NOTES

Reefer Access: Dispensaries as "Places of Public Accommodation" Under Title III of the ADA

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This Note analyzes whether federal customer and employee discrimination claims brought in federal court against dispensaries and other marijuana businesses in legalizing states can prevail. This inquiry strikes at the core of marijuana's complicated legal status in our dual-federalism system, in which the drug remains outlawed under the federal Controlled Substances Act of 1970 (CSA), yet flourishes in many legalizing state markets with tacit approval from the Justice Department.

The Note begins by probing the issue through the lens of Title III of the Americans with Disabilities Act (ADA). A simple question is posited: can a disabled person sue a dispensary in federal court in a legalizing state for injunctive relief if the dispensary fails to "make reasonable accommodations" for access. Under Title III, all businesses that operate as "places of public accommodation" must ordinarily "remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable" to accommodate disabled patrons. But several common law and prudential legal doctrines present obstacles to a federal court's ability to grant customer access to marijuana storefronts under Title III. This Note analyzes these legal limitations, as well as the history, text, and administration of Title III, to propose a legal framework that empowers courts to issue relief.

Leveraging its Title III analysis, the Note then analyzes federal protections for employees. It reaches a troubling conclusion: hundreds of thousands of employees of marijuana businesses in the United States are very likely unprotected by federal civil rights laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, Title I of the Americans with Disabilities Act, and the Fair Labor Standards Act. Because these employees are engaging in an ongoing federal criminal conspiracy, a federal court is unlikely to grant backpay, frontpay, or reinstatement if these employees suffer flagrant sexual

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harassment, racial discrimination, or any other violation of federal employee protections in the workplace. Generally, these employees can only obtain relief through a patchwork of state employment laws. This outcome is especially disconcerting because members of identity-based groups protected by federal employment statutes are often disproportionately targeted by marijuana arrests and convictions—and because roughly 80% of cannabis business owners are white.

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INTRODUCTION

Despite marijuana's prohibition under the federal Controlled Substances Act (CSA), an estimated 2,100 brick-and-mortar dispensaries distribute the drug in most of the thirty-three states that have enacted legalization initiatives. Marijuana's complicated legal status in these jurisdictions, stemming from the Justice Department's selective nonenforcement of the CSA, raises a host of legal

issues that complicate the normal operation and patronization of these businesses.

One particular issue that has received limited attention to date is whether federal civil rights protections for customers and employees apply to dispensaries and other private sector participants in the marijuana industry. This Note analyzes this topic through the lens of Title III of the Americans with Disabilities Act (ADA), which prohibits discrimination by businesses against individuals with disabilities. Ordinarily, Title III requires all businesses operating as "places of public accommodation" to provide access to disabled patrons. A business that fails to do so can be enjoined under federal law.

But dispensaries are not legally ordinary businesses. An open question exists as to whether they qualify as "places of public accommodation" for purposes of Title III. This Note argues in favor of this classification based on a survey of the ADA's legislative history, text, and federal administrative implementation. In doing so, it examines underlying principles of equity—the rule against illegal injunctions, *in pari delicto*,[1] and the "unclean hands" doctrine[2]—to show that jurisdictional bars to relief can yield to would-be patrons suing dispensaries. At bottom, this Note argues that because Title III protects customer access to the lawful inventory that virtually all dispensaries sell, it also protects collateral customer access to cannabis.

Following its Title III analysis, the Note pivots to the employment context, asking whether federal workplace protections[3] extend to employees of marijuana businesses. It recognizes that the special status conferred on these entities by the

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1. The full maxim is *in pari delicto potior est conditio defendentis*—"In a case of equal or mutual fault . . . the condition of the party . . . defending[] is the better one." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

