IF IT LOOKS LIKE A DUCK: EQUAL PROTECTION, SELECTIVE PROSECUTION, AND GEOGRAPHIC DIFFERENCES IN THE FEDERAL PROSECUTION OF MARIJUANA CRIMES UNDER THE CONTROLLED SUBSTANCES ACT

By
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State legalization of marijuana for medical purposes has skyrocketed since California first authorized medical marijuana in 1996. Today, citizens in 33 states can use marijuana for medical purposes. While each state maintains distinct regulatory systems and eligibility requirements, the core result of these state medical marijuana programs is that citizens in 33 states can lawfully possess and use marijuana. Yet federal law makes any use of marijuana illegal under the Controlled Substances Act (CSA). Through the Supremacy Clause, this illegality is controlling and preemptive in every state; that is, even if a state makes marijuana legal for certain purposes, an individual using marijuana for those purposes still violates federal law. If individuals violate federal criminal law, they potentially face criminal liability and prosecution by the federal government. This places medical marijuana patients, and the states that permit them to use marijuana, in an awkward position.

This awkward disjoint between state and federal law was addressed during the Obama presidency in two ways. The first was a series of memos, which culminated in the Cole Memo. That memo established a policy for the federal Department of Justice (DOJ) that guided federal prosecutors to save resources by focusing them on marijuana activity that implicated one of several federal policies. This predominantly served to leave enforcement of marijuana laws with local and state authorities. The second mechanism for addressing the state-federal conflict is an appropriations rider added to the federal budget in 2014. That provision prevents the federal DOJ from using its funds to prevent certain states from implementing their medical marijuana programs. The ap-

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propriations rider has been continuously reenacted, and is currently set to expire on September 30, 2019. The Cole Memo was rescinded by Attorney General Jeff Sessions in early 2018.

The Cole Memo and the rider individually create the appearance of disparate enforcement of federal criminal laws, a potential violation of the equal protection guarantee of the Due Process Clause of the Fifth Amendment. The federal government's non-prosecution of citizens in some states for conduct for which it does prosecute citizens in other states, looks and acts like a violation of that guarantee. This Comment endeavors to determine whether the Cole Memo and the rider actually do violate equal protection.

To determine whether the disparate enforcement of the CSA by the federal government actually violates equal protection, several interlocking components must be examined. This Comment thus begins by presenting the general history of marijuana prohibition and enforcement in the United States, along with the standards for equal protection and selective prosecution claims. Although marijuana prohibition started in the early 21st Century, modern prohibition started with the passing of the Controlled Substances Act in 1970. The War on Drugs continued thereafter unabated, until California authorized medical marijuana in 1996. Since then, 32 other states have joined California and come directly into conflict with federal law. The rider and the Cole Memo represent the two chief responses of the executive and legislative branches to overcome this conflict. The introduction further identifies the development of the equal protection doctrine, the tiered-scrutiny framework used by the courts for equal protection challenges, and the development and requirements of the specific claim of selective prosecution.

Section II then examines the Cole Memo, and how courts addressed claims that it violated equal protection and amounted to selective prosecution. Virtually every court that has examined such challenges to the Cole Memo has dismissed them. These courts found the non-binding nature of the Memo on prosecutorial discretion to undercut the argument that citizens in states with medical marijuana laws were being treated differently than those in other states. Because citizens in every state remained open, from a legal standpoint, to being federally prosecuted for violating the CSA, equal protection was not violated.

Section III thereafter engages a similar inquiry with the rider. Courts have applied the rider differently over time, and this Section presents the pertinent developments as well as the current authoritative application of the rider. Because few courts have addressed equal protection or selective prosecution challenges to the rider, this Comment presents a critical examination of how those doctrines should apply. In addition to those concerns, this Section also discusses practical concerns that would arise in challenges to the rider.

A brief conclusion subsequently discusses the path trodden and lessons learned. Ultimately, it is not enough to look or act like a duck. Some inequalities may stand despite intuitive concerns about the constitutional guarantee of equal protection.

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I. INTRODUCTION

In October 2018, Patrick Beadle was sentenced by the state of Mississippi to eight years in prison for possessing 2.89 pounds of marijuana.[1] Mr. Beadle was an Oregon resident and medical marijuana patient, and claimed that he possessed the

[1] Ezekiel Edwards, *Mississippi Sentences Man to 8 Years in Prison for Medical Marijuana He Purchased Legally in Another State*, AM. C.L. UNION (Oct. 22, 2018, 12:15 PM), https://www.aclu.org/blog/criminal-law-reform/drug-law-reform/mississippi-sentences-man-8-years-prison-medical-marijuana.

marijuana solely for medical purposes.[2] While his amount of marijuana was excessive even under Oregon law,[3] his prosecution nonetheless raised a significant issue: people in 33 states can use marijuana for medical purposes[4] while people located outside those states remain subject to criminal prosecution for using marijuana medically. What is legal in Iowa is illegal in South Dakota. What is illegal in Idaho is legal in Oregon. Yet federal law makes the possession and use of marijuana illegal for any purpose in any state. The federal government, through a now-defunct executive policy and a year-to-year congressional budgetary rider, has acted to accommodate state marijuana laws. In doing so, however, a significant issue emerges: if the federal government is enforcing marijuana prohibition against people in one state, and not against people in another state, is federal law being applied equally?

Equal protection of the laws is a fundamental component of the United States' constitutional order. The notion that the government must create and apply laws that apply equally to everyone is intuitive. Selective application of the law has accompanied every tyrannical plague, and wherever it occurs the legitimacy of governing institutions becomes immediately suspect. And yet, when it comes to federal marijuana enforcement, a stark inequality seems to hide in plain sight.

A longstanding idiom, referred to as the "duck test," dictates that if a thing *looks* like a duck and *sounds* like a duck, it probably *is* a duck. When people in seventeen states cannot acquire or use medical marijuana but the remainder of the country can, and the federal government prosecutes for marijuana use in one set of states but not the other, equal protection alarms are triggered. Applying federal law in only one subset of states, when it is the supreme law over all states, *looks* and *sounds* like an unconstitutional violation of equal protection. But is it? This question forms the heart of this Comment's inquiry.

To examine the potential equal protection violation posed by the disparate federal enforcement of marijuana prohibition, this Comment focuses on two significant acts promulgated by the executive and legislative branches that appear to cause unequal application of the law. By examining the Cole Memo and the congressional budget rider, this Comment will determine whether the disparate federal enforcement of marijuana prohibition violates equal protection. For this principal end, this Comment is arranged into four parts. Part I details the historical background of marijuana prohibition, the creation of the Cole Memo and the rider, and the legal

[2] *Id.*

[3] Oregon law limits the amount of medical marijuana one may possess to 24 ounces or 1.5 pounds. *Frequently Asked Questions*, OR. HEALTH AUTHORITY, https://www.oregon.gov/oha/PH/DISEASESCONDITIONS/CHRONICDISEASE/MEDICALMARIJUANAPROGRAM/Pages/top20.aspx#patientlimits (last visited Mar. 20, 2018).

[4] Jeremy Berke & Skye Gould, *This Map Shows Every US State Where Pot Is Legal*, BUS. INSIDER (Jan. 4, 2019, 12:49 PM), https://www.businessinsider.com/legal-marijuana-states-2018-1.

standards for claims rooted in equal protection and selective prosecution. Part II discusses the Cole Memo and examines whether it satisfies the duck test—that is, whether it actually is a violation of equal protection. Part III engages a similar inquiry with the congressional budget rider. Part IV discusses the results of these inquiries and presents the ultimate conclusion: it is not enough to *sound* or *look* like a duck to actually *be* a duck. Some inequities pass constitutional muster despite their seemingly questionable operation.

A. *Marijuana Enforcement Historically*

The United States' history with marijuana has been well documented and need not be fully recounted here. Nonetheless, a brief overview of that history provides a necessary backdrop for the contemporary approaches of the executive and legislative branches in the enforcement of federal marijuana laws.

Marijuana was legal throughout the United States at the federal and state levels until the early twentieth century.[5] Physicians regularly prescribed marijuana for "a variety of maladies."[6] In 1906, the federal government passed the Pure Food and Drugs Act, which required "listing marijuana as an intoxicating ingredient."[7] State prohibitions followed shortly thereafter. These prohibitions began in the 1910s[8] and spread from the American West to the Northeast as black and Latino migrant workers dispersed across the nation.[9] In 1937, Congress passed the Marihuana Tax Act.[10] As the first federal regulation of marijuana, the Act led to the removal of marijuana from the Federal Pharmacopoeia, which negated its status as a permissible medicine in the eyes of the federal government.[11]

Modern federal prohibition of marijuana began with Congress's passing of the Controlled Substances Act (CSA) in 1970.[12] The CSA declared that marijuana had a "high likelihood of addiction and no safe dose,"[13] and thus constituted a Schedule

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[5] Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81 (2015).

[6] United States v. Taylor, No. 1:14-CR-67, 2014 WL 12676320, at *1 (W.D. Mich. Sept. 8, 2014).

[7] *Id.*

[8] For example, California banned marijuana in 1913. Dale H. Gieringer, *The Origins of Cannabis Prohibition in California*, *in* CONTEMPORARY DRUG PROBLEMS 2 (Fed. Legal Publ'ns 2006), http://www.canorml.org/background/caloriginsmjproh.pdf.

[9] Chemerinsky et al., *supra* note 5, at 81–82.

[10] Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

[11] Chemerinsky et al., *supra* note 5, at 82.

[12] *Id.*

[13] *Id.* (citing 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2012)).

I drug, which the CSA "categorically and unambiguously bans."[14] Because of the supremacy of federal law, the CSA made it so that "the ability of states to enable marijuana use and distribution of *any* kind remains contingent upon the forbearance of federal law enforcement officials within the executive branch."[15] Nationwide prohibition was established. The War on Drugs was on.

While the logistics of marijuana's prohibition varied with presidential administration and legislative focus, the underlying illegality of marijuana remained fundamentally unchanged until 1996 when California voters passed Proposition 215. This initiative permitted persons to use marijuana if they received an "oral or written recommendation from a doctor."[16] California became the first state to authorize what federal law explicitly prohibited, and it opened the floodgates for states to reconsider their approaches to marijuana. Medical marijuana legalization spread across the states; by President Barack Obama's inauguration in 2009, thirteen states permitted the medical use of marijuana.[17]

While enforcement of the CSA, and the broader War on Drugs, varied logistically across presidential administrations,[18] the Obama administration undertook an unprecedented approach, as evinced by the public policy statements of his Department of Justice. Two prominent policy statements—the Ogden Memo and the Cole Memo—established a new approach to marijuana enforcement. Rather than systematically and uniformly applying the federal law prohibiting the cultivation, possession, and sale of marijuana, the Obama administration prioritized its enforcement goals with a general hands-off approach to states that had legalized marijuana in contravention of federal law.

The Ogden Memo was promulgated on October 19, 2009 by Deputy Attorney General David W. Ogden, and it served to "provide[] clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."[19] To avoid overcomplication due to the varied nature of these states' regulatory frameworks and statutes, the memo aimed to "provide[] uniform guidance to focus federal . . . prosecutions in these States on core federal enforcement

[14] Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 290 (2015).

[15] *Id.*

[16] Chemerinsky et al., *supra* note 5, at 85. The language of Proposition 215 was "carefully chosen" and based on Supreme Court case law establishing that doctors could not be banned from discussing medical treatment options. Because the doctors did not *prescribe* marijuana, they did not trigger penalties under the CSA or other anti-marijuana regulations. *Id.*

[17] *Id.* at 85–86.

[18] *Id.*

[19] Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations & Prosections in States Authorizing the Med. Use of Marijuana (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

priorities."[20] Specifically, Ogden's memo argued that the prosecution of individuals who were in "clear and unambiguous compliance" with state laws permitting the use of medical marijuana would be "unlikely to be an efficient use of limited federal resources."[21] To preserve these resources, the memo guided U.S. Attorneys to focus on "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit."[22] In establishing the clear and unambiguous compliance standard, Ogden emphasized several "characteristics" that would demonstrate an individual's failure to sufficiently comply with state law.[23] While prioritizing prosecutorial resources, the memo nonetheless reaffirmed the federal illegality of marijuana and the Department of Justice's ability to prosecute CSA violations regardless of state law. Moreover, the memo specifically identified that it did not legalize marijuana or "create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter."[24] Thus, clear and unambiguous compliance with state law in the absence of any of the identified characteristics did not provide a legal defense in a federal prosecution for CSA crimes.[25]

Public response to Ogden's memo was swift and the number of marijuana dispensaries quickly grew.[26] When California voters considered Proposition 19, an initiative that would have authorized the recreational use of marijuana, United States Attorney General Eric Holder warned that the federal government might not provide the same leniency toward recreational uses as it had toward medical uses.[27] Consequently, Proposition 19 failed narrowly—53.5% to 46.5%.[28]

In 2011, Deputy Attorney General James M. Cole released a follow-up memo in response to U.S. Attorney requests for DOJ guidance in handling CSA violations.[29] This memo clarified the strength of the cautionary language in the Ogden

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* These characteristics include "unlawful possession or unlawful use of firearms; violence; sales to minors; financial and marketing activities inconsistent with . . . state law . . . ; excessive amounts of marijuana inconsistent . . . with state or local law; illegal possession or sale of other controlled substances; [and] ties to other criminal enterprises." *Id.*

[24] *Id.*

[25] *Id.* This portion of the Ogden memo would be flipped on its head in *U.S. v. McIntosh*, which is discussed in a later Section. United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

[26] For example, nearly 1,000 opened up in Colorado in just one year. Chemerinsky et al., *supra* note 5, at 87.

[27] *Id.*

[28] *Id.*

[29] Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use (June

memo. Chiefly, the DOJ remained "committed to the enforcement of the Controlled Substances Act in all States."[30] Furthermore, Cole clarified that regardless of state law, those in violation of the CSA remained subject to federal prosecution.[31] Somewhat ominously, the memo ended with a declaration to dispel any confusion regarding the federal DOJ's enforcement abilities: "The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority."[32] Enforcement actions promptly demonstrated the seriousness of the DOJ's position.[33]

Nonetheless, Colorado and Washington legalized recreational marijuana in November 2012. These initiatives decriminalized possession of minor amounts of marijuana and called for implementation of regulatory and taxation schemes.[34] The federal government remained silent after this affront until Cole promulgated another memo to U.S. Attorneys in August 2013.[35] This memo, widely referred to as the "Cole Memo," updated the previous memos "in light of state ballot initiatives" that permitted recreational marijuana use.[36] Although repeating the warning that the DOJ was "committed to enforcement of the CSA," the memo echoed the Ogden memo's message that the DOJ would use its limited resources efficiently.[37] Emulating the Ogden memo, the Cole Memo presented a list of eight "priorities" that

29, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

[30] *Id.*

[31] *Id.* ("The Ogden Memorandum was never intended to shield [commercial marijuana] activities from federal enforcement action and prosecution . . . . Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law.").

[32] *Id.*

[33] Chemerinsky et al., *supra* note 5, at 88 ("[F]our U.S. Attorneys in California combined forces in a concerted action against California's medical marijuana industry; Montana's industry was essentially shut down by law enforcement actions; and Colorado dispensaries within a thousand feet of a school were told they must either relocate or close their doors.").

[34] *Id.* at 88–89.

[35] Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [hereinafter Cole Memo].

[36] *Id.*

[37] *Id.* ("The [DOJ] is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.").

served to "guide the [DOJ's] enforcement of the CSA against marijuana-related conduct."[38] Cole directed U.S. Attorneys to "focus their enforcement resources and efforts, including prosecution, on persons . . . whose conduct interferes with any one or more of these priorities, regardless of state law."[39]

The Cole memo further addressed some practical realities that underlaid the federal government's change in approach. Because the DOJ "traditionally" left minor CSA violations, such as possession of small amounts of marijuana, "to state and local authorities," the DOJ previously only "stepped in to enforce the CSA" when the scale of the CSA violation "threatened to cause one of the harms" listed in the memo.[40] Furthermore, Cole conditioned federal leniency on the strength of the states' regulation and enforcement.[41] State regulatory schemes were further expected to "provide the necessary resources and demonstrate the willingness" of states to enforce their regulations such that the legalization of marijuana did not "undermine federal enforcement" policies—the enumerated "priorities."[42] Therefore, so long as a state that legalized marijuana had "strong and effective regulatory and enforcement systems," U.S. Attorneys were advised that state and local law enforcement should be "the primary means of addressing marijuana-related activity."[43] Ultimately, the "primary question in all cases—and in all jurisdictions—should be whether the conduct at issue implicate[d] one or more of the enforcement priorities."[44] As in the previous memos, the Cole Memo reiterated that the DOJ's stated policy did not diminish the illegality of CSA violations, did not prevent the DOJ from enforcing the CSA nationwide, and did not create a legal defense or any legal rights. Unlike the previous memoranda, however, it made clear that the DOJ's new approach was only prospective; no prosecution brought before the issuance of the memo would be reconsidered. Although listing the routine cautions, the Cole Memo gave the

[38] *Id.* These priorities were to prevent: distribution to minors; use of marijuana revenue to fund criminal organizations; distribution of marijuana beyond the boundaries of the state in which it is legal; trafficking of other drugs; violence; driving while under the influence of marijuana; growing marijuana on public lands; and possession on federal property. *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* Some commentators have argued that this represented a deferential approach to state law enforcement. *See, e.g.*, Markano, *supra* note 14, at 295–96. However, this view ignores the significant discretion the federal DOJ—and individual U.S. Attorneys—have in determining whether to defer to local authorities. Because the federal government has authority to determine the insufficiency of a state's regulatory or enforcement systems, it is inaccurate to portray the federal government as deferring to state authority rather than simply wielding traditional prosecutorial discretion.

