

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”

by  
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*Litigation stemming from the state-legal cannabis industry has presented many unique questions for federal courts to grapple with. Can federal courts provide equitable relief to state-legal cannabis litigants, despite being in violation of federal law? Can workers in the state-legal cannabis industry sue their employers to recover required minimum wage under federal statutes? Is a contract that is made in a state-legal cannabis market automatically void? This Comment examines the precarious nature of state-legal cannabis litigation in federal courts through a dissection of how litigation has progressed. It also examines the framing of the arguments made in cannabis disputes. Although the litigation related to the state-legal cannabis industry has been very diverse, this Comment attempts to provide a synthesis of the fundamental principles courts are viewing these disputes from. This Comment argues that two relatively distinct views have emerged as a result of the unclear legal status of the state-legal cannabis industry. One view, the “Broad View,” focuses on how federal illegality creates broad barriers to otherwise clear legal rights that “normal” business industry participants would have. The other view, the “Narrow View,” focuses on the uniqueness of the state-legal cannabis industry and attempts to navigate the issues carefully and narrowly. This Comment further argues for adoption of the Narrow View from both a legal and policy perspective.*

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## I. INTRODUCTION

Picture Herb, a hardworking courier for Mary Jane’s Lab, a cannabis<sup>1</sup> testing laboratory in State A. Mary Jane’s Lab fully complies with State A laws and regulatory requirements regarding cannabis businesses.<sup>2</sup> Mary Jane’s Lab hired Herb to pick up cannabis samples it tests for clients, as required by State A law.<sup>3</sup> After working for a few months, Herb realizes he is not receiving the federal required minimum

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<sup>1</sup> This Comment endorses the use of the term “cannabis” as opposed to “marijuana.” For a fuller discussion of why this term is preferable, see Jon Gettman, *Marijuana vs. Cannabis: Pot-Related Terms to Use and Words We Should Lose*, HIGH TIMES (Sept. 10, 2015), <https://hightimes.com/culture/marijuana-vs-cannabis-pot-related-terms-to-use-and-words-we-should-lose/>; Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2018), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism>.

<sup>2</sup> Cannabis testing laboratories generally have additional regulatory requirements in addition to the customary regulatory schemes that are implemented to oversee state legal cannabis industries. See, e.g., OR. ENVTL. LABORATORY ACCREDITATION PROGRAM, PROTOCOL FOR COLLECTING SAMPLES OF USABLE MARIJUANA (2017), <https://www.oregon.gov/oha/PH/LABORATORYSERVICES/ENVIRONMENTALLABORATORYACCREDITATION/Documents/sop-001.pdf>.

<sup>3</sup> For an example of these types of testing requirements, see *id.*

overtime pay.<sup>4</sup> After consulting with an experienced employment law attorney and after Mary Jane’s Lab refuses to compensate Herb for the overtime hours, Herb files suit in State A District Court seeking relief under the Fair Labor Standards Act (“FLSA”).<sup>5</sup>

Herb is in for a surprise. Mary Jane’s Lab moves to dismiss the suit pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(6). Mary Jane’s Lab argues that because Herb is employed in an industry that is entirely illegal under federal law, pursuant to the Federal Controlled Substance Act of 1970 (“CSA”),<sup>6</sup> he cannot seek the benefits of federal employment protections.<sup>7</sup> Will Herb be barred from recovery in federal court due to the CSA’s express prohibition of cannabis?

This Comment begins by providing background about the evolution of the legal status of cannabis and about how courts generally deal with disputes involving activities of questionable legality. From contract disputes to bankruptcy, FLSA, and banking, this Comment provides an overview of the “reefer madness” that has occurred when federal courts adjudicate state-legal cannabis related disputes.<sup>8</sup> Federal courts have generally taken two “views” on how to handle cannabis litigants.<sup>9</sup> Many courts view these disputes in a broad manner, finding federal illegality of these businesses to be absolute and barring litigants from using the federal court system.<sup>10</sup> This view relies on sweeping views of illegality and limited views of a federal court’s power to adjudicate disputes when the court’s ruling may facilitate criminal activity (what this Comment refers to as the “Broad View”).<sup>11</sup> More recently, federal courts began adopting a narrower view of illegality in the cannabis industry under the CSA and have attempted to recognize the uniqueness of the legal issues before them (what this Comment refers to as the “Narrow View”).<sup>12</sup>

After an overview of pertinent case law, this Comment examines why the Narrow View is the preferable way to address these disputes, as it leads to better policy outcomes and respects the spirit of federalism that allows for States to function as laboratories of democracy.<sup>13</sup> Part V then examines a potential threat to the Narrow View.<sup>14</sup> The Department of Justice (“DOJ”) has recently changed its enforcement

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<sup>4</sup> See 29 U.S.C. § 207(a)(1) (2012).

<sup>5</sup> *Id.*

<sup>6</sup> See 21 U.S.C. § 812(c).

<sup>7</sup> See *infra* Part III.A.4 for a further discussion of this argument.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *id.*

<sup>10</sup> See *infra* Part III.A.

<sup>11</sup> *Id.*

<sup>12</sup> See *infra* Part III.B.

<sup>13</sup> See *infra* Part IV; *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>14</sup> See *infra* Part V.

policy toward state-legal cannabis and that change may undermine some of the reasoning that underlies the Narrow View.<sup>15</sup>

## II. BACKGROUND

### A. Cannabis “Legalization”

Cannabis was first prohibited in the United States approximately 80 years ago,<sup>16</sup> and cannabis still remains illegal under federal law as a Schedule 1 controlled substance.<sup>17</sup> According to the CSA, cannabis has “no currently accepted medical use” and it is illegal to profit from it.<sup>18</sup> Furthermore, the federal government can prosecute anyone involved with cannabis for other crimes, such as those prohibited by money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act.<sup>19</sup> DOJ has made clear, even under the prior limited enforcement policy,<sup>20</sup> that state law does not change the illegality of the cannabis industry under federal law.<sup>21</sup> DOJ has even carried out raids on state-legal cannabis businesses, although this is fairly uncommon.<sup>22</sup>

However, the federal policy stance towards cannabis was fairly unclear for a number of years.<sup>23</sup> This was due to the release of four DOJ memos from 2009 to 2014 (“DOJ Memos”).<sup>24</sup> The DOJ Memos essentially provided a “yellow” light to

<sup>15</sup> *Id.*

<sup>16</sup> Jeremy Berke & Skye Gould, *This Map Shows Every State that Has Legalized Marijuana*, BUS. INSIDER (Jan. 4, 2019), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>17</sup> 21 U.S.C. § 812(c) (2012).

<sup>18</sup> *Id.* §§ 812(b)(1)(B), 841, 844–848.

<sup>19</sup> *See* 18 U.S.C. § 1960 (2012); 31 U.S.C. § 5318 (2012).

<sup>20</sup> *See infra* Part V.

<sup>21</sup> *See* Memorandum from James M. Cole, U.S. Deputy Attn’y Gen., to U.S. Att’y, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Cole 2011 Memo] (“Persons who are in the business of cultivating, selling, or distributing marijuana . . . are in violation of the [CSA], regardless of state law.”).

<sup>22</sup> Nick Sibilla, *Cops Raid Medical Marijuana Business, Seize Over \$100,000, Including Teenage Girls’ College Savings*, FORBES (Nov. 2, 2016), <https://www.forbes.com/sites/instituteofjustice/2016/11/02/cops-raid-medical-marijuana-business-seize-over-100000-including-teenage-girls-college-savings/#1323fa052a5c>.

<sup>23</sup> *See infra* Part V.

<sup>24</sup> *See* Memorandum from David W. Ogden, U.S. Deputy Att’y Gen., to U.S. Att’y, Investigations & Prosecutions in States Authorizing the Med. Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>; Cole 2011 Memo, *supra* note 21; Memorandum from James M. Cole, U.S. Deputy Att’y Gen., to U.S. Att’y, Guidance Regarding Marijuana Enft, (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole 2013 Memo]; Memorandum

the state-legal cannabis industry by providing clear guidelines for when DOJ would use federal funds to prosecute state-legal cannabis businesses.<sup>25</sup> Congress also weighed in on the issue of medical marijuana, preventing DOJ from spending appropriated funds to prevent implementation of state-legal medical cannabis programs.<sup>26</sup> The Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") guidelines further address cannabis banking issues and provide guidance for how banks can work with cannabis companies,<sup>27</sup> but the heavy cost of compliance and federal illegality has made banking practically unavailable for cannabis businesses.<sup>28</sup> Recently, however, under Attorney General Jefferson B. Sessions (and as will be explained in Part V), DOJ has seemingly turned this "yellow" light back to red.<sup>29</sup>

Over the last decade, the American public has increasingly supported legalizing cannabis, with support reaching an all-time high in 2017, with 62 percent of Americans supporting legalization for adult use.<sup>30</sup> In 1981, only 25 percent of Americans supported legalization for adult use.<sup>31</sup> This 39 percent increase indicates the change in cultural perception regarding adult cannabis use. Furthermore, this support has translated into action, with cannabis now legal in some form in thirty states<sup>32</sup> and

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from James M. Cole, United States Deputy Attorney Gen., to United States Attorneys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.

<sup>25</sup> See Cole 2013 Memo, *supra* note 24; Memorandum from David W. Ogden, *supra* note 24.

<sup>26</sup> Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 129 Stat. 2130, 2217 (2014) ("None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."); H.R. Res. 1625, 115th Cong. (2018) (enacted) (extending the limitation through September 30, 2018); see also *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016). *But see* *United States v. Gilmore*, 886 F.3d 1288, 1290 (9th Cir. 2018) (holding that the limitation does not apply to cannabis cultivation on federal land). The appropriations rider remains in effect as of this writing. Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

<sup>27</sup> See DEP'T TREASURY FIN. CRIMES ENF'T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

<sup>28</sup> See generally Robert McVay, *Feds Green Light Marijuana Banking*, CANNA L. BLOG (Feb. 14, 2014), <https://www.cannalawblog.com/feds-green-light-marijuana-banking/>.

<sup>29</sup> See Memorandum from Att'y Gen. Jefferson B. Sessions, III, to U.S. Att'ys, Marijuana Enf't (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>30</sup> Berke & Gould, *supra* note 16.

<sup>31</sup> Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <https://news.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

<sup>32</sup> Berke & Gould, *supra* note 16.

legal for adults over 21 years of age in ten states and Washington, D.C.<sup>33</sup> This has resulted in a boom of cannabis-related businesses, with Colorado having more dispensaries in the state than Starbucks and McDonalds combined.<sup>34</sup>

As of 2017, the cannabis market in the United States is worth 9.2 billion dollars,<sup>35</sup> a 37 percent increase from 2016.<sup>36</sup> The market is expected to reach 47.3 billion dollars in a decade<sup>37</sup> and some estimates predict the industry will be worth 75 billion dollars by 2030.<sup>38</sup> Currently, there are over fifty publicly-traded companies related to cannabis on the stock market<sup>39</sup> and job growth in the industry is expected to increase by 110 percent by 2020.<sup>40</sup> This breaks down to approximately 211,000 full-time and part-time jobs, with the cannabis industry expected to employ more people than manufacturing, utilities, and governmental industries.<sup>41</sup>

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<sup>33</sup> Conor Dougherty, *Cannabis, Marijuana, Weed, Pot? Just Call It a Job Machine*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/business/economy/jobs-in-cannabis-weed-marijuana.html>. Vermont also became the first state to legalize cannabis through the legislature. Berke & Gould, *supra* note 16. Canada and Uruguay are the only two nations to have federally legalized cannabis. Bani Sapra, *Canada Becomes Second Nation in the World to Legalize Marijuana*, CNN (June 20, 2018), <https://www.cnn.com/2018/06/20/health/canada-legalizes-marijuana/index.html>.

<sup>34</sup> *How Many Dispensaries Are in Denver Colorado?*, 420 TOURS (Feb. 28, 2018), <https://my420tours.com/many-dispensaries-denver-colorado/>.

<sup>35</sup> Thomas Pellechia, *Legal Cannabis Industry Poised for Big Growth, in North America and Around the World*, FORBES (Mar. 1, 2018), <https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead/#73db9c676510>.

<sup>36</sup> Debra Borchart, *Marijuana Sales Totaled \$6.7 Billion in 2016*, FORBES (Jan. 3, 2017), <https://www.forbes.com/sites/debraborchart/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#756028ba75e3>.

<sup>37</sup> Pellechia, *supra* note 35.

<sup>38</sup> *Will Marijuana Industry Overtake Beer as Legalization Spurs Innovation?*, INVESTOR'S BUS. DAILY, (May 29, 2018), <https://www.investors.com/news/marijuana-industry-cannabis-business-threaten-beer-industry-420/>. As a comparison, the beer industry is currently worth 110 billion and the cigarette industry is worth 77 billion. *Id.*

<sup>39</sup> Alex Tribou & Adam Pearce, *For These 55 Marijuana Companies, Every Day is 4/20*, BLOOMBERG, <https://www.bloomberg.com/graphics/2015-weed-index>.

<sup>40</sup> Bruce Barcott, *Part I, Legal Cannabis Created 211,000 Full-Time Jobs*, LEAFLY (Mar. 4, 2019), <https://www.leafly.com/news/industry/legal-cannabis-jobs-report-2019>.

<sup>41</sup> Debra Borchart, *Marijuana Industry Projected to Create More Jobs than Manufacturing by 2020*, FORBES (Feb. 22, 2017), <https://www.forbes.com/sites/debraborchart/2017/02/22/marijuana-industry-projected-to-create-more-jobs-than-manufacturing-by-2020/#2076e9313fa9>.

