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AN UNCERTAIN MIDDLE GROUND: *BURFORD* ABSTENTION IN FEDERAL CANNABIS CONTRACT ENFORCEMENT ACTIONS

Nicolas L. Davis[*]

I. INTRODUCTION

Imagine you are a small business owner in California operating a cannabis dispensary. You have earned your state-required permit to run your business, complied with the necessary zoning requirements to operate the location, and sold only what the state commercially permits you. You have been operating since 2016, the year when your state passed the Adult Use of Marijuana Act, and your business profits have exceeded all

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expectations.[1] The business is in a good position to continue turning a profit, but you want to get out of the business because you feel comfortable with the profits made. After advertising your business for sale, you have found a company interested in purchasing it. This company operates out of Washington, primarily as a tobacco supplier for the West Coast of the United States, and they are interested in purchasing your business because of the profitability of the industry. There are several meetings between you and the executives of this other business, and you come to terms on an asset purchase agreement. The contract looks great, and you are both happy.

Unfortunately, the other party fails to pay you what you are owed. Wanting to get the money owed to you in the contract, you file a claim for breach of contract against the company. However, they remove the case to federal court on diversity grounds and move to have the case dismissed. They argue that the case fails to present a claim upon which relief can be granted because cannabis is still considered a Schedule I drug under the Controlled Substances Act ("CSA").[2]

Both you and the company were aware of this going into the sale, but it did not seem like an issue since both companies operate where state laws permit commercial cannabis transactions. The CSA had not been consistently enforced in your state, so you did not expect that enforcing your contract with the company would lead to such a complicated issue. You are now stuck in limbo, with the federal court deciding whether to dismiss your case pursuant to Federal Rules of Civil Procedure 12(b)(6) or enforce your contract pursuant to state law and other policy considerations in violation of federal law.[3]

The above narrative paints the difficult picture that federal courts find themselves in with respect to cannabis contracts. Under federal law, cannabis is an illegal Schedule I substance; this means it is highly susceptible to abuse, has no recognized medical benefits, and has insufficient safety guidelines for medical use.[4] Federal courts have an obligation to further the interests of the United States through the enforcement of the Constitution and other federal laws.[5] State law, however, differs substantially from federal law, with many states legalizing or decriminalizing the possession, use, and distribution of the substance and allowing the commercialization of cannabis through licensure or permit processes.[6] States have identified public policy considerations contradicting the CSA, with one state even codifying the enforcement of cannabis contracts as good public policy.[7] Given this federal-state conflict,

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[1] Cal. Legis. Serv. Prop. 64.
[2] Controlled Substances Act, 21 U.S.C. § 812(c)(c)(10).
[3] FED. R. CIV. P. 12(b)(6).
[4] 21 U.S.C. § 812(b)(1).
[5] *See Federal Courts & the Public*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/federal-courts-public (last visited May 20, 2022) [hereinafter U.S. Cts].
[6] WASH. REV. CODE § 69.50.395; OR. REV. STAT. §475B.535; Cal. Legis. Serv. Prop. 64.
[7] *See* COLO. REV. STAT. ANN. § 13-22-601.

it is important to understand the considerations that federal courts must make regarding the enforcement of cannabis contracts.

This Comment argues for federal court abstention from cannabis contract enforcement actions to avoid disrupting the Separation of Powers and allow more experienced state courts to adjudicate such matters. Part II of this Comment will provide a history of cannabis legality under the CSA and introduce the different approaches taken by federal courts in relation to cannabis contracts. Part II will also analyze the difficulty posed by the federal government's non-enforcement of cannabis restrictions and why this creates an uncertain playing field for businesses attempting to operate within the bounds of the law.

Part III will then explore all three approaches to cannabis contract enforcement in more detail, providing the pros and cons of each. Part III will also explain how the Supremacy Clause and the doctrines of Illegality and Separation of Powers are used in cannabis contract enforcement actions both as justification for adherence to the CSA and as guideposts for obtaining equity. Lastly, Part III will explain why the third option of *Burford* abstention is the best approach for federal courts to utilize, given the inconsistency between Congress's stance on the CSA and Executive enforcement thereof. This Comment will end with a brief conclusion and review of the major discussion points.

II. HISTORY OF CANNABIS LEGALITY UNDER THE CSA

Before discussing the federal court approaches to cannabis contract enforcement, it is important to frame the federal landscape for cannabis law generally. This requires an understanding of the CSA's provisions, its legislative history, and the historical approach to enforcement from the federal government. It is also important to understand how the structure of federal and state laws interact to create an uncertain arena for judicial intervention.

A. Introduction of the Controlled Substances Act

Cannabis was completely prohibited for use, possession, sale, distribution, and cultivation in 1970 with the passage of the CSA.[8] As a Schedule I substance, the restrictions on testing cannabis for scientific and medical purposes are very strict.[9] Debate was rife in the immediate aftermath of the CSA's passage and the establishment of the National Commission on Marijuana and Drug Abuse, as Commission Chairman Raymond Shafer recommended that cannabis possession be decriminalized

[8] Controlled Substances Act, Pub. L. No. 91-513, §§ 100, 401, 84 Stat. 1236, 1242, 1260 (1970).

[9] *See* DRUG POL'Y ALL. & MAPS, THE DEA: FOUR DECADES OF IMPEDING AND REJECTING SCIENCE 9–10 (2014) https://drugpolicy.org/sites/default/files/DPA-MAPS_DEA_Science_Final.pdf.

in small amounts to discourage unnecessarily high criminal penalties for fairly innocuous activity.[10]

The 1970s saw a shift in state cannabis laws, as scientific groups and state legislatures advocated for increased research into the medical benefits of cannabis for patients with serious medical conditions.[11] For example, New Mexico began to implement legislation permitting the issuance of cannabis by the federal government to treat glaucoma and cancer patients.[12] However, early state legislative efforts were often regarded as ineffective and without legal justification due to the continued federal illegality of the substance under the CSA.[13]

Several attempts were made to reevaluate cannabis's status as a Schedule 1 drug under the CSA, with each of these attempts failing to produce any change.[14] As of November 2020, cannabis is still considered a Schedule 1 substance due to its hallucinogenic effects.[15] This Schedule prevents physicians from prescribing it to their patients, regardless of the perceived benefits.[16] Despite failures from both federal and state governmental actors, support for medicinal cannabis rose in the 1990s.[17] A successful push in California resulted in the passage of the Compassionate Use Act of 1996, legalizing the medical use of cannabis in the state.[18] Several other initiatives were successful in the years following California's efforts, with many states legalizing or decriminalizing both medical and recreational cannabis.[19]

Given the diverse array of opinions in the medical field regarding the potential uses of cannabis in patient care, the question arose as to whether physicians were able to prescribe cannabis to their patients. The United States Circuit Court for the Ninth Circuit answered this question in *Conant v. Walters*, in which the court explained that physicians had the right to recommend their patients use medical cannabis, but they did not have the right to prescribe it.[20] This decision was unsurprising, given that a ruling permitting cannabis prescriptions would effectively circumvent the CSA's

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[10] *See* Donald Scarinci, *Marijuana Is Richard Nixon's Fault?*, OBSERVER (Nov. 21, 2012, 12:28 PM), https://observer.com/2012/11/marijuana-is-richard-nixons-fault/.

[11] *See generally* DRUG POL'Y ALL. & MAPS, *supra* note 9, at 6.

[12] Alice O'Leary-Randall, *Today Is the 40th Anniversary of America's First Medical Marijuana Law*, CANNABISNOW (Feb. 21, 2018), https://cannabisnow.com/lynn-pierson-first-medical-marijuana-law/.

[13] *See generally State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/ (Dec. 2016).

[14] DRUG POL'Y ALL. & MAPS, *supra* note 9, at 6.