2. For purposes of this Note, the "unclean hands" doctrine will refer to the broad principle that a court will not entertain a claim by a wrongdoer arising out of the claimant's own wrongful conduct. This principle is traditionally "expressed in two well-worn maxims": (1) *ex turpi causa non oritur actio*—no action arises out of an immoral act, and (2) *ex dolo malo non oritur actio*—no action arises out of one's own fraud or wrongdoing. Brian A. Blum, *Equity's Leaded Feet in a Contest of Scoundrels: The Assertion of the* In Pari Delicto *Defense Against a Lawbreaking Plaintiff and Innocent Successors*, 44 HOFSTRA L. REV. 781, 781–82 (2016). It is true that the unclean hands doctrine "is in one respect broader and in another respect narrower" than *ex turpi causa* and *ex dolo malo*. *See id.* at 799. The unclean hands doctrine traditionally applies only where a plaintiff seeks equitable, not legal, relief. *Id.* at 800. Additionally, the unclean hands doctrine, unlike *ex turpi causa* and *ex dolo malo*, is relevant where plaintiffs have acted legally but in an inequitable manner. *See* Epstein v. Epstein, 915 So. 2d 1272, 1275 (Fla. Dist. Ct. App. 2005) (applying the unclean hands doctrine in the absence of fair dealing by movant); Rose v. Nat'l Auction Grp., 646 N.W.2d 455, 461 (Mich. 2002) ("[The unclean hands doctrine] closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . . ." (quoting Stachnik v. Winkel, 230 N.W.2d 529, 532 (Mich. 1975))). However, for the sake of brevity and because the modern distinction between legal and equitable actions is collapsing, *see, e.g.*, Mendoza v. Ruesga, 86 Cal. Rptr. 3d 610, 616–17 (Cal. Ct. App. 2008), this Note will use "the unclean hands doctrine" as interchangeable with *ex turpi causa* and *ex dolo malo*.

3. Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), Title I of the Americans with Disabilities Act (Title I), and the Fair Labor Standards Act (FLSA).

federal government logically supports providing correlative benefits to marijuana-industry employees. But it also points out that many courts may prove unwilling to embrace this view in the absence of a compelling legal rationale.

Analyzing the question as a purely legal issue, then, the Note argues that the "mixed inventory" or "severability" principle that authorizes relief in the Title III context would not apply in equal force to employment discrimination suits brought by marijuana-industry employees who are actively engaging in an ongoing criminal conspiracy in violation of the CSA. Thus, it finds that the several courts that have extended federal workplace protections to marijuana-industry employees have done so improperly.

I. THE PROLIFERATION OF CANNABIS DISPENSARIES IN THE STATES

Federal law criminalizes cannabis use, possession, cultivation, and distribution under the Controlled Substances Act of 1970 (CSA).[4] The Supreme Court has upheld the constitutionality of the CSA against Commerce Clause challenges to the federal government's authority to regulate local cultivation and consumption of cannabis.[5] It has also declined to recognize the drug's "medical necessity" as a legally cognizable defense to violations of the CSA.[6]

Still, in January 2020, Illinois became the eleventh and most recent state to legalize the local possession and use of recreational marijuana.[7] Counting jurisdictions that have authorized medical cannabis programs, thirty-three states[8] and the District of Columbia have approved some form of legalization under their concurrent authority with the federal government to regulate drug offenses.[9] These initiatives have

4. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–971). Section 401 of the CSA makes it a crime to "manufacture, distribute, or dispense" cannabis. *Id.* § 401(a)(1), 21 U.S.C. § 841(a)(1) (2012). *See also id.* § 202(c)(c)(10), 21 U.S.C. § 812(c)(c)(10) (listing marijuana as a Schedule I controlled substance). Simple possession is a crime as well. *See id.* § 404(a), 21 U.S.C. § 844(a).

5. *See* Gonzales v. Raich, 545 U.S. 1, 17–33 (2005).

6. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001).

7. *See* Audrey McNamara, *These States Now Have Legal Weed, and Which States Could Follow Suit in 2020*, CBS NEWS (Jan. 1, 2020, 3:55 PM), https://www.cbsnews.com/news/where-is-marijuana-legal-in-2020-illinois-joins-10-other-states-legalizing-recreational-pot-2020-01-01/ [https://perma.cc/4C79-5M67]. These states include Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, ESQUIRE (Feb. 7, 2020), https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/ [https://perma.cc/D36V-SUU9]. Recreational marijuana is also legal in the District of Columbia. *Id.*

8. *See* Rense, *supra* note 7. Legalizing jurisdictions include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia, and the District of Columbia.