The legal cannabis industry has also resulted in a massive tax benefit to the states with medical and recreational programs.<sup>42</sup> Similar to the results of state legalization, studies have suggested that federal legalization would result in 132 billion dollars in tax revenue and create approximately one million jobs.<sup>43</sup>

Due to public perception, industry growth, and tax revenue, the cannabis industry—in spite of federal illegality—is currently thriving. Due to the size of this industry, businesses must be able to plan, as they would in any other business setting, with some level of predictability.<sup>44</sup> Clear legal rules and predictability, along with the ability to enforce these rules in court, will provide massive benefits to this growing industry by attracting more sophisticated investors and business entrepreneurs, thus further increasing industry legitimacy and stability.<sup>45</sup>

Yet, due to the CSA, significant uncertainty confronts any cannabis litigant who steps into federal court.<sup>46</sup> Litigants' contracts may be unenforceable, or federal statutory relief may be denied.<sup>47</sup> It is worth reviewing the underlying principles that create this uncertainty before digging into the specifics of the federal case law.

### *B. Overview of Federal Courts Dealing with Illegality in Civil Litigation*

Illegality doctrine, relevant to the analysis in this Comment, generally arises in two different ways in federal court. Both doctrines draw from the Supremacy Clause,<sup>48</sup> the preemption doctrine, and the Commerce Clause.<sup>49</sup> Generally, defendants will raise either the unclean hands doctrine<sup>50</sup> in the contract context or rely on the principle that federal courts cannot use equitable powers to facilitate illegal activity.<sup>51</sup>

One may wonder why cannabis litigants would not simply avoid federal court and litigate exclusively in state court in an attempt to avoid any issues with the CSA.

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<sup>42</sup> Oregon, Washington, and Colorado alone received a combined 1.3 billion dollars in tax revenue. Katie Zezima, *Study: Legal Marijuana Could Generate More than \$132 Billion in Federal Tax Revenue and 1 Million Jobs*, WASH. POST (Jan. 10, 2018), [https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm\\_term=.3abe336e027b](https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.3abe336e027b).

<sup>43</sup> *Id.*

<sup>44</sup> See Francis J. Mootz III, *E/Insuring The Marijuana Industry*, 49 U. PAC. L. REV. 43, 43 (2017) (arguing the only way to ensure the cannabis industry is successful is if it can insure itself against risk, which will provide the ability to plan future business strategy accordingly).

<sup>45</sup> *Id.*

<sup>46</sup> See *infra* Part III.

<sup>47</sup> *Id.*

<sup>48</sup> U.S. CONST. art. VI, cl. 2.

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>50</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981).

<sup>51</sup> See *infra* Part II.B.3.

But while this may be a way around these issues,<sup>52</sup> federal court is simply unavoidable at times for cannabis litigants. For example, cases that are filed or removed under diversity jurisdiction<sup>53</sup> are common when parties, such as investors, are from different states.<sup>54</sup> Strategic removal is common, when diversity requirements are met, especially as defendants become increasingly savvy by realizing that removal could be a path to victory in, for example, contract disputes.<sup>55</sup> Furthermore, if a plaintiff alleges federal law claims in state court, defendants can also remove to federal court under federal question jurisdiction.<sup>56</sup> Thus, federal courts are going to be and already are making policy decisions based on illegality arguments that have impacts for cannabis litigants. In light of this, attorneys with clients in the cannabis industry need to understand the principles that federal courts use when making these decisions.

### 1. *The Commerce Clause, Supremacy Clause, and Preemption*

Due to continued federal illegality of cannabis,<sup>57</sup> the Supremacy Clause and the preemption doctrine undeniably make the CSA the supreme law of the land.<sup>58</sup> States that have legalized cannabis make clear that the laws passed are only creating an exemption to state criminal laws, not federal law.<sup>59</sup> *Gonzales v. Raich* further makes clear that when Congress legislates within the Commerce Clause power, which it does for cannabis through the CSA, then federal courts will follow Congress's demands, even when an individual consumes cannabis solely for medical use.<sup>60</sup>

Accordingly, federal and state laws conflict, even though federal law preempts state law.<sup>61</sup> The Tenth Amendment's<sup>62</sup> anti-commandeering doctrine allows these laws<sup>63</sup> because no matter how strong the federal interest is, the federal government

<sup>52</sup> See *infra* Part III.B.3 for a discussion of whether this is a viable way around the preemption issue.

<sup>53</sup> 28 U.S.C. § 1332(a) (2012).

<sup>54</sup> See Stephanie Gambino & Jamison Klang, *Investing in Cannabis: Residency Requirements at a Glance*, DORSEY CANNABIS (July 20, 2018), <https://dorseycann.com/investing-in-cannabis-residency-requirements-at-a-glance/>; see also *infra* Part III.B.

<sup>55</sup> See *infra* Part III.A.3.

<sup>56</sup> See 28 U.S.C. § 1331.

<sup>57</sup> See *supra* Part II.A.

<sup>58</sup> *Haerberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at \*3 (Colo. Dist. Ct. Aug. 8, 2012).

<sup>59</sup> *Id.*

<sup>60</sup> *Gonzales v. Raich*, 545 U.S. 1, 27–33 (2005).

<sup>61</sup> See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102 (2015).

<sup>62</sup> U.S. CONST. amend. X.

<sup>63</sup> Chemerinsky et al., *supra* note 61, at 102–03.

cannot require states to enact and enforce a federal regulatory program.<sup>64</sup> However, the federal government can, through Congress, regulate in any area the Commerce Clause allows, and can do what is necessary to enforce that regulation.<sup>65</sup> Thus, Congress can regulate cannabis even though states cannot be forced to align their policies with the federal government.<sup>66</sup>

Some argue that the CSA does not preempt state law when there is no positive conflict between the CSA and state law so that the two cannot consistently stand together.<sup>67</sup> However, many scholars still firmly hold the belief that states cannot protect citizens from federal enforcement of the CSA, leaving them vulnerable to the federal law's reach.<sup>68</sup> Overall, what is important about the Supremacy Clause, preemption doctrine, and the Commerce Clause is that there is existing ambiguity that leaves the door open for federal courts to use arguments grounded in these doctrines to restrict recovery for cannabis litigants in federal court under the CSA.<sup>69</sup>

## 2. *Unclean Hands Doctrine, Public Policy, and Illegality*

Defendants often use, especially in contract litigation and bankruptcy, the unclean hands doctrine, public policy, and illegality. Defendants will use these doctrines by pointing to the CSA and arguing that an illegal business does not come into court with clean hands or that it violates public policy to enforce a contract regarding cannabis.<sup>70</sup> Federal courts have applied this doctrine as a defense to suits seeking money damages, despite the doctrine's origins in courts of equity.<sup>71</sup> Federal courts have also invoked this doctrine *sua sponte*.<sup>72</sup> The doctrine generally makes a

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<sup>64</sup> *Printz v. United States*, 521 U.S. 898, 912 (1997) (state legislatures are not subject to federal direction); *New York v. United States*, 505 U.S. 144, 178 (1992).

<sup>65</sup> *New York*, 505 U.S. at 178.

<sup>66</sup> *Gonzales v. Raich*, 545 U.S. 1, 27–33 (2005).

<sup>67</sup> Chemerinsky et al., *supra* note 61, at 106 (discussing this argument without endorsing it).

<sup>68</sup> See *id.* for a full discussion of the arguments.

<sup>69</sup> Chemerinsky et al., *supra* note 61, at 103.

<sup>70</sup> Unclean hands doctrine is often used interchangeably with illegality and public policy and is a powerful doctrine that precludes a party from any type of relief. See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981); see also 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, 1362–74 (2016).

<sup>71</sup> *Id.* at 1360.

<sup>72</sup> See, e.g., *Karpenko v. Leendertz*, 619 F.3d 259, 265 (3d Cir. 2010) (unclean hands doctrine can be raised *sua sponte*); *In re Halvorson*, 581 B.R. 610, 637 (Bankr. C.D. Cal. 2018), *vacated*, No. 8:18-cv-00525 JVS, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018) (authorities agree it is proper to raise the defense *sua sponte*); *Valentine v. Metro. Life Ins. Co.*, No. 85 3006 CSH, 2004 WL 2496074, at \*4 (S.D.N.Y. Nov. 4, 2004) (a judge may raise the unclean hands doctrine *sua sponte*).

contract unenforceable if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by public policy.<sup>73</sup>

The main policy decision behind these doctrines is deterrence by making it known to parties contracting together that if they form an illegal contract, it will not be enforceable in court.<sup>74</sup> In *McMullen v. Hoffman*, the Supreme Court of the United States embraced the deterrence policy of the unclean hands doctrine, stating it was the Court's proper role "to refuse to grant . . . judicial aid for the enforcement of [an illegal contract] . . . [in order to keep the] number of such transactions to a minimum."<sup>75</sup> Courts often invoke unclean hands under the general language of illegality or public policy.<sup>76</sup>

The doctrine's origins lie in the courts of equity.<sup>77</sup> Scholars have various perspectives on the philosophy underlying courts of equity, and the process perspective is particularly fitting for this Comment.<sup>78</sup> The process perspective "stems from the instinct that equity is more than a recitation of its rules"<sup>79</sup> and the courts role was to use flexibility to maintain the integrity of the law.<sup>80</sup> The doctrines that grew out of equity are often fuzzy around the edges due to the courts' unique role, i.e., using standards rather than rules to ensure justice.<sup>81</sup> Equity courts enforced certain "ethical ideals"<sup>82</sup> and the courts justified equitable defenses, such as unclean hands, as a necessary mechanism to stop strategic behavior and safeguard the court.<sup>83</sup> The unclean hands doctrine developed as one of the many "second-order safety valve[s]" to combat opportunism.<sup>84</sup> Specifically, the equity courts developed unclean hands doctrine to protect the court against enabling a litigant to profit from its own wrongdoing.<sup>85</sup> The fundamental purposes of the unclean hands doctrine are to "protect

<sup>73</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

<sup>74</sup> Mare, *supra* note 70, at 1360.

<sup>75</sup> 174 U.S. 639, 669–70 (1899). The Court has subsequently reaffirmed this deterrence policy. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").

<sup>76</sup> Mare, *supra* note 70, at 1360.

<sup>77</sup> See T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1837–38 (2018); Philip A. Ryan, *Equity: System or Process?*, 45 GEO. L.J. 213, 217–23 (1957).

<sup>78</sup> Anenson, *supra* note 77, at 1838–39.

<sup>79</sup> *Id.* at 1839.

<sup>80</sup> *Id.* This philosophy stems from the Aristotelian idea that law would fail due to its generality and courts of equity had to use ex post discretion to ensure justice. *Id.*

<sup>81</sup> *Id.* at 1839–40.

<sup>82</sup> *Id.* at 1841.

<sup>83</sup> *Id.* at 1842.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1843.

judicial integrity and promote justice.”<sup>86</sup> These themes should provide an important reference point for federal judges when litigants raise arguments based on the unclean hands doctrine, and courts still have a duty today to ensure justice for litigants.

Federal bankruptcy courts often use the unclean hands doctrine.<sup>87</sup> Many courts refused to hear cannabis-related bankruptcy matters because debtors involved in the cannabis industry are asking for equitable relief from a federal court for a business in violation of federal law, making debtors’ hands unclean.<sup>88</sup> Federal judges’ oath to uphold the laws of the United States, which prescribe and uphold criminal sanctions for involvement in the cannabis industry, poses another potential issue.<sup>89</sup> Unclean hands could even be used against a landlord who has rented to a tenant who grows or distributes cannabis.<sup>90</sup>

Skilled defense attorneys can push unclean hands doctrine to its limits to aid clients, and judges have ample room to raise the defense.<sup>91</sup> Even though this doctrine is largely limited to contracts and bankruptcy, both legal mechanisms are important to the cannabis industry.<sup>92</sup> Due to the doctrine’s origins in courts of equity, judges are left with no bright line rule, which makes understanding how decisions will affect policy even more important.<sup>93</sup>

### 3. *Limitation on Equitable Power if It Facilitates Criminal Activity*

The second policy underpinning federal courts’ refusal to adjudicate claims brought by cannabis litigants comes from the idea that federal courts cannot use equitable powers to grant or deny relief to a party if it will facilitate criminal activity.<sup>94</sup> The Tenth Circuit Court of Appeals recently held that due to the CSA, via preemption, federal courts cannot use their equitable powers to issue an order that would facilitate criminal activity.<sup>95</sup> In other words, a federal court cannot lend aid to the perpetuation of criminal acts.<sup>96</sup> The specific facts and rulings of this case will be discussed in depth in Part III.A.2 of this Comment. Relevant here is that the Tenth Circuit ruled that a defendant did not even need to raise illegality as an affirmative defense because the defense appeared on the face of plaintiff’s complaint;

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<sup>86</sup> *Id.*

<sup>87</sup> *See infra* Part III.A.1.

<sup>88</sup> Mare, *supra* note 70, at 1363.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1365.

<sup>91</sup> *Id.* at 1362.

<sup>92</sup> *See* Mare, *supra* note 70, at 1353; Mootz, *supra* note 44, at 62.

<sup>93</sup> *See* Part IV for a deeper discussion of this importance.

<sup>94</sup> *See, e.g.*, *Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 861 F.3d 1052, 1054 (10th Cir. 2017) (per curiam).

<sup>95</sup> *Id.* at 1053.

<sup>96</sup> *Id.*

thus, the court could dispose of the case on a motion to dismiss under FRCP 12(b)(6).<sup>97</sup>

The breadth of this doctrine is readily apparent and creates great uncertainty for cannabis litigants as this type of argument could reach almost any cannabis-related litigation in federal court; it seems unclear where the line would be drawn regarding what constitutes facilitation of criminal activity by a federal court.<sup>98</sup> With a cursory understanding of how illegality doctrine<sup>99</sup> relates generally to cannabis litigation in federal court, it is now necessary to dive deeper into the case law, and explore how federal courts have either embraced the Broad View or Narrow View of illegality doctrine.