[15] 21 C.F.R. § 1308.11(d)(23).

[16] Brian J. Kenny & Charles V. Preuss, *Pharmacy Prescription Requirements*, NCBI, https://www.ncbi.nlm.nih.gov/books/NBK538424/ (Sept. 27, 2021).

[17] *See generally* DRUG POL'Y ALL. & MAPS, *supra* note 9, at 6–8.

[18] *See, e.g.*, CA. HEALTH & SAFETY CODE § 11362.5 (1996).

[19] *See generally* MARIJUANA POL'Y PROJECT, *supra* note 13.

[20] *See* 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring).

scheduling of cannabis.[21] If elected legislators had failed to alter cannabis's place within the CSA, then physicians would be given no power to do the same.

Then, in 2009, the Department of Justice issued the Ogden Memo.[22] This memorandum, named after and issued by Deputy Attorney General David Ogden, advised federal prosecuting attorneys to only initiate proceedings against medical cannabis providers who violated their state laws or committed other federal crimes while engaged in their cannabis dealings.[23] This loosened the restrictions on state cannabis transactions, but federal raids on state providers continued after the issuance of the memo just as they had before.[24] The Ogden Memo position was reaffirmed by Deputy Attorney General James Cole in 2011 and again in 2013 with the issuance of the Cole Memoranda.[25] Then, in 2014, the Rohrabacher-Farr Amendment was passed, prohibiting federal prosecution of individuals engaged in the distribution of medical cannabis unless the distributors violated state law.[26] Again, this was all done while the CSA classified cannabis as a Schedule I drug.[27]

B. Supremacy Clause, Legal Standing, and Separation of Powers

The primary stumbling block for states seeking to allow easier access to cannabis is the Supremacy Clause, which provides that the United States Constitution and federal law take precedence over state laws.[28] If a state law conflicts with federal law, then the Supremacy Clause holds that the federal

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[21] *Id.* at 632.

[22] *See* Memorandum from David W. Ogden, Deputy Att'y Gen., on *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* to Selected U.S. Att'ys, (Oct. 19, 2009) (on file with U.S. Dept. of Just.).

[23] *See id.* at 2.

[24] *See DEA Continues to Raid California Medical Dispensaries, Despite Obama*, DRUG POL'Y ALL. (Feb. 4, 2009), https://drugpolicy.org/news/2009/02/dea-continues-raid-california-medical-marijuana-dispensaries-despite-obama; Emilie Ritter, *Federal agents raid Montana medical marijuana facilities*, REUTERS (Mar. 14, 2011, 10:16 PM), https://www.reuters.com/article/us-montana-marijuana/federal-agents-raid-montana-medical-marijuana-facilities-idUSTRE72E0O520110315.

[25] *See* Memorandum from James M. Cole, Deputy Att'y Gen., on *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* to U.S. Att'ys, (June 29, 2011) (on file with U.S. Dept. of Just.). *See generally* Kyle Jaeger, *James Cole Talks Jeff Sessions And Marijuana Legalization*, MARIJUANA MOMENT (July 11, 2018), https://www.marijuanamoment.net/james-cole-talks-jeff-sessions-and-marijuana-legalization/.

[26] *See* Tom Angell, *Federal Medical Marijuana Amendment Author Dies At 79*, MARIJUANA MOMENT (Nov. 24, 2017), https://www.marijuanamoment.net/federal-medical-marijuana-amendment-author-dies-79/; *US House Votes to End Funding for Federal Medical Cannabis Enforcement*, AMERICANS FOR SAFE ACCESS (May 31, 2014), https://www.safeaccessnow.org/first_major_victory_in_the_fight_to_end_federal_interference; *Interpreting the renewed Rohrabacher-Farr Amendment: A loophole for enforcement?*, THOMPSON COBURN LLP (May 31, 2017), https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2017-05-31/interpreting-the-renewed-rohrabacher-farr-amendment-a-loophole-for-enforcement [hereinafter Thompson Coburn].

[27] 21 C.F.R. § 1308.11(d)(23).

[28] U.S. Const. art. VI, cl. 2.

law supersedes the state law, preventing it from going into effect.[29] A major area where the Supremacy Clause has been applied is in cases interpreting congressional power under the Commerce Clause.[30]

Cannabis law was specifically targeted by the Commerce Clause through the Supreme Court's decision in *Gonzales v. Raich*, where the Court determined Congress had the requisite authority to regulate the private possession and use of medical cannabis as part of a structured set of regulations regarding the substance.[31] Prohibiting state-permitted possession and use of the substance was a necessary part of the scheme of federally-prohibited possession and use.[32] This case and its implications for cannabis contracts will be explored in-depth in Part III.

However, federal preemption has not stopped states from adopting policies that permit the medicinal use of cannabis, decriminalize non-medical possession and use, or legalize it altogether.[33] Public perception has shifted toward such decriminalization and legalization efforts, and the federal government has been fairly lax on enforcing the CSA, suggesting state legislatures have more leeway than before.[34] If laws are on the books but are not actively enforced, there is uncertainty as to whether they must be followed.

This concept of unenforced laws relates to the idea of standing and whether or not a party may actually bring a suit in the first place. Lawsuits predicated on violations of laws that the state has not historically enforced have been dismissed because the party bringing the suit lacked standing.[35] This issue of standing has gone before the Supreme Court on numerous occasions, with the decision in *Abbott Laboratories v. Gardner* clarifying that the concept of judicial ripeness—the presence of an actual case or controversy—is central to the ability for a plaintiff to bring a suit to federal courts.[36] If the threat of prosecution for violating a law is high, then there is a legitimate case or controversy that grants the complaining party the necessary standing to bring a suit and seek a remedy.[37]

Standing is essential to claims in federal court relating to cannabis contracts, just as it would be for any other issue. If the court does not

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[29] *See Supremacy Clause*, CORNELL LAW SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/supremacy_clause (June 2017).

[30] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 29 (2005).

[31] *See id.* at 32.

[32] *Id.* at 24–25.

[33] *See supra* text accompanying note 6.

[34] *See* Andrew Daniller, *Two-thirds of Americans support marijuana legalization*, PEW RSCH. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/; Joanna R. Lampe, *The Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*, CONG. RSCH. SERV. 5 n.54 https://sgp.fas.org/crs/misc/R45948.pdf (Feb. 5, 2021).

[35] *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961).

[36] 387 U.S. 136, 148–49 (1967).

[37] *Id.* at 152–54.

recognize that there is a case or controversy due to the lack of federal enforcement of the CSA, then a party to a breach of contract may not have standing to bring the issue to federal court. It would seem appealing then to assume that prosecution and subsequent convictions under the CSA may be a fiction due to the recent activities of federal administrative agencies and executive branch officials. The Cole Memos and the Rohrabacher-Farr Amendment indicate that there is substantial wiggle room for those persons who adhered to the state regulations on cannabis, so it is questionable whether there would be standing for persons who violated the CSA to actually bring a suit.[38]

Despite the historical inconsistency, the federal government has enforced the CSA through prosecution and federal raids of private businesses engaged in the distribution of cannabis.[39] Further, the CSA has not modified cannabis's status as a Schedule I drug throughout the fifty-year history of the Act despite numerous attempts to do so.[40] Therefore, the standing issue in cannabis contract disputes is a modern advent stemming from lax enforcement of cannabis prohibitions between 2009 and 2014, as outlined above.[41]

The confusion has only grown during the Trump Administration. The Department of Justice submitted new guidelines for companies interested in researching cannabis to determine what, if any, health benefits exist through particular uses of the substance.[42] Prior to this request, however, former Attorney General Jeff Sessions rescinded the Cole Memos on non-enforcement of the CSA with respect to cannabis in an attempt to enforce the CSA in full.[43] Though Sessions is no longer in office, the rescission of the Cole Memos gave cannabis law advocates cause for concern. Businesses rely on consistent legal frameworks in order to operate with any sense of confidence. That confidence is baseless if the federal government's approach to cannabis contract enforcement is established by malleable federal agency position statements rather than enacted legislation.