9. *Cf.* Abbate v. United States, 359 U.S. 187, 191–92 (1959) (citing Moore v. Illinois, 55 U.S. 13, 20 (1852) for the proposition that "[e]very citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence [sic] or transgression of the laws of both . . . That either or both may (if they see fit) punish such an offender, cannot be doubted"). *See* Rachel A. Cartier,

flourished in derogation of federal law, in part, because of the Justice Department's adoption of a policy of CSA nonenforcement with respect to select marijuana offenses.[10] In August 2013, the Department informed the governors of "legalizing" states that it would not seek to preempt their regulatory frameworks, provided that these states "implement effective . . . enforcement systems to protect federal priorities and the health and safety of every citizen."[11] Though the Justice Department's guidance initially wavered under the Trump Administration,[12] it has subsequently kept with the Obama Administration's decision to forego CSA enforcement.[13]

How have states undertaken "marijuana legalization"? Though a small minority have resisted the development of regulated infrastructure,[14] most have devised highly formalized registration and application procedures for the creation of brick-and-mortar dispensaries and upstream marijuana production.[15] As a result, roughly 2,100 dispensaries[16] service an estimated 3.1 million medical marijuana

Comment, *Federal Marijuana Laws and Their Criminal Implications on Cultivation, Distribution, and Personal Use in California*, 20 SAN JOAQUIN AGRIC. L. REV. 101, 104 (2011).

10. *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All United States Attorneys (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/4MQH-7YKA]. Professor Robert Mikos also observes that state reforms express compassion in reflection of softening public attitudes concerning marijuana's danger and wickedness. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424–25 (2009). He also observes that the success of these reforms flows from the government's limited enforcement apparatus, the absence of substantial barriers to entry in the private marketplace, and the CSA's lack of a private right of action. *See id.* at 1464–67.

11. *See Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary*, 113th Cong., 1st Sess. 8 (2013) [hereinafter *Conflicts Hearing*] (statement of James Cole, Deputy Att'y Gen., U.S. Department of Justice).

12. *See* Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to All United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/F298-M5BM].

13. *See* Eileen Sullivan, *Trump Says He's Likely to Back Marijuana Bill, in Apparent Break with Sessions*, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/us/politics/trump-marijuana-bill-states.html.

14. *See* Reid Wilson, *Vermont Governor Signs Marijuana Legalization Bill*, HILL (Jan. 22, 2018, 2:38 PM), https://thehill.com/homenews/state-watch/370139-vermont-governor-signs-marijuana-legalization-bill [https://perma.cc/FF7X-UBD8] ("[The Vermont law] does not allow legal sales of marijuana, something [Governor] Scott said he would veto if the legislature tried to go farther without first adding significant elements to combat young people using marijuana and to bolster traffic safety.").

15. *See, e.g.*, *Bureau of Cannabis Control—Licensing Information*, CAL. CANNABIS PORTAL, https://cannabis.ca.gov/apply-for-a-license/ [https://perma.cc/SQD9-FDV5] (last visited Feb. 28, 2020); *Marijuana Licensing*, WASH. ST. LIQUOR & CANNABIS BOARD, https://lcb.wa.gov/mjlicense/marijuana-licensing [https://perma.cc/S2FD-VXSW] (last visited Mar. 7, 2020).

16. *See* Ab Hanna, *How Many Dispensaries Are in Each State?*, HIGH TIMES (Feb. 12, 2018), https://hightimes.com/dispensaries/how-many-state/ [https://perma.cc/A6FJ-QCT6]. The High Times estimate was cross-referenced using state data, academic studies, and news media publications. *See, e.g.*, Erick Eschker, *Active Medical Marijuana Dispensaries in California, 2015*, HUMBOLDT INST. FOR INTERDISCIPLINARY MARIJUANA RESEARCH, ACTIVE MEDICAL MARIJUANA DISPENSARIES IN CALIFORNIA (2015), https://hiimr.humboldt.edu/sites/default/files/hiimr/docs/california%20dispensaries.pdf [https://perma.cc/69NS-CBJJ]; Danica Hibpshman, *Marijuana Licensing Updates*, OR. LIQUOR CONTROL COMM'N (2017), https://www.oregon.gov/olcc/marijuana/Documents/Presentations/OLCC_RecMJ_Licensing_Workshop_Update_020817.pdf [https://perma.cc/W3VP-WVKC]; STATE OF NEV. DEP'T OF TAXATION, STORES LICENSED TO SELL ADULT-USE MARIJUANA IN NEVADA (May 30, 2018), https://tax.

patients[17