[44] Cole Memo, *supra* note 35.

impression that "the executive branch ha[d] simply decided not to enforce the CSA in many cases when doing so would inconvenience the states."[45]

The DOJ's approach was further constrained in 2014, when Congress cemented protections for medical marijuana patients by adding an appropriations rider to the federal budget.[46] The rider bars the DOJ from using its federal funds to "prevent" states with medical marijuana "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[47] The rider has been reenacted numerous times since 2014[48] and, although its name has fluctuated,[49] each version has been "essentially the same"[50] except for the addition of new states to its coverage. Whereas the original budget rider contained 32 states and the District of Columbia, the most recent version applies to 46 states, the District of Columbia, the Commonwealth of the Northern Mariana Islands, Puerto

[45] Markano, *supra* note 14, at 291.

[46] *See* Tom Angell, *Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#4b0138693575; Riker Danzig Scherer Hyland & Perretti LLP, *Rohrabacher-Blumenauer Amendment is Renewed Through September 2018*, LEXOLOGY (Apr. 3, 2018), https://www.lexology.com/library/detail.aspx?g=49575d57-77b9-4e1d-9e2e-15b9c9925878.

[47] Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

[48] *See* Tom Angell, *Congressional Committee Protects Medical Marijuana From Jeff Sessions*, FORBES (May 17, 2018, 12:38 PM), https://www.forbes.com/sites/tomangell/2018/05/17/congressional-committee-protects-medical-marijuana-from-jeff-sessions/#4f88649e1e55.

[49] The rider has gone through numerous name changes, referred to as the "Hinchey-Rohrabacher Amendment," the "Rohrabacher-Farr Amendment," the "Rohrabacher-Blumenauer Amendment," and the "Joyce Amendment." Its codification has similarly differed between versions, codified as § 538, § 542 and § 537 in various federal appropriations bills. *Compare* United States v. Kleinman, 880 F.3d 1020, 1027 (9th Cir. 2017) ("In this opinion we refer to the riders collectively as § 542.") *with* Appellee's Answering Brief at 20, United States v. Zucker, No. 15-30232, (9th Cir. Nov. 9, 2017) (stating the appropriations rider is "commonly known as § 538"). *See also* Eric Sandy, *House Appropriations Committee Advances Medical Marijuana Protections*, CANNABIS BUS. TIMES (May 17, 2018), https://www.cannabisbusinesstimes.com/article/house-appropriations-committee-joyce-amendment/ (identifying the latest iteration of the rider as the "Joyce Amendment").

[50] *Kleinman*, 880 F.3d at 1027 (quoting United States v. Nixon, 839 F.3d 885, 887 (9th Cir. 2016) (per curiam)).

Rico, and Guam.[51] This iteration expires on September 30, 2019.[52] For ease of clarity, this Comment will refer to the riders collectively as "the rider."

By the end of Obama's presidency, eight states had fully legalized marijuana (allowing its medical and recreational usage), twenty states had legalized medical marijuana, and a handful of states had decriminalized the possession of marijuana.[53] Furthermore, public opinion had decidedly shifted in favor of legalization: in 2016, 57% the general population and over 70% of millennials supported legalizing marijuana.[54]

After the election of President Donald Trump, states continued to enact marijuana policy reforms, albeit at a more limited pace.[55] On January 4, 2018, Attorney General Jeff Sessions issued a one-page memo to U.S. Attorneys that summarily

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[51] The most current version of the rider states:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act § 537.

[52] *Congress Extends State-Legal Medical Cannabis Programs' Protections Timing*, MARIJUANA BUS. DAILY (Feb. 19, 2019), https://mjbizdaily.com/feds-extend-state-legal-medical-cannabis-programs-protections-2019/.

[53] German Lopez, *It's Official: 2016 Was Marijuana Legalization's Biggest Year Ever*, VOX (Dec. 29, 2016, 8:30 AM), https://www.vox.com/policy-and-politics/2016/12/29/14054172/marijuana-legalization-2016.

[54] Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RES. CTR. (Oct. 12, 2016), http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/. As of October 2018, these numbers are 62% and 74%, respectively. Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/.

[55] In 2017, New Hampshire decriminalized marijuana possession and West Virginia legalized medical marijuana. Tom Angell, *These States Are Likely to Legalize Marijuana in 2018*, FORBES (Dec. 26, 2017, 12:50 PM), https://www.forbes.com/sites/tomangell/2017/12/26/these-states-are-likely-to-legalize-marijuana-in-2018/#6125490d1032. By June 2018, Oklahoma legalized medical marijuana and Vermont legalized recreational marijuana. German Lopez, *Marijuana Legalization Is Having Its Best Year Ever*, VOX (June 27, 2018, 1:00 PM) https://www.vox.com/2018/6/27/17508694/marijuana-legalization-canada-oklahoma-vermont-2018.

overturned all previous DOJ policies pertaining to prosecutorial discretion in enforcing CSA violations.[56] U.S. Attorneys were instructed to abide by the "well-established principles that govern all federal prosecutions . . . . reflected in chapter 9-27.000 of the U.S. Attorneys' Manual."[57] These well-established principles were deemed sufficient; the Ogden and Cole Memos were declared "unnecessary," and were "rescinded, effective immediately."[58]

Concerns arose following the Sessions Memo, but were allayed somewhat in the following days. Though Attorney General Sessions has not taken active steps to dismantle the marijuana industry, he has called his change in approach a "return to the rule of law."[59] The U.S. Attorney's Office for the District of Colorado immediately issued a statement identifying that its approach to marijuana prosecutions would remain essentially unchanged.[60] The U.S. Attorney for the District of Oregon held a "Marijuana Summit" in February, which attracted "130 people from nearly 70 organizations."[61] Ultimately, the resultant Williams Memo reflected an approach similar to that of the Cole Memo, albeit localized and fact-specific to the issues affecting Oregon.[62] Thus, the Sessions Memo largely served to return full discretion to U.S. Attorneys to prosecute marijuana crimes, with results varying across the nation. However, it appears that U.S. Attorneys generally have not increased enforcement of the CSA beyond the framework of the Cole Memo.[63]

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[56] Memorandum from Jefferson B. Sessions, Att'y Gen., to U.S. Att'ys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [hereinafter Sessions Memo]. In doing so, Attorney General Sessions renewed concerns about reliance by industries and citizens on federal non-enforcement of the CSA. *See, e.g.*, Paul Lewis, *A Gateway to Future Problems: Concerns about the State-by-State Legalization of Medical Marijuana*, 13 U.N.H. L. Rev. 49, 69–70 (2015).

[57] Sessions Memo, *supra* note 56.

[58] *Id.*

[59] Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

[60] *Id.*

[61] Memorandum from Billy J. Williams, U.S. Att'y, Priorities in Enf't of Fed. Laws Involving Marijuana in the District of Oregon (May 18, 2018), http://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20(1).pdf.

[62] As part of the updated approach to marijuana law enforcement, the Williams Memo identified five "priorities" that the U.S. Attorney would focus upon when prosecuting marijuana offenses: "Overproduction and Interstate Trafficking"; "Protecting Oregon's Children"; "Violence, Firearms, or other Public Safety Threats"; "Organized Crime"; and "Protecting Federal Lands, Natural Resources, & Oregon's Environment." *Id.*

[63] Peter S. Murphy, *State Officials and U.S. Attorneys Respond to Sessions Move to Rescind Cole Memo*, ECKERT SEAMANS (Jan. 17, 2018), https://www.eckertseamans.com/stay-informed/blogs/controlled-substance/state-officials-and-u-s-attorneys-respond-to-sessions-move-to-rescind-cole-memo.

As of this Comment's publication, the Sessions Memo and the rider constitute the legal parameters for federal prosecution of marijuana offenses under the Controlled Substances Act. The rider is set to expire on September 30, 2019, unless reenacted again in the next federal budget.[64] Marijuana is legal for recreational uses in ten states and is legal for medical uses in 33 states.[65] Recent surveys show that nearly 60% of the public supports legalizing marijuana, and one in two Americans has tried marijuana.[66]

B. Equal Protection

The constitutional guarantee of equal protection of the laws is cemented in the Fourteenth Amendment[67] and applies to the federal government via the reverse incorporation of that guarantee into the Fifth Amendment's Due Process Clause.[68] To determine whether a federal governmental action violates equal protection, a court applies "ordinary equal protection standards" typically applied under the Fourteenth Amendment.[69]

Ordinary equal protection analyses generally follow an established formula. First, the governmental action must be analyzed to identify if a classification between people has been established. Virtually all laws create and rely upon classifications.[70] To discern whether the classification violates equal protection, the court reviews the law under a certain degree of scrutiny. Scrutiny refers to the level of skepticism held by the court as to the motive and purpose underlying a particular government action, and it sets the functional presumptions that guide the actual litigation of the equal protection claim. The level of scrutiny applied to determine the constitutionality of a particular governmental action turns on (a) whether the

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64 *See Medical Cannabis Programs' Protections*, *supra* note 52.

65 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.

66 Jennifer de Pinto et al., *Support for Legal Marijuana Use Remains High*, CBS NEWS (Apr. 20, 2018, 7:00 AM), https://www.cbsnews.com/news/support-for-legal-marijuana-use-remains-high-cbs-news-poll/.

67 "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

68 Wayte v. United States, 470 U.S. 598, 608 n.9 (1985) ("Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component." (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954))).

69 *Id.*; *Bolling*, 347 U.S. at 499.

70 For example, a law criminalizing marijuana possession creates a classification that distinguishes between those who do not possess marijuana and those who do possess marijuana.

classification harms a suspect[71] or quasi-suspect class[72] and/or (b) whether the classification unconstitutionally burdens a fundamental right. If a law, directly or indirectly, targets members of a suspect or quasi-suspect class based on their membership in that class, a heightened level of scrutiny is applied.[73] Laws that target members of a suspect class are subject to strict scrutiny. Those that target quasi-suspect class members are subject to heightened scrutiny. Under the second strand, laws that excessively burden *fundamental rights* are subject to strict scrutiny.[74]

Strict scrutiny presumes that the governmental action at issue is unconstitutional, and a court using strict scrutiny places a heavy burden on the government to establish (1) that the action was done in furtherance of a compelling state interest and (2) that the act was narrowly tailored, such that there were no less onerous means available to achieve that interest. If the government can meet this burden, the act is deemed constitutional.[75]

Heightened scrutiny similarly presumes the unconstitutionality of the act under review, but places a lighter burden on the government. To show the legality of the scrutinized act, the government must establish (1) that the act was done in furtherance of an actual, important, and legitimate state interest and (2) that the act was substantially related to that end.[76]

Laws that neither burden a fundamental right nor target a suspect or quasi-suspect class are subject to rational-basis review.[77] Rational-basis review is generally very deferential, such that most laws remain constitutional following its application.[78] In rational-basis review, the statute is presumed constitutional, and the focus

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[71] Suspect classes include race, ethnicity, and nationality. *See* Sonu Bedi, *Collapsing Suspect* Class *with Suspect* Classification*: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough,* 47 GA. L. REV. 301, 308 (2013).

[72] Quasi-suspect classes include sex and bastardy. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting).

[73] Timothy Snowball, *All Rights Were Created Equal*, PAC. LEGAL FOUND. (Mar. 27, 2018), https://pacificlegal.org/all-rights-were-created-equal/.

[74] *Id.* Fundamental rights here include those deemed fundamental under the doctrine of Substantive Due Process under the Fourteenth Amendment as well as many, but not all, of those rights listed in the Bill of Rights. *See* Rory Little, *Guest Post: Come On, Justices Gorsuch and Kavanaugh! Doctrinal (and Intemperate) Error in the Timbs v. Indiana Oral Argument*, PRAWFSBLAWG (Dec. 3, 2018), https://prawfsblawg.blogs.com/prawfsblawg/2018/12/guest-post-come-on-justices-gorsuch-and-kavanaugh-doctrinal-and-intemperate-error-in-the-timbs-v-ind.html.

[75] Snowball, *supra* note 73.

[76] *Id.*

[77] *Id.*

[78] *Id.* In certain contexts, the Court has employed a more demanding rational-basis standard, such as when examining a state's constitutional prohibition of laws protecting individuals based on sexual orientation, Romer v. Evans, 517 U.S. 620 (1996), or when examining a prohibition on a community living center for the mentally disabled, City of Cleburne v. Cleburne Living Ctr.,

is on whether the statute is rationally related to a legitimate state interest.[79] If the court can be convinced that *any* set of facts—real or hypothetical—could make the need for the law rationally related to a legitimate state interest, the law is constitutional.[80] Thus, a heavy burden falls upon the challenger; to invalidate the statute for constitutional infirmity, the challenger must disprove every "conceivable basis" that "might support" the statute's constitutionality.[81] If the court can understand a statute "to [have] result[ed] from a justification independent of unconstitutional grounds," it will uphold the statute.[82]

The Supreme Court recently acknowledged that, "[g]iven the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[83] The significant differences between heightened scrutiny (at either level) and rational basis review make the determination of applicable scrutiny the critical preliminary issue in equal protection litigation.

The guarantee of equal protection serves as a distinct basis for challenging the constitutionality of government action. The preceding tiered-scrutiny approach is the default analysis, and in certain contexts, the guarantee of equal protection can manifest in particularly specific claims. In the prosecutorial context, equal protection prohibits the unconstitutional use of prosecutorial power to target groups or individuals for invalid reasons. In response to such oppression, citizens may present a claim of selective prosecution in addition to a claim of a violation of equal protection. The next Section details the standards for this particularized claim.

C. *Selective Prosecution*

Prosecutorial discretion is a tool that the executive branch alone wields, and this power "remains relatively unchecked by Congress or by the Judiciary."[84] U.S. Attorneys have overwhelming discretion in prosecuting cases, which includes con-

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Inc., 473 U.S. 432 (1985). However, these are generally recognized as particular contexts and do not involve the generally applicable standard of rational-basis review.

[79] Jarrett Dieterle, *Differing Levels of Scrutiny for Economic Regulations: "Anything Goes" Rational Basis v. Rational "With Bite*,*"* FEDERALIST SOC'Y (Apr. 26, 2017), https://fedsoc.org/commentary/blog-posts/differing-levels-of-scrutiny-for-economic-regulations-anything-goes-rational-basis-v-rational-basis-with-bite.

[80] *Id.*

[81] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

[82] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

[83] *Id.*

[84] Lewis, *supra* note 56, at 87.

trol over "which crime, if any, to charge the defendant with; when to grant immunity; whether to accept a plea bargain; and whether to dismiss charges."[85] They also make the initial decision of whether to prosecute an individual case at all.[86] This discretion lets prosecutors evaluate each potential case in light of their priorities, policies, and resources. Minimal input from the federal DOJ directs each U.S. Attorney in applying this discretion.[87] Prosecutorial discretion is widely respected and largely unchallenged by courts.[88]

Despite judicial deference, prosecutorial discretion is not without limits. In a series of cases, the Supreme Court made clear that if prosecutors comply with legal requirements, their prosecutorial decisions would "remain largely unchecked," so long as those decisions did not run afoul of "certain narrow constitutional constraints"[89] such as equal protection. [90] The prosecutor's decision whether to prosecute an individual, or individuals, cannot be discriminatory or arbitrary.[91] For example, a prosecutor's decision to prosecute cannot be based on a suspect class such as race, national origin, or ethnicity.[92]

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[85] *Id.* (footnotes omitted).