An additional consideration that must be discussed with respect to the role of federal courts in the arena of cannabis law and the CSA is the

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[38] Thompson Coburn, *supra* note 26.

[39] *See e.g.*, Megan Carpentier, *Why Are Feds Targeting High-End Pot Producers in California?*, ROLLING STONE (Dec. 2, 2016, 3:36 PM), https://www.rollingstone.com/culture/culture-news/why-are-feds-targeting-high-end-pot-producers-in-california-124701/.

[40] See generally DRUG POL'Y ALL. & MAPS, *supra* note 9.

[41] *See supra* text accompanying notes 22–27.

[42] *See generally* Controls to Enhance the Cultivation of Marihuana Research in the United States, 85 Fed. Reg. 16292 (proposed Mar. 23, 2020) (to be codified at 21 C.F.R. 1301 and 21 C.F.R. 1318).

[43] *See* Tom Angell, *Sessions Rescinds Memo On State Marijuana Laws*, MARIJUANA MOMENT (Jan. 4, 2018), https://www.marijuanamoment.net/sessions-rescind-memo-state-marijuana-laws/;
John Hudak, *Why Sessions is wrong to reverse federal marijuana policy*, BROOKINGS (Jan. 4, 2018), https://www.brookings.edu/blog/fixgov/2018/01/04/why-sessions-is-wrong-to-reverse-federal-marijuana-policy/.

Separation of Powers doctrine.[44] This doctrine is fundamental to the governance of the United States, as it provides that the powers of enacting, enforcing, and interpreting law are separated into three distinct but related branches of government: Legislative, the Executive, and the Judiciary, respectively.[45] The issue of cannabis law has to do with all three branches of government, and there is substantial danger that the Separation of Powers doctrine will be disrupted and the balance of powers thrown into disarray depending on the actions of each branch.

Congress's position seems to be rather clear: the CSA was passed with the intent to criminalize the use, possession, and distribution of cannabis due to it having no medical value.[46] The lack of any movement on rescheduling the substance or removing it from the CSA altogether indicates that this intent controls. The current status of the law controls and cannabis continues to be illegal. Based on this position, the Executive is supposed to carry out enforcement and prosecution under the CSA by arresting and charging individuals who violate the law, though there is some discretion with how they approach this responsibility.[47] As explained above, however, the enforcement role does not prevent administrative agencies such as the Department of Justice from proposing new regulations on research into medical uses of cannabis.[48] Nor does it prevent them from taking a lax position on that enforcement obligation.[49]

Lastly, the judiciary has the responsibility of ensuring that justice is meted out with respect to violations of the CSA, applying the law to cases that come before them.[50] The threat of disruption to the Separation of Powers is strongest from the judiciary since the courts must consider relevant action or inaction on the part of Congress and the Executive to determine whether and how to proceed with cases. If the judiciary interprets, for example, the inclusion of the Rohrabacher-Farr Amendment in the annual budget and spending bills to be an indication that Congress is less concerned with cannabis law violations, then they may not strictly apply the CSA. If the Executive branch is not willing to enforce the CSA because they want to provide deference to state laws, the judiciary could enforce contracts that comply with state laws despite their conflict with federal law. This judicial freedom threatens the Separation of Powers because a court may make a ruling on a case that conflicts directly with Congress's position on the letter

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[44] *See generally* Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125 (2016).

[45] *Id.* at 127.

[46] *See* Controlled Substances Act, 21 U.S.C. § 812(c)(c)(10).

[47] *See* Todd Garvey, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, CONG. RSCH. SERV. 1, 15 (Nov. 9, 2012), https://sgp.fas.org/crs/misc/R42398.pdf.

[48] *See supra* note 42 and accompanying text.

[49] *See* Thompson Coburn, *supra* note 26.

[50] Garvey, *supra* note 47, at 15–16.

of the CSA while remaining consistent with the Executive's position on the spirit of enforcement. On the other hand, a court may make a ruling that is consistent with the CSA but inconsistent with enforcement efforts. That balance is difficult to strike when the approaches appear to contradict one another.

III. FEDERAL COURT APPROACHES TO CANNABIS CONTRACT ADJUDICATION

Cannabis law in the United States has seen a dramatic shift from strict enforcement of the CSA to a nuanced analysis of state laws and public policy.[51] Nowhere is this shift more prevalent than in the realm of cannabis contract law. State courts generally have an easy time with disputes involving cannabis contracts since their state legislatures have codified public policy encouraging the enforcement of these contracts.[52] However, the continuing federal prohibition of cannabis under the CSA has led some courts to quick resolutions of contract disputes on the basis of illegality.[53]

District courts have continued to declare cannabis contracts unenforceable because they involve interests in a substance that is illegal under the CSA.[54] This 'strict compliance' approach is consistent with the federal courts' role in enforcing federal laws.[55] Other federal courts have employed a nuanced approach, enforcing cannabis contracts so long as enforcement does not require or allow a party to acquire an interest in the growth, sale, possession, or distribution of cannabis.[56] A less common but nonetheless available approach—and the one advocated by this Comment—is to abstain from a case and push it back to a state court with valid jurisdiction. By considering the interests of the federal and state governments, law enforcement officials, attorneys, and businesses, this third approach represents a safe "middle ground" by which federal courts can avoid butting heads with conflicting laws.

Recent enforcement of the CSA with respect to cannabis has led to uncertainty as to how federal courts should approach cannabis contracts. As explained above, federal courts considering whether to enforce cannabis contracts generally look to one of three options for adjudication: (1) the strict

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[51] *See generally* Blake Marvis, Comment, *Reefer Madness in Federal Court: An Overview of How Federal Courts are Dealing with Cannabis Litigation and Why it is Necessary to "Dig into the Weeds,"* 23 LEWIS & CLARK L. REV. 967 (2019).

[52] *See supra* text accompanying note 6.

[53] *See, e.g.*, Tracy v. USAA Cas. Ins. Co., No. 11-00487, 2012 U.S. Dist. LEXIS 35913, at *39 (D. Haw. Mar. 16, 2012); Polk v. Gontmakher, No. 2:18-cv-01434, 2019 U.S. Dist. LEXIS 146724, at *8 (W.D. Wash. Aug. 28, 2019); Bart St., III v. ACC Enters., LLC, No. 2:17-cv-00083, 2020 U.S. Dist. LEXIS 58003, at *28 (D. Nev. Apr. 1, 2020).

[54] Marvis, *supra* note 51, at 982–83.

[55] U.S. CTS., *supra* note 5.

[56] Marvis, *supra* note 51, at 988–91.

compliance approach, (2) the nuanced approach, and (3) the abstention approach.[57]

The first option is to strictly adhere to the CSA and rule that enforcement would be contrary to federal law under the Supremacy Clause, the Separation of Powers doctrine, and the Illegality doctrine. The second would be to consider the circumstances of the contract in light of the equitable outcomes possible from either enforcement or non-enforcement and to issue a decision on enforcement based on public policy. The third option is to abstain from the case and remand the issue back to a state court that has proper jurisdiction over the matter. Legal commentators and law journals have discussed the first two approaches at length.[58] However, the third approach is not often brought up in the context of cannabis contracts—at least, not until recently. The abstention approach, while less popular than the strict compliance or nuanced approaches, is more consistent with the legislative intent of the CSA, the Supremacy Clause, the Separation of powers doctrine, and the Executive Branch's administrative agencies' nuanced approach to enforcement. As a result, the abstention approach ought to be followed by federal courts. To understand why this is the case, it is important to understand the pros and cons of each approach and consider how and why they have been applied.