### III. THE TWO WAYS FEDERAL COURTS VIEW CANNABIS LITIGATION

As discussed in Part II, state-legal cannabis litigation in federal court is becoming more and more common. Courts have often embraced or turned away from illegality doctrine, making it worthwhile to examine the different areas of law where courts have raised or distinguished these issues. Part III.A will examine areas of law and cases where courts have taken the Broad View of illegality as well as the policy reasons behind those decisions.<sup>100</sup> Part III.B will then examine the cases where courts have taken the Narrow View of illegality and the policy reasons the courts advance for doing so.

#### A. *The Broad View*

The Broad View can be summed up as federal courts using the unclean hands, public policy, and facilitation of criminal activity doctrines, backed up by the Supremacy Clause, preemption doctrine, and Commerce Clause, to refuse to hear cases

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<sup>97</sup> *Id.* at 1058. *See supra* Part II.B.2 for a counter-argument to this ruling.

<sup>98</sup> Is denying an injunction against a cannabis company facilitating illegal activity because the court allows the business to continue to operate? Would a federal court be facilitating criminal activity by forcing a cannabis industry employer to pay overtime wages to an employee, even though it knows these wages are coming from violations of the CSA? *See infra* Part III.B for some insight into these issues, but overall the questions remain unclear.

<sup>99</sup> For the remainder of this Comment, “illegality doctrine” will generally refer to the foundational doctrines discussed in Part II.B.2—for example, unclean hands doctrine, public policy, and the prohibition against facilitation of criminal activity doctrine.

<sup>100</sup> One area this Comment will not touch on, but that provides examples of the Broad View characterization of illegality is in federal constitutional rights cases. For analysis of these issues in that context, see, for example, *Barrios v. City of Tulare*, No. 1:13-CV-1665 AWI GSA, 2014 WL 2174746, at \*5 (E.D. Cal. May 23, 2014) (holding that the plaintiff had no property interest federally due to CSA’s prohibition of cannabis).

involving cannabis litigants due to the industry's federal illegality.<sup>101</sup> The federal courts employing the Broad View will generally dispose of these cases on a motion to dismiss under FRCP 12(b)(6).<sup>102</sup> Exploring court opinions employing the Broad View in various areas of law will better illuminate the reasoning behind it.

### 1. Federal Bankruptcy Courts

Debtors involved in the cannabis industry have found it next to impossible to obtain federal bankruptcy relief.<sup>103</sup> Federal bankruptcy courts are especially absolutist in applying the illegality doctrine and are the forum in which the Broad View provides the normative standard. This absolutism primarily results from the way federal bankruptcy is viewed as a privilege for debtors.<sup>104</sup> Federal bankruptcy courts also often focus on preemption and the unclean hands doctrine to find bad faith and dismiss a case for cause.<sup>105</sup>

*In re Beyries*<sup>106</sup> set the tone early on<sup>107</sup> when the Northern District of California affirmed the bankruptcy court's holding that it could not enter judgment for debtors engaged in unlawful activity through participation in the cannabis industry, regardless of whether that industry was legal at the state level.<sup>108</sup> The *Beyries* bankruptcy court relied explicitly on the unclean hands doctrine, stating, "[i]t is very unseemly for the court to be asked to grant relief to a plaintiff which claims it lost its cash from illegal drug sales."<sup>109</sup> Although the bankruptcy court stated that a finding of

<sup>101</sup> See *infra* Part III.A.

<sup>102</sup> *Id.*

<sup>103</sup> This Section discusses and shows why this is the case.

<sup>104</sup> See, e.g., *In re Arenas*, 535 B.R. 845, 853 (B.A.P. 10th Cir. 2015) ("Bankruptcy relief is merely a privilege.").

<sup>105</sup> See, e.g., *In re Medpoint Mgmt., LLC*, 528 B.R. 178, 184 (Bankr. D. Ariz. 2015), *vacated in part*, *In re Medpoint Mgmt., LLC*, BAP No. AZ-15-1130-KuJaJu, 2016 WL 3251581, at \*8 (B.A.P. 9th Cir. June 3, 2016); *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805–09 (Bankr. D. Colo. 2012).

<sup>106</sup> *In re Beyries*, Bankr. No. 10-13482, 2011 WL 5975445, at \*2 (Bankr. N.D. Cal. Nov. 29, 2011), *aff'd sub nom.* *Northbay Wellness Grp., Inc. v. Beyries*, No. C 11-06255 JSW, 2012 WL 4120409 (N.D. Cal. Sept. 18, 2012), *rev'd and remanded*, 789 F.3d 956 (9th Cir. 2015), and *aff'd in part, rev'd in part*, 607 F. App'x 693 (9th Cir. 2015).

<sup>107</sup> This is despite the district court's affirmation and the bankruptcy court's opinion being overturned by the Ninth Circuit, which is discussed in Part III.B.1 of this Comment.

<sup>108</sup> *In re Beyries*, 2011 WL 5975445, at \*2 ("[T]he funds plaintiffs gave to Beyries were the actual proceeds of illegal drug sales. This is not the sort of case which is supposed to darken the doors of a federal court."). The *Beyries* bankruptcy court relied on *Gonzales v. Raich* for this argument. *Id.* at \*1.

<sup>109</sup> *Id.* at \*2.

unclean hands is not made “lightly or automatically,” the court’s language demonstrates that simply being involved in the cannabis industry was enough to preclude the possibility of relief, even without additional wrongdoing.<sup>110</sup>

The bankruptcy court in Colorado followed a similar line of reasoning as the *Beyries* court when in *In re Rent-Rite* it held that the unclean hands doctrine precluded protections for a debtor whose activities constitute a violation of the CSA.<sup>111</sup> *Rent-Rite* uses especially broad language when discussing unclean hands, finding that the debtor, who rented space to a cannabis cultivator, “knowingly and intentionally engaged in conduct that constitutes a violation of federal criminal law.”<sup>112</sup> The court further determined the CSA violation could be characterized as either unclean hands doctrine or as a dismissal for “cause” under the bankruptcy code.<sup>113</sup> *Rent-Rite* is interesting because both the unclean hands doctrine and the facilitation of criminal activity are themes in the court’s opinion, as the court also states that “a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a debtor whose activities constitute a continuing federal crime.”<sup>114</sup>

*In re Olson* further indicates that it will be difficult for cannabis debtors to obtain bankruptcy relief.<sup>115</sup> The *Olson* court reversed the district court’s affirmance of the bankruptcy court’s ruling for failing to apply the proper method when making a finding of bad faith to grant a dismissal for cause.<sup>116</sup> The *Olson* court also cited and seemed to endorse the reasoning that a federal court cannot grant administration of a Chapter 13 proceeding because it would require the trustee to administer proceeds of an illegal business.<sup>117</sup> The *Olson* court further indicated that a proper finding of unclean hands doctrine would have been sufficient for dismissal, but determined the bankruptcy court had not made specific enough findings and conclusions that would allow it to determine whether the ruling was based on a sound legal

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<sup>110</sup> *Id.*

<sup>111</sup> *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 807 (Bankr. D. Colo. 2012).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 809; *see also In re Arenas*, 535 B.R. 845, 851 (B.A.P. 10th Cir. 2015) (affirming the bankruptcy court’s for-cause dismissal because any proposed plan by debtor would have to be carried out through means forbidden by law, for example, through violation of the CSA).

<sup>114</sup> *In re Rent-Rite*, 484 B.R. at 805; *see also In re Arenas*, 535 B.R. at 853 (similarly endorsing the bankruptcy court’s determination that “it would be impossible for the Chapter 7 Trustee to administer the Arenases’ estate because selling and distributing the proceeds of the [cannabis] assets would constitute federal offenses”) (emphasis added).

<sup>115</sup> *In re Olson*, No. NV-17-1168-LTiF, 2018 WL 989263, at \*6 (B.A.P. 9th Cir. Feb. 5, 2018). However, this opinion does offer a glimmer of hope to cannabis debtors seeking bankruptcy relief, discussed *infra* Part III.B.1.

<sup>116</sup> *Id.* at \*4.

<sup>117</sup> *Id.* at \*6.

standard.<sup>118</sup> *Olson* seems to be more concerned about properly applying the standards that prevent cannabis debtors from recovery, rather than advocating for rethinking or narrowing the bankruptcy court's general view of illegality.

Overall, *Beyries*, *Rent-Rite*, and *Olson* make clear how bankruptcy courts frequently endorse a broad view of illegality through both the unclean hands doctrine and the prohibition on facilitation of criminal activity doctrine. The Broad View is very clearly articulated in bankruptcy cases dealing with cannabis debtors and leaves them little hope of recovery, absent a change in federal law.

## 2. Access to Banking

The primary case dealing with cannabis banking issues in federal court, *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas*, draws heavily on the prohibition on facilitating criminal activity doctrine.<sup>119</sup> Fourth Corner Credit Union intended to provide banking services to compliant state licensed cannabis and hemp businesses, their employees, and industry vendors.<sup>120</sup> Fourth Corner Credit Union sued the Federal Reserve Bank of Kansas for declaratory judgment, requesting the district court to issue "a judgment declaring that [the Reserve Bank] must grant [the Credit Union] a master account."<sup>121</sup> The district court denied the declaratory judgment, stating, "[t]he problem here is that [Fourth Corner] is asking the court to exercise its equitable authority to issue a mandatory injunction. But courts cannot use equitable powers to issue an order that would facilitate criminal activity."<sup>122</sup> The Tenth Circuit agreed,<sup>123</sup> and took time to emphasize how DOJ's stance via the DOJ Memos<sup>124</sup> and the FinCEN guidelines<sup>125</sup> do not change Congress's clear intent through the CSA.<sup>126</sup>

The Tenth Circuit also made an interesting procedural ruling, finding that Fourth Corner's complaint established the affirmative defense of illegality, making

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<sup>118</sup> *Id.*

<sup>119</sup> *Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 861 F.3d 1052, 1057 (10th Cir. 2017).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1058 (alteration in original).

<sup>122</sup> *Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 154 F. Supp. 3d 1185, 1188 (D. Colo. 2016), *vacated*, 861 F.3d 1052 (10th Cir. 2017).

<sup>123</sup> *Fourth Corner Credit Union*, 861 F.3d at 1057 ("The district court correctly declined to facilitate this illegality.").

<sup>124</sup> For a full discussion of the memos, see *infra* Part V.

<sup>125</sup> DEP'T TREASURY FIN. CRIMES ENF'T NETWORK, *supra* note 27.

<sup>126</sup> *Fourth Corner Credit Union*, 861 F.3d at 1056 ("But [the FinCEN guidance], like the Cole Memorandum, didn't nullify the CSA or federal money-laundering statues . . . . And the Credit Union doesn't explain how Executive Branch enforcement decisions could undermine substantive law.").

it proper to dismiss its claims under FRCP 12(b)(6).<sup>127</sup> Whether this was a proper procedural move is discussed *infra* Part III.B.2. Overall, the District Court and Tenth Circuit opinions in *Fourth Corner* provide some of the clearest examples of the prohibition on facilitation of criminal activity doctrine. If a court's equitable powers could potentially be used to facilitate or interpreted as facilitating criminal activity, cannabis litigants should be prepared for these types of arguments.

### 3. *Contract Enforceability and Unclean Hands*

When federal courts are faced with contract disputes, defendants can raise the unclean hands doctrine and public policy as affirmative defenses to get cases dismissed.<sup>128</sup> Defendants realize that strategically removing to federal court and arguing some form of illegality doctrine can ultimately be the deciding factor in the outcome of a case.<sup>129</sup> This occurred in *Tracy v. USAA*, an insurance contract coverage case in federal court on diversity jurisdiction.<sup>130</sup> The plaintiff in *Tracy* had an insurance contract with USAA and ended up having \$45,600 worth of cannabis plants stolen.<sup>131</sup> Tracy argued the stolen plants were covered by her homeowner's insurance policy because the language of the contract included stolen "trees, shrubs, and other plants."<sup>132</sup> Interestingly, USAA offered to satisfy the claim, but Tracy sued for breach of contract in Hawaii state court, with USAA subsequently removing to federal district court.<sup>133</sup>

The district court made two fascinating rulings. First, the court determined that the Hawaii Supreme Court would likely find Tracy had an insurable interest in the cannabis plants, meaning they would be covered by the insurance contract with USAA.<sup>134</sup> However, the good news for Tracy ended there. Due to the status of cannabis under the CSA, the *Tracy* court determined that despite having an insurable interest in cannabis plants, USAA was precluded from providing coverage for the plants because it would be contrary to federal law and federal public policy.<sup>135</sup> The court stated, "[t]he rule under Hawai'i law that courts may decline to enforce a contract that is illegal or contrary to public policy applies where the enforcement of

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<sup>127</sup> *Id.* at 1058 ("[T]he Credit Union's own allegations establish the defense, and the district court properly granted the Reserve Bank's motion to dismiss on that basis.").

<sup>128</sup> See generally Mare, *supra* note 70.

<sup>129</sup> See *High and Dry: No Homeowners Coverage for Stolen Marijuana Plants*, WESTLAW J. INS. BAD FAITH, Apr. 17, 2012, at 2 (the attorney for USAA thought the case turned on removal to federal court).

<sup>130</sup> *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487LEK-KSC, 2012 WL 928186, at \*1 (D. Haw. Mar. 16, 2012).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Mare, *supra* note 70, at 1368.

<sup>134</sup> *Tracy*, WL 928186, at \*10.