[86] *Id*; *see also* Steven A. Vitale, *"Dope" Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States*, 23 U. MIAMI BUS. L. REV. 131, 143 (2014) ("The doctrine of *prosecutorial discretion* enables the federal government to exercise broad discretionary power 'as to when, whom, and whether to prosecute for violations of federal law.'" (quoting TODD GARVEY, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 16 (2012))).

[87] Markano, *supra* note 14, at 290.

[88] *Id.* at 310 ("[B]ecause the decision of whether to bring any given case to trial is a complex fact-based inquiry, the Court has repeatedly asserted that prosecutors are to be granted substantial liberty to control which crimes are prosecuted and which are ignored."); *see also* Lewis, *supra* note 56, at 88–89 ("[T]he Judicial Branch seems to be in agreement that 'the decision of a prosecutor . . . not to indict . . . has long been regarded as the special province of the Executive Branch,' and therefore that limiting that discretion by imposing judicial review 'would invade the traditional separation of powers doctrine.'" (first quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985); and then Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 10 (2009))).

[89] Markano, *supra* note 14, at 310–11.

[90] Vitale, *supra* note 86, at 143 ("Prosecutorial discretion, although broad, is still subject to a few limitations such as the Equal Protection Clause.").

[91] Markano, *supra* note 14, at 311; *see also* Lewis, *supra* note 56, at 93 ("[W]hen a defendant is able to demonstrate that a *Constitutionally impermissible criterion* played a significant role in the *decision* to prosecute, defendants may have standing to 'check' specific instances of prosecutorial discretion, although they are rarely successful.") (footnotes omitted); Vitale, *supra* note 86, at 143.

[92] Many have questioned whether disproportionate arrests and sentencing of minorities under the CSA for marijuana crimes violates Equal Protection. *See, e.g.*, Michèle Alexandre, *First Comes Legalization, Then Comes What? Tips for Washington and Colorado to Help Break the Cycle of Selective Prosecution and Disproportionate Sentencing*, 91 OR. L. REV. 1253, 1254 (2013).

Several cases have delineated the contours of a prosecutor's discretion and the requirements for establishing a claim of selective prosecution. A brief overview[93] of these cases will identify the theoretical underpinnings and requirements of selective prosecution as a means for criminal defendants to have their indictments dismissed[94] and have equal protection guaranteed at the intersection of citizens and the legal system.

In *Wayte v. United States*, the Supreme Court delineated the elements of a selective prosecution claim and reasoned that the "ordinary" standards of equal protection applied to claims of selective prosecution.[95] As applied, this requires claimants to show that the government action at issue "had a discriminatory effect" and that the action "was motivated by a discriminatory purpose."[96] The Court clarified that "discriminatory purpose" was narrowly defined, requiring "more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[97] In *Wayte*, the criminal defendant failed on his claim of selective prosecution because he did not show "that the Government prosecuted him *because* of his protest activities."[98]

The Court clarified the underpinnings of a selective prosecution claim eleven years later, in *United States v. Armstrong*.[99] Prosecutors are constrained by the "equal protection component of the Due Process Clause of the Fifth Amendment,"[100] which mandates that the decision to prosecute "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"[101] Rather than a criminal defense, a claim of selective prosecution is "an independent assertion that

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[93] For a fuller discussion of relevant case law, see Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 41–50 (1998).

[94] This is one thread of possible selective prosecution claims. The full world of selective prosecution claims is broader, with more nuance than presented here. *See, e.g.*, Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 933 (1997) ("In general, selective prosecution claims can be divided into two subsets: those based on claims of racial discrimination; and those based on other constitutionally impermissible infringements, such as First Amendment violations, prosecution of repeat offenders, or cases involving alien defendants charged with reentering the United States . . . . Moreover, a distinction must also be drawn between a selective prosecution claim based upon a civil suit for injunctive relief against the individual prosecutor and that asserted as a defense to a criminal charge . . . .") (footnotes omitted).

[95] Wayte v. United States, 470 U.S. 598, 608–11 (1985).

[96] *Id.* at 608.

[97] *Id.* at 610 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

[98] *Id.*

[99] United States v. Armstrong, 517 U.S. 456 (1996).

[100] *Id.* at 464 (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954)). Here the Court fully cements the reverse incorporation discussed in note 73.

[101] *Id.* (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

the prosecutor has brought the charge for reasons forbidden by the Constitution."[102] Because such a claim "asks a court to exercise judicial power over a 'special province' of the Executive,"[103] the Court recognized a "presumption of regularity" that supports prosecutorial decisions and presumed that prosecutors had "properly discharged their official duties," unless the defendant could provide "clear evidence to the contrary."[104]

The burden to establish a claim of selective prosecution or even obtain discovery is high.[105] To prevent frivolous suits and thereby protect prosecutorial resources, the Court recognized a "background presumption" that the "showing necessary to obtain discovery" should be a "significant barrier."[106] To obtain discovery, a defendant must "dispel the presumption that a prosecutor has not violated equal protection" by presenting "clear evidence to the contrary."[107] This requires presenting "'some evidence tending to show the existence of the essential elements'" of the selective prosecution claim—"discriminatory effect and discriminatory intent."[108]

For the first element of a selective prosecution claim, discriminatory effect, the Court held that a "credible showing of different treatment of similarly situated persons" would permit discovery.[109] Although the court declared that this requirement would not make selective prosecution claims "impossible to prove,"[110] scholars have heavily questioned the reality of that declaration.[111] As one commentator argued,

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[102] *Id.* at 463.

[103] *Id.* at 464 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[104] *Id.* (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14 (1926)).

[105] *Id.* at 463, 468.

[106] *Id.* at 463–64. The Court detailed specific concerns that mitigated judicial scrutiny of prosecutorial decisions:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." . . . It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."

Id. at 465 (citations omitted) (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

[107] *Id.* at 465.

[108] *Id.* at 468 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).

[109] *Id.* at 470.

[110] *Id.* at 466 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 15 (1926)).

[111] *E.g.*, Davis, *supra* note 93, at 18 ("[S]elective prosecution claims . . . requir[e] a nearly impossible showing that the prosecutor intentionally discriminated against the defendant or the victim. One reason this standard is so difficult to meet . . . . is the exacting legal standard for obtaining discovery of information that would help to prove discriminatory intent when it does

the consequence of this standard is that the requirements for obtaining discovery and the requirement for proving selective prosecution have "practically merge[d]."[112]

In *Armstrong*, the Ninth Circuit followed a "presumption that people of *all* races commit *all* types of crimes," and thus a disproportionate prosecution of black citizens for crack-related crimes manifested discriminatory effect.[113] However, the court lacked authority for this presumption, and statistics from the U.S. Sentencing Commission showed that particular races were more likely to commit particular crimes.[114] Warning that "[p]resumptions at war with presumably reliable statistics have no proper place in the analysis of this issue," the Supreme Court held that the evidence provided was inadequate to establish discriminatory effect. Because this deficiency was sufficient to deny discovery to the defendants on their selective prosecution claim, the Court reversed the Ninth Circuit and remanded the case.[115]

The most recent case examining the *Armstrong* standards was decided in 2002. In *United States v. Bass*, the Court summarily reversed the Sixth Circuit's finding that the defendant had satisfied the discriminatory effect element of his selective prosecution claim.[116] The Sixth Circuit had accepted "nationwide statistics" demonstrating a disparate application of "death-eligible offense[s]" to black defendants as demonstrating a discriminatory effect.[117] The Court questioned the use of nationwide statistics, but did not declare them unsuitable for demonstrating discriminatory effect. The Court did seem to prefer evidence that would provide "a showing regarding the record of the decisionmakers in [the criminal defendant's] case."[118] Thus, the necessary contextual focus of the evidence establishing discriminatory effect remains an open question. Regarding the necessary evidence, the Court noted that such "raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*."[119] Because the criminal defendant

exist."); Jampol, *supra* note 94, at 932 ("[T]he Supreme Court's decision in *United States v. Armstrong* imposes a barrier that is too high for almost any defendant alleging selective prosecution to obtain discovery, thus making the already difficult claim of race-based selective prosecution virtually impossible to prove.").

[112] Jampol, *supra* note 94, at 954.

[113] United States v. Armstrong, 48 F.3d 1508, 1516 (9th Cir. 1995).

[114] *Armstrong*, 517 U.S. at 469 ("Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black . . . ; 93.4% of convicted LSD dealers were white . . . ; and 91% of those convicted for pornography or prostitution were white." (citations omitted)).

[115] *Id.* at 469–71.

[116] United States v. Bass, 536 U.S. 862, 862 (2002) (per curiam).

[117] *Id.* at 863.

[118] *Id.* at 864.

[119] *Id.*

failed to offer evidence comparing similarly situated defendants, the Court held he was not entitled to discovery under *Armstrong* and reversed the Sixth Circuit.[120]

D. The Standard

At present, the Supreme Court's case law on selective prosecution is minimal and appears fairly stagnant. To establish a claim for selective prosecution, a claimant must establish that the "administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial of equal protection of the law.'"[121] To establish this equal protection violation, a claimant must show that the prosecutorial decision or policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[122] This is an intentionally difficult test to satisfy.

To establish discriminatory effect, a claimant must prove that similarly situated persons were treated differently.[123] While it is unclear if evidence at a national level can satisfy the discriminatory effect element of a selective prosecution claim, the Court has made clear that the evidence must speak directly to the alleged differential treatment of similarly situated defendants.[124] Thus, in *Wayte*, the Court held that the defendant's selective prosecution claim failed because, *inter alia*, the facts showed that the government treated all persons that failed to register for the Selective Service equally, regardless of the defendant's First Amendment activities.[125]

While the Court has not thoroughly delineated discriminatory purpose, the base standard requires a claimant to show that the government is prosecuting them *because of* a constitutionally impermissible reason.[126] Thus, in *Wayte*, the defendant's selective prosecution claim failed because the government was not prosecuting him *because* of his protest activities; the government was prosecuting him for failing to register for the Selective Service.[127]

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[120] *Id.*

[121] United States v. Armstrong, 517 U.S. at 464–65 (1996) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

[122] Wayte v. United States, 470 U.S. 598, 608 (1985).

[123] *Armstrong*, 517 U.S. at 465 (applying a "similarly situated" standard to selective prosecution claim based on alleged racial discrimination); *Wayte*, 470 U.S. at 605–07 (affirming the court of appeals' denial of the defendant's selective prosecution claim for failing to establish that "others similarly situated generally had not been prosecuted for conduct similar to" theirs).

[124] *Bass*, 536 U.S. at 864.

[125] *Wayte*, 470 U.S. at 609–10.

[126] *Id.* at 610.

[127] *Id.*

Although selective prosecution claims have alleged selectivity based on racial discrimination,[128] immigration status,[129] and the exercise of fundamental rights,[130] the Court has routinely acknowledged that selective prosecution claims can be based on "other arbitrary classification[s]."[131] At present, it appears that the *Wayte* standard, as clarified by *Armstrong* and *Bass*, would apply to claims of selective prosecution rooted in the use of arbitrary classifications.

With the principles underlying equal protection and selective prosecution claims established, the following Sections turn to examining the Cole Memo and the rider, and their seemingly unconstitutional disparate enforcement of federal marijuana prohibition. Ultimately, these inquiries arrive at the same conclusion: the immense burden of establishing an equal protection and/or selective prosecution claim precludes a finding of unconstitutionality. Despite a patchwork of federal prosecutorial authority, and different levels of criminal liability for the same conduct in different states, this equal protection/selective prosecution animal merely *looks* and *sounds* like a duck, but it is *not* a duck.

II. EXECUTIVE PRIORITIZATION AND EQUAL PROTECTION

Although the Cole Memo is no longer in force, examination of its comportment with equal protection is necessitated by both the unique constitutional issues it raised while in force as well as the possibility of its reemergence in future presidential administrations.

Federal courts across the country uniformly held that the Cole Memo—and its resultant impacts on the federal prosecution of marijuana-related CSA violations—did not amount to selective prosecution and did not violate equal protection.[132] In so holding, these courts generally followed two analytic threads. First, the Cole Memo did not *require* prosecutors to selectively enforce the CSA based on the law of the state where they serve. Because the Cole Memo did not mandate differential

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[128] *Armstrong*, 517 U.S. 456, 458 (1996).

[129] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 472 (1999).

[130] *Wayte*, 470 U.S. at 608.

[131] *Armstrong*, 517 U.S. at 464 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[132] United States v. White, No. 12-cr-03045-BCW, 2016 WL 4473803, at *4 (W.D. Mo. Aug. 23, 2016); United States v. Nguyen, No. 2:15-cr-234-JAM, 2016 WL 3743143, at *1 (E.D. Cal. July 13, 2016); United States v. Apicelli, No. 14-cr-012-JD, 2016 WL 50436, at *15 (D.N.H. Jan. 4, 2016); United States v. Pickard, 100 F. Supp. 3d 981, 988 (E.D. Cal. 2015); United States v. Vawter, No. 6:13-cr-03123-MDH, 2014 WL 5438382, at *8 (W.D. Mo. Oct. 24, 2014); United States v. Taylor, No. 1:14-CR-67, 2014 WL 12676320, at *3 (W.D. Mich. Sept. 8, 2014); United States v. Heying, No. 14-CR-30 (JRT/SER), 2014 WL 5286153, at *12 (D. Minn. Aug. 15, 2014); United States v. Keller, No. 12-20083-41-KHV, 2014 WL 12695942, at *3 (D. Kan. Mar. 24, 2014). Similar challenges based on the Ogden Memo also failed. *E.g.*, United States v. Canori, 737 F.3d 181, 185 (2d Cir. 2013); James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012).

treatment between states, citizens of every state remained equally susceptible to criminal liability, thereby satisfying equal protection.[133] Second, the evidence used to support selective prosecution claims (often the Cole Memo and statements made by officials in the Obama Administration) was frequently insufficient given the rigorous standards set forth in *Armstrong*.[134]

The court in *United States v. Heying* demonstrates of both approaches.[135] In considering the defendants' selective prosecution claim, the court acknowledged that "[a]t first blush," it "may appear to have some merit."[136] However, this merit was supported only by "a superficial analysis" of the Cole Memo and related policy statements.[137] Furthermore, the court ultimately held that the defendants' reliance on these policy statements did not satisfy either of the *Armstrong* elements.[138]

For discriminatory effect, the court found that the "similarly situated" standard was fatally unsatisfied. Defendants argued that the Cole Memo established an impermissibly arbitrary classification for federal prosecution of marijuana offenses and that it "protected" similarly situated individuals.[139] In analyzing these arguments, the court was skeptical of the defendants' "blanket assertion that all individuals that

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[133] *See, e.g.*, *Apicelli*, 2016 WL 50436, at *15; *Taylor*, 2014 WL 12676320, at *6; *Keller*, 2014 WL 12695942, at *3 n.16 ("[T]he memorandum makes clear that the federal government retains the discretion and authority to prosecute violations of federal laws prohibiting marijuana, and does not grant any person or class of persons immunity from federal prosecution.").

[134] *See, e.g.*, *White*, 2016 WL 4473803, at *4 ("[D]efendant has not presented clear evidence to support his selective prosecution claim, sufficient to rebut the presumption that a prosecutor does not violate equal protection . . . . Defendant has failed to show any other person similarly situated who was not prosecuted."); *Vawter*, 2014 WL 5438382, at *8 ("[D]efendants fail to argue a sufficient selective prosecution or other equal protection claim concerning the enforcement of federal marijuana laws. Defendants failed to show any other person similarly situated who was not prosecuted."); *Keller*, 2014 WL 12695942, at *3 n.16 ("Defendant has presented no evidence that similarly situated persons are being selectively prosecuted.").

[135] *Heying*, 2014 WL 5286153, at *17.

[136] *Id.*

[137] *Id. But see* Feinberg v. Comm'r, 808 F.3d 813, 814 (10th Cir. 2015) (Gorsuch, J.) ("So it is today that prosecutors will almost always overlook federal marijuana distribution crimes in Colorado but the tax man never will.").

[138] *Heying*, 2014 WL 5286153, at *11.