A. Non-Enforcement Through Strict Adherence to the Controlled Substances Act

One approach is for courts to adopt strict adherence to the CSA and not enforce cannabis contracts. This would give deference to the CSA's scheduling of cannabis, safeguard the illegality defense to contract enforcement, provide predictability for federal courts, and ignore the difficulty posed by the inconsistency in federal enforcement efforts. The primary justification for this approach comes down to the role of the federal courts in enforcing federal, rather than state, laws.[59] So long as cannabis is illegal under the CSA, federal courts have an obligation not to enforce cannabis contracts in violation of the CSA.[60]

i. Preemption and the Illegality Defense

The decision in *Gonzales v. Raich* dealt with issues surrounding congressional power to regulate state law under the auspices of the Commerce Clause, the Supremacy Clause, and preemption.[61] In deciding *Raich*, the Supreme Court held that Congress may regulate private possession and use of

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[57] *See supra* text accompanying notes 51–56.
[58] *See, e.g.*, Marvis, *supra* note 51, at 978–1000.
[59] *Id.* at 978–79.
[60] *See* U.S. CTS., *supra* note 5.
[61] Gonzales v. Raich, 545 U.S. 1, 15, 29 (2005).

medicinal cannabis otherwise permitted under state law which is incidental to a legitimate government interest in halting the illegal drug trade.[62] When Congress passed the CSA, they did so with an interest in stopping those who would engage in interstate drug trafficking.[63] Plaintiffs in *Raich* argued that this interest was not being obstructed by the state of California passing its own law allowing the private use and growing of cannabis plants within a medical context.[64] The Supreme Court rejected this argument because the private use, possession, distribution, and cultivation of a substance prohibited under federal law was central to the enforceability of that law, regardless of medicinal purpose.[65] The *Raich* decision on medical cannabis laws seems to guide the disposition of cannabis contract enforcement actions. If state statutes permit the enforcement of cannabis contracts in violation of the CSA, then it would be assumed that the CSA would preempt that state statute and preclude enforcement of the contract and the statute.

The decision in *Raich* was a major guidepost for lower federal courts to rule cannabis contracts unenforceable due to the illegality of the subject matter involved. In *Tracy v. USAA Casualty Insurance Co.*, the United States District Court for the District of Hawaii ruled that an insurance contract covering damage to cannabis plants was unenforceable.[66] The court ruled that enforcing the insurance contract would violate federal law because of the illegality of the plants at the center of the insurance claim.[67] Although the plants were insurable property under the policy, enforcement of this insurance contract would result in the provider paying money to the policyholder for damage to cannabis plants which the policyholder was prohibited from possessing under federal law.[68] The District Court for the Western District of Washington passed down a similar decision in the case of *Polk v. Gontmakher*, where the court ruled that it would be a violation of the CSA to award damages in the form of ownership and a share of profits in a company that produces cannabis.[69] The recency of these decisions indicates the strict compliance approach continues to be justified by both the Illegality doctrine and the principle of preemption even as states pass laws to the contrary.

ii. Unclean Hands

The Unclean Hands doctrine is an affirmative defense available to parties seeking to avoid liability to a plaintiff by appealing to the plaintiff's

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[62] *Id.* at 32–33.
[63] *Id.* at 10.
[64] *Id.* at 30.
[65] *Id.* at 27–28.
[66] Tracy v. USAA Cas. Ins. Co., No. 11-00487, 2012 U.S. Dist. LEXIS 35913, at *39 (D. Haw. Mar. 16, 2012).
[67] *Id.*
[68] *Id.*
[69] Polk v. Gontmakher, No. 2:18-cv-01434, 2019 U.S. Dist. LEXIS 146724, at *5–6 (W.D. Wash. Aug. 28, 2019).

own bad or inequitable behavior.[70] It originates from the philosophical view that a party seeking equity should not be able to recover if they engage in inequity.[71] The concept of "unclean hands" was central to the determination by the United States District Court for the District of Nevada in *Bart St., III v. ACC Enters., LLC*.[72] The Plaintiff there argued that Defendants breached a loan contract funding the expansion of their cannabis cultivation business.[73] The District Court for the District of Nevada first discussed how the loan contract could not be enforced because select terms in the contract allowed a company to develop an interest in cannabis cultivation businesses in contravention of the CSA.[74] Specifically, the District Court found that the right of first refusal provision in the contract allowed Plaintiff to acquire profits from the sale of cannabis, and the operating capital terms provision provided direct financial assistance to Defendants for the cultivation of their cannabis business.[75]

Plaintiff argued that these provisions were severable under the contract, thus allowing the contract to continue to operate without violating the CSA.[76] The court disagreed, finding that the two clauses may have been central to the existence of the loan.[77] Because the court could not decide on whether the unlawful provisions were collateral or central, they did not make a ruling on that issue.[78] However, the court did determine that Plaintiff was unable to prevail under the theory of unjust enrichment because they had to first determine that the contract was illegal and incapable of severance, then determine that Bart St. III, LLC, had clean hands in the arrangement.[79] If the contract was ruled to be unenforceable, it was because Bart St. III, LLC, entered into the agreement with the intent of developing an interest in the cultivation of a cannabis business in violation of the CSA.[80]

Since the conspiracy to cultivate cannabis constituted a crime of "moral turpitude," the court found that Bart St. III, LLC, could not recover under unjust enrichment because they had unclean hands in the dealing of illegal contracts.[81] The court explained that "[i]t is irrelevant that the Nevada legislature 'legalized' marijuana because marijuana is illegal under federal law, and the CSA preempts Nevada law under the Constitution's Supremacy

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[70] Marvis, s*upra* note 51, at 982.
[71] *See* T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. Davis L. Rev. 1827, 1843–44 (2018).
[72] Bart St., III v. ACC Enters., LLC, No. 2:17-cv-00083, 2020 U.S. Dist. LEXIS 58003, at *24–26 (D. Nev. Mar. 31, 2020).
[73] *Id.* at *2.
[74] *Id.* at *17–18.
[75] *Id.* at *6.
[76] *Id.* at *11.
[77] *Id.* at *24.
[78] *Id.* at *24.
[79] *Id.* at *24–25.
[80] *Id.* at *26.
[81] *Id.* at *25, *27.

Clause."[82] The court could not, in equity, allow Bart St. III, LLC, to receive any profit from their circumvention of federal law.[83]

As explained above, the strict compliance approach is strongly supported by the existing framework of the CSA and is consistent with the role of federal courts.[84] This seems to provide something close to a 'bright-line rule' in contract enforcement: if enforcement of the contract would grant a party to that contract interest in substances prohibited by federal law, then the court will not enforce the contract.[85] The strict compliance approach would be easier for courts to follow than the nuanced approach because the sole question is whether enforcement of the contract would grant this illicit interest. If the answer is yes, then the contract is unenforceable. Otherwise, the contract would be enforced.

iii. Criticisms of the Strict Compliance Approach

The major problem with this approach is that the federal courts would be obligated to ignore the Rohrabacher-Farr Amendment, the recent history of non-enforcement of cannabis prohibitions, and the inequities that may be present in each contract situation. Even worse, parties would be able to enter into cannabis contracts, breach those contracts when it suits them, and have a federal court rule the contracts unenforceable when the party on the receiving end of the breach attempts to recover from the breach.[86] So long as the strict compliance approach is followed, the unclean hands doctrine would allow defendants in breach of contract actions to benefit from undeserved windfalls.[87] There would be no security in the cannabis industry if this method were adopted across the board.[88] While this may be the intent behind such an approach, it would directly harm the economic, political, and legal structures of Colorado, California, Washington, and many other states which have worked to develop consistent and tenable enforcement schemes for their existing cannabis markets.[89] It would also prohibit states like Arizona—which recently passed the Smart and Safe Act—from enacting policies

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[82] *Id.* at *27 (citing United States v. Nixon, 839 F.3d 855, 888 (9th Cir. 2016).