<sup>135</sup> *Id.* at \*13.

the contract would violate federal law.”<sup>136</sup> The court cited *Raich* to emphasize Congress’s stance towards cannabis.<sup>137</sup> The court uses the principles behind the Broad View throughout its opinion, leaving little doubt that it viewed cannabis prohibition under the CSA as far reaching.

*Haerberle v. Lowden* addresses a similar issue as did the court in *Tracy*.<sup>138</sup> The plaintiff sued in Colorado district court after delivering \$40,000 worth of cannabis plants to the purchaser and not receiving payment.<sup>139</sup> Interestingly, in this case the district court raised the issue of illegality *sua sponte* and requested briefing on the issue.<sup>140</sup> After briefs were submitted, the court ruled that contracts for the sale of cannabis were void as against public policy, due to illegality under the CSA.<sup>141</sup>

Both *Tracy* and *Haerberle* show how cannabis plaintiffs in contract-related litigation in federal court need to find a way around illegality arguments, whether they are framed under public policy or unclean hands.<sup>142</sup> However, more recent cases addressing contract enforceability in the cannabis industry possibly provide light at the end of the tunnel for cannabis litigants.<sup>143</sup>

#### 4. Federal Statutory Relief—The Fair Labor Standards Act

Issues that arise when cannabis industry plaintiffs attempt to recover under FLSA are crucial to understanding the Broad View. Interestingly, the opinions addressing FLSA applicability to the cannabis industry have embraced the Narrow View when ruling on the issues.<sup>144</sup> Yet, defendants in the two FLSA cases this Comment focuses on use arguments that embrace a particularly sweeping interpretation of the Broad View.

In *Greenwood v. Green Leaf Lab, LLC* the plaintiff brought claims under FLSA for failure to pay minimum wages and overtime pay.<sup>145</sup> Defendant filed a motion

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*12.

<sup>138</sup> *Haerberle v. Lowden*, No. 11 CV 709, 2012 WL 7829578 (Colo. Dist. Ct. Aug. 8, 2012).

<sup>139</sup> *Id.* at \*2.

<sup>140</sup> *See Haerberle v. Lowden*, No. 2011CV709, 2012 WL 6123439, at \*1–2 (Colo. Dist. Ct. May 10, 2012).

<sup>141</sup> *Haerberle*, 2012 WL 7829578, at \*3.

<sup>142</sup> For further discussion on how cannabis litigants may fight back against application of illegality for contract disputes, see *Mare*, *supra* note 70.

<sup>143</sup> *See infra* Part III.B.2.

<sup>144</sup> *See infra* Part III.B.3.

<sup>145</sup> *Greenwood v. Green Leaf Lab LLC*, No. 3:17-CV-00415-PK, 2017 WL 3391671, at \*1 (D. Or. July 13, 2017), *adopted by* No. 3:17-CV-00415-PK, 2017 WL 3391647 (D. Or. Aug. 7, 2017). This case was adjudicated by a magistrate judge and the findings and recommendations were referred to an Article III district court judge for review. This Comment will cite to the findings and recommendations, as they provide the relevant substantive analysis, and were subsequently endorsed by the district court.

to dismiss for lack of jurisdiction under FRCP 12(b)(1).<sup>146</sup> Defendant argued that, “Plaintiff cannot invoke the power of a federal statute to enforce an alleged employment relationship that was based entirely on an occupation that is federally illegal.”<sup>147</sup> Defendant also argued that FLSA does not create an exception to the CSA that authorizes a person to engage in illegal activity.<sup>148</sup>

Interestingly, the defendant’s arguments invoked the Broad View of illegality, yet framed the motion to dismiss under FRCP 12(b)(1) for lack of jurisdiction.<sup>149</sup> However, the magistrate judge recharacterized the defendant’s motion as a motion to dismiss under FRCP 12(b)(6) because defendant was not challenging whether the court had federal question jurisdiction, but rather, “challenge[d] the legal sufficiency of Plaintiff’s FLSA claims.”<sup>150</sup> By framing its argument as preventing federal question jurisdiction because of illegality of the industry under the CSA, the defendant pushed the Broad View to the outer limits of reasonableness, but it shows how other defendants may use the Broad View to support a jurisdiction stripping argument.<sup>151</sup>

*Kenney v. Helix TCS, Inc.*<sup>152</sup> was filed shortly after the *Greenwood* court ruled on the motion to dismiss.<sup>153</sup> Plaintiff brought claims under FLSA as part of a class of security guard workers who were employed by Helix and provided security for cannabis businesses.<sup>154</sup> Helix brought a motion to dismiss under both FRCP 12(b)(1) and 12(b)(6).<sup>155</sup>

Helix first argued that in order to get into federal court, plaintiffs must present a substantial contested federal issue, “indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.”<sup>156</sup> Helix further argued that it is “axiomatic that a federal court cannot intercede to assist or promote criminal activity,” and stated that a federal court cannot “reasonably interpret a federal statute in such a way as to allow the statute to function as a facilitator of illegal

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at \*2.

<sup>148</sup> Defendant’s Motion to Dismiss at 3, *Green Leaf*, 2017 WL 3391671 (No. 9).

<sup>149</sup> *Id.* at 1–2.

<sup>150</sup> *Green Leaf*, 2017 WL 3391671, at \*1.

<sup>151</sup> To really get a sense of the breadth of the defendant’s argument, see Defendant’s Motion to Dismiss, *supra* note 148.

<sup>152</sup> *Kenney v. Helix TCS, Inc.*, 284 F. Supp. 3d 1186 (D. Colo. 2018), *motion to certify appeal granted*, No. 17-CV-01755-CMA-KMT, 2018 WL 510276 (D. Colo. Jan. 23, 2018).

<sup>153</sup> *Green Leaf* was filed in 2017 and the court ruled on the motion to dismiss in the same year. *Helix* was filed in 2018. See *Green Leaf*, 2017 WL 3391671; *Helix*, 284 F. Supp. 3d 1186.

<sup>154</sup> *Helix*, 284 F. Supp. 3d at 1187–88.

<sup>155</sup> *Id.* at 1188.

<sup>156</sup> Defendant’s Motion to Dismiss at 3, *Helix*, 284 F. Supp. 3d 1186 (No. 13), 2017 WL 7053606 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313 (2005)).

conduct.”<sup>157</sup> Thus, because Helix was providing security services to the cannabis industry (which defendant characterizes as a violation of the CSA),<sup>158</sup> the plaintiff cannot ask a federal court to interpret FLSA in a way that would “monitor and protect” employment in an illegal industry.<sup>159</sup> The expansive nature of Helix’s interpretation of the prohibition on facilitation of criminal activity doctrine, arguably the most expansive discussed in this Comment so far, should be noted.<sup>160</sup>

Helix further argued that Congress did not intend FLSA to be mutually inconsistent with the CSA.<sup>161</sup> This argument centers around statutory interpretation, but is based heavily on general concepts of illegality.<sup>162</sup> Helix argued that because the CSA seeks to eliminate commercial transactions of cannabis in the interstate market entirely,<sup>163</sup> FLSA cannot be interpreted to allow recovery for cannabis industry employees.<sup>164</sup> Helix analogizes FLSA application to cases that dealt with the issue of whether the Fair Housing Act<sup>165</sup> requires reasonable accommodation for medical cannabis users.<sup>166</sup> Helix concludes its motion by arguing that plaintiff does not have a legally protected interest that provides jurisdiction in federal court because plaintiff is seeking compensation for aiding and abetting cultivation and distribution of cannabis.<sup>167</sup> Helix fully embraces the Broad View, claiming it goes to the inherent power of the federal court to go beyond what Congress prohibits under federal law.<sup>168</sup>

Noteworthy is that both defendants’ arguments in *Greenwood* and *Helix* relied on different doctrines to advance broad illegality arguments, despite both framing

<sup>157</sup> *Id.* at 7 (citing *Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City*, 154 F. Supp. 3d 1185, 1188 (D. Colo. 2016)).

<sup>158</sup> *Id.* at 5–6.

<sup>159</sup> *Id.* at 7.

<sup>160</sup> It is unclear whether *Fourth Corner* even reasons this far, as the court in that case made clear it was a prohibition on the court using its *equitable power* if it would cause or lead to facilitation of criminal activity. See *Fourth Corner Credit Union*, 861 F.3d at 1054. For a further discussion, see *infra* Part III.B.3.

<sup>161</sup> Defendant’s Motion to Dismiss, *supra* note 156, at 8.

<sup>162</sup> See *id.* at 7–12.

<sup>163</sup> 21 U.S.C. § 801(3)(b) (2012); *Gonzales v. Raich*, 545 U.S. 1, 13 n.20 (2005) (noting Congress’s finding that cannabis is detrimental to health and well-being).

<sup>164</sup> Defendant’s Motion to Dismiss, *supra* note 156, at 8.

<sup>165</sup> 42 U.S.C. §§ 3601–3619 (2012).

<sup>166</sup> Defendant’s Motion to Dismiss, *supra* note 156, at 11; see also *Assenburg v. Anacortes Hous. Auth.*, 268 Fed. App’x 643, 644 (9th Cir. 2008); *Forest City Residential Mgmt., Inc. ex rel. Plymouth Square Ltd. Dividend Hous. Ass’n v. Beasley*, 71 F. Supp. 3d 715, 719 (E.D. Mich. 2014). But see *infra* Part III.B.3 for an argument distinguishing these cases from being analogous to the FLSA context.

<sup>167</sup> Defendant’s Motion to Dismiss, *supra* note 156, at 12–14.

<sup>168</sup> *Id.*

the arguments as jurisdictional by making FRCP 12(b)(1) motions.<sup>169</sup> Helix relied heavily on the prohibition of facilitation of criminal activity doctrine,<sup>170</sup> whereas Green Leaf focused more on the standard preemption doctrine and general concepts of illegality.<sup>171</sup> Plaintiffs attempting to recover in federal court under FLSA should be prepared for their opponents to use broad arguments invoking illegality against them. However, on the subject matter jurisdiction level, these arguments seem to be incorrect, as subject matter jurisdiction only requires the assertion of a colorable, non-frivolous claim.<sup>172</sup> Further, the unclean hands doctrine is not part of FLSA and it seems the doctrine would need to be part and parcel with FLSA to create a substantial jurisdictional defect.<sup>173</sup>

Overall, the review of cases decided in the bankruptcy, banking, contract, and FLSA contexts provided numerous examples of courts accepting defendants' arguments rooted in the Broad View of illegality.

### B. *The Narrow View*

Even though federal courts have been receptive to arguments based on the Broad View of illegality, more recent case law has seen courts begin to accept arguments that employ the reasoning underlying the Narrow View.<sup>174</sup> The Narrow View is characterized by interpreting legal issues involving the state-legal cannabis industry as unique and interpreting illegality in a narrow fashion.<sup>175</sup> Part of the policy reasoning behind employing the Narrow View relies on the previous stance taken

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<sup>169</sup> Helix was perhaps a bit more reasonable by seeking dismissal for both lack of jurisdiction and failure to state a claim for relief. *Kenney v. Helix TCS, Inc.*, 284 F. Supp. 3d 1186, 1188 (D. Colo. 2018), *motion to certify appeal granted*, No. 17-CV-01755-CMA-KMT, 2018 WL 510276 (D. Colo. Jan. 23, 2018).

<sup>170</sup> See Defendant's Motion to Dismiss, *supra* note 156, at 5–7.

<sup>171</sup> See *id.* at 1–2.

<sup>172</sup> See *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (dismissing a suit for lack of jurisdiction “where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous”); see also Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 NW. U. L. REV. COLLOQUY 215, 215–16 (2008).

<sup>173</sup> See *Bell*, 327 U.S. at 682–83; Wasserman, *supra* note 172, at 216–17.

<sup>174</sup> For an example not discussed in this Comment, see *Tarr v. USF Reddaway, Inc.*, 3:15-CV-02243-PK, 2018 WL 659859, at \*1 (D. Or. Feb 1, 2018). The court held that the CSA did not preclude plaintiff from recovering economic damages for lost wages even though the wages were for employment with the plaintiff's family cannabis business. *Id.* at \*3. The court also distinguished *Raich*, *Arenas*, and *Fourth Corner* because those cases arose out of issues related to the illegal operation of cannabis itself, whereas here, the defendant cited no authority that prohibits a claim for damages arising from cannabis industry employment in federal court. *Id.* Interestingly, the court placed the burden on the defendant to show that federal policy was not changing and becoming more accepting of cannabis. *Id.*

<sup>175</sup> This Part of the Comment will examine the cases that employ this reasoning.

by DOJ that gave a “yellow” light to the cannabis industry.<sup>176</sup> Judges who have accepted the Narrow View argue this makes federal policy unclear, even in light of the CSA and *Raich*.<sup>177</sup> The Narrow View also is grounded in the process perspective of equity and views the courts’ role when presented with such a unique issue as fundamentally seeking justice.<sup>178</sup> As with the Broad View, this Comment will explore three different areas of law to illuminate how courts have justified acceptance of arguments based on the Narrow View of illegality.

### 1. Federal Bankruptcy Relief

*In re Beyries*, discussed *supra* Part III.A.1, was appealed to the Ninth Circuit,<sup>179</sup> where the court delivered an opinion that provides some room to argue that cannabis companies can receive federal bankruptcy relief.<sup>180</sup> The Ninth Circuit spent most of the opinion clarifying how unclean hands doctrine should be applied in the bankruptcy context.<sup>181</sup> The court indicated that determining whether unclean hands doctrine precludes relief requires a balancing test where the alleged wrongdoing of the plaintiff is weighed against the alleged wrongdoing of the defendant.<sup>182</sup> Unclean hands, the court explained, does preclude recovery for a plaintiff, but just because plaintiff was engaged in wrongdoing is not itself dispositive.<sup>183</sup> Plaintiffs are only precluded from recovery if the balancing of wrongdoing ends up weighing against them.<sup>184</sup> The court explains that a bankruptcy court determining whether unclean hands applies must weigh the “substance of the right asserted by [the] plaintiff against the transgression which, it is contended, serves to foreclose that right” and that “the clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest.”<sup>185</sup>

Debtors involved in the cannabis industry should be encouraged by the Ninth Circuit’s finding that the unclean hands argument does not tip the balance in either party’s direction when raised in the state-legal cannabis industry context because the

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<sup>176</sup> See *infra* Part IV for a full discussion of this stance.