[139] *Id.* at *12. ("Defendants assert that . . . individuals who distribute marijuana in states that have legalized the distribution of marijuana are no longer prosecuted while individuals who distribute marijuana in states that continue to prohibit its distribution continue to be prosecuted.").

engage in conduct meeting the statutory definition of conspiracy to distribute marijuana are similarly situated."[140] Applying the Fourth Circuit's definition of "similarly situated,"[141] the court stated:

> Several distinct and legitimate prosecutorial factors may justify different prosecutorial decisions with regard to individuals conspiring to distribute marijuana in a state where marijuana is illegal under state law in contrast to individuals conspiring to distribute marijuana in a state where certain marijuana-related activity has been legalized. These factors include the extent to which the prosecution would serve federal enforcement priorities, the constraints imposed by limits on prosecutorial resources, and the deterrent effect of the prosecution. . . . Indeed, the Cole Memo explicitly refers to such factors.[142]

While not explicitly stated, this reasoning appears sufficient to have defeated the defendants' selective prosecution claim because the court's further analysis assumed *arguendo* that the defendants' "similarly situated" argument was successful.[143]

The court then turned to the second significant flaw in defendants' "similarly situated" argument: the evidence. The evidentiary issue was twofold, though the court addressed both with quick force. Foremost, the court held that the defendants "failed to offer any evidence that" individuals committing similar illegal conduct within states that authorize legal marijuana "have not been prosecuted."[144] Rather than presenting this evidence, the defendants presented the general argument that the Cole Memo would allow marijuana distribution in states where such conduct was legal under state law, thereby evincing an unequal application of federal law. The court quickly dispensed with this argument because: (1) the Cole Memo did not exempt persons living in any state from criminal liability under federal law; (2) the Memo's guideline priorities applied to *all* federal enforcement "regardless of state law"; and (3) the Memo did not alter the DOJ's enforcement authority or recognize a legal defense based on state marijuana laws.[145] Thus, the court held that the defendants "failed to meet their burden to offer some evidence that the relevant prosecutorial policies have had a discriminatory effect."[146]

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[140] *Id.*

[141] *Id.* ("Defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." (quoting United States v. Venable, 666 F.3d 893, 900–01 (4th Cir. 2012))).

[142] *Id.* at *13 (citations omitted).

[143] *Id.*

[144] *Id.*

[145] *Id.* (quoting Cole Memo, *supra* note 35).

[146] *Id.* at *14.

Although the foregoing reasoning was sufficient to dispose of defendants' selective prosecution claim, the court nonetheless examined the second *Armstrong* factor, discriminatory intent. Here, too, the court found the defendants' "inaccurate characterization of the Cole Memo" and the corresponding lack of evidence to be insurmountably fatal.[147] Using the Eighth Circuit's standard for "discriminatory purpose," which requires defendants to show a "constitutionally impermissible motive prompting the prosecution," [148] the court found dispositive the fact that "the Cole memo and related memoranda d[id] not exempt from prosecution those involved in the distribution of marijuana in states where such activity is authorized under state law."[149] Because the establishment of "broad enforcement priorities" and the "enforcement of the law in accordance therewith are entirely rational exercises of prosecutorial discretion," the court found the Cole memo by itself insufficient to establish discriminatory intent.[150]

The logic deployed by *Heying* was used by federal courts throughout the nation.[151] Selective prosecution claims rooted in alleged executive prioritization of federal enforcement of marijuana offenses under the CSA have uniformly failed due to the broad text of the Cole Memo and the significant evidentiary burdens imposed by *Armstrong*.

One court differed from this majority view. In *United States v. Guess*, the district court discussed at length the potential for unequal enforcement of marijuana laws:

> [T]his Court is troubled by the unequal application of law that results from the current state of marijuana laws, which leaves criminal defendants facing imprisonment under federal law for activities that their counterparts in states that have legalized marijuana possession will not face prosecution for. Furthermore, the CSA and the accompanying uniform federal enforcement of the CSA are arguably intended to give certainty and notice to the public as to what activities are and are not legal under the CSA. However, the current state of the law—in which state law either legalizes or criminalizes marijuana; federal law criminalizes marijuana; and federal policy does not enforce the

[147] *Id.* at *15.

[148] *Id.* at *14 (quoting United States v. Leathers, 354 F.3d 995, 963 (8th Cir. 2004)).

[149] *Id.* at *15.

[150] *Id.* Defendants also advanced a unique alternative argument premised on marijuana's placement in the CSA. Defendants argued that because "there is no rational reason for the government to refrain from . . . prosecutions in light of marijuana's status as a Schedule 1 substance," the "rational response" of the federal government "would be to increase enforcement of the CSA in states where marijuana has been legalized." *Id.* at *14. The court quickly rejected this argument because it is unrealistic to expect the federal government to prosecute every suspected CSA violation, and prioritization of prosecutorial resources has been repeatedly permitted by federal courts. *Id.* at *15.

[151] *E.g.*, Wayte v. United States, 470 U.S. 598, 610 (1985).

> federal criminalization of marijuana depending on a defendant's geographic location—creates an untenable grey area in which such certainty and notice have effectively, if not formally, been eradicated.[152]

Focusing on the abstract core of equal protection, the court further delineated the intuitive argument that was defeated in the other district courts:

> This difference is based on what is arguably a relatively arbitrary classification: which state one resides in. And, at the very least—beyond any analogies one may draw to selective prosecution—applying and enforcing federal marijuana laws in some states but not others appears inconsistent with the principle of equal application of the law.[153]

Despite the court's concerns, its holding did not depart from other districts because the court was addressing supervised release violations and not a motion to dismiss an indictment due to selective prosecution.[154] Thus, the court's equal protection concerns were relegated to dicta.

While scintillating, the *Guess* court's analysis would likely fail if utilized in a selective prosecution claim, as it appears to rely on a characterization of federal policy similar to the argument presented by defendants in *Heying*. With district courts seemingly uniform with *Heying*'s logic and holding, *Guess* at best represents judicial open-mindedness on a question that is now foreclosed. With the Cole Memo no longer in effect,[155] avenues for judicial reconsideration of selective prosecution challenges are essentially foregone,[156] at least for the time being. Therefore, the Cole

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[152] United States v. Guess, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016).

[153] *Id.* at 696.

[154] *Id.* at 697–98 ("[T]he question before the Court is not whether the possession of marijuana is a crime for which one can be federally prosecuted in Virginia, but whether Defendant violated the conditions of his supervised release."). Another district court, building on the *Guess* court's stated concerns, decided to alter its approach to supervised release and marijuana-related conditions. United States v. Trotter, 321 F. Supp. 3d 337, 361 (E.D.N.Y. 2018); *see also* Gerald F. Uelmen & Alex Kreit, *Selective Prosecution*, *in* 2 UELMAN & HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK § 10:1 (2018), Westlaw (updated December 2018) (characterizing the *Guess* court's concerns and arguments as "dicta").

[155] Sessions Memo, *supra* note 56.

[156] One pertinent case is currently pending before the Ninth Circuit. In *United States v. Gentile*, the defendant-appellant is arguing selective prosecution based on geographic location. Interestingly, the geographic disparity is not between states that permit medical marijuana and states that do not; rather, the focus is between California and Colorado, which both permit use of medical marijuana. The issue on appeal, essentially, is whether it is a violation of equal protection to have U.S. Attorneys operate differently in their prosecutions in states with medical marijuana based on the Ogden and Cole Memos. Although an intriguing claim, such a narrow focus is beyond the scope of this Comment and is unlikely to resolve the larger question of equal protection vis-à-vis states that do and do not permit medical marijuana. Appellant's Opening Brief at 2, United States v. Gentile, No. 17-10254 (9th Cir. Feb. 5, 2018).

Memo fails the duck test. While at first blush the Cole Memo sounds like an unequal application of the laws, upon closer inspection it does not violate equal protection. It is not a duck, despite sounding like one. Perhaps, then, the Cole Memo is really a male wood frog.[157]

III. LEGISLATIVE RESTRICTIONS AND EQUAL PROTECTION

If the executive policy of prosecutorial prioritization passes constitutional muster, how does the legislative restriction on prosecutorial resources fare? To determine whether the appropriations rider violates equal protection—that is, to determine if the federal government can constitutionally prosecute crimes in some areas of the country and not others—this Section engages a multi-part analysis. First, the evolution of the rider's interpretation and application by federal courts is presented. Attention then turns to federal cases that addressed equal protection and selective prosecution challenges to the rider. Because these cases are few and the analyses are perfunctory, this Comment then undertakes a formal application of the standards of equal protection and *Armstrong* to the rider. Ultimately, this analysis reveals once again that looks can be deceiving.

A. Evolution of the Appropriations Rider

Judicial interpretation of the rider has changed significantly over time. Most significantly, the Ninth Circuit's holding in *United States v. McIntosh* established a quasi-defense for criminal defendants charged with violating the CSA for conduct authorized by state medical marijuana laws.[158] With *McIntosh* being the most direct and transformative application of the rider, judicial consideration of the rider can be historically contextualized around that case. This Section will thus detail judicial consideration of the rider before, in, and after *McIntosh*.

*1. Pre-*McIntosh

Early judicial consideration of the rider's impact on marijuana prosecution established two competing interpretative threads. In *United States v. Tote*, a criminal defendant filed a motion to dismiss premised in part on the argument that federal prosecution for his marijuana-related offense violated the terms of the rider.[159] The defendant argued that because he possessed a prescription for marijuana, authorized under California law, his prosecution would "prevent California from implementing its own state laws authorizing the use, distribution, possession, or cultivation of

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[157] Chris Martin, *Something Wild: If It Sounds like a Duck It Might Be a Frog*, NHPR (Apr. 3, 2015), http://www.nhpr.org/post/something-wild-if-it-sounds-duck-it-might-be-frog#stream/0.

[158] United States v. McIntosh, 833 F.3d 1163, 1164 (9th Cir. 2016).

[159] United States v. Tote, No. 1:14-mj-00212-SAB, 2015 WL 3732010, at *1 (E.D. Cal. June 12, 2015).

medical marijuana."[160] Consequently, he argued that his prosecution should be dismissed. The court rejected this argument for two reasons. First, no authority existed in support of defendant's interpretation of the rider. The budget rider "did not repeal federal laws criminalizing the possession of marijuana," and "no authority . . . suggest[ed] that the proper remedy for the expenditure of funds in violation of [the rider] would be the dismissal of the information against Defendant."[161] The court further reasoned that, if "[t]aken to its logical conclusion, Defendant's position would yield illogical results" because it would prevent the DOJ from "appearing or taking a position" in probation hearings, which would raise separation of powers issues.[162] The court also rejected the defendant's argument because it was not applicable, notwithstanding the court's foregoing concerns. Even if the rider provided a defense, which the court assumed *arguendo*, the defendant's conduct did not comply with California law, and thus his prosecution did not interfere with the implementation of California's medical marijuana laws.[163] Regardless, the court emphasized that the rider did not seem to constitute an affirmative defense.[164] Thus, early examination of the rider demonstrated heavy skepticism of its consequences for criminal defendants prosecuted for marijuana offenses for conduct in compliance with state medical marijuana laws.

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[160] *Id.* at *2.

[161] *Id.*

[162] *Id.* at *3. The court's concern with impacts on probation was prescient. *See also* United States v. Schostag, 895 F.3d 1025 (8th Cir. 2018); United States v. Kleinman, 880 F.3d 1020 (9th Cir. 2018); United States v. Tuyakbayev, No. 15-cr-00086-MEJ-1, 2017 WL 3434089 (N.D. Cal. Aug. 10, 2017); United States v. Parker, 219 F. Supp. 3d 183 (D.D.C. Nov. 30, 2016). Further discussion of the court's concern is discussed later in this Section.

[163] *Tote*, 2015 WL 3732010, at *4 ("Assuming, without deciding, that . . . an affirmative defense is valid, Defendant bears the burden of proving this affirmative defense by demonstrating that his conduct was in conformity with California's laws and the Government's conduct constitutes a violation of the [the rider] by interfering with California's implementation of its medical marijuana laws. . . . The facts alleged in this case suggest that Defendant was using marijuana in a manner that violates California law.").

[164] *Id.* ("[A]t first blush this amendment does not appear to the Court to be an affirmative defense. Affirmative defenses are often defined in criminal law jurisprudence by way of the common law or statutory enactment through the crime itself. The amendment does not address a defense to the actus rea or mens rea of a crime, those essential elements the government must prove against the accused. Again, the amendment appears to be fiscal in application."). The district court in *United States v. Pickard*, which predates *Tote*, seemed skeptical as well; however, defendants there failed to argue how the rider would impact the prosecution, so the court did not discuss the merits of the rider's possible applications. United States v. Pickard, 100 F. Supp. 3d 981, 1012 (E.D. Cal. 2015) ("Defendants have not sought to amend their motion to rely expressly on [the rider] and have not argued clearly that the language of [the rider] alone provides an additional reason for dismissal. The court need not tease out all the implications of the appropriations language to resolve the motion here.").

A different district court in California established a contrary approach shortly after *Tote*. In *United States v. Marin Alliance for Medical Marijuana*, the defendant asked the court to dissolve a permanent injunction barring it from operating a medical marijuana dispensary.[165] Although the court denied the motion, it modified the injunction to comply with the rider.[166] The court held that "Congress's policy choices," as dictated in the CSA and the rider, mandated judicial enforcement of the CSA "to the full extent that Congress has allowed in [the rider]."[167] Therefore, the court would only enjoin the defendant "insofar as that organization [wa]s in violation of California" medical marijuana laws—the opposite conclusion of *Tote*.[168]

In reaching this conclusion, the court thoroughly rejected the government's "counterintuitive and opportunistic" interpretation that prosecution of individual marijuana offenders did not prevent California from implementing its medical marijuana laws.[169] The court reasoned that this "drop-in-the-bucket argument" was "at odds with fundamental notions of the rule of law,"[170] contrary to the plain meaning of the statute,[171] and contrary to the legislative intent of the rider.[172] While the government relied on *Tote* and associated cases, the court found such reliance misplaced.[173] In each of those cases, the criminal defendants' conduct was outside the protective scope of state medical marijuana laws; as the *Tote* court acknowledged, the rider does not prevent prosecution of such individuals. Thus, prosecutions in *Tote* and similar cases were not contrary to the court's application of the rider in *Marin*.

Although the *Marin* court found its ruling harmonious with *Tote*, the underlying interpretation and application of the rider employed by these courts differed significantly. The *Tote* court was skeptical of the rider providing a legal defense, or

165 United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1039 (N.D. Cal. 2015).

166 *Id.* at 1040 ("As long as Congress precludes the Department of Justice from expending funds . . . the permanent injunction will only be enforced against [defendant] insofar as that organization is in violation of California 'State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.'").

167 *Id.* at 1044.

168 *Id.* at 1047–48.

169 *Id.* at 1044–46. The court's rejection of the government's argument is difficult to overstate: "The Government's contrary reading so tortures the plain meaning of the statute that it must be quoted to ensure credible articulation." *Id.* at 1044.

170 *Id.* at 1044.

171 *Id.*

172 *Id.* at 1046–47.

173 *Id.* at 1047 ("To the extent the Government cites a few cases addressing [the rider], none are analogous or even particularly favorable to the Government's position.").

functioning beyond a fiscal level to any degree. The *Marin* court found direct application of the rider in the adjudication.

However, *Marin* dealt with an injunction and not with a challenge to pending prosecution. Thus, in *United States v. Chavez*, the court held that defendant's reliance on *Marin* to dismiss his criminal charges was "misplaced."[174] Building from *Tote*'s rationale that "the appropriations acts concern funding[] and did not repeal or amend federal laws criminalizing the possession of marijuana," the court denied defendant's motion to dismiss for two reasons.[175] As with *Tote*, the defendant's conduct fell outside the scope of California's medical marijuana laws, making any hypothetical defense inapplicable.[176] Additionally, the court had "difficulty reconciling" *Marin* and other Ninth Circuit case law.[177] This case law, however, was reconcilable with *Marin*. The two contrary cases identified by the *Chavez* court discussed the non-application of the rider to tax disputes related to marijuana businesses[178] and the limits of the rider in the face of federal law criminalizing certain conduct.[179] However, the first case was explicitly reconciled in *Marin*,[180] and the second case provided only a footnote hypothetical that was more directly addressed in *Tote*.[181] In essence, then, the court declined to extend *Marin*'s application of the rider to the dismissal of federal marijuana prosecutions, opting to follow *Tote* in that context instead.

Subsequent consideration of the rider followed the route established by *Chavez*.[182] So entrenched was the *Tote* interpretation that the Eastern District of

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[174] United States v. Chavez, No. 2:15-cr-210-KJN, 2016 WL 916324, at *1 (E.D. Cal. Mar. 10, 2016).

[175] *Id.*

[176] *Id.* at *2.

[177] *Id.* at *1.

[178] Olive v. Comm'r, 792 F.3d 1146, 1147 (9th Cir. 2015).

[179] Navarro v. Encino Motorcars, LLC, 780 F.3d 1267, 1276 n.5 (9th Cir. 2015), *vacated*, 136 S. Ct. 2117 (2016).