[83] *Id.* at *27–28.

[84] *See* Tracy v. USAA Cas. Ins. Co., No. 11-00487, 2012 U.S. Dist. LEXIS 35913, at *33–34 (D. Haw. Mar. 16, 2012); *see also* note 51 and accompanying text accompanying.

[85] *See* Bart St., III v. ACC Enters., LLC, No. 2:17-cv-00083, 2020 U.S. Dist. LEXIS 58003, at *26 (D. Nev. Mar. 31, 2020).

[86] *See* Steven Mare, *He Who Comes into Court Must Not Come with Green Hands: The Marijuana Industry's Ongoing Struggle with the Illegality and Unclean Hands Doctrines*, 44 HOFSTRA L. REV. 1351, 1353 (2016).

[87] *See* Marvis, *supra* note 51, at 975–76. This would be the case even if the defendant in the case does not bring the unclean hands doctrine as a defense, since courts are permitted to raise the issue *sua sponte*. *See* Karpenko v. Leendertz, 619 F.3d 259, 265 (3rd Cir. 2010).

[88] *See* Mare, *supra* note 86, at 1373 (discussing the difficulties of contract enforcement when federal judges rule such contracts unenforceable regardless of state law).

[89] *See* Marvis, *supra* note 51, at 971, 1003.

designed to institute a proper enforcement mechanism for state cannabis laws.[90] As a result, this approach is untenable.

B. Consideration of the Circumstances in Equity and Public Policy

Another approach is for the federal courts to examine the nuances behind contract enforcement and determine each case on an individual basis, contemplating the potential inequitable results from strict enforcement in a decision based in equity rather than law.[91] This approach, referred to in this Comment as the "Nuanced Approach" and alternatively known as the "Narrow View" in other articles, allows federal courts to ensure justice is meted out by preventing companies from operating in uncertain or illegal markets without risk, allows contracts to be enforced to prevent windfalls or forfeitures, and reflects the changing landscape in state laws which has tended towards decriminalization and legality.[92]

i. Weakness of the Illegality Defense

A major case supporting the nuanced approach focuses heavily on the idea that the illegal contract defense is not an absolute safe haven for litigants.[93] Quoting from the court's decision in *Bassidji v. Goe*:

> Nuanced approaches to the illegal contract defense, taking into account such considerations as the avoidance of windfalls or forfeitures, deterrence of illegal conduct, and relative moral culpability, remain viable in federal court and represent no departure from *Kaiser Steel*, but only as long as the relief ordered does not mandate illegal conduct.[94]

The general principle established in this case is that the illegal contract defense will not always be successful where there are counterbalancing equity interests at play.[95] The nuanced approach to contract enforcement works to prevent inequities, since it looks to other public policy considerations beyond the illegality defense.[96] The principle announced in *Bassidji* is used as a basis to not dispose of a case merely on the grounds of illegality when there are equitable considerations, such as unjust enrichment, and where enforcement is possible without providing an interest in illegal substances or activities in violation of federal law.[97]

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[90] *See* Max Savage Levenson, *Arizona just legalized marijuana. Here's what happens next* (Nov. 3, 2020), https://www.leafly.com/news/politics/arizona-just-legalized-marijuana-what-happens-next.
[91] *See* Marvis, *supra* note 51, at 986–87.
[92] *See id.* at 1000–1002.
[93] Bassidji v. Goe, 413 F.3d 928, 932 (9th Cir. 2005).
[94] *Id.* at 937–38.
[95] *Id.* at 932.
[96] *See id.* at 937–38.
[97] *Id.* at 938.

One of the first cases on cannabis contracts that relied on the discussion in *Bassidji* was *Mann v. Gullickson*.[98] The case involved the defendant defaulting on their promissory note executed pursuant to an agreement to purchase two businesses from the plaintiff.[99] One business was a consulting business for a state-regulated cannabis dispensary and cultivation licenses, and the other was a hydroponic retail operation.[100] The District Court for the Northern District of California ruled that the contract was enforceable on the grounds that enforcing the payment of the note neither required the defendant to possess, cultivate, or distribute cannabis, nor granted the defendant any interest in a cannabis cultivation company.[101] According to the court, the contract was enforceable because there were no illegal interests that would contravene state or federal public policy.[102]

The nuanced approach would also permit courts to sever illegal portions of cannabis contracts so long as the intent of the parties is not frustrated by that removal.[103] This concept was employed by the United States District Court for the District of Nevada in *Street v. ACC Enters., LLC*, which was decided before their decision in *Bart St., III*, the court stated that Nevada law would allow provisions in a contract to be severed from the contract due to their illegality if those provisions are collateral to the primary purpose of the transaction, the intent of the parties in making the contract is preserved, and there is at least one remedy that the court can provide that is legal under federal or state law.[104] This seems to indicate that states are willing to analyze the intent of the parties in making a contract and adhere to the principle of freedom of contract by following that intent rather than abandoning ship and ruling contracts involving cannabis null and void.[105]

ii. Preventing Unclean Hands

Another benefit is that the nuanced approach would allow federal courts to consider the unclean hands doctrine as a factor in providing equitable recovery in breach cases when the parties to the contract knew about

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[98] No. 15-cv-03630, 2016 U.S. Dist. LEXIS 152125, at *18 (N.D. Cal. Nov. 2, 2016).

[99] *Id.* at *2–3.

[100] *Id.* at *2.

[101] *Id.* at *29.

[102] *Id.* at *34. Rather than assuming the broad view of the strict compliance approach on illegality and unclean hands, the court in *Mann* considered the nuance of the remedy sought to determine whether they could provide a remedy without violating the CSA. *Id.* at 24–25. So long as they could order a remedy without violating the CSA, the contract could be enforced. *Id.* at 25–26.

[103] *See* Street v. ACC Enters., LLC, No. 2:17-cv-00083, 2018 U.S. Dist. LEXIS 167299, at *12 (D. Nev. Sept. 27, 2018).

[104] *Id.* at *11–14.

[105] *See* Bart St., III v. ACC Enters., LLC, No. 2:17–cv-00083, 2020 U.S. Dist. LEXIS 58003, at *7, *17–18 (D. Nev. Apr. 1, 2020).

the potential illegality of their business interests.[106] The United States District Court for the District of Colorado considered unclean hands in *Green Earth Wellness Center v. Atain Specialty Insurance Company*.[107] Colorado had been at the forefront of cannabis legalization and decriminalization efforts, with Amendment 64 having been passed just four years prior to legalizing recreational cannabis use by adults.[108] Because of their early efforts to legalize and decriminalize cannabis, it makes sense that Colorado developed a legislative and judicial approach to enforcing cannabis contracts.[109] Part of the Colorado State Constitution even stipulates that enforcement of cannabis contracts is the public policy of the state.[110]

Within this framework, the court held that they would not invalidate the contract in *Green Earth Wellness* on public policy grounds.[111] Since the parties understood the federal illegality of cannabis and pursued a contractual relationship involving cannabis anyways, they could not reasonably be shielded from liability for breach of contract.[112] In providing a remedy, the court deferred to state public policy and enforced the contract on the grounds that the remedy requested would not require a violation of the CSA.[113]

The approach has been employed in other district and circuit courts as well. One case in the Northern District of Texas dealt with issues of unjust enrichment, with the court finding that enforcement of cannabis contracts would be appropriate in order to avoid granting unjust enrichment or unearned windfalls to the parties seeking to not have the contracts enforced.[114] Another decision in the Tenth Circuit dealt with whether employers were obligated to adhere to the Fair Labor Standards Act ("FLSA") with respect to overtime pay for their employees who provided security services for cannabis businesses.[115] That court determined that employers were still obligated to follow the FLSA even when providing services for a company violating federal law so long as those employees met all relevant criteria.[116]

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[106] Marvis, *supra* note 51, at 976.