<sup>177</sup> See *infra* Part III.B.2 and the cases discussed therein.

<sup>178</sup> See *supra* Part II.B.2; Anenson, *supra* note 77, at 1838–39.

<sup>179</sup> See *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956 (9th Cir. 2015).

<sup>180</sup> But *In re Olson* may make this less likely than it seemed when the Ninth Circuit handed down its opinion in *Beyries*, as the court in *Olson* appeared to endorse dismissal under unclean hands or bad faith, as long as the proper application and analysis of either test was conducted. *In re Olson*, No. NV-17-1168-LTiF, 2018 WL 989263, at \*6 (B.A.P. 9th Cir. Feb. 5, 2018).

<sup>181</sup> *Beyries*, 789 F.3d at 959–61.

<sup>182</sup> *Id.* at 960.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (alteration in original) (first quoting *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d 347, 350 (9th Cir. 1963); and then *Equal Emp’t Opportunity Comm’n v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753 (9th Cir. 1991)).

plaintiff and defendant were both engaged in the same illegal industry in violation of the CSA.<sup>186</sup> The court ultimately ruled that Beyries's wrongdoing outweighed that of Northbay's<sup>187</sup> and found the bankruptcy court "abused its discretion by applying the doctrine of unclean hands to bar Northbay's request for a judgment of nondischargeability."<sup>188</sup>

Even though *In re Olson* reversed largely because the bankruptcy court did not properly walk through the methodology required for a finding of bad faith and dismissal for cause,<sup>189</sup> the reasoning by the Ninth Circuit in *Beyries* is similar, in that both opinions attempt to walk back the idea that unclean hands or any reliance on illegality due to the CSA is absolute.<sup>190</sup>

Overall, the Ninth Circuit in *Beyries* is a clear example of how cannabis debtors benefit when courts address illegality issues with precision and care. The Narrow View is defined by this type of judicial reasoning, one that digs into illegality doctrine and attempts to make sense of it in light of a new, emerging, state-legal industry.

## 2. Contract Enforceability and Unclean Hands

*Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*<sup>191</sup> provides a direct counter argument to the district court's opinion in *Tracy v. USAA*.<sup>192</sup> Procedurally similar to *Tracy*, *Green Earth* was also in federal court, in the District Court of Colorado, on diversity jurisdiction after the defendant removed.<sup>193</sup> *Green Earth* was seeking to recover under an insurance policy that Atain provided for smoke and ash damage to its ventilation system, which subsequently destroyed numerous cannabis plants.<sup>194</sup> Atain brought a motion for summary judgment arguing, among

<sup>186</sup> *Id.*

<sup>187</sup> This was primarily because Beyries was an attorney who misappropriated \$25,000 of his clients' money and then sought bankruptcy relief. *Id.* at 961. Query how the court would have handled this case if there was no wrongdoing other than the CSA violations. It seems possible, in that situation, despite the court's language, that bankruptcy relief still may have been precluded. See, e.g., *In re Olson*, No. NV-17-1168-LTiF, 2018 WL 989263, at \*1 (B.A.P. 9th Cir. Feb. 5, 2018).

<sup>188</sup> *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 961 (9th Cir. 2015).

<sup>189</sup> *In re Olson*, WL 989263, at \*6.

<sup>190</sup> *Id.*; *Beyries*, 789 F.3d at 959–61. For an argument advancing increased use of the balancing test the Ninth Circuit employed in *Beyries*, see generally Mare, *supra* note 70 (advocating that violations of the CSA should be irrelevant to the unclean hands analysis and that courts should focus on other instances of wrongdoing).

<sup>191</sup> *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016).

<sup>192</sup> See *supra* Part III.A.3; *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487LEK-KSC, 2012 WL 928186 (D. Haw. Mar. 16, 2012).

<sup>193</sup> *Green Earth Wellness Ctr.*, 163 F. Supp. 3d at 834 n.9.

<sup>194</sup> *Id.* at 823.

other things, that Green Earth's breach of contract claim should fail because any "claim for benefits relat[ed] to damage to potted [cannabis] plants is barred by the 'growing crops' exclusion in the Policy."<sup>195</sup>

The district court distinguished *Tracy* due to the additional years of cannabis non-enforcement by DOJ under the DOJ Memos.<sup>196</sup> Specifically, the court considered the federal stance to create ambiguity in the contract's terms, stating "the Policy's 'Contraband' exclusion is rendered ambiguous by the difference between the federal government's *de jure* and *de facto* public policies regarding state-regulated medical [cannabis]."<sup>197</sup> This statement by the court, along with the ruling itself, shows how different the policy considerations are for courts that employ the Narrow View of illegality. Significantly, the court found that the DOJ Memos created enough of a question regarding federal policy towards cannabis to support finding a contract term ambiguous. This is a revealing example of how courts employing the Narrow View often dig deep into the facts and, using the DOJ Memos, narrow how far illegality doctrines extend.<sup>198</sup>

*Ginsburg v. ICC Holdings, LLC*<sup>199</sup> provides further hope to cannabis litigants that federal courts are beginning to adopt the Narrow View when confronted with contract disputes, as it appears the Northern District of Texas is doing what it can to avoid painting illegality doctrine with a broad brush. Ginsburg loaned money to ICC to aid ICC in starting a medical cannabis business.<sup>200</sup> ICC was unable to pay Ginsburg back on the loan and Ginsburg brought claims for breach of contract, among other claims.<sup>201</sup> ICC moved to dismiss for failure to state a claim upon which relief can be granted, arguing the loan contract was illegal because of the CSA, and asserted illegality as an affirmative defense.<sup>202</sup> The district court had to determine what law applied to the contract and found that Illinois law applied because of the loan agreement's choice of law clause.<sup>203</sup> However, because ICC alleged that the agreement violated federal law, the district court reasoned it must look to federal

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<sup>195</sup> *Id.* at 824.

<sup>196</sup> *Id.* at 835. *Tracy* was decided in 2012, *Green Earth* was decided in 2016. During this time, DOJ released several additional memos outlining its enforcement policies regarding cannabis. See *infra* Part IV.

<sup>197</sup> *Green Earth Wellness Ctr.*, 163 F. Supp. 3d at 833.

<sup>198</sup> Also fascinating is how the court in *Green Earth* refused to provide any sort of "guidance" to cannabis litigants regarding illegality and refused to offer any opinion as to whether "it is legal for Atain to pay for damages to [cannabis] plants and products." *Id.* at 834. The court simply found that the breach of contract claim presented genuine issues of material fact. *Id.* at 837.

<sup>199</sup> *Ginsburg v. ICC Holdings, LLC*, 3:16-CV-2311-D, 2017 WL 5467688 (N.D. Tex. Nov. 13, 2017).

<sup>200</sup> *Id.* at \*1.

<sup>201</sup> *Id.* at \*3.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at \*5.

law to determine whether the contract is illegal or violates public policy, and if so, it is unenforceable.<sup>204</sup>

At this point, it may seem that Ginsburg was out of luck. Surely federal law would void this contract under illegality or public policy doctrine, as we saw in *Tracy*. However, the court stuck to the Narrow View, analyzed the specific wording of the contract, and determined the enforcement of it would not violate federal public policy.<sup>205</sup> The district court reasoned that on its face, the loan agreement did not violate the CSA because nothing contained in the agreement required Ginsburg or ICC to manufacture, distribute, dispense, or possess cannabis.<sup>206</sup> The loan agreement did not mention cannabis nor how ICC would obtain funds to repay Ginsburg; rather, the agreement simply set forth terms of the loan and provided for repayment at a certain rate of interest.<sup>207</sup> The district court determined that “even if the [loan agreements] concern an illegal object (i.e., a violation of the CSA), it is possible for the court to enforce the [loan agreements] in a way that does not require any party to engage in illegal conduct.”<sup>208</sup> The court found it necessary to take into account “the benefits of enforcement [of the contract] ‘that lie in creating stability in contract relations and preserving reasonable expectations’ and the ‘costs in forgoing the additional deterrence of behavior forbidden by the [CSA.]’”<sup>209</sup>

This type of reasoning is exactly what the Narrow View seeks to advance. The court here was careful, precise, and understood that an absolutist view of illegality is a bad policy because it creates undesirable outcomes.<sup>210</sup> The district court further clarified that illegality arguments are affirmative defenses and courts must “treat the defense of illegality to the enforcement of a contract as presumptive rather than absolute, forgiving minor violations and not allowing the defense to be used to confer windfalls.”<sup>211</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at \*7–8.

<sup>206</sup> *Id.* at \*7.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at \*8.

<sup>209</sup> *Id.* (quoting *Dervin Corp. v. Banco Bilbao Vizcaya Argentaria, S.A.*, No. 03 Civ. 9141(PKL), 2004 WL 1933621, at \*3 (S.D.N.Y. Aug. 30, 2004)).

<sup>210</sup> See *infra* Part IV for a further discussion of why the Broad View is bad from a policy perspective.

<sup>211</sup> *Ginsburg*, 2017 WL 5467688, at \*8 (quoting *Nagel v. ADM Inv’r Servs., Inc.*, 217 F.3d 436, 440 (7th Cir. 2000)). The court also made clear that unless the illegality of the loan agreements appears on the face of the plaintiff’s complaint, it is improper to dismiss based on illegality at the motion to dismiss phase. *Id.* at \*7. This can be reconciled with how *Fourth Corner* was decided, as the court there reasoned that the illegality defense did arise on the face of plaintiff’s complaint. See *supra* Part III.A.2.

Lastly, in *Mann v. Gullickson* the Northern District of California addressed a defendant's summary judgment motion over whether a stock agreement for a cannabis business was enforceable.<sup>212</sup> The district court first determined that California law included federal law, and because of this the contract at issue concerned an illegal object, which would typically make it unenforceable.<sup>213</sup> However, similar to *Ginsburg*, the district court reasoned that even though the contract concerned an illegal object, it was possible to enforce the contract if it could do so in a way that did not require illegal conduct to occur.<sup>214</sup> Because enforcing the contract would not require the parties to possess, distribute, or cultivate cannabis, the contract did not require a violation of the CSA.<sup>215</sup>

Both *Mann* and *Ginsburg* provide a nuanced response to the facilitation of criminal activity doctrine of illegality that posed such a barrier for the plaintiff in *Fourth Corner* because both courts narrowed in on what actually constitutes facilitation.<sup>216</sup> *Green Earth*, *Ginsburg*, and *Mann* all provide the cannabis industry with additional arguments to combat illegality doctrine and seem to open the door for contract disputes to be litigated in federal court.<sup>217</sup>

### 3. Federal Statutory Relief—The Fair Labor Standards Act

The FLSA context is perhaps where the strongest iteration of the Narrow View can be found. Courts dealing with FLSA applicability to the CSA have outright dismissed the argument that the CSA prevents a qualified employee<sup>218</sup> from seeking relief under the statute.<sup>219</sup> Query whether the courts' different approach is due to FLSA being a remedial statute with broad language and a presumption that the employee is covered until rebutted by the defendant who has the burden to prove coverage does not apply.<sup>220</sup> Furthermore, these disputes do not involve sophisticated

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<sup>212</sup> *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215, at \*1–2 (N.D. Cal. Nov. 2, 2016).

<sup>213</sup> *Id.* at \*6. The court also endorsed *Green Earth* and distinguished *Tracy*, agreeing that federal policy has become less clear since *Tracy*. *Id.* at \*4–5.

<sup>214</sup> *Id.* at \*6–8. Additionally, Nevada District Courts have extended this idea. See *Bart St. III v. ACC Enters., LLC*, No. 2:17-cv-000083-GMN-VCF, 2018 WL 4682318, at \*4 (D. Nev. Sept. 27, 2018) (determining the court could sever illegal parts of the contract and leave the rest enforceable).

<sup>215</sup> *Mann*, 2016 WL 6473215, at \*8 (finding *Tracy* distinguishable because enforcement in that case would have required a violation of the CSA).

<sup>216</sup> *Id.*; *Ginsburg*, 2017 WL 5467688, at \*8.

<sup>217</sup> See, e.g., *Dream Team Holdings LLC v. Alarcon*, No. CV-16-01420-PHX-DLR, 2017 WL 3460806 (D. Ariz. Aug. 11, 2017) (where neither party raised an illegality defense specifically for CSA violations and the case survived summary judgment and proceeded to trial).

<sup>218</sup> See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–217 (2012).

<sup>219</sup> This Part discusses the cases that have ruled this way.