[180] United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039, 1047 (N.D. Cal. 2015) ("A single Ninth Circuit case held that a prohibition on the deduction of expenses in connection with illegal drug trafficking applied to bar a medical marijuana dispensary from deducting its business expenses to eliminate a tax deficiency. In that separate context, the Ninth Circuit explained that '[the rider] does not apply' because the government was 'enforcing only a tax, which does not prevent people from using, distributing, or cultivating marijuana in California.'" (quoting *Olive*, 792 F.3d at 1146)).

[181] *Navarro*, 780 F.3d at 1276 n.5.

[182] *See, e.g.*, United States v. Nguyen, No. 2:15-cr-234-JAM, 2016 WL 3743143, at *1 (E.D. Cal. July 13, 2016); United States v. Gentile, No. 1:12-CR-0360-DAD-BAM, 2016 WL 3549252, at *1 (E.D. Cal. June 30, 2016); United States v. Silkeutsabay, No. 13-CR-0140–TOR-1, 2015 WL 2376170, at *1 (E.D. Wash. May 18, 2015); United States v. Gregg, No. 13-CR-0024-TOR, 2015 WL 1757832, at *1 (E.D. Wash. Apr. 17, 2015); United States v. Pickard, 100 F. Supp. 3d 981, 1012 (E.D. Cal. 2015).

California, which had dealt with the majority of cases involving the rider, declared that "every court to have considered the argument" that the rider could apply to dismiss federal marijuana prosecutions "ha[d] rejected it and concluded that dismissal of federal criminal charges relating to marijuana is not warranted under [the rider]."[183] At that point, the only published appellate guidance on the rider[184] was limited to however, this guidance was limited to recognizing that it did not apply to tax disputes.[185] Thus, beyond the injunctive context of *Marin*, courts widely considered the rider of minimal consequence for criminal defendants in individual prosecutions.

2. United States v. McIntosh

Two months after the *Gentile* court's declaration that every court had declined applying the rider to dismiss federal marijuana prosecutions, the Ninth Circuit radically changed the field. In *United States v. McIntosh*, the court addressed ten consolidated cases involving defendants indicted for violating the CSA who moved to "dismiss their indictments or to enjoin their prosecutions" based on the rider.[186] The first significant issue the court had to address was whether, as an appellate court, it had jurisdiction over the criminal interlocutory appeals at issue.[187] Answering affirmatively, the court emphasized the "unusual circumstances presented by these cases."[188] Whereas injunctive relief and interlocutory appeals would "not be appropriate" in most criminal prosecutions, the necessary intervention of the court as enforcer of Congress's will permitted a particular exception.[189] The Ninth Circuit reasoned that congressional prioritization of the law was a task fit for judicial enforcement, which necessitated the court's interlocutory jurisdiction. This unique approach merits direct quotation:

> [I]n almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under § 1292(a)(1).

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183 Gentile, 2016 WL 3549252, at *1. Notably, it took no notice of *Marin*.

184 *Olive*, 792 F.3d at 1151. The Sixth Circuit addressed the issue in an unpublished opinion. United States v. Walsh, 654 F. App'x 689, 696 (6th Cir. 2016). In that case, defendants relied on *Marin*, but the court ultimately sided with the logic of *Tote*. The court held that the district court's reasoning that "satisfaction of state law is not a defense to breaching federal law" was not altered by the enactment of the rider. *Id.* As an unpublished opinion, however, it lacked binding precedential value for federal courts within the Sixth Circuit.

185 *Olive*, 792 F.3d at 1151.

186 United States v. McIntosh, 833 F.3d 1163, 1169 (9th Cir. 2016).

187 *Id.* at 1170–72.

188 *Id.* at 1172.

189 *Id.*

> Here, however, Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. It is "emphatically . . . *the exclusive province of the Congress* not only to formulate legislative policies and mandate programs and projects, *but also to establish their relative priority for the Nation*. Once Congress, exercising its delegated powers, has decided the order or priorities in a given area, *it is for . . . the courts to enforce them when enforcement is sought.*" A "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation."' Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from spending funds from the relevant appropriations acts on such prosecutions. When Congress has enacted a legislative restriction like [the rider] that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants *may seek to enjoin the expenditure of those funds*, and we may exercise jurisdiction over a district court's direct denial of a request for . . . injunctive relief.[190]

Thus, because Congress has the authority to prioritize legislative policies, and because it is the duty of the court to enforce such priorities, the rider's restriction of DOJ funding for certain prosecutions represents a congressional prioritization of the law which the court should not ignore. The mechanism for the courts to enforce this congressional policy is to permit criminal defendants to enjoin the DOJ from spending funds on their prosecutions. From this unique analysis, the Ninth Circuit ultimately crafted a quasi-affirmative defense from the rider.

After establishing subject matter jurisdiction, the court further determined that criminal defendants had Article III standing to seek enjoinment of the DOJ from violating the rider.[191] Based on *Bond v. United States*,[192] the court held that the defendants "clearly had Article III standing to pursue their challenges below because they were merely objecting to relief sought at their expense."[193] As for the appeal, defendants had standing "because their potential convictions constitute[d] concrete, particularized, and imminent injuries, which [we]re caused by their prosecutions and redressable by injunction or dismissal of such prosecutions."[194]

Moreover, a special constitutional avenue cemented the defendants' standing to enforce the rider. The Supreme Court in *Bond* "explained that both federalism and separation-of-powers constraints in the Constitution serve to protect individual

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190 *Id.* at 1172–73 (emphasis added and omitted) (footnote omitted) (citations omitted) (first quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)); and then United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001)).

191 *Id.* at 1173–74.

192 Bond v. United States, 564 U.S. 211 (2011).

193 *McIntosh*, 833 F.3d at 1173–74.

194 *Id.* at 1174.

liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'"[195] In a subsequent case applying this principle, the court provided that "it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'"[196] As it is a duty for the court to enforce legislative priorities, it is also a judicial duty to enforce separation of powers safeguards. Because the Appropriations Clause[197] "plays a critical role" in the separation of powers, and constitutes an essential part of the "checks and balances" system of government, the DOJ's use of money in violation of the rider would violate the Appropriations Clause and thereby constitute a clear violation of "a separation-of-powers limitation."[198] Therefore, criminal defendants also "have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions."[199]

With jurisdiction and standing established, the next question for the court was how to interpret and apply the rider. Reading it in the context of "the overall statutory scheme for marijuana regulation" and "[i]n light of the ordinary meaning of [its] terms," the court held that the DOJ was barred from prosecuting individuals for CSA violations incurred in compliance with medical marijuana in states that were listed in the rider.[200] The court reasoned that when state law provides for "non-prosecution of individuals who engage in [authorized] conduct," federal prosecution of such individuals "prevent[s] the state from giving *practical effect* to its law providing for non-prosecution."[201] Thus, DOJ prosecutions of individuals who obey state medical marijuana laws violate the rider, and criminal defendants in such prosecutions have more than sufficient standing to seek enjoinment of their prosecutions based on that violation.

With the dots connected, the Ninth Circuit ultimately held that "at a minimum, the rider prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."[202] The court noted, however, that absent an individual's strict compliance with state marijuana law, the DOJ's prosecution would not contravene the states' implementation

[195] *Id.* at 1174 (alteration in original) (quoting *Bond*, 564 U.S. at 222).

[196] *Id.* (quoting NLRB v. Noel Canning, 134 S. Ct. 2550, 2559–60 (2014)).

[197] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[198] *McIntosh*, 833 F.3d at 1175.

[199] *Id.* at 1174.

[200] *Id.* at 1176.

[201] *Id.* at 1176–77 (emphasis added).

[202] *Id.* at 1177.

of medical marijuana programs.[203] Thus, immunity under the rider was made dependent upon one's strict compliance with state medical marijuana laws. However, the diversity of such laws, as well as the variety of conduct that falls under such laws and the CSA, makes strict compliance a case-by-case finding. The court remanded the underlying cases for "evidentiary hearings to determine whether [the defendant's] conduct was completely authorized by state law."[204] Within the Ninth Circuit, criminal defendants now have a statutory procedural right to an evidentiary hearing to determine whether they can enjoin the DOJ from prosecuting them for medical-marijuana-related violations of the CSA.

In ending its analysis, the court emphasized the capricious nature of the procedural right it had established. Congress could "appropriate funds for [these] prosecutions tomorrow," or "continue[] to include the same rider in future appropriations bills."[205] Moreover, the court clarified that the rider did not provide immunity from criminal liability. Because the funding restriction is a year-to-year provision, and the statute of limitations for marijuana offenses is five years, the government could prosecuted individuals at a later time if the rider expired.[206]

*3. Post-*McIntosh

Unsurprisingly, *McIntosh* drastically altered the significance of the rider in the context of federal marijuana prosecution. Courts subsequently applied *McIntosh* to routinely mandate evidentiary hearings on criminal defendants' compliance with state laws.[207] However, the scope and contour of *McIntosh*'s holding was left for district courts to address "in the first instance."[208]

Courts applying *McIntosh* quickly expounded the reasonable scope of its holding. One district court reasoned that a *McIntosh* hearing could be held after trial, with relevant marijuana convictions conditioned upon the results of the hearing.[209] Another district court held that *McIntosh* was not triggered when the defendant's criminal liability was not entirely premised on a basic CSA violation.[210] The Tenth

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[203] *Id.* at 1178 (emphasis added).

[204] *Id.* at 1179.

[205] *Id.*

[206] *Id.* at 1179 n.5. *See also id.* at 1179 ("Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.").

[207] *See, e.g.*, United States v. Lynch, 903 F.3d 1061, 1086–87 (9th Cir. 2018); United States v. Zucker, 743 F. App'x 835, 836 (9th Cir. 2018); United States v. Silkeutsabay, 678 F. App'x 608, 610 (9th Cir. 2017).

[208] *McIntosh*, 833 F.3d at 1179 n.2.

[209] United States v. Gentile, No. 1:12-cr-00360-DAD-BAM, 2017 WL 1437532, at *6 (E.D. Cal. Apr. 24, 2017).

[210] United States v. Ragland, No. 2:15-cr-20800, 2017 WL 2728796, at *3 (E.D. Mich. June 26, 2017) ("Unlike in *McIntosh* . . . the Government does not seek to prosecute Ragland for conduct that is otherwise legal but for the element of marijuana use. Rather, . . . Ragland is

Circuit affirmed *McIntosh*'s inapplicability in the context of tax disputes.[211] The question of the burden of proof at a *McIntosh* hearing received much attention,[212] as did the issue of enforcing probationary marijuana prohibitions on defendants with prescription medical marijuana.[213]

The next significant guidance on the application of *McIntosh* came from the Ninth Circuit in *United States v. Kleinman*.[214] There, the court first clarified that the rider applied to *all* DOJ prosecutorial work relating to medical marijuana prosecutions, including appellate matters on cases fully prosecuted before the rider was enacted[215] and that the rider did not affect the legality of marijuana federally, but

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charged with possession of a destructive device by a prohibited person, . . . and possession of explosive material by a prohibited person that created a substantial risk of injury to another person, including a public safety officer performing duties . . . . Even without the element of marijuana use, the Government alleges that Ragland *still* engaged in illegal conduct: the possession of an unregistered destructive device and creation of a substantial risk of injury through the use of an explosive device. Thus, the prosecution . . . here pose[s] no violation of [the rider]." (citations omitted)).

[211] Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1114 (10th Cir. 2017).

[212] *Compare* United States v. Samp, No. 16-cr-20263, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017) (defendant has presumption of innocence which government can overcome by preponderance of evidence), *with* United States v. Carrillo, No. 2:12-cr-00185-TLN, 2018 WL 4638418, at *4 (E.D. Cal. Sept. 26, 2018) ("Defendant bears the burden of proof by a preponderance of the evidence of his strict compliance with state laws."), *and* United States v. Daleman, No. 1:11-CR-00385-DAD-BAM, 2017 WL 1256743, at *4 (E.D. Cal. Feb. 17, 2017) (same), *and* United States v. Pisarski, 274 F. Supp. 3d 1032, 1036 (N.D. Cal. 2017) (same). The Ninth Circuit was reluctant to provide guidance. *See, e.g.*, United States v. Gilmore, 886 F.3d 1288, 1291 n.1 (9th Cir. 2018) ("The parties argue over the burden of proof applicable at a *McIntosh* hearing, but because [the rider] does not apply in this case, we leave that issue for another day.").

[213] *See, e.g.*, United States v. Bally, No. 17-20135, 2017 WL 5625896, at *1 (E.D. Mich. Nov. 22, 2017); United States v. Tuyakbayev, No. 15-cr-00086-MEJ-1, 2017 WL 3434089, at *2 (N.D. Cal. Aug. 10, 2017). Several courts addressed this issue without relying on *McIntosh*. *See, e.g.*, United States v. Schostag, 895 F.3d 1025, 1026 (8th Cir. 2018); O'Neal v. Johnson, No. 2:14-cv-2374 DB PS, 2018 WL 4050741, at *3 (E.D. Cal. Aug. 23, 2018) (applying California law); United States v. Johnson, 228 F. Supp. 3d 57, 61 (D.D.C. 2017); United States v. Parker, 219 F. Supp. 3d 183, 188 (D.D.C. 2016).

[214] United States v. Kleinman, 880 F.3d 1020 (9th Cir. 2017).

[215] *Id.* at 1027–28 ("Kleinman was convicted and sentenced shortly before [the rider] was enacted. The government therefore claims that [the rider] is inapplicable to Kleinman's prosecution for two reasons, neither of which is availing. . . . [Kleinman] argues that [the rider] prohibits *continued* DOJ expenditures on his case since its enactment, which in this case refers to the DOJ's ongoing litigation *on appeal*."). The Ninth Circuit's interpretation necessarily raises the issues identified by the *Tote* court. *See* United States v. Tote, No. 1:14–mj–00212–SAB, 2015 WL 3732010, at *3 (E.D. Cal. June 12, 2015) ("Taken to its logical conclusion, Defendant's position would yield illogical results. If the Court were to place a probation restriction on an individual defendant prohibiting him from using medical marijuana, under Defendant's interpretation, the Department of Justice would be prohibited from appearing or taking a position

"merely enjoins certain DOJ expenditures while it is in effect."[216] The court then explained that the defendant was not entitled to a *McIntosh* hearing because the rider only applies to prosecutions of offenses that result entirely from conduct that is compliant with state medical marijuana laws.[217] Courts are to undertake a "count-by-count analysis" of a defendant's charges and determine if any are "restricted" by the rider.[218] If the conduct alleged in a particular charge does not comply with state law, *McIntosh* is not triggered and prosecution is unrestrained. Thus, the court held that defendants did not merit a *McIntosh* hearing on charges of "conspiracy to distribute marijuana . . . and conspiracy to commit money laundering" because both crimes "involved marijuana sales to out-of-state customers in violation of California law."[219]

The Ninth Circuit further held that marijuana convictions obtained before the congressional rider took effect were unaltered by the rider and *McIntosh*.[220] Rather, only the DOJ's "continued expenditure of funds pertaining to that particular state-law-compliant conviction *after* [the rider] took effect was unlawful."[221] Thus, the scenario envisioned by the *Tote* court[222]—of the DOJ being unable to appear in a post-conviction hearing pertaining to a conviction obtained before the rider was enacted—was actualized in *Kleinman*. The court explained that "[w]hen [the rider] took effect, the DOJ was obligated to stop spending funds in connection with any charges involving conduct that fully complied with state law, but that temporary spending freeze does not spoil the fruits of prosecutorial expenditures made before [the rider] took effect."[223]

In *United States v. Gloor*, the Ninth Circuit next held that a "genuine factual dispute as to [a defendant's] strict compliance with state law" is required to trigger

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relating to a lawfully imposed court restriction under federal law. In essence, the Department of Justice could be accused of prosecuting a probation violation under [the rider], raising separation of powers issues.").

[216] *Kleinman*, 880 F.3d at 1028.

[217] This is in line with the district court's holding in United States v. Ragland, No. 2:15-cr-20800, 2017 WL 2728796, at *3 (E.D. Mich. June 26, 2017). *See supra* note 210.

[218] *Kleinman,* 880 F.3d at 1028.

[219] *Id.* at 1029. The U.S. District Court for the Eastern District of Missouri reached a similar conclusion without relying on *McIntosh* or its interpretation of the rider. *See* United States v. Forty-Four Thousand Dollars, No. 4:17-CV-2409 RLW, 2018 WL 3611955, at *2 (E.D. Mo. July 27, 2018) ("[The rider] is irrelevant to [defendant] . . . . [because] medical marijuana laws do not permit drug trafficking.").

[220] *Kleinman*, 880 F.3d at 1028. ("In other words, when a defendant's conviction was entered before [the rider] became law, a determination that the charged conduct was wholly compliant with state law would *not* vacate that conviction.").