[107] 163 F. Supp. 3d 821, 832–34 (D. Colo. 2016).

[108] *See* Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFPOST, https://www.huffpost.com/entry/amendment-64-passes-in-co_n_2079899 (Nov. 20, 2012).

[109] Colo. Rev. Stat. Ann. § 13-22-601.

[110] *See id.*; *see also* COLO. CONST. art. 18 § 16.

[111] 163 F. Supp. 3d 821, 835 (2016).

[112] *Id.*

[113] *See id.*

[114] *See* Ginsburg v. ICC Holdings, LLC, No. 3:16-CV-2311-D, 2017 U.S. Dist. LEXIS 187391, at *23–24 (N.D. Tex. Nov. 13, 2017) (holding that a motion to dismiss a claim for illegality requires analysis of factors including the avoidance of forfeitures, avoidance of unjust enrichment, deterrence of illegal conduct, statutory language declaring contracts unenforceable, and other pros and cons to the enforcement of the contract).

[115] *See* Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1108 (10th Cir. 2019) (holding that a company that provides security for marijuana and cannabis companies is not exempt from complying with the Fair Labor Standards Act merely because the company they serve conducts business in contravention to federal law when allowing such exemptions would permit companies to engage in illegal markets with fewer requirements).

[116] *Id.* at 1110–11.

iii. Criticisms of the Nuanced Approach

The cases enforcing cannabis contracts provide an equitable argument as to why the illegality defense is insufficient to defeat enforcement absent a showing that enforcement would compel violations of the CSA. However, this approach is also subject to substantial change by the federal government if the Department of Justice, Drug Enforcement Agency, Attorney General, or President provides guidelines encouraging enforcement of the CSA. The fact that Attorney General Jeff Sessions was able to rescind the Cole Memoranda indicates that informal position statements by federal officers are not enough to properly protect the interests of parties to cannabis contracts.[117]

While the nuanced approach seems desirable from a fairness and equitable perspective, it is nonetheless contrary to controlling federal law.[118] The attractiveness of a solution in equity does not create legal validation or support where there is directly contrary law that federal judges are obligated to enforce, so the federal courts are reliant on a case-by-case analysis which may be inconsistent and unreliable.[119] This approach seriously threatens the balance and Separation of Powers provided for by the Constitution since it would empower the judiciary to employ equitable remedies despite the dictates of federal law. Therefore, while the nuanced approach seems like a just and fair method for federal courts to follow, it is plagued by too many issues that run contrary to the role of such courts for it to be viable or consistent.

C. Abstention, Divesting Jurisdiction, and Remanding to State Courts

The third option is for federal courts to reject cases even where jurisdiction exists. This appears to present a nice middle-ground for courts to avoid the stigma of legislating from the bench, protects the balance of Separation of Powers between the Legislative and Judicial branches, and mirrors the uncertainty posed by the current system without having to strike inconsistent decisions and without threatening the credibility of the courts. Rejecting jurisdiction over such cases also provides the judiciary with a persuasive argument that Congress and the states need a resolution on how to proceed, as federal courts need a better baseline to operate from than easily undone, unofficial executive memoranda.

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[117] *See* Memorandum from Jefferson B. Sessions, U.S. Att'y Gen., on *Marijuana Enforcement* to U.S. Att'ys, (Jan. 4, 2018) (on file with U.S. Dept. of Just.).

[118] Marvis, *supra* note 51, at 1000.

[119] *Id.* at 977. *But see id.* at 1003.

i. *Burford* Abstention Reviewed

The primary way for a federal court to not hear a case that they have proper jurisdiction over is by applying the doctrine of Abstention.[120] There are five different doctrines of Abstention, each named after the Supreme Court decision where they were announced.[121] Of these doctrines, the *Burford* Abstention doctrine is most related to the issue of cannabis contract enforcement because the doctrine allows federal courts to reject matters that are governed by comprehensive state regulations.[122]

Burford involved the Railroad Commission of Texas granting an order to Burford to drill oil wells, with the case revolving around the interpretation of state law.[123] The case was before the Supreme Court on diversity jurisdiction grounds.[124] Writing for the plurality, Justice Hugo Black found that the state court review would be proper since the case involved state law interpretation rather than federal law interpretation.[125] The general principle that came out of the case allows federal courts to abstain from hearing cases validly presented to them under diversity jurisdiction when state courts have more expertise in a complex and unique area of state law that is particularly significant to that state.[126] This doctrine has been applied in two cases involving cannabis: *Big Sky Sci. LLC, v. Bennetts* in the Ninth Circuit and *Left Coast Ventures Inc. v. Bill's Nursery Inc.* in the Western District of Washington.[127]

ii. Abstention in *Big Sky*

In the case of *Big Sky Sci. LLC, v. Bennetts*, the Ninth Circuit dealt with the seizure of hemp being transported through Idaho.[128] The case had originally gone through the District Court for the District of Idaho, which refused to abstain from the case and subsequently denied plaintiff Big Sky

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[120] *See generally* Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811 (1991).

[121] *See generally* R.R. Comm. of Tex. v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Younger v. Harris, 401 U.S. 37 (1971); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

[122] Massey, *supra* note 120, at 832. *Younger* abstention requires there to be pending state cases occurring simultaneously as the federal case. *Id.* However, this limitation applies to state criminal cases or state civil cases which are similar in kind to criminal proceedings. *See* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2287 (2018). *Pullman* abstention requires a delay in federal proceedings while state courts clarify state law to avoid constitutional issues. Massey, *supra* note 120, at 832. *Thibodaux* abstention is largely similar to *Burford* abstention, to such a degree that it is treated as "a specific application of *Burford* abstention." *Id.* (footnote omitted). *Colorado River* abstention allows deference to duplicative state court cases where the need for abstention is "exceptional." *Id.* at 833.

[123] *Burford*, 319 U.S. at 316–17.

[124] *Id.* at 317.

[125] *Id.* at 334.

[126] *Id.*

[127] *See generally* Big Sky Sci., LLC, v. Bennetts, 776 F.App'x 541 (9th Cir. 2019); Left Coast Ventures, Inc. v. Bill's Nursery Inc., No. C19-1297, 2019 U.S. Dist. LEXIS 210736 (W.D. Wash. Dec. 6, 2019).

[128] *Bennetts*, 776 F.App'x at 541.