<sup>220</sup> See 29 U.S.C. §§ 201–217. This Section further discusses cases relying on these principles.

parties and generally, employees lack bargaining power and are seeking to correct employer overreach and abuse.<sup>221</sup>

One of the first cases to address this issue is *Greenwood*, where the district court pushed back against the defendant's broad assertion that illegality created a jurisdictional defect sufficient to grant a motion to dismiss for lack of subject matter jurisdiction.<sup>222</sup> As discussed in Part III.A.4., the district court re-characterized this as a motion to dismiss for failure to state a claim.<sup>223</sup> The district court first emphasized that FLSA receives a broad reading from the court because it is a remedial statute and is construed against employers.<sup>224</sup> Furthermore, under FLSA, courts will not exempt a class of workers unless the statute specifically exempts that class.<sup>225</sup> One document the court heavily relied on to reject the notion that the CSA prevents FLSA coverage is a legal advice memorandum from the National Labor Relations Board ("NLRB").<sup>226</sup> The court found the NLRB legal advice memorandum to be persuasive authority and determined that an employer "violating one federal law does not give it license to violate another."<sup>227</sup>

The district court endorsed the idea that the federal stance towards cannabis is changing.<sup>228</sup> The court relied on both the DOJ Memos and Congress's prohibition on DOJ spending funds for enforcement against state-legal medical marijuana to support this argument.<sup>229</sup> Interestingly, the court, to some degree, put the burden on the defendant to prove there was a change in this policy stance, stating "[d]efendant has not cited any actual change in [DOJ] policy that would be relevant to the issues here."<sup>230</sup>

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<sup>221</sup> *Id.* § 201.

<sup>222</sup> Discussed *supra* Part III.A.4.

<sup>223</sup> Finding that the defendant's illegality arguments go to the sufficiency of the plaintiff's claim, not to whether there is federal question jurisdiction. *Greenwood v. Green Leaf Lab LLC*, No. 3:17-CV-00415-PK, 2017 WL 3391671, at \*1 (D. Or. July 13, 2017), *adopted by* No. 3:17-CV-00415-PK, 2017 WL 3391647 (D. Or. Aug. 7, 2017).

<sup>224</sup> *Id.* at \*2.

<sup>225</sup> *Id.* at \*3.

<sup>226</sup> Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, to Jonathan B. Kreisberg, Regional Director, Northeast Patients Grp. d/b/a Wellness Connection of Me. (Oct. 25, 2013), [www.managementmemo.com/files/2014/08/01\\_CA\\_104979\\_10\\_25\\_13\\_.pdf](http://www.managementmemo.com/files/2014/08/01_CA_104979_10_25_13_.pdf). For a further discussion of unfair labor practices in the cannabis industry, see Taylor Sachs, *The Wellness Approach: Weeding Out Unfair Labor Practices in the Cannabis Industry*, 43 FLA. ST. U. L. REV. 287, 288–89 (2015).

<sup>227</sup> *Greenwood*, 2017 WL 3391671, at \*2 (quoting Memorandum from Barry J. Kearney, *supra* note 226).

<sup>228</sup> *Id.* at \*3.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* How the new Sessions memorandum and policy stance could change this is discussed *infra* Part V.

The district court in *Helix* followed the same reasoning as the district court in *Greenwood* by holding that employers are not excused from complying with federal law just because business practices may violate federal law.<sup>231</sup> The court agreed that the types of arguments the defendants in *Greenwood* and *Helix* presented go to the sufficiency of the plaintiff's claims, not the sufficiency of jurisdiction.<sup>232</sup> It seems that the district court correctly evaluated the jurisdictional arguments because alleging a plausible claim under a federal statute, regardless of whether the conduct is illegal, would still seemingly satisfy the *Bell v. Hood* standard.<sup>233</sup>

It is noteworthy that after the district court denied the defendant's motion to dismiss,<sup>234</sup> *Helix* filed for interlocutory appeal,<sup>235</sup> arguing the FRCP 12(b)(6) denial constituted a controlling question of law for which there were substantial grounds for disagreement and an immediate appeal may materially advance the ultimate termination of the litigation.<sup>236</sup> The district court agreed with the defendant<sup>237</sup> and stayed the litigation until the appeal was complete.<sup>238</sup> The Tenth Circuit accepted the interlocutory appeal and all briefs have been filed before the court in preparation for oral argument, which was held on November 15, 2018.<sup>239</sup> It is worth examining both *Helix's* arguments and Kenney's arguments to further contrast the Broad and Narrow View conflict currently before the Tenth Circuit.

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<sup>231</sup> Kenney v. Helix TCS, Inc., 284 F. Supp. 3d 1186, 1190 (D. Colo. 2018), *motion to certify appeal granted*, No. 17-CV-01755-CMA-KMT, 2018 WL 510276 (D. Colo. Jan. 23, 2018). However, query whether the *entire industry* being illegal under federal law makes a difference for this argument, as the court cited to immigration cases, where only the alleged *employment relationship* was illegal. See *id.* Query further whether tax law is analogous in light of 26 U.S.C. § 280E, which seems to make clear that congressional intent is still to tax illegal businesses. See 26 U.S.C. § 280E (2012).

<sup>232</sup> *Helix*, 284 F. Supp. 3d at 1189 ("Defendant does not cite to *any* authority adopting its novel theory of jurisdiction.")

<sup>233</sup> See *id.*; *Greenwood*, 2017 WL 3391671, at \*1; *Bell v. Hood*, 327 U.S. 678, 682–85 (1946).

<sup>234</sup> *Helix*, 284 F. Supp. 3d at 1190.

<sup>235</sup> Kenney v. Helix TCS, Inc., No. 17-CV-01755-CMA-KMT, 2018 WL 510276, at \*1 (D. Colo. Jan. 23, 2018).

<sup>236</sup> *Id.* at \*2.

<sup>237</sup> *Id.*

<sup>238</sup> Kenney v. Helix TCS, Inc., No. 17-cv-01755-CMA-KMT, slip op. at \*4 (D. Colo. Feb. 5, 2018) (order granting equitable tolling and to stay discovery pending interlocutory appeal). The court also granted plaintiff's motion for equitable tolling of the FLSA statute during the appeal. *Id.*

<sup>239</sup> See Appellant's Opening Brief, Kenney v. Helix TCS, No. 18-1105 (10th Cir. May 29, 2018); Appellee Robert Kenney's Response Brief, *Helix*, No. 18-1105 (10th Cir. July. 19, 2018); Oral Argument, *Helix*, No. 18-1105 (10th Cir. Nov. 15, 2018), <https://www.ca10.uscourts.gov/sites/default/files/clerk/18-1105.MP3>.

Helix argued in its opening brief a very absolutist position on the Broad View. Helix stated: “[a]ll participants in Colorado’s recreational [cannabis] industry<sup>240</sup> voluntarily assume the risk that their activities will subject them to federal criminal sanction. No participant is entitled to the benefits of federal law, nor should they reasonably expect federal courts to aid their conduct.”<sup>241</sup> Helix cited the Supremacy Clause and argued that it ensures federal law is applied equally throughout the states and that uniform application of the law means other federal statutes must be read in harmony with the CSA.<sup>242</sup> Helix also used both the CSA’s broad language and *Raich* to argue Congress has declared that “drug abuse constitutes a serious and continuing threat to national health and welfare,”<sup>243</sup> and that the CSA is the mechanism to curb this threat, with the objective to “conquer drug abuse and control the legitimate and illegitimate traffic in controlled substances.”<sup>244</sup>

Helix next focused on how the wages plaintiff seeks to recover are subject to forfeiture under federal law.<sup>245</sup> Helix reasoned that this means Congress determined, through the CSA, that plaintiff should get zero compensation for working in the cannabis industry.<sup>246</sup> Interestingly, Helix relied heavily on *Fourth Corner*, and argued granting relief to cannabis litigants would be good from a policy perspective, but federal courts are unable to do so because it would aid in the business laundering money or assisting the business in other CSA violations.<sup>247</sup> Helix reiterated that this is the risk of currently running a business or working in the cannabis industry, and a federal court cannot use its powers to change what Congress has made clearly

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<sup>240</sup> It is likely Helix limited this to recreational cannabis due to Congress’s policy stance on medical cannabis via the appropriations bill’s limitation on DOJ spending. *See Consolidated Appropriations Act of 2019*, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”).

<sup>241</sup> Appellant’s Opening Brief, *supra* note 239, at 5. It is worth pointing out that Helix argues patents are not obtainable for cannabis, which is mistaken, as the USPTO has no legal restriction on what is patentable. *See* 35 U.S.C. § 101 (2012). *See also Cannabis Patents: The 101*, CANNA L. BLOG (Sept. 17, 2017), <https://www.cannalawblog.com/cannabis-patents-the-101/>; Craig Nard, *Companies Are Quietly Patenting Marijuana and It Could Lead to a Messy Legal Future*, BUS. INSIDER (July 8, 2017), <https://www.businessinsider.com/companies-are-patenting-pot-and-it-could-lead-to-a-messy-legal-future-2017-7>.

<sup>242</sup> Appellant’s Opening Brief, *supra* note 239, at 5.

<sup>243</sup> *Id.* at 7.

<sup>244</sup> *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 12 (2005)).

<sup>245</sup> *Id.* at 9; *see also* 21 U.S.C. § 881(a)(6) (2012).

<sup>246</sup> Appellant’s Opening Brief, *supra* note 239, at 10.

<sup>247</sup> *Id.* at 12.

illegal.<sup>248</sup> By interpreting FLSA the way the plaintiff desired, the court steps into the law-making realm reserved for Congress.<sup>249</sup>

Helix also made several arguments based on statutory interpretation.<sup>250</sup> First, Helix argued statutes should be interpreted in harmony with each other and Congress is assumed to know the law when legislating.<sup>251</sup> Thus, reading FLSA in light of the CSA, it follows that Congress did not intend to provide protection to illicit drug trafficking.<sup>252</sup> The CSA's purpose is to eliminate commercial transactions of cannabis entirely, leaving no reasonable way to read FLSA and the CSA in harmony with each other.<sup>253</sup> Congress simply did not consider criminals to be employees, and thus, did not explicitly exempt them from FLSA.<sup>254</sup> Helix concluded by pointing to other areas of law where agencies have interpreted "use in commerce" as having an implicit "lawful" requirement,<sup>255</sup> arguing FLSA should be read the same way.<sup>256</sup>

Kenney responded to Helix's opening brief by articulating a very compelling characterization of the Narrow View. The initial statement of the issues narrowed the focus to how the court is dealing with "state sanctioned [cannabis] industries."<sup>257</sup> Kenney also responded to the jurisdictional argument Helix made, arguing courts have to convert a motion to dismiss for lack of subject matter jurisdiction to a motion to dismiss for failure to state a claim if resolution of the jurisdictional questions are intertwined with the merits of plaintiff's claims.<sup>258</sup> Kenney initially highlighted some of the contradictions in Helix's argument, suggesting that Helix was simply trying to get out of paying employees overtime wages though escaping application of the FLSA, even though Helix still understood and complied with other federal laws, e.g., paying federal taxes.<sup>259</sup>

First, Kenney applied rules of statutory interpretation and argued that overtime pay is not a "discretionary benefit"<sup>260</sup> and that FLSA was enacted to promote a "great public policy" for all workers as well as to promote "health, efficiency, and

<sup>248</sup> *Id.* at 16.

<sup>249</sup> *Id.* at 15–19.

<sup>250</sup> *Id.* at 16–24. These arguments seem more cogent than the absolutist view of illegality that Helix posits initially in its opening brief, as they delve more into the specific language of FLSA and attempt to make sense of it in light of state cannabis legalization.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 20–21 (claiming RICO is also further proof of Congress's intent).

<sup>253</sup> *Id.* at 20.

<sup>254</sup> *Id.* at 23.

<sup>255</sup> *Id.* at 24 (USPTO considers "use in commerce" in the trademark context to include "lawful"). But see *supra* note 241, discussing USPTO not requiring this for patents.

<sup>256</sup> Appellant's Opening Brief, *supra* note 239, at 23–24.

<sup>257</sup> Appellee Robert Kenney's Response Brief, *supra* note 239, at 2.

<sup>258</sup> *Id.* at 6.

<sup>259</sup> *Id.* at 4.

<sup>260</sup> *Id.*

general well-being of workers.”<sup>261</sup> Kenney argued FLSA uses expansive definitions for both “employee” and “employer” and that the statute’s remedial purpose requires workers to be specifically exempted, as there is a presumption of coverage.<sup>262</sup> Furthermore, Kenney attacked Helix’s assertion that the CSA controls over FLSA by pointing out that FLSA has been amended twelve times post-enactment of the CSA, yet Congress has never added an exemption for legal cannabis industry workers.<sup>263</sup> Kenney also addressed Helix’s assertion that interpreting FLSA in the way Kenney requested would encroach on the legislative process because the court would step into legislative territory if it excluded employees from FLSA.<sup>264</sup>

Kenney distinguished many of the cases cited by Helix that support the Broad View of illegality.<sup>265</sup> Kenney argued, for example, that the Fair Housing Act, the Americans with Disability Act, trademark, and tax analogies are all inaccurate because the statutes and regulations involved with each all explicitly restrict drugs that are illegal under the CSA, whereas FLSA has no such explicit exclusion.<sup>266</sup> The response brief adeptly distinguished *Fourth Corner* as well.<sup>267</sup> It pointed out how *Fourth Corner* is a per curiam opinion in which only one judge adopted the reasoning that the court could not grant relief if it would facilitate illegal activity.<sup>268</sup> Kenney asserted that failing to apply FLSA would facilitate criminal activity more than allowing FLSA coverage.<sup>269</sup>

<sup>261</sup> *Id.* at 9 (quoting 29 U.S.C. § 216(b) (2012)).

<sup>262</sup> *Id.* at 10.

<sup>263</sup> *Id.* at 11. Kenney also points out that FLSA did apply to cannabis workers prior to the enactment of the CSA. *Id.*

<sup>264</sup> *Id.* at 12 (arguing that it is up to Congress to determine whether workers are exempt from FLSA, not the courts). Kenney also cites to articles that argue that FLSA applies to the cannabis industry. *Id.* For further analysis of this argument, see, for example, Noah A. Frank, *Cannabis Business Owners: Employment Laws Apply to You!*, MJINews (May 27, 2016), <https://mjineews.com/cannabis-business-owners-employment-laws-apply-to-you/>; *New Federal Overtime Rules and Your Cannabis Labor Expenses*, CANNA L. BLOG (Nov. 9, 2017), <https://www.cannalawblog.com/new-federal-overtime-rules-coming-what-it-could-mean-for-cannabis-labor-expenses-ready-for-review/>.