[221] *Id.*

[222] United States v. Tote, No. 1:14–mj–00212–SAB, 2015 WL 3732010, at *4 (E.D. Cal. June 12, 2015).

[223] *Kleinman*, 880 F.3d at 1028.

a *McIntosh* hearing.[224] Although an unpublished opinion, *Gloor* makes explicit that if one party fails to counter an assertion that the defendant was or was not following state law, the application of the rider's restriction is straightforward.

4. Incorporation of McIntosh

It bears brief mention that because *McIntosh* currently stands as the sole, and thus authoritative, appellate interpretation of the rider, that provision should be understood to implicitly contain *McIntosh* such that other courts applying the rider will likely utilize the approach set forth by the Ninth Circuit. This is because the holding of *McIntosh* has likely been congressionally incorporated into the rider.

The "reenactment rule" is a longstanding canon of statutory construction that provides that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute" and that Congress "adopt[s] that interpretation when it re-enacts a statute without change."[225] Congress's adoption of a preexisting judicial interpretation also occurs when "Congress adopts a new law incorporating sections of a prior law . . . at least insofar as it affects the new statute."[226] Congress has repeatedly reenacted the rider. While congressional knowledge of the judicial interpretation can be assumed, the legislative history strongly indicates both that *McIntosh* reflected Congress's original intent and that Congress was aware of how the rider would be applied.

Congressional statements made during the 2014 addition of the rider to the Commerce, Justice, Science, and Related Agencies Appropriations Act of 2015 by supporters of the rider described the purpose of the rider as ending federal prosecutions in states with legalized medical marijuana programs. Representative Sam Farr summed the rider as "essentially saying":

> [I]f you are following State law, you are a legal resident doing your business under State law, the Feds just can't come in and bust you and bust the doctors and bust the patient. . . .This doesn't change any laws. This doesn't affect one law, just lists the States that have already legalized it only for medical purposes, only medical purposes, and says, Federal Government, in those States, in those places, you can't bust people.[227]

Representative Barbara Lee was even more direct in the meaning of the rider, arguing that it was "past time for the Justice Department to stop its unwarranted persecution of medical marijuana and puts its resources where they are needed."[228]

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[224] United States v. Gloor, 725 F. App'x 493, 496 (9th Cir. 2018).

[225] Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[226] *Id.* at 581.

[227] 160 CONG. REC. 82, H4984 (daily ed. May 29, 2014) (statement of Rep. Farr).

[228] *Id.* (statement of Rep. Lee).

In addition to the congressional intent when the rider was first passed, evidence shows that Congress was aware and approving of applying the rider to prohibit individual prosecutions of people in compliance with state medical marijuana laws. In 2016, the House Subcommittee of Commerce, Justice, Science, and Related Agencies asked then-Administrator of the DEA Charles Rosenberg about the DEA's investigatory policies in light of the rider.[229] Mr. Rosenberg identified that a district court made the rider "an issue" in *Marin*,[230] which predated *McIntosh* but interpreted the rider in a similar fashion.[231] Although Mr. Rosenberg disagreed with *Marin*, this discussion demonstrates congressional attention to the rider's application. Representative Dana Rohrabacher—a longtime proponent of the rider—has similarly demonstrated continuous support of *McIntosh*'s interpretation of the rider. The same day *McIntosh* was announced, Rep. Rohrabacher issued a public release "applaud[ing] the Ninth Circuit Court of Appeals for proclaiming the law as it has been intended by congressional legislation."[232] He continued:

> The intent of [the rider] that was enacted and is thus now the law of the land dictated that the federal government will not take actions that counteract the state law in those states that have legalized the use of medical marijuana. . . . The Justice Department needs to go on notice that there should be no more prosecutions and raiding of dispensaries in those states where the state government has legalized medical marijuana.[233]

A year later, when Attorney General Jeff Sessions was pending confirmation, Rep. Rohrabacher "fe[lt] compelled to point out that Federal law *has* been changed and currently prohibits the Department of Justice from spending appropriated funds to prosecute individuals who are acting in compliance with their state's medical marijuana laws."[234] He then identified the court's holding in *McIntosh* and the continuing restriction on DOJ prosecutorial funding.[235] The rider has been reenacted twice after this explicit applause of *McIntosh*.[236]

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[229] *Commerce, Justice, Science, and Related Agencies Appropriations for 2017: Hearings Before a Subcomm. of the Comm. on Appropriations*, 114th Cong. 116 (2016) (statement of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).

[230] United States v. Marin All. for Med. Marijuana, 139 F. Supp. 3d 1039 (N.D. Cal. 2015).

[231] *Commerce, Justice, Science, and Related Agencies Appropriations for 2017: Hearings Before a Subcomm. of the Comm. on Appropriations*, 114th Cong. 116 (2016) (statement of Chuck Rosenberg, Acting Administrator, Drug Enforcement Administration).

[232] Press Release, Congressman Dana Rohrabacher, Rohrabacher Praises Court in Decision Supporting Medical Marijuana Rule, (Aug. 16, 2016).

[233] *Id.*

[234] 163 CONG. REC. H311 (daily ed. Jan. 11, 2017) (statement of Rep. Rohrabacher).

[235] *Id.*

[236] *See supra* note 49.

Thus, the evidence strongly suggests that Congress knew of *McIntosh*'s interpretation of the rider and incorporated that holding in its repeated reenactment of the rider. Because *McIntosh* has also been applied outside the Ninth Circuit,[237] and because the Supreme Court recently denied certiorari for a case predicated upon *McIntosh*'s holding,[238] it is reasonable to conclude that *McIntosh*'s interpretation of the rider is *the* applicable interpretation of the statute in federal courts.[239]

B. Equal Protection

As of the time of this Comment's writing, the appropriations rider applies to preclude the DOJ from using funds to prevent the implementation of medical marijuana laws in 46 states, the District of Columbia, Puerto Rico, and Guam.[240]

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[237] TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., LSB10054, ATTORNEY GENERAL'S MEMORANDUM ON FEDERAL MARIJUANA ENFORCEMENT: POSSIBLE IMPACTS 3 (2018) ("*McIntosh* represents the established interpretation of the rider in the Ninth Circuit. The opinion, however, has had wider practical impact, as it has been cited with approval by district courts in Michigan and Missouri, which are outside of, and therefore not bound by, the Ninth Circuit. In addition, the U.S. Court of Appeals for the Tenth Circuit appears to have suggested that it too concurs with the Ninth Circuit's interpretation.").

[238] Gloor v. United States, 139 S. Ct. 348 (mem.) (2018). The question presented in that case was broad and encouraged the Court to thoroughly consider the constitutional ramifications of *McIntosh*:

> Were the Tenth Amendment, Due Process Clause, and the separation of powers doctrine violated where Congress expressed its clear intent to respect states' rights by enacting the Rohrabacher-Farr amendment, an appropriations rider prohibiting the Department of Justice from spending funds to prevent the states and territories' implementation of their own medical marijuana laws, where the Ninth Circuit in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), eviscerated the federal law and subverted states' rights by holding that in order to enjoin federal prosecution pursuant to the appropriations rider defendants must show that they "strictly complied" with the state medical marijuana laws, and where in the petitioner's case the Ninth Circuit denied the petitioner an opportunity to present evidence in an evidentiary hearing to show compliance with Washington State's medical marijuana laws?

Petition for Writ of Certiorari at i, Gloor v. United States, 139 S. Ct. 348, (2018) (No. 18-5858).

[239] Even if *McIntosh* were not incorporated into the rider, the equal protection analysis in this Comment would be fundamentally unchanged. Most of the states within the Ninth Circuit, which are bound by *McIntosh*, authorize the use of medical marijuana, but Idaho does not. Thus, even if *McIntosh* were limited to the Ninth Circuit, the equal protection issue would still manifest, albeit between people located in Idaho and people located throughout the other states within the Ninth Circuit.

[240] The most current version of the rider, referred to as the "Joyce Amendment," lists the following states and territories: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah,

While the content of medical marijuana laws differs from state to state, the overarching application of the rider provides a quasi-defense from federal prosecution in a majority of the United States. As it stands, citizens in four states and three territories may be subject to federal prosecution for conduct that is permissible under the laws of another state or territory. U.S. Attorneys in a significant majority of states are constrained from prosecuting certain CSA violations, while U.S. Attorneys in a minority of states are free to prosecute such violations without budgetary constraint. Such a difference certainly looks like an unequal application of federal law in violation of the Fifth Amendment.[241] But does it pass the duck test?

The next Section discusses the case law examining equal protection and selective prosecution claims rooted in the rider. Because this case law is minimal and contains significant analytical errors, formal application of equal protection and *Armstrong* standards to potential claims under the rider is presented following the extant case law. Ultimately, this Comment will show that, as with the Cole Memo, the rider is not a violation of equal protection despite its strong resemblance. Though it greatly resembles a duck, it is not.

1. Case Law

Case law pertaining to the rider is evolving. However, at present, it seems that few courts have addressed equal protection and selective prosecution claims in the context of the rider. Those that have faced such claims have rejected them.

In *United States v. Davis*, the district court rejected the defendant's argument that unequal federal enforcement of marijuana laws pursuant to the rider violated equal protection because people in California and Washington were not being prosecuted for conduct similar to that of the defendant.[242] The defendant argued that the CSA and the rider, combined, created "an administrative classification that bears no rational relation to a legitimate governmental end."[243] Because *McIntosh* allowed individuals in other states to avoid prosecution for the conduct that underlaid the defendant's prosecution, the defendant argued that his case should be dismissed as a violation of equal protection.[244] After acknowledging that the rider did not bar the defendant's prosecution because his conduct fell outside the scope of state marijuana

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Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia., the Commonwealth of the Northern Mariana Islands, Guam, and Puerto Rico. Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019); *see also* Sandy, *supra* note 49 (identifying the latest rider as the Joyce Amendment).

[241] For other relevant constitutional considerations, see Appellant's Brief at 10, United States v. Zucker, 743 F. App'x 835 (9th Cir. 2018) (No. 15-30232); Motion to Dismiss of Defendant, United States v. Myers, No. SA-16-CR-320-FB (W.D. Tex. Jan. 28, 2017).

[242] United States v. Davis, No. 4:16CR495 CDP/NCC, 2017 WL 2703863, at *1–2 (E.D. Mo. May 24, 2017).

[243] *Id.* at *2.

[244] *Id.*

laws, the court turned to the larger equal protection question. The defendant argued that, regardless of his compliance with state law, a class of defendants existed that would not be prosecuted for similar conduct, which constitutes an equal protection violation.[245] The court disposed of this claim on two grounds.

First, the court acknowledged that the CSA and the rider are "neutral laws" and that the defendant did not claim that he was prosecuted "arbitrarily" or based on his membership in a suspect class.[246] Thus, his claim could only be that his right to equal protection was violated because he was "impermissibly targeted for prosecution" due to geographic location.[247] The court tersely noted that this claim "lacks merit" because the CSA and the rider both "have a rational basis that furthers a legitimate governmental end."[248] However, in support of this holding, the court only cited *US v. White*.[249] This reliance is problematic because: (1) *White* dealt only with a selective prosecution claim based on the Cole Memo and did not involve the rider; and (2) it did not identify that either the CSA or the rider were rationally related to a legitimate governmental end. As will be discussed in the next subsection, equating the Cole Memo with the rider is troubling because the latter makes mandatory and binding what the former makes discretionary. The discretion of the Cole Memo was an integral part of judicial rejection of equal protection challenges to federal CSA enforcement.[250] Absent that discretion, the legal consideration must necessarily be different; the court's reliance on *White* ignored this critical distinction.

Second, the court held that the defendant was unable to meet the demanding standard of *Armstrong* for a selective prosecution claim.[251] Enforcing federal criminal laws is "well within the rational exercise of the Executive's broad discretion," and the defendant's claim neither met the standard for judicial intervention nor "d[id] it appear that he could do so" with the facts of the case.[252] With both the equal protection and selective prosecution claims summarily extinguished, the court denied the defendant's motion to dismiss his indictment.[253]

In addition to the foregoing, the court made the critical connection between equal protection and selective prosecution claims, stating that the Supreme Court

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[245] *Id.* at *3.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] United States v. White, No. 12-cr-03045-BCW, 2016 WL 4473803 (W.D. Mo. Aug. 23, 2016).

[250] *See supra* Section II.

[251] *Davis*, 2017 WL 2703863, at *4.

[252] *Id.*

[253] *Id.* at *5.

in *Armstrong* "recognized the link between the constitutional constraints on a prosecutor's discretion and claims of equal protection."[254] Thus, while the defendant pleaded strictly an equal protection claim, and rejected the government's characterization of his claim as one of selective prosecution, the court noted that the distinction did not amount to much.[255] Intuitively, it appears that constitutional constraints on prosecutorial discretion can still be analyzed under equal protection and selective prosecution; here, the court separated the claims but blurred the analytic distinction, save for the explicit and rigorous *Armstrong* standards for selective prosecution claims.

In *United States v. Zachariah*, the court similarly rejected a defendant's quasi-equal protection claim.[256] The defendant argued that "in 29 of the 50 states, persons can legally possess or use marijuana . . . . [and] face[] no prosecution in the state courts, but face[] prosecution in the federal courts" in violation of Due Process.[257] From this argument, the court discerned a claim of "arbitrary and discriminatory enforcement."[258] The court undertook two analyses, both of which resulted in the denial of the defendant's motion to dismiss his indictment.[259]

First, the court reasoned that the possibility of suit in federal court and not state court, in states with medical marijuana authorization, did not violate Due Process because "[s]imilar challenges have been . . . uniformly rejected" across the United States.[260] The court then cited several cases to cement the point. However, these supporting authorities are problematic. Of the six cases cited, two were decided before the rider existed,[261] three were decided prior to *McIntosh*,[262] and the other was *U.S. v. White* (the same cited by the *Davis* court). None of these cases discussed the rider in the context of an equal protection claim.

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[254] *Id.* at *3.

[255] *Id.*

[256] United States v. Zachariah, No. SA-16-CR-694-XR, 2018 WL 3017362, at *1 (W.D. Tex. June 15, 2018).

[257] *Id.*

[258] *Id.* It is unclear whether the court considered the claim in the Due Process or Equal Protection context, as the ultimate holding states that the defendant "faile[d] to establish that his marijuana prosecution unconstitutionally deprive[d] him of due process in violation of the Fifth Amendment," but Equal Protection is part of Due Process within the Fifth Amendment, and the court did not employ a traditional mode of analysis for Due Process or Equal Protection claims and cited cases involving both types of claims. *Id.* at *2.

[259] *Id.* at *2.

[260] *Id.* at *1.

[261] United States v. Canori, 737 F.3d 181 (2d Cir. 2013); James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012).

[262] United States v. Olea, No. 14-10304-DPW, 2016 WL 8730167 (D. Mass. Aug. 12, 2016); United States v. Pickard, 100 F. Supp. 3d 981 (E.D. Cal. 2015); United States v. Trujillo, No. CR-13-2109-FVS-1, 2014 WL 3697796 (E.D. Wash. July 24, 2014).

Second, the court reasoned that while the rider could apply to enjoin federal marijuana prosecutions, the defendant's reliance on *McIntosh* was misplaced because: (1) there was no claim that Congress had prohibited the DOJ from using funds to prosecute marijuana crimes in Texas; and (2) the defendant "fail[ed] to establish that he was in compliance" with any state's medical marijuana laws, as he was alleged to have trafficked marijuana interstate.[263] Thus, the rider did not apply to enjoin the defendant's prosecution, and his motion to dismiss the indictment was denied.[264]

One takeaway of these cases is that district courts have not broadly considered the equal protection implications of the rider. As *Zachariah* demonstrates, courts generally consider the rider solely for the question of whether a criminal defendant is entitled to an evidentiary hearing to demonstrate strict compliance with state medical marijuana law. Those few courts that have addressed the rider and equal protection unfortunately missed the key distinction between the Cole Memo and the rider and relied on wanting case law.

The issue of equal protection has not been addressed by the federal appellate courts yet, although the rider is gaining appellate attention. The Supreme Court recently declined certiorari for a case entirely centered on the constitutional impacts of *McIntosh* and the rider.[265] However, the petition for certiorari did not focus on equal protection or selective prosecution claims, but argued that the *McIntosh* "strict compliance" standard, as applied narrowly by courts, itself violated several constitutional provisions.[266] The unequal application of criminal liability for CSA violations has yet reached the Court for consideration.