Scientific's motion for a preliminary injunction.[129] The issue before the Ninth Circuit was whether the District of Idaho had abused its discretion by not abstaining from ruling on the case when there was an *in rem* forfeiture action pending in Idaho state court that could have provided a forum for the presentation of federal law issues.[130]

The Ninth Circuit applied a version of the abstention doctrine test set forth in *Younger v. Harris*, which requires that "(1) there is 'an ongoing state judicial proceeding'; (2) the proceeding 'implicates important state interests'; (3) there is 'an adequate opportunity in the state proceedings to raise constitutional challenges'; and (4) the requested relief 'seeks to enjoin' or has 'the practical effect of enjoining' the ongoing state judicial proceeding."[131] Using this test, the Ninth Circuit found that it was improper for the District of Idaho not to apply the *Younger* Abstention doctrine on the grounds that there was an *in rem* forfeiture action pending in state court, there were legitimate state interests in having the case resolved in that court, there was sufficient opportunity for Big Sky to present their federal claims in the state proceeding, and a decision by the federal court would result in a practical enjoinder of the state issue.[132] However, the issue with applying this doctrine to other cases is that there may not be a pending state court case justifying Abstention. *Younger* abstention would also be inappropriate for cannabis contract disputes because it runs contrary to the idea of *Burford* abstention. State courts attempt to reinforce existing policies regarding cannabis contract disputes, so it is unlikely that a state proceeding would provide insufficient or inadequate redress for injuries suffered as a result of a breach of contract.[133]

iii. Abstention in *Left Coast Ventures*

The case of *Left Coast Ventures Inc. v. Bill's Nursery Inc* had substantially more to do with cannabis contract enforcement than *Big Sky*. This case involved two parties that had a contract to prepare applications for medical cannabis licenses in Florida after the passage of the Compassionate Medical Cannabis Act.[134] There were five available licenses for companies to apply for which, if granted, would allow those businesses to grow and provide cannabis for qualifying medical patients in the state.[135] After reapplying and partnering with the Department of Health, Bill's Nursery was awarded the license.[136]

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[129] *Id.*
[130] *Id.*
[131] *Id.* (quoting Arevalo v. Hennessy, 882 F.3d 763, 765 (9th Cir. 2018)).
[132] *Id.*
[133] *See* Smith, Jr., *supra* note 122, at 2293.
[134] Left Coast Ventures, Inc. v. Bill's Nursery Inc., No. C19-1297, 2019 U.S. Dist. LEXIS 210736, at *1 (W.D. Wash. Dec. 6, 2019).
[135] *Id.* at *1–2.
[136] *Id.* at *3.

Part of the contract between Left Coast—who took over as the assignee for the original contract between Bill's Nursery and Privateer Holdings—and Bill's Nursery granted the former a right to purchase the latter's stock without any encumbrances.[137] When Bill's Nursery ultimately received the license, Left Coast filed suit to exercise their option to receive a share of the license.[138] The contract included a choice of law provision requiring claims arising out of the contract to be filed in a state or federal court in Washington.[139] Further, the provision required that Washington law be used to govern and construe any provisions of the contract.[140] The case was initially filed in the state court, but Bill's Nursery filed to remove it to federal court.[141]

When it went before the District Court for the Western District of Washington, the court issued an Order to Show Cause requiring the parties to plead why the case should not be dismissed when it appeared that it would require them to rule on a remedy granting ownership interests in a cannabis business in violation of the CSA.[142] Bill's Nursery requested that the contract be ruled unenforceable because it violated the CSA, and Left Coast argued that the cause of action should not be dismissed because the contract could be enforced without violating the CSA, and there was substantial public policy supporting the enforcement of the agreement.[143] Left Coast also requested that the court adopt the Abstention doctrine and push the case back to state court due to the state's interest in adjudicating the issue.[144]

When considering whether to apply a doctrine of Abstention, the court explained that it would be necessary to employ their discretion to fit the narrow and specific limits of whichever doctrine they found suitable.[145] The district court determined that the *Burford* Abstention doctrine was the most appropriate doctrine to follow, given the circumstances.[146] Under this doctrine, the court had to assess whether there were difficult issues of state law "bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."[147] Such Abstention would be justified where (a) the federal issues of the case cannot easily be separated from complicated issues of state law which require the competence of state courts to address and (b) involvement by the federal court would prevent the state from properly developing coherent policies of

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137 *Id.* at *2.
138 *Id.* at *3.
139 *Id.*
140 *Id.*
141 *Id.* at *3–4.
142 *Id.* at *4.
143 *Id.*
144 *Id.* at *4–5.
145 *Id.* at *5.
146 *Id.*
147 *Id.* (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

enforcement.[148] Though the *Burford* Abstention doctrine considers an additional factor, the court found that the presence of the prior two factors was sufficient to establish a basis for applying the doctrine.[149]

The court ultimately determined that they could properly abstain from hearing the case because it dealt with an apparent conflict between Florida law and the CSA.[150] This conflict in laws was improper for the court to review, especially given the interests of the state of Florida to develop a consistent policy of medical cannabis enforcement.[151] The court felt that the illegality defense presented by Bill's Nursery would disincentivize businesses from complying with state cannabis laws.[152] Companies could enter into agreements with other companies involving an interest in cannabis processing or cultivation in violation of the CSA and simply remove the issue to federal court whenever it was available, thus providing "an absolute defense to private contract claims."[153] Because the court found that this outcome was inconsistent with the objectives of the Washington legislature to establish a coherent cannabis policy, the court abstained from hearing the case and remanded it to the King County Superior Court.[154]

D. Federal Courts Should Reject Jurisdiction to Secure Separation of Powers, Supremacy of Federal Law, and the Nuances of Cannabis Law

In order to reconcile the possibility of federal enforcement or non-enforcement of the CSA with the business interests of executing valid cannabis contracts, companies involved with such contracts should recognize the lack of federal support for enforcement.[155] When considering whether to participate in business ventures involving interests in cannabis companies, there should be a more clearly defined, predictable expectation than what is currently available.[156]

Judges in the federal district and circuit courts have an obligation to adhere to and enforce federal law, and it is clear that federal law prohibits the enforcement of illegal contracts generally.[157] At the same time, it is unclear how the Separation of powers doctrine has been impacted by the

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[148] *Id.* at *5–6.

[149] *Id.* at *6. The factor that was not met here was whether "the state has concentrated suits involving the local issue in a particular court." *Id.* (quoting Tucker v. First Md. Sav. & Loan, Inc., 942 F.2d 1401, 1405 (9th Cir. 1991)).

[150] Left Coast Ventures, Inc. v. Bill's Nursery Inc., No. C19-1297, 2019 U.S. Dist. LEXIS 210736, at *6–7 (W.D. Wash. Dec. 6, 2019).

[151] *Id.* at *7.

[152] *Id.* at *6.

[153] *Id.* at *6–7.

[154] *Id.*

[155] *See* Edwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 77 (2015).

[156] *See id.* at 97, 113.

[157] Marvis, *supra* note 51, at 973–74.

inconsistency in enforcement and judicial action.[158] Strict adherence to the CSA and principles of federal supremacy and the illegality doctrine will result in inequitable outcomes that encourage businesses to enter into—and breach—contracts involving cannabis because of the lack of accountability.[159] Non-adherence to the CSA alongside a nuanced approach to each contract on a case-by-case basis ignored the role of the federal court system in enforcing and interpreting federal law, thus allowing for results that would not be supported as a matter of law despite their apparent equity.

As a result, it would be in the best interests of federal courts to reject jurisdiction over cannabis contracts that may or may not involve parties developing an interest in the cultivation or profits of a cannabis business until Congress and the Executive Branch develop a more consistent approach to CSA enforcement and illegality. Pushing these cases back down to state courts that have valid jurisdiction allows for a more consistent and predictable approach to contract enforcement issues since many of the states in which cannabis contracts are formed and operate have already codified their approach to subsequent enforcement.[160]

While this Comment advocates for the implementation of the Abstention doctrine, it is appropriate to mention the difficulty of implementing such an approach. One substantial downside to this approach is that federal courts rarely abstain from hearing a case under the current abstention doctrines.[161] As explained in 28 U.S.C. § 1447(c): "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[162] This has been applied in cases within the Ninth Circuit, requiring federal courts to reject jurisdiction over cases that they believe were improperly removed.[163]

Companies that operate in different states and who contract for significant monetary value will often be able to bring actions to federal courts under diversity jurisdiction.[164] This will often be the primary grounds for removal to federal court in cannabis contract disputes since the other route of federal question jurisdiction is unlikely to be present.[165] So long as this

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[158] *See generally* Sam Kamin, *"You've Always Had the Power." Marijuana, Federalism, and Separation of Powers*, AM. CONST. SOC' Y (Jan. 16, 2018), https://www.acslaw.org/expertforum/youve-always-had-the-power-marijuana-federalism- and-separation-of-powers/.