<sup>265</sup> Appellee Robert Kenney’s Response Brief, *supra* note 239, at 15–21.

<sup>266</sup> *Id.* Kenney also specifically cites cases where FLSA still applied despite illegality. See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985); *Bustamente v. Uno Café & Billiards, Inc.*, No. 1:15-cv-04192-FB-RML, 2018 WL 2349507, at \*4 (E.D.N.Y. May 23, 2018) (finding that FLSA covered an employee working as a security guard and slot machine manager for an illegal gambling operation).

<sup>267</sup> Appellee Robert Kenney’s Response Brief, *supra* note 239, at 19.

<sup>268</sup> *Id.* (“[A] single justice was troubled by the idea of having a federal entity (a federal reserve bank) provide federal funds to serve as the ‘linchpin’ for a credit union (with no alternative funding) to violate federal law . . .”).

<sup>269</sup> *Id.*

Kenney took time, as well, to examine the preemption arguments Helix advances in its brief.<sup>270</sup> Kenney argued Helix did not assert a preemption issue in this case; rather, it asserted an implied repeal issue by arguing the CSA implicitly repealed state-legal cannabis industry coverage from FLSA.<sup>271</sup> Kenney argued that there is a strong presumption against implied repeals and that if a court finds Congress implicitly repeals a section of a statute, it must be clear and manifest.<sup>272</sup> Kenney ended his brief by pointing out that if Helix really believed this was a preemption issue, it was disingenuous in suggesting Kenney could recover under state wage and hour laws because the CSA would preempt those laws as well in the cannabis industry context.<sup>273</sup>

Helix's reply brief immediately begins with a discussion surrounding the rescission of the DOJ Memos and argued that Sessions's new memo makes federal policy clear regarding cannabis illegality.<sup>274</sup> Helix argued it would be absurd for the federal government to put people in prison for cannabis-related crimes, while also guaranteeing minimum wages for the same conduct.<sup>275</sup> Overall, Helix stuck to its assertion of the Broad View of illegality and reasoned that even though states may experiment with their own criminal laws, they cannot undermine the CSA because no state has the power to change how federal law applies to its citizens.<sup>276</sup>

The oral argument before the Tenth Circuit in *Helix* was compelling and provided a great clash between the Narrow and Broad Views.<sup>277</sup> Helix mapped out its statutory interpretation-based argument and claimed the court could look to the congressional intent behind FLSA and CSA to find that Kenney did not state a claim for relief under FLSA.<sup>278</sup> Helix argued that the use of "their unpaid compensation" in section 216(b)<sup>279</sup> of FLSA requires plaintiffs to have a private property right in the compensation they are owed, and because Congress has explicitly prohibited any private property right to compensation from the cannabis industry under the CSA, Kenney is left without recovery and fails to state a claim for relief.<sup>280</sup> The judges

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<sup>270</sup> *Id.* at 24–29.

<sup>271</sup> *Id.* at 24–25.

<sup>272</sup> *Id.* at 26 (arguing the important question is whether Congress intended to benefit drug dealers with an implied exemption from FLSA).

<sup>273</sup> *Id.* at 29.

<sup>274</sup> Appellant's Reply Brief at 1–3, *Helix*, No. 18-1105 (10th Cir. Aug. 16, 2018).

<sup>275</sup> *Id.* at 3–4 (arguing Congress did not intend to protect and provide minimum wage for industries it sought to eradicate through the CSA).

<sup>276</sup> *Id.* at 11–13 (making a comparison to the Defense of Marriage Act in that even though the CSA is unpopular in some states, it does not mean those states get federal law protection when they violate the CSA).

<sup>277</sup> See Oral Argument, *supra* note 239.

<sup>278</sup> *Id.* at 1:15–2:48.

<sup>279</sup> 29 U.S.C. § 216(b) (2012).

<sup>280</sup> Oral Argument, *supra* note 239, at 4:05–5:10.

seemed unconvinced by this argument and looked for direction from Helix on how to rule, stating they “need[ed] some sort of standard to evaluate what we do in that circumstance” and that the unclean hands doctrine did not seem to provide the court with any path to a dispositive ruling, as Helix is also involved in the cannabis industry.<sup>281</sup>

The court pushed Helix on the fact that it complies with other federal laws, such as federal tax law and social security laws, and seemed concerned that if the court found Helix was exempted from FLSA coverage, it could give Helix an unfair advantage over other security companies who do have to comply with FLSA.<sup>282</sup> Helix held its ground, arguing it would likely have to comply with FLSA if the Department of Labor brought a compliance action, but that the question before the court was whether a private plaintiff can get compensation that he claims is his only by virtue of federal law, which he is violating.<sup>283</sup> Helix ended by reiterating the statutory interpretation argument that a plaintiff must have a property right to “their” unpaid wages, and because the CSA forecloses any such right, plaintiffs in the cannabis industry cannot recover under FLSA.<sup>284</sup>

Kenney focused heavily on an implied repeal argument, explaining that Congress had numerous opportunities since the states began to enact medical and recreational cannabis laws to make clear that the FLSA would not apply to these industries.<sup>285</sup> Kenney emphasized the remedial nature of the FLSA, which presumptively covers employees, and argued that because Helix is engaged in commerce (due to the non-cannabis related portions of its business), Helix falls within FLSA coverage for the purposes of a motion to dismiss for failure to state a claim.<sup>286</sup> In other words, because the express terms of FLSA apply, i.e., Helix is engaged in interstate commerce, Kenney is presumptively covered by FLSA as an employee, and no exception expressly applies. Therefore, Helix must make an implied repeal argument to show that Kenney’s FLSA claim does not survive a motion to dismiss for failure to state a claim.<sup>287</sup>

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<sup>281</sup> *Id.* at 7:00–7:20.

<sup>282</sup> *Id.* at 8:50. It is worth noting that part of Helix’s business is not involved in the cannabis industry, thus, the court was concerned over whether avoidance of FLSA compliance in one portion of Helix’s business would give Helix an unfair advantage in the legal portions of its business.

<sup>283</sup> *Id.* at 9:05.

<sup>284</sup> *Id.* at 9:30.

<sup>285</sup> *Id.* at 16:30.

<sup>286</sup> *Id.* at 18:00.

<sup>287</sup> *Id.* at 19:10, 21:30. Kenney argued further that Helix needs to show a “clear and manifest” congressional intent that the two statutes cannot be harmonized, and that Congress’s silence on this issue speaks volumes, as Congress is presumed to know the law when legislating and chose not to amend FLSA despite the rise of state-legal cannabis industries. *Id.* at 22:20.

Kenney embraced the principles of the Narrow View to rebut Helix's unclean hands argument by pointing out to the court that the unclean hands doctrine applies to the underlying claim itself—here, a claim for overtime pay; and because Kenney was not involved in any inappropriate conduct regarding the calculation of his overtime pay, the unclean hands doctrine is inapplicable.<sup>288</sup> Kenney ended by claiming Helix can bring this issue to Congress if it wants to be considered exempt from FLSA coverage, but until that day comes, Kenney urged the court to avoid legislating from the bench and to affirm the district court.<sup>289</sup>

On rebuttal, Helix focused heavily on the facts of the case, arguing that a vast majority of its business is in cannabis related security protection, making any advantage in the security guard market minimal.<sup>290</sup> Helix claimed that Congress had plenty of time to indicate that FLSA did apply to the cannabis industry, and the lack of action either way means we cannot discern any clear congressional intent.<sup>291</sup> Thus, due to an absence of clear congressional intent, the Tenth Circuit's role in this case is to read the apparently conflicting statutes in harmony, and the only way to avoid frustrating either statute's purpose is to read FLSA as protecting workers engaged in legal interstate commerce—which does not include cannabis industry workers because the CSA meant to preclude cannabis from interstate commerce entirely.<sup>292</sup>

The Tenth Circuit seemed very split on the issues but appeared willing to embrace the principles of the Narrow View. The judges were clear that this is a new area of law that presents novel legal questions. With little guidance from precedent, the court needed to tread lightly to ensure that any decision has an element of fundamental fairness to it. It was encouraging to see the Tenth Circuit focus on the facts and understand that the unclean hands doctrine is probably not the proper legal vehicle on which to decide this case. The clash over congressional intent provides another example of how messy cannabis litigation becomes in federal court, due to the lack of clear guidance from Congress. This clash also shows how important and helpful it would be to the cannabis industry and the federal courts if Congress took a clear stance on the issue. The oral argument provided much for those following the case to ponder, and the decision will have a huge impact on whether more courts begin to embrace the Narrow or Broad View.

This discussion of the briefs filed before the Tenth Circuit and the subsequent oral argument in *Helix* attempts to further illuminate the arguments used when parties are employing either the Broad or Narrow View of illegality. The briefs and oral

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<sup>288</sup> *Id.* at 24:30.

<sup>289</sup> *Id.* at 26:40.

<sup>290</sup> *Id.* at 27:40.

<sup>291</sup> *Id.* at 29:00.

<sup>292</sup> *Id.* at 31:35.

argument provide some of the most well-reasoned assertions of the principles underlying each view and will surely provide the Tenth Circuit with much to consider while coming to its ruling on the issue.<sup>293</sup> After summarizing the main cases that articulate both the Broad and Narrow View, this Comment will now address the reasons why the Narrow View is a preferable policy route for federal courts to take when addressing issues with state-legal cannabis litigants.

#### IV. THE NARROW VIEW SHOULD BE ADOPTED BY FEDERAL COURTS

This Comment advances two main policy arguments for why the Narrow View leads to better, more nuanced judicial opinions and long-term outcomes for all stakeholders in the cannabis industry. First, the Narrow View recognizes the uniqueness of the issue before the court. Second, it provides the fairest results for the parties involved while increasing professionalism and certainty in this new and growing industry.

##### A. *The Narrow View Recognizes the Uniqueness of the Issues*

Scholars commonly call on courts to be more careful when deciding cases and to embrace the nuance of complex and novel legal issues.<sup>294</sup> Legal issues in the cannabis industry especially call out for this type of thoughtful judicial reasoning due to the uniqueness of the cannabis business—given its position as a rare industry that, while legal under state law, remains in clear violation of federal law.<sup>295</sup>

Because of the lack of clarity regarding cannabis legal issues in federal court, parties can make a broad spectrum of arguments.<sup>296</sup> This is especially apparent after reviewing the briefs filed in *Helix* before the Tenth Circuit and subsequent oral argument, as both parties have the ability to distinguish cases on either factual grounds, or by simply invoking the uniqueness of the cannabis industry.<sup>297</sup> This lack of clarity and precedent leaves the door open for policy arguments to have

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<sup>293</sup> To follow the docket of this case and see how the Tenth Circuit rules, see Kenney v. *Helix TCS*, Docket No. 18-01105 (10th Cir. Mar. 19, 2018), Court Docket.

<sup>294</sup> E.g., Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029 (2011); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L. L. 301 (2007); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

<sup>295</sup> This Comment does not suggest this type of conflict has never arisen; rather, it simply recognizes that it is not a typical situation and that the cannabis industry presents federal courts with novel legal issues.

<sup>296</sup> See, e.g., *supra* Part III.

<sup>297</sup> See *supra* Part III.B.3. On some level this is unsurprising, given the frequency at which courts are addressing issues for which they simply do not have direct precedent. See *supra* Part III.

greater persuasive authority. Courts unrestrained by precedent should recognize how important it is to carefully think through the policy their rulings will create. Even though Congress has the sole authority to make laws,<sup>298</sup> courts presented with the issues in state-legal cannabis industry litigation must be cautious and thorough to ensure that the law, when possible, does not deprive litigants of justice.<sup>299</sup> The courts of equity's original role when litigants invoked the unclean hands doctrine was to ensure that opportunism was avoided and justice was served.<sup>300</sup> Federal courts presented with state-legal cannabis litigation should use the Narrow View to ensure the unclean hands doctrine is not turned on its head, e.g., used as a defense by cannabis companies to deny workers relief.<sup>301</sup>

The court opinions analyzed in Part III.B all discuss or use the fact that the cannabis industry is legal under state law, which demonstrates the need for the court to embrace a less absolutist view of illegality.<sup>302</sup> These opinions recognize the difference between state-legal cannabis litigants coming into federal court seeking relief and a cocaine street dealer coming into federal court seeking relief, particularly during the time that the DOJ Memos were still in effect.<sup>303</sup> There is undoubtedly a serious preemption issue to consider in cases involving cannabis litigants,<sup>304</sup> but there does not seem to be any apparent harm in courts considering this issue with great care. In *Helix*, Kenney has the more intellectually honest and reasonable position on preemption, especially because making a preemption argument does not just extend to cannabis litigants' ability to enter into federal court. The argument would equally apply if they sought relief under state law and preemption actually applied.<sup>305</sup> This is just one issue that illuminates the need for courts to be nuanced and attempt to determine whether the CSA is actually preempted in the specific factual context before the court.<sup>306</sup> Luckily, it seems the Tenth Circuit was attempting to do just this during the *Helix* oral argument.<sup>307</sup>

To be clear, this Comment does not advocate courts making exceptions to federal law where Congress has explicitly addressed the issue.<sup>308</sup> It makes little sense for

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<sup>298</sup> U.S. CONST. art. I, § 1.

<sup>299</sup> See *supra* Part III.B.

<sup>300</sup> Anenson, *supra* note 77, at 1838–42.

<sup>301</sup> See *supra* Part III.B.3.