A similar ships-in-the-night situation is unfolding within the Ninth Circuit as well. In *United States v. Gentile*, the defendant-appellant is arguing a selective prosecution claim rooted in allegedly disparate prosecutorial policies among states that authorize medical marijuana. [267] He is further arguing that the district court erred in its application of *McIntosh* and its consideration of his motion to dismiss.[268] Although these issues are scintillating and ripe for appellate resolution, the connection between equal protection and the rider is never made by the appellant. Regardless

[263] *Zachariah*, 2018 WL 3017362, at *2.

[264] *Id.*

[265] Gloor v. United States, 139 S. Ct. 348 (mem.) (2018) (No. 18-5858), 2018 WL 4260213.

[266] Petition for Writ of Certiorari at 26, Gloor v. United States, 139 S. Ct. 348 (2018) (No. 18-5858).

[267] Appellant's Opening Brief, *supra* note 156, at 2.

[268] Appellant's Opening Brief at 29, United States v. Gentile, No. 1:12-cr-00360-DAD-BAM, 2017 WL 1437532, at *6 (E.D. Cal. Apr. 24, 2017).

of the Ninth Circuit's decision, the larger question of equal protection and the disparate federal prosecution of CSA violations under the rider will not be resolved.[269]

2. The Open Question: Equal Protection and the Appropriations Rider

Because so few courts have addressed equal protection challenges to the rider, and because no appellate court has addressed the issue, whether the rider comports with equal protection under the Fifth Amendment remains an open question. Attempting to answer this question is the focus of this Section, and is the larger contribution of this Comment to this developing field of law.

3. Distinguishing the Cole Memo and the Appropriations Rider

The few courts that have addressed equal protection challenges based on the rider missed the key legal distinction between the Cole Memo and the rider. This distinction is core to legal consideration of the rider—not taking it into account essentially robs claimants of review of their constitutional grievance. This subsection endeavors to briefly explain the significance of the binding/non-binding distinction between the rider and the Cole Memo.

While the Cole Memo and the rider are distinguishable on many grounds, the key distinction between them is the availability of prosecutorial discretion. Under the Cole Memo, federal prosecutors were encouraged to set their prosecutorial targets and policies for CSA enforcement based on eight priorities.[270] Yet prosecutors retained prosecutorial discretion over their prosecutorial authority. As courts uniformly acknowledged, this discretion left citizens in every state potentially susceptible to criminal liability for CSA violations notwithstanding state medical marijuana laws.[271] Because everyone in the nation could be prosecuted, equal protection was not offended, and no one was selectively prosecuted. Thus, the Cole Memo's non-binding nature on federal prosecutors was a core reason for its constitutionality.

The rider differs dramatically in its relationship with prosecutorial discretion. As interpreted in *McIntosh*, the rider completely bars federal prosecution of certain CSA violations for certain defendants located within 46 states.[272] Prosecutors have no discretion to pursue charges against these defendants, regardless of the commands of the executive branch or their local policies. An aggressive federal prosecutor, bent on ridding their community of all marijuana, is strictly restrained from doing so. What the Cole Memo made *discretionary*, the rider makes *mandatory*. This

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[269] In another Ninth Circuit appeal, similar issues of *McIntosh*'s applicability and the impact of the rider combined with the Cole Memo may be addressed. However, these issues were raised in an *Anders* brief, and it appears that the court has not acted upon the appeal. Regardless of the Ninth Circuit's treatment of that case, the larger Equal Protection question remains unanswered. Anders Brief for Appellant at 11, United States v. Griffith, No. 17-1365 (9th Cir. May 4, 2018).

[270] *See supra* note 38.

[271] *See supra* Section III.A.

[272] *See supra* note 240.

distinction is of critical importance. Whereas equality existed in theory under the Cole Memo, the rider guarantees—or, rather, it mandates—that some defendants will be eligible for federal prosecution for CSA violations while other defendants can avoid federal prosecution for the exact same conduct. This is the fundamental underpinning of equal protection concerns involving the rider. That courts faced with such concerns elided the Cole Memo and the rider so as to eliminate this critical distinction demonstrates continued underappreciation of the rider's potential legal significance.

4. Applying Equal Protection

With the foundational points established, focus may now turn toward the application of equal protection and the *Armstrong* standards to the rider. For clarity, this analysis proceeds along a similar structure as that used by the *Davis* court; the analysis proceeds from a generalized equal protection claim to the specific application of the *Armstrong* factors. Discussion thereafter turns to addressing significant practical considerations that affect the likelihood of succeeding in such challenges to the rider.

The first step in an equal protection/selective prosecution analysis is to identify the classification created by the challenged law that is allegedly unconstitutional.[273] The rider operates based on a classification rooted in *geographic location*. At first blush, disparate treatment under the rider may be seen as based on state citizenship or residency, but this is incorrect. Under *McIntosh*, protection from federal prosecution turns on compliance with state medical marijuana laws for the governmental territory in which one is being prosecuted.[274] Hence, someone complying with California medical marijuana laws could be prosecuted for conduct on federal property,[275] in another state without medical marijuana laws,[276] or for conduct in another state with more narrow medical marijuana laws.[277] The protections of the rider begin and end at state borders, with each state having unique legislative content that controls the scope of the rider's protections. If an Idahoan legally possesses medical

[273] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 698 (5th ed. 2015).

[274] United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

[275] United States v. Gilmore, 886 F.3d 1288, 1291 (9th Cir. 2018).

[276] United States v. Forty-Four Thousand Dollars, No. 4:17-CV-2409 RLW, 2018 WL 3611955, at *2 (E.D. Mo. July 27, 2018) (finding the defendant's California medical marijuana card irrelevant to prosecution for conduct occurring in Missouri).

[277] Arguably, there may be an Equal Protection concern with how people in states with different medical marijuana laws are treated by federal prosecutors under the rider. For example, someone traveling with medical marijuana for chronic back pain, in compliance with Oregon law, inside a state with more limited conditions for which citizens can obtain medical marijuana, may be prosecuted because his conduct will be judged based on the standards of the state with narrower medical marijuana laws.

marijuana in California[278] and never takes the marijuana onto federal property or back to Idaho, he would be immune from prosecution under the rider. If, however, an Idahoan obtained marijuana for medical purposes in Idaho, the rider would provide no refuge from federal prosecution. The disparate treatment is significant: either immediate federal prosecution, which may result in prison and a fine, or temporal protection that could last long enough to eliminate the possibility of prosecution. While this classification applies to the full extent of each state's medical marijuana laws, the rider operates uniformly in areas with medical marijuana laws by shielding medical marijuana patients from criminal liability for possession of marijuana.[279] This classification based on geographic location arguably violates the Court's fundamental rule that the application of the law, and the decision to prosecute an individual, cannot be predicated on an arbitrary classification.[280]

It is not entirely clear what the courts consider an "arbitrary classification" for purposes of a selective prosecution claim.[281] Moreover, no federal court appears to have reviewed a selective prosecution challenge predicated on an arbitrary classification based on geographic location.[282] One case before the Seventh Circuit contained such a claim, but the plaintiff mooted it by stipulation before the district court could address it.[283] The only case that directly addressed a claim of selective enforcement

[278] California does not require a person to have California residency to qualify for medical marijuana. Thus, if the Idahoan were injured in California and received a recommendation for marijuana from an approved physician, he could receive medical marijuana which he would have to forfeit upon leaving California. *See* David Downs, *Debunked – The California Residency Requirement for Medical Marijuana Is a Myth*, SFGATE (Jan. 30, 2015, 8:45 AM), https://blog.sfgate.com/smellthetruth/2015/01/30/debunked-the-california-residency-requirement-for-medical-marijuana-is-a-myth/; *California Residency Requirement for Cannabis: More Custom than Fact*, HERALD TRIB.: MED. MARIJUANA (Jan. 31, 2015), http://marijuana.heraldtribune.com/2015/01/31/debunked-california-residency-requirement-medical-marijuana-myth/; *Frequently Asked Questions*, CAL. CANNABIS PORTAL, https://cannabis.ca.gov/faqs/ (last visited Mar. 3, 2019).

[279] 21 U.S.C. § 844(a) (2012) ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both . . . .").

[280] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ("One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment . . . is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, *or other arbitrary classification*' . . . ." (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962) (emphasis added) (citation omitted)).

[281] Federal prosecutors agree. *See* Answering Brief of the United States at 60, United States v. Gentile, No. 17-10254 (9th Cir. June 6, 2018).

[282] This scarcity of cases was noticed by the parties in *United States v. Gentile*. The Ninth Circuit has yet to hear oral argument on *Gentile*, and the cases cited in this Section include only the ones used in that appeal to support a claim based on an unconstitutional geographic classification. Appellant's Opening Brief, *supra* note 156, at 60–62.

[283] Kramer v. Village of N. Fond Du Lac, 384 F.3d 856, 863 (7th Cir. 2004).

based on a geographic classification comes from the Wisconsin Supreme Court.[284] Appellants in *Gentile* best summarize the case:

> In *Kramer*, a defendant tavern owner succeeded in meeting his burden to present a prima facie case of discriminatory purpose based on evidence that only taverns within a certain geographical area were sent letters notifying them of potential legal prosecutions under Wisconsin's newly-changed law regarding payouts on video poker machines. . . . The Wisconsin Supreme Court concluded that the fact that only businesses within one geographical area received these letters indicated an underlying "arbitrary classification: geographic location." . . . The Court also concluded the defendant made a prima facie showing of discriminatory effect because other similarly-situated tavern owners were not prosecuted for the same conduct as threatened against the defendant.[285]

The Wisconsin Supreme Court thereafter remanded the case for an evidentiary hearing to determine if the state could rebut the prima facie case of selective prosecution, but the defendant entered into a plea bargain immediately following remand.[286]

It is difficult to glean much from this case that is directly applicable to the rider, save that geographic location has been acknowledged as a cognizable foundation for a claim of arbitrariness federal prosecution.[287] However, it is noticeably stark how few selective prosecution claims have addressed geographic location as an unconstitutional classification. And, of course, this case is only precedential in Wisconsin, although the Supreme Court's recognition of arbitrary classifications shows that there is room for a geographically-based claim within the doctrine of selective prosecution and equal protection challenges.[288]

5. "Ordinary Equal Protection"

In an equal protection challenge, a claimant would thus argue the following: the rider is an unconstitutional violation of the equal protection guarantee of the Fifth Amendment's Due Process Clause because it irrationally exempts people from, and subjects people to, criminal liability under the Controlled Substances Act based on their geographic location.

[284] State v. Kramer, 637 N.W.2d 35 (Wis. 2001).

[285] Appellant's Opening Brief, *supra* note 156, at 83 (citations omitted) (citing and quoting State v. Kramer, 248 Wis. 2d 1009, 1024–27 (Wis. 2001)).

[286] *Kramer*, 384 F.3d at 861. This plea bargain is partially what mooted the selective prosecution claim in the case that later went before the Seventh Circuit.

[287] The appellants in *Gentile* used *Kramer* to establish that a claim of "selective prosecution based on geography is a cognizable claim." Appellant's Opening Brief, *supra* note 156, at 60.

[288] Interestingly, the appellees in *Gentile* assumed *arguendo* that "geographical location constitutes an arbitrary classification." Answering Brief of the United States, *supra* note 281, at 61.

Because geographic location is neither a suspect nor quasi-suspect class, and federal courts have held that the medical use of marijuana is not a fundamental right,[289] the rider would necessarily receive rational-basis review. The burden of challenging a law under rational-basis review cannot be overstated. Heavy presumptions favor the rider's constitutionality, and courts will be requisitely hesitant to consider those presumptions surmounted. As the Court recently established, animus—a "'bare . . . desire' to harm a politically unpopular group"—is generally present when a law is invalidated at this level of scrutiny.[290] Success under rational-basis review, then, requires finding either that it is "impossible" to "discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus.'"[291] To succeed on an equal protection challenge, the challenger must show that there is no "reasonably conceivable state of facts that could provide a rational basis" for the rider's classification.[292] This is quite a challenge. As a consequence, it is highly unlikely that an equal protection challenge to the rider would surmount the heavy burden of rational-basis review.[293]

6. The Armstrong *Factors*

The immense burdens of ordinary equal protection analysis under rational-basis review essentially foreclose a successful challenge to the rider on broader equal protection grounds. While the *Armstrong* factors are similarly rigorous and would likely defeat challenges to the rider, their grounding in reality makes more thorough consideration of a challenge to the rider possible.

Selective prosecution claims carry rigorous, demanding burdens. A claimant must establish that "the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."[294] As with the traditional equal protection analysis, this standard is immensely difficult to satisfy. The following application of the *Armstrong* factors reiterates that the rider, despite its eyebrow-raising differential treatment of individuals under federal criminal law, would very likely survive constitutional challenge. The rider, it seems, is not a duck.

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[289] *See, e.g.*, Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007); United States v. Cannabis Cultivator's Club, No. C 98-00085 CRB, 1999 WL 111893, at *3 (N.D. Cal. Feb. 25, 1999).

[290] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[291] *Id.* at 2420–21 (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)).

[292] F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

[293] The lack of discernible animus by Congress in enacting the rider similarly makes any challenge against the rider face the full burden of rational-basis review.

[294] United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

a. Discriminatory Purpose

To establish a selective prosecution claim, a claimant must prove that the decisionmaker at issue "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[295] Before applying this standard, the group that is allegedly affected by the rider must be identified. Assuming *arguendo* that a court would expand upon *Kramer*'s recognition of a geographic classification for prosecution as arbitrary, the identifiable group affected by the rider is individuals located physically inside of Idaho, South Dakota, Nebraska, Kansas, American Samoa, and the U.S. Virgin Islands.[296] Establishing further specificity for the group, however, poses a significant theoretical complication. Individuals who could not otherwise qualify for medical marijuana under any state's eligibility standards are equally situated in every state. Individuals who could otherwise qualify for medical marijuana are splintered into numerous subgroups based on where they could otherwise qualify for medical marijuana. At base, the identifiable group would likely have to consist of the largest subgroup—that is, the group of people who would otherwise qualify for medical marijuana in the most states. There is room for creative lawyering at this stage. Any formulation of the group could be argued to fall within the rider's arbitrary classification for purposes of a selective prosecution claim.

Regardless of the specifics of the group allegedly harmed by the rider's arbitrary classification, the government has a strong argument that the rider's classification is not arbitrary. As the government argued in *Myers*, "[i]t would have made little sense for Congress in 2016 to financially restrain DOJ from interfering with the implementation of state medical marijuana programs that either did not then exist . . . or were not yet operational."[297] Listing the remaining states and territories without medical marijuana in the rider would provide no quasi-immunity under *McIntosh* for people in those areas, as there would be no medical marijuana law with which one could be in compliance. "Strict compliance" with state law in those locations unequivocally means following the proscriptions of the CSA. As states have increasingly legalized medical marijuana, Congress has responded by increasing the scope of the rider's coverage.[298] If the remaining areas were to join the growing ranks, there is every reason to expect Congress would add them to the rider.

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[295] Wayte v. United States, 470 U.S. 598, 610 (1985) (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

[296] These are the only states and territories not protected from prosecution under the rider. *See supra* note 240.

[297] Government's Response to Defense Motion to "Dismiss Unconstitutional Enforcement of Marijuana Prohibition Provisions of the Controlled Substances Act" at 49, United States v. Myers, No. SA-16-CR-320-FB (W.D. Tex. Jan. 28, 2017).

[298] *See supra* note 240.

Furthermore, Congress's geographic classification makes sense in light of differences in state policies. States like California, by legalizing medical marijuana, have an interest in ensuring that the DOJ respects state policy. This interest was given practical effect in *McIntosh*. If a state like Idaho has not legalized medical marijuana, however, it likely has a state policy of enforcing the CSA. Restraining federal prosecutors in these states would thus adversely affect states seeking to maintain the status quo vis-à-vis marijuana prohibition.[299]

Consequently, a court would likely find the rider's geographic classification to be not arbitrary and thus satisfy rational-basis review. Going forward, this analysis will assume *arguendo* that the geographic classification is sufficiently arbitrary. Nonetheless, this preliminary part of the analysis is one point at which a court could end its consideration of a selective prosecution claim.

Assuming that an identifiable and affected group could be satisfactorily argued, the *Armstrong* standard next requires that the claimant establish that Congress "selected or reaffirmed" the rider "at least in part 'because of' . . . its adverse effects upon an identifiable group."[300] This is likely another insurmountable hurdle. The legislative history of the rider, as well as Congressional representation of the rider in the public, identify several interests that Congress considered when passing the rider.[301] The overwhelming result of these sources is that the rider was not passed *because of* its adverse effects on people located in states without medical marijuana laws. One could argue that, in exempting people located in states with medical marijuana laws, Congress left medical marijuana patients located in other states with the adverse effects of criminal liability under the CSA. However, as will be further argued below, this argument is a non-starter. CSA liability existed in those areas for over four decades before the rider was first enacted. Leaving the status quo in one area but not another—although smelling like an equal protection violation—likely fails to overcome the heavy burden required for a selective prosecution claim. Furthermore, Congress's continual addition of states to the rider as they consider legalizing marijuana for medical purposes significantly undercuts the argument that Congress was aiming to adversely affect particular geographic areas.

