse to act in the face of public demand, such mandates should strive to avoid the imposition of unrealistic timeframes and deadlines on any regulatory process. The problems Arkansas is now facing are due, in large part, to the very rushed process forced on the state.

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406. See Matthew Mershon, *Ark. Medical Marijuana Commission sets number of state dispensaries at 32*, KATV (Jan. 10, 2017), <https://katv.com/news/local/ark-medical-marijuana-commission-sets-number-of-state-dispensaries-at-32> [https://perma.cc/R6CD-D4P5].

407. See *Ark. Dep't of Fin. & Admin. v. Naturalis Health*, 2018 Ark. 224, 549 S.W.3d 901.

### C. CONCLUSIONS AND FINAL RECOMMENDATIONS FOR THE FUTURE

The cultivation facility and dispensary applications deadlines have passed,<sup>408</sup> and the original application forms have been removed from the MMC website.<sup>409</sup> The five initial cultivation facility applications have finally been granted,<sup>410</sup> albeit after a considerable delay.<sup>411</sup> The winning applicants for the cultivation facilities have begun announcing their plans, and most of the top five seem ready to move forward.<sup>412</sup> Dispensary applications are being considered by the MMC, and a decision about how the commissioners will proceed is awaiting a legislative determination about whether to permit the hiring of an independent consultant.<sup>413</sup> The process will move forward.

There are some lessons to be learned from the process, of course. Most observers would probably be ready to admit that the time frames for this particular regulatory reform were far too short. This resulted in rules that had to be amended and clarified, and even the “final” rules were probably unnecessarily complicated. The entire process should serve to illustrate the kinds of issues that are created by rushed drafting. Ideally, it will also serve as a cautionary advice to those considering this kind of last ditch alternative to traditional legislation in the future.

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408. The license application period closed on September 18, 2017. Emma Pettit, *About 300 applicants submit bids to grow, distribute medical marijuana in Arkansas*, ARK. DEMOCRAT-GAZETTE (Sept. 18, 2018, 12:07 PM), <http://www.arkansasonline.com/news/2017/sep/18/day-deadline-high-number-applications-potential-gr/> [<https://perma.cc/L7YW-4YF4>].

409. See *supra* note 61 for a discussion of this process.

410. Field, *Growers Gain*, *supra* note 297.

411. The MMC announced in October of 2017 that it was behind schedule, because of the number of applications received. See Kimberly Rusley, *Slow Down in Process of AR Medical Marijuana Cultivation Center, Dispensary Applications*, KATV (Oct. 16, 2017), <http://katv.com/news/local/slow-down-in-process-of-ar-medical-marijuana-cultivation-center-dispensary-applications> [<https://perma.cc/3VHU-5D84>]. At that time the original deadline to receive background information was extended from November 1 to December 1. The deadline to redact personal information was moved to December 15. *Id.* Oddly, even though the application deadline had passed a month earlier, this story also noted that the MMC was continuing to “clarif[y] minimum qualifications.” *Id.*

412. Back in February of 2018, the successful applicants reported on their readiness to move ahead. See *Arkansas Names 5 Companies Picked to Grow Medical Marijuana*, *supra* note 292.

413. Field, *Growers Gain*, *supra* note 297.

Sometimes proceeding more slowly and carefully will actually be faster in the long run.

Ideally, this entire situation will also be an incentive for the legislature to be proactive where it is clear that the population is overwhelmingly in favor of something notwithstanding resistance by the elements among the existing administration. In the case of medical marijuana, Arkansas voters gave a fairly significant hint of things to come in 2012.<sup>414</sup> National trends also pointed to rapidly increasing support for legalization of marijuana, particularly for medical purposes.<sup>415</sup> When elected representatives fail to respect the wishes of the population, we run the risk of winding up with legislation that lacks the clarity that is desirable and fails to present a complete, workable framework.

In addition to the immediate lessons for the MMC and other agencies as they move ahead with the dispensary applications and if and when they decide to grant additional cultivation facility licenses, there are lessons here both for legislators and those who feel they have no other option but to seek an amendment to the state constitution. Hopefully, these lessons will not be ignored.

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414. In 2012, the Arkansas Medical Marijuana Question, Issue 4 of the 2012 ballot would have been an initiated state statute, but it was defeated on November 6, 2012, by a vote of 51.44% against and a vote of 48.56% in favor. *Arkansas Medical Marijuana Question, Issue 5* (2012), BALLOTPEdia, [https://ballotpedia.org/Arkansas\\_Medical\\_Marijuana\\_Question,\\_Issue\\_5\\_\(2012\)](https://ballotpedia.org/Arkansas_Medical_Marijuana_Question,_Issue_5_(2012)) [<https://perma.cc/UJ6V-R25A>].

415. See, i.e., *Votes and Polls, 2000-Present*, PROCON (Aug. 15, 2017, 8:43 PM) <https://medicalmarijuana.procon.org/view.additional-resource.php?resourceID=000149> [<https://perma.cc/6B59-QVHC>] (listing votes and polls from 2000 to 2017 regarding support for medical marijuana across the states). The vast majority of these polls showed support for medical marijuana, with many state polls approving the concept by margins of two to one or more. *Id.*