<sup>302</sup> See *id.*

<sup>303</sup> *Id.*

<sup>304</sup> See Chemerinsky et al., *supra* note 61, at 102.

<sup>305</sup> Appellee Robert Kenney's Response Brief, *supra* note 239, at 29.

<sup>306</sup> This author believes the spirit of federalism suggests federal courts should, in general, respect the prerogative of the states to engage in experimental lawmaking, and do their best to not sabotage the states' efforts when it is not necessary to do so.

<sup>307</sup> See generally Oral Argument, *supra* note 239.

<sup>308</sup> See *supra* Part III.B.3; Appellee Robert Kenney's Response Brief, *supra* note 239, at 24–29.

courts to carve out an exception to the USPTO's determination that trademarks only be granted for lawful use in commerce,<sup>309</sup> or to find a way around reasonable accommodation for cannabis under the Americans with Disability Act, when that act specifically bars that type of accommodation.<sup>310</sup> Rather, this Comment advocates that when we are faced with the complex and unclear issue of whether FLSA can protect cannabis industry employees or other similar issues, courts should be very hesitant to adopt broad, sweeping language and arguments of illegality under the CSA and instead should meticulously and scrupulously rule on these issues.<sup>311</sup> When handling something as unclear as FLSA coverage for cannabis industry workers or other similar issues, it really does make sense to "dig into the weeds." Even if the Tenth Circuit ends up ruling against Kenney in *Helix*, the court should be lauded for how they approached the issue during oral argument. The judges all seemed mindful of the nuance of the situation and avoided painting any issue with a broad brush, even pushing back against the litigants when they over or under framed the issues.<sup>312</sup> The conduct of the Tenth Circuit during oral argument alone is an encouraging sign for the cannabis industry, and further evidence that federal courts are moving more towards the Narrow View.

Overall, the Narrow View recognizes the uniqueness of the state-legal cannabis industry and the legal issues that arise from it.<sup>313</sup> More courts should employ this view as it embraces one of the core values in our country: the balance of power between the federal government and the states.<sup>314</sup> By carefully navigating these uncharted waters, courts end up supporting some of the core principles of our legal system and help ensure that the roots of these principles remain strong.

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<sup>309</sup> See 15 U.S.C. §§ 1051, 1127 (2012); U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 907 (2016), <https://tmap.uspto.gov/RDMS/TMEP/print?version=Apr2016&href=TMEP-900d1e1.html> ("For applications based on Trademark Act Section 1(b), 44, or 66(a), if the record indicates that the mark or the identified goods or services are unlawful, actual lawful use in commerce is not possible. Thus, a refusal under Trademark Act Sections 1 and 45 is also appropriate for these non-use-based applications, because the applicant does not have a bona fide intent to lawfully use the mark in commerce."); In Re JJ206, LLC, DBA Juju Joints, 120 U.S.P.Q.2d 1568 (T.T.A.B. Oct. 27, 2016).

<sup>310</sup> 42 U.S.C. § 12114(a) (2012); *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012).

<sup>311</sup> This is not to say that the rulings discussed in *supra* Part III.A were not careful or thoughtful. Reasonable minds can certainly disagree on this issue and a court could thoughtfully arrive at the conclusion those courts did. This is more a suggestion for courts in the future to be wary of the difficulty of these issues.

<sup>312</sup> See Oral Argument, *supra* note 239.

<sup>313</sup> See *supra* Part III.B.

<sup>314</sup> See generally Chemerinsky et al., *supra* note 61.

B. *Equity for Parties and Fostering Professionalism*

Federal court rulings in cannabis industry cases have impacts on the viability and safety of the industry.<sup>315</sup> Ten states have created massive, quickly growing industries, that walk, talk, and look like any other business industry.<sup>316</sup> Individuals involved in the cannabis industry, despite violating the CSA, generally follow conventional business norms.<sup>317</sup> The employees working at dispensaries, cultivation facilities, processing facilities, testing laboratories, etc., go to work and carry out their jobs in the same way that individuals in the beer industry, agricultural industry, and service industry do every day.<sup>318</sup> Walking into a dispensary to purchase cannabis products is not so different from walking into a liquor store to purchase alcohol.<sup>319</sup>

In order to protect employees and encourage safe growth in an industry that provides hundreds of thousands of jobs<sup>320</sup> and provides massive financial benefits for stakeholders and the states themselves,<sup>321</sup> federal courts should do what they can to *not* impact the industry in significantly adverse ways, e.g., employing caution in a contract dispute when parties are in federal court on diversity jurisdiction by following the approach the courts have used in *Green Earth, Mann*, and *Ginsburg*. This sort of approach not only encourages professionalism in the industry<sup>322</sup> but also respects the expectation of parties and prevents more sophisticated parties from taking advantage of other individuals. The unclean hands doctrine was meant specifically to address these types of opportunistic arguments and to ensure justice to parties.<sup>323</sup>

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<sup>315</sup> See Mootz, *supra* note 44, at 51–66.

<sup>316</sup> Berke & Gould, *supra* note 16; Dougherty, *supra* note 33.

<sup>317</sup> See Debra Borchartd, *The Five Best Marijuana Jobs*, FORBES (May 27, 2016), <https://www.forbes.com/sites/debraborchartd/2016/05/27/the-5-best-marijuana-jobs/#71269d396e3a>.

<sup>318</sup> *Id.* In fact, they follow the same normative standards, while also being subject to significant more regulation than these industries. See Melissa Schiller, *Cannabis Businesses Struggle to Stay Compliant in California*, CANNABIS BUS. TIMES (July 30, 2018), <https://www.cannabisbusinesstimes.com/article/cannabis-businesses-stay-compliant-california/>.

<sup>319</sup> See Rancee Niedermeyer et al., *Oregon's Regulatory Structure for Cannabis, Beer, Wine, and Distilled Spirits*, HOUSE COMMITTEE ON BUS. & LAB. (Sept. 19, 2017), <https://olis.leg.state.or.us/liz/201711/Downloads/CommitteeMeetingDocument/138404>.

<sup>320</sup> See Barcott, *supra* note 40; Cathy Barrera, *Will Cannabis Job Growth Continue to Outpace Tech Job Growth?*, ZIPRECRUITER, <https://www.ziprecruiter.com/blog/cannabis-job-growth-tech-job-growth/> (last visited Feb. 27, 2019).

<sup>321</sup> See Pellechia, *supra* note 35; Zezima, *supra* note 42.

<sup>322</sup> For a deeper dive into why professionalism in the industry is important, see Mootz, *supra* note 44; Luke Scheuer, *The "Legal" Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511 (2015).

<sup>323</sup> Anenson, *supra* note 77, at 1838–42.

Even in light of the DOJ memos' rescission,<sup>324</sup> Congress still has made a clear statement of intent through the appropriations act regarding medical cannabis.<sup>325</sup> Federal courts should at least be cognizant of this policy stance and should attempt to not rely solely on the CSA when addressing state-legal cannabis industry issues. However, because former Attorney General Sessions rescinded the previous DOJ Memos on cannabis guidance, it is worthwhile to explore what this means for the cannabis industry and federal courts addressing legal issues arising from it.

## V. THE NEW FEDERAL STANCE

On January 4, 2018, Attorney General Jefferson B. Sessions rescinded the DOJ Memos.<sup>326</sup> This turned the “yellow” light for the cannabis industry to a hard “red.”<sup>327</sup> Does this policy change affect the cases discussed in Part III.B? And what does it mean for the opinions that heavily relied on the DOJ policy stance to take a more lenient stance towards cannabis litigants' ability to seek relief in federal court?

### A. *Overview of the New Sessions Policy*

The initial DOJ memos essentially established clear situations where DOJ would use funds to prosecute even state-legal cannabis industry actors.<sup>328</sup> These situations include, among other things, “[p]reventing the distribution of [cannabis] to minors . . . [p]reventing revenue from the sale of [cannabis] from going to criminal enterprises, gangs, and cartels . . . [p]reventing the diversion of [cannabis] from states where it is legal under state law in some form to other states . . . [and] [p]reventing [cannabis] possession or use on federal property.”<sup>329</sup> Due to these guidelines no longer being DOJ policy, it is theoretically possible that DOJ may prosecute state-legal cannabis businesses in the recreational market.<sup>330</sup> More particularly, under the Sessions memo, each federal district's U.S. Attorney has discretion to either prosecute or look the other way towards violations of the CSA.<sup>331</sup>

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<sup>324</sup> See *infra* Part V.

<sup>325</sup> See Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

<sup>326</sup> See Memorandum from Att'y Gen. Jefferson B. Sessions, *supra* note 29.

<sup>327</sup> *Id.* (“[P]revious nationwide guidance specific to [cannabis] enforcement is unnecessary and is rescinded, effective immediately.”).

<sup>328</sup> See Cole 2013 Memo, *supra* note 24.

<sup>329</sup> *Id.*

<sup>330</sup> See Hilary Bricken, *Breaking News: Bye, Bye Cole Memo, Hello Uncertainty for Marijuana*, CANNA L. BLOG (Jan. 4, 2018), <https://www.cannalawblog.com/breaking-news-bye-bye-cole-memo-hello-uncertainty-for-marijuana/>; Robert McVay, *What You Need to Know Now: An Analysis of the Sessions Marijuana Memo*, CANNA L. BLOG (Jan. 5, 2018), <https://www.cannalawblog.com/what-you-need-to-know-now-an-analysis-of-the-sessions-marijuana-memo/>.

<sup>331</sup> Bricken, *supra* note 330.

*B. The Complications of Rescission*

On the one hand, unless U.S. Attorneys in districts where cannabis is legal at the state level decide to bring new prosecutions, the current landscape of state-legal cannabis may remain largely unchanged.<sup>332</sup> U.S. Attorneys' statements in Oregon, California, Colorado, and Washington have been somewhat of a mixed bag, but it seems most are concerned with over-production issues, minors-in-possession issues, and cartel and fraud related issues.<sup>333</sup>

On the other hand, the DOJ policy change could have a significant effect on federal courts' ability to provide leniency to cannabis litigants. The DOJ Memos provided solid ground for federal courts to stand on when asserting the idea that the federal government is having a "change of heart" regarding cannabis enforcement.<sup>334</sup> Federal courts can still point to the NLRB legal advice memo<sup>335</sup> and the appropriations act<sup>336</sup> to help bolster the argument that federal policy is unclear regarding the state-legal cannabis industry. However, the NLRB memo itself relies heavily on the DOJ Memos, complicating the issue of whether it still is persuasive or relevant authority.<sup>337</sup> This change poses a big problem for courts employing the Narrow View and provides additional ammunition for the Broad View, as we saw with *Helix*.<sup>338</sup> It is possible the Tenth Circuit will be the first court to address cannabis litigation in federal court under the new Sessions memo and that this circuit's ruling could set the tone for whether the Narrow View will continue its trend towards broader acceptance.

The new DOJ stance is unlikely to change the practical, on-the-ground progress of the cannabis industry, barring U.S. Attorneys ramping up enforcement efforts. However, the new stance does pose complications to cannabis litigants who seek relief in federal court, and could slow or stop the acceptance of the Narrow View in the future.

## VI. CONCLUSION

The emergence of the state-legal cannabis industry is unlikely to slow down.<sup>339</sup> Public support of recreational cannabis is unlikely to decrease and more states will

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<sup>332</sup> McVay, *supra* note 330.

<sup>333</sup> *Id.*

<sup>334</sup> *See supra* Part III.B.

<sup>335</sup> Memorandum from Barry J. Kearney, *supra* note 226.

<sup>336</sup> Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

<sup>337</sup> Memorandum from Barry J. Kearney, *supra* note 226.

<sup>338</sup> Appellant's Reply Brief, *supra* note 274 at 1–3.

<sup>339</sup> *See supra* Part II.A.

likely change state laws to allow cannabis usage.<sup>340</sup> The CSA remains a dark cloud hanging over the industry that complicates issues and makes it difficult for the industry to plan and make decisions in the fashion other businesses do.<sup>341</sup> This ambiguity in federal law has led to two distinct trends in federal court regarding illegality of cannabis: the Broad and Narrow Views.<sup>342</sup>

Yet, federal courts are embracing a more tolerant view towards cannabis litigants.<sup>343</sup> Federal courts embracing the Narrow View accept the uniqueness of legal issues surrounding the cannabis industry and respect the principles of federalism by avoiding the creation of more uncertainty in an industry that desperately needs to foster a professional approach in its business practices and honor the constitutional protection of its workers.<sup>344</sup> They also ensure that the reasonable expectations of parties are generally met and avoid creating or upholding legal rules that lack common sense foundations.<sup>345</sup>

Through continued acceptance of the Narrow View, Herb, our hardworking laboratory courier, has access to the protections that other similarly situated employees do while they are working in legitimately legal jobs.<sup>346</sup> This view also ensures that employers or individuals are not let off the hook for their federal obligations, e.g., paying minimum wage, or their contractual obligations, simply because they are making deals or employing individuals in an industry that is in violation of one federal law.<sup>347</sup> Yet, with DOJ's new policy under Sessions now in effect, Herb may have to deal with more reefer madness in federal court for the foreseeable future. This Comment hopes that when presented with state-legal cannabis litigation, federal courts can find the time to really "dig into the weeds," and make decisions that ensure justice.

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<sup>340</sup> *See id.*

<sup>341</sup> *See supra* Part II.A–B; *see also* Mootz, *supra* note 44.

<sup>342</sup> *See supra* Part III.A–B.

<sup>343</sup> *See supra* Part III.B.

<sup>344</sup> *See id.*; *supra* Part IV.

<sup>345</sup> *Id.*

<sup>346</sup> *See supra* Part II–IV.

<sup>347</sup> *See supra* Part III.B.