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[299] Indeed, extending the rider's protections into states without medical marijuana would allow people to "flout[] the laws of no less than two sovereigns—the federal government and the state [government]." Government's Response to Defense Motion to "Dismiss Unconstitutional Enforcement of Marijuana Prohibition Provisions of the Controlled Substances Act," *supra* note 297, at 51.

[300] *Wayte*, 470 U.S. at 610 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

[301] When the rider was first added to the congressional budget at the subcommittee level, representatives discussed its significance in terms of states' rights, respect for the doctor-patient relationship, and removing barriers to medical research. *See generally* 160 CONG. REC. 82, H4982–85 (daily ed. May 29, 2014).

Although a failure to establish discriminatory purpose is fatal to a claim of selective prosecution, it is worthwhile to address the considerable theoretical barrier posed by the other *Armstrong* factor in the context of the rider.

b. Discriminatory Effect

In addition to discriminatory purpose, a claimant must show that the prosecutorial decision or policy had a discriminatory effect.[302] To establish discriminatory effect, a claimant must prove that similarly situated persons were treated differently.[303] While it is unclear if evidence at a national level can satisfy this element, the Supreme Court has made clear that the evidence must speak directly to alleged differential treatment of similarly situated defendants.[304]

There are two potential arguments to be made concerning discriminatory effect. On the one hand, people in states without medical marijuana laws can point to a sizeable group of people who are registered with state governments, doctors' offices, and local marijuana businesses,[305] and who, at a minimum, are significantly likely to possess marijuana on a day-to-day basis. One policy education non-profit has estimated that 3.5 million people in the United States are registered for medical marijuana, with almost 1 million in California alone.[306] While these records are protected by state and federal law, the fact stands that unlike defendants in most selective prosecution claims, a defendant prosecuted for simple possession of marijuana that challenges the rider can point to over 3 million people that, per the rider, are guaranteed to not be prosecuted so long as the rider remains effective. Of course, the more complicated the defendant's actual circumstances, the more difficult it becomes to find individuals that match.[307] Nonetheless, a generic first-time offender

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[302] *Wayte*, 470 U.S. at 608.

[303] *Id.* at 605–07 (affirming the Court of Appeals' denial of the defendant's selective prosecution claim for failing to establish that "others similarly situated generally had not been prosecuted for conduct similar to" his own); United States v. Armstrong, 517 U.S. 456, 465 (1996) (applying "similarly situated" standard to selective prosecution claim based on alleged racial discrimination).

[304] United States v. Bass, 536 U.S. 862, 864 (2002) (per curiam).

[305] For an example of the types of records kept for California's medical marijuana program, see David Downs, *The Truth About Medical Marijuana Card Privacy*, EAST BAY EXPRESS (Jan. 2, 2013), https://www.eastbayexpress.com/oakland/the-truth-about-medical-marijuana-card-privacy/Content?oid=3426638.

[306] *Number of Legal Medical Marijuana Patients*, PROCON (May 18, 2018, 11:28 AM), https://medicalmarijuana.procon.org/view.resource.php?resourceID=005889.

[307] For example, consider the government's argument in *Gentile*:

> Even if Gentile had shown that people in other districts were not prosecuted for marijuana offenses, Gentile made no showing that a similarly-situated person—who cultivated and distributed marijuana from a storefront for three years, possessed firearms at the store which were unlawfully obtained, had a criminal history category of III, was charged in the past with marijuana cultivation, and had a history of violence and making threats—was not prosecuted in a different judicial district.

accused of minor possession of marijuana has 3 million people who, at minimum, are recognized by state governments as people who are significantly likely to possess marijuana at any given moment. A more abstract secondary argument is possible, but unlikely to gain traction. Because the rider's classification is geographic, a hypothetical defendant could point to their previous conduct to demonstrate the discriminatory effect of the rider. That is, if an Idahoan received medical marijuana while in California and was prosecuted for possession subsequently in Idaho (assuming there is not a concurrent trafficking or other charge), that person could identify that their conduct was protected while they were physically in California but not when they were physically in Idaho. While odd, this reveals the awkwardness that the rider creates. However, it is uncertain if this particular and abstract argument could surmount the significant hurdle of *Armstrong*'s discriminatory effect prong.

The government has two strong counterarguments that would very likely carry the day in court. First, it is questionable whether one could realistically claim that members of the arbitrarily affected class are subjected to adverse effects. The CSA was enacted, and continuously enforced by state and federal authorities, for over four decades before the rider was enacted. While the rider shields people in 46 states from criminal liability under the CSA, it does not impose any *new* or *additional* burdens or effects on people living elsewhere. As the government argued in *Myers*, the legal posture vis-à-vis the rider of a defendant in a state without medical marijuana "is the same" "irrespective" of the scope of the rider.[308] Before the rider was enacted, South Dakotans had no medical marijuana exemption from CSA liability. After the rider was enacted, they still had no such exception. Thus, the rider would likely be found to not have impacted people in South Dakota at all. Without creating *new effects* on people in states without medical marijuana, it is unlikely that the rider could be construed to satisfy the discriminatory effects element.

The argument that the rider burdens these defendants by not extending them the same benefits it extends to others is a nonstarter. The scope of the rider's protection is determined completely by state legislatures. Hence, the rider protects certain conduct in California that is still prosecutable in Oregon. To extend the benefit of the rider to Idaho, Idaho must first legalize medical marijuana. The source of the benefit is thus not entirely Congress, and Congress cannot violate equal protection by not extending a benefit it cannot unilaterally create. Put another way, the benefit created by the rider cannot practically extend to people in non-listed states because those states have not themselves created a benefit that could be protected.

The second significant argument the government has against a claim of discriminatory effect is that people located within areas without medical marijuana

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Answering Brief of the United States, *supra* note 281, at 59.

[308] Government's Response to Defense Motion to "Dismiss Unconstitutional Enforcement of Marijuana Prohibition Provisions of the Controlled Substances Act," *supra* note 297, at 50.

who engage in illicit conduct involving marijuana are self-selecting themselves for criminal liability. In *Wayte*, the Supreme Court reasoned that someone's self-selection for criminal liability undercut their claim of selective prosecution.[309] There, the defendant was prosecuted for not registering for the Selective Service, but claimed selective prosecution based on his First Amendment activity.[310] The Court recognized that the governmental policy was to prosecute only people that were reported or self-reported not registering for the Service and who did not actually register.[311] Thus, when defendant "wrote several letters to Government officials, including the President, stating that he had not registered and did not intend to do so," he made himself vulnerable for prosecution.[312] Had he not written those letters, or had he written only of his disapproval and not of his intent to continue violating the law, he would very likely have avoided prosecution.[313] Similarly, people who live in or visit areas without medical marijuana laws are, or reasonably should be, aware of their exposure to criminal liability. Criminal liability for possessing medical marijuana is not tied to an immutable characteristic of any individual. By taking, or seeking, medical marijuana in such a location, defendants are knowingly opening themselves to potential federal prosecution. Because there is no fundamental right to use or possess marijuana, and because the rider does not burden people travelling to or living in states without medical marijuana, arguments rooted in the Privileges and Immunities Clause, or the fundamental right of movement under the doctrine of Substantive Due Process, are likely nonstarters.

It also bears mentioning that those who live in states without medical marijuana possess the same means of achieving protection from the rider as those who are currently protected: the political process. At the federal level, Congress has repeatedly demonstrated its willingness to add states to the rider as they authorize medical marijuana.[314] Voters in states without medical marijuana have the same ability to bring their states within the congressional plan as voters in states with medical marijuana. If Idahoan voters legalize medical marijuana, it is reasonable to expect that the rider would be extended to include Idaho.[315] Thus, people living in Idaho are not disadvantaged in their ability to come within the purview of the rider.

As a result of the foregoing, it is highly likely that a court would find the discriminatory effect element of *Armstrong* wanting, as applied to the rider.

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[309] Wayte v. United States, 470 U.S. 598, 610 (1985).

[310] *Id.* at 604.

[311] *Id.* at 610.

[312] *Id.* at 601.

[313] *Id.* at 601, 609–10.

[314] Angell, *supra* note 48.

[315] Indeed, if Idaho did legalize medical marijuana and Congress failed to add Idaho to the list of states in the rider, the prospects of success on an equal protection claim would become much stronger.

C. Practical Problems: Standing & Timing

In addition to failing to meet the rigorous equal protection and *Armstrong* standards, a claim that the rider violates equal protection would encounter two practical complications. The first is constitutional standing, which likely poses an insurmountable barrier. The second is timing, which adds a unique wrinkle to potential claims rooted in the rider.

The Supreme Court has established that the "case or controversy" requirement of Article III of the U.S. Constitution requires a plaintiff to show that they have an injury in fact that is caused by the defendant and that can be redressed by a favorable court decision.[316] Because a selective prosecution claim is not an affirmative defense, but an independent claim for relief,[317] a claim based on the rider must satisfy these requirements to be justiciable in federal court. As with the *Armstrong* factors, each of these requirements brings significant problems for an equal protection challenge based on the rider.

Foremost, a court would likely find that there is no injury in fact for a person challenging the rider. As discussed above, the rider does not increase or modify the criminal liability of people living in states without medical marijuana laws. Consequently, the rider cannot be said to *injure* those people. The only arguable injury for criminal defendants is their prosecution and subsequent loss of liberty upon conviction. However, this injury was not brought about or exacerbated by the rider. The rider did not create criminal liability, nor did it authorize or impact federal prosecution of people with medical marijuana in states without medical marijuana laws. Thus, the second *Lujan* element, causation, is also left wanting. The final element, redressability, is naturally unsatisfied as a consequence of the other elements being unsatisfied. Even if the rider were deemed an unconstitutional violation of equal protection, the criminal defendants would be in the *exact same* legal situation as they would be if the rider were upheld. Because the criminal liability which authorizes federal prosecution is based on the CSA and not the rider, the federal prosecution is wholly unchanged regardless of the constitutional validity of the rider. The government in *Myers* made this argument, albeit in a less formalistic manner.[318]

Another significant practical problem is the timing of a claimed equal protection violation. CSA violations are subject to a five-year statute of limitations period.[319] Thus, under the rider, no person has technically been exempted from prosecution for possessing marijuana. As the *McIntosh* court warned: "Congress could

[316] Lujan v. Defs. of Wildlife, 504 U.S. 553, 560–61 (1992).

[317] United States v. Carrillo, No. 2:12-cr-00185-TLN, 2018 WL 4638418, at *5 (E.D. Cal. Sept. 26, 2018) ("Courts have been clear that a *McIntosh* hearing is not an opportunity for the defendant to present an affirmative defense . . . .").

[318] Government's Response to Defense Motion to "Dismiss Unconstitutional Enforcement of Marijuana Prohibition Provisions of the Controlled Substances Act," *supra* note 297, at 50.

[319] 18 U.S.C. § 3282(b)(2)(A) (2012).

restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding."[320] The first batch of people who are fully shielded from criminal liability under the CSA will not come about until December 11, 2019 at the earliest.[321] At present, no person has been fully exempted from prosecution for a CSA violation due to the rider. Thus, a claimant arguing that they have been disadvantaged by the rider is temporally blocked from presenting a solidified unequal treatment of CSA violators until the end of 2019.

D. The Takeaway

The upshot of the preceding analyses is that the rider would very likely survive an equal protection challenge under ordinary equal protection standards and the more specific standards of selective prosecution. While this finding comports with the limited case law containing such claims, it reaffirms those cases on more critical ground. At each stage of the formal analysis, the rider poses unique problems that cumulatively reveal a significant likelihood that the rider would not violate equal protection. Were these challenges overcome, there nonetheless remains the hefty practical issues of who could bring the challenge and why. Because the only individuals who could claim an equal protection violation would not have standing for their claim and because significantly more time must pass before unequal treatment by federal prosecutors is cemented, it is questionable if a claim against the rider on equal protection grounds would merit judicial consideration. Even assuming *arguendo* that standing could be met, the theoretical barriers to lodging an equal protection claim against the rider seem thoroughly fatal. Despite directly mandating disparate enforcement of federal criminal laws, the rider nonetheless survives constitutional muster. The rider thus fails the duck test, despite looking very similar to a duck. Perhaps, then, it is merely a pied-billed grebe.

IV. CONCLUSION

The Cole Memo and the rider represent unique modern approaches to modifying the federal enforcement of marijuana prohibition under the Controlled Substances Act in response to shifting public opinion and state laws. Both purported to lessen the breadth of the DOJ's focus in enforcing the CSA. Both demonstrate the legal complexities that manifest from implementing differing political stances on marijuana across time. And despite having different legal foundations, the rider and

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[320] United States v. McIntosh, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

[321] The first successful version of the rider was passed as part of the 2014 "cromnibus" spending bill on December 11, 2014. Bill Chappell, *"Cromnibus" Spending Bill Passes, Just Hours Before Deadline*, NPR (Dec. 11, 2014, 2:29 PM), https://www.npr.org/sections/thetwo-way/2014/12/11/370132039/house-poised-to-vote-on-controversial-cromnibus-spending-bill.

the Cole Memo both find easy refuge from equal protection and selective prosecution challenges.

The Cole Memo was non-binding and enacted no legal change to the federal DOJ's ability to enforce the CSA. Rather, it represented a shift in enforcement priorities enacted by the executive branch. While many construed the Cole Memo as meaning that marijuana laws would no longer be enforced, such was not the case. Consequently, arguments that the Cole Memo mandated unequal application of the CSA and therefore violated equal protection, found no purchase in federal courts. Attorney General Sessions has rescinded the Cole Memo, bringing either an end or temporary pause to executive self-restraint as a means of accommodating state interests in facilitating legalized uses of marijuana. Were the Cole Memo, or its functional equivalent, reinstated, federal courts would surely be forced to entertain and reject equal protection and selective prosecution challenges across the nation. However, as demonstrated above, such challenges are nonstarters. The unequal administration of the CSA under the Cole Memo was an illusion. An enticing illusion for those looking for refuge from criminal punishment—but equal protection has never been welcoming to unreasonable inferences or individual desires.

Although defunct, the Cole Memo faced several constitutional attacks during its tenure. Despite public impression that federal enforcement of marijuana laws had fundamentally changed, the remaining illegality of marijuana combined with the Memo's repeated caveats significantly undercut the reasonability of that reliance. Equal protection challenges to the Cole Memo were thus quickly and uniformly rejected by federal courts.

The rider, on the other hand, is binding and directly impacts the federal DOJ and people located in 46 states, the District of Columbia, and two territories. Moreover, it represents legislative prioritization of policy and has been continuously reenacted by Congress in each federal budget since the end of 2014. Unlike the Cole Memo, the rider necessarily creates a classification for criminal CSA liability based on the geographic location of the person being prosecuted. While geographic location may serve as an arbitrary classification for equal protection purposes, only one case has dealt with such a claim. Furthermore, the government has numerous reasons why the geographic nature of the classification is reasonably related to a legitimate state interest. This, combined with the theoretical difficulty of identifying the particular group allegedly harmed by the rider, makes an equal protection or selective prosecution claim a nonstarter. Even if these hurdles could be overcome, rational-basis review and the rigorous requirements of *Armstrong* present hefty burdens that are likely insurmountable. Practical problems of standing and timing further cement the implausibility of challenging the rider on equal protection grounds.

Equal protection and selective prosecution challenges to the rider have been minimal. The few challenges that have been made were firmly rejected. A thorough

analysis of the issue here has shown that the courts were ultimately correct to disregard such challenges.

Whereas the Cole Memo represents an equal protection illusion, the rider represents something far more notable. The concerns connected with the Cole Memo are only heightened by the rider. The protection of that law turns entirely on where one is located when engaging in conduct violative of the CSA. People in four states and three territories are subject to prosecution for conduct that goes unprosecuted in numerous other states. Among states with medical marijuana, differing state laws similarly cause disparate criminal liabilities for the same underlying conduct. The administration of the CSA could hardly appear less equal. Yet, the equal protection guarantee of the Fifth Amendment's Due Process Clause is unperturbed. Rarely can something that so greatly looks like a duck and acts like a duck be not a duck. This Comment's examination of the disparate federal prosecution of marijuana crimes under the CSA, however, has revealed that in this instance, the duck in question really is something else.