[159] *See* Mare, *supra* note 86, at 1353; *see also* Paul D. Sarkozi, *California State Appeals Court Focuses on Illegality at Time of Contract to Dismiss Commercial Cannabis Dispute*, TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP (May 21, 2020), https://www.thsh.com/cannabizdisputes/california-state-appeals-court-focuses-on-illegality-at-time-of-contract-to-dismiss-commercial-cannabis-dispute.

[160] WASH. REV. CODE. § 69.50.395; OR. REV. STAT. § 475B.535; Cal. Legis. Serv. Prop. 64.

[161] *See* Beth Shankle Anderson, *Our Federalism–The Younger Abstention Doctrine*, 81 FL. BAR. J. 8, 8 n.17 (2007).

[162] 28 U.S.C. § 1447(c).

[163] *See, e.g.*, Evans v. Mut. of Omaha Ins. Co., 134 F.App'x 194 (9th Cir. 2005); United States *ex rel.* Walker v. Gunn, 511 F.2d 1024 (9th Cir. 1975).

[164] Marvis, *supra* note 51, at 974.

[165] Mare, *supra* note 86, at 1376 n.228.

jurisdiction is properly vested in the federal courts and there is no question as to the legitimacy of the removal from state court, the doctrine of Abstention will appear unviable.[166] Additionally, applying the Abstention doctrine, regardless of the specific form taken but especially with the *Burford* Abstention doctrine, does not mean that the particular issue will avoid federal courts entirely.[167] Abstention merely allows a state court to resolve the issue without prejudice from the federal court.[168] Lastly, review of an issue under the *Burford* Abstention by the U.S. Supreme Court may not be possible where there exists federal diversity jurisdiction as opposed to federal question jurisdiction.[169]

However, the imperfection in the abstention doctrine is not a sufficient reason to abandon its proper application when federal review would disrupt the ability of state legislatures to develop consistent methodologies of cannabis contract enforcement. The Supreme Court explained that the doctrine of Abstention would be proper and appropriate to either avoid a premature resolution of a constitutional issue or protect the balance between federal and state laws.[170]

As explained above, there are substantial difficulties in properly employing either the strict compliance approach or the nuanced approach. While the application of the abstention doctrine would not completely resolve the issues present with federal courts and their responsibilities to rule on cannabis enforcement actions, it strikes a fair balance between protecting the integrity of the federal court system and Congress's authority to pass laws by following the CSA on one hand and allowing state courts to properly consider the circumstances of each contract action to provide equitable outcomes on the other.

IV. CONCLUSION

As the laws regarding cannabis continue to change over time, it is important for courts to have proper methods of cannabis contract enforcement. This holds true for both state and federal courts. Critically, the capability of private businesses to enter into interstate commercial interactions with other businesses implicates the need for federal courts to be

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[166] Although rarely adhered to due to its antiquity and the myriad of jurisdictional exceptions developed to encourage judicial efficiency, Chief Justice John Marshall's heavy discouragement of courts declining their valid jurisdiction in *Cohens v. Virginia* serves as a constant reminder of the role of federal courts in assessing jurisdictional disputes. 19 U.S. 264, 404 (1821).

[167] *See* Kade N. Olsen, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 798 (2013).

[168] *See* Harrison v. NAACP, 360 U.S. 167, 176–177 (1959); *see also* Am. Trial Law. Ass'n, et al. v. N.J Sup. Ct., 409 U.S. 467, 469 (1973).

[169] Olsen, *supra* note 167, at 782.

[170] *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965)).

prepared to approach contract enforcement actions when they appear under diversity or federal question jurisdiction.

Congress has entertained several pieces of legislation that would decriminalize, legalize, or reschedule cannabis, opting not to pass any such legislation over the fifty-year history of the CSA.[171] Until such a change occurs, there will be a strong impetus for federal courts to abide by preemption principles, respect the doctrine of Separation of Powers, and rule cannabis contracts unenforceable on the grounds of illegality under the CSA.[172] Despite this impetus, following a strict model of adherence is likely to produce a litany of inequitable outcomes, even if the law itself is clear on how federal courts should proceed.[173]

Especially given the increasingly complex nature of state laws regarding cannabis, federal courts are opting to follow a more nuanced approach to enforcement by considering equitable conditions such as unjust enrichment and unclean hands.[174] This approach accorded more deference to state law, and it mirrors the general approach to enforcement adopted by federal agencies in the years since the Cole Memorandum.[175] Particularly in the Ninth Circuit, this approach has been employed with favorable results for some litigators.[176] However, this approach does not have a basis for support in the role of federal courts or existing federal law.[177] Until the CSA is amended to either reschedule cannabis or remove it entirely, this nuanced approach will be contrary to the law.

Because of the weaknesses of employing the strict compliance approach and the nuanced approach, federal courts must rely on some other methodology for consistently ruling on contract enforcement actions that present valid jurisdiction. Depending on the circumstances of the case, it would be valuable for these courts to employ *Burford* Abstention and send cannabis contract enforcement actions back to state courts.[178] This method defers to state courts that have more experience and skill at handling such actions, allows state legislatures to develop consistent enforcement schemes, secures the Separation of Powers by having federal courts rule on issues that implicate legislative or executive action, and does not require violation of the

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[171] *See supra* note 11, 15 and accompanying text.

[172] *See, e.g.*, Tracy v. USAA Cas. Ins. Co., No. 11-00487, 2012 U.S. Dist. LEXIS 35913, *33 (D. Haw. Mar. 16, 2012); Polk v. Gontmakher, No. 2:18-cv-01434, 2019 U.S. Dist. LEXIS 146724, *5 (W.D. Wash. Aug. 28, 2019); Bart St., III v. ACC Enters., LLC, 2:17-cv-00083, 2020 U.S. Dist. LEXIS 58003, *27–28 (D. Nev. Apr.1, 2020).

[173] *Bart St., III*, 2020 U.S. Dist. LEXIS 58003, at *26–27 (D. Nev. Apr. 1, 2020); *see supra* text accompanying notes 80–82 for a discussion on the cons of the strict adherence approach.

[174] *See generally* Marvis, *supra* note 51 and its accompanying text.

[175] *See* DRUG POL'Y ALL., *supra* note 24 and accompanying text; Ritter, *supra* note 24 and accompanying text; Jaeger, *supra* note 25 and accompanying text.

[176] *See, e.g.*, Ginsburg v. ICC Holdings, LLC, No. 3:16-CV-2311, 2017 U.S. Dist. LEXIS 187391, *24 (N.D. Tex. Nov. 13, 2017).

[177] *See supra* note 15.

[178] Olsen, *supra* note 167, at 798.

CSA by keeping federal courts out of the conflict between federal and state law.

The use of the *Burford* Abstention is beneficial for the courts that employ it since it avoids the potential for constitutional issues or applications of contrary law.[179] While Abstention may frustrate valid federal jurisdiction and impose unexpected challenges on private contracts that specify federal court forum selection clauses, these frustrations are counterbalanced by state policies that promote consistency and equity.[180] Although it may not be a popular method for dealing with controversial cases, federal courts should look to abstain from cannabis contract enforcement actions until a clearer legislative and enforcement policy is adopted consistent with existing state law trends.

[179] *See* Left Coast Ventures Inc. v. Bill's Nursery Inc., No. C19-1297, 2019 U.S. Dist. LEXIS 210736, *5 (W.D. Wash. Dec. 6, 2019).

[180] *See generally* Burford v. Sun Oil Co., 319 U.S. 315 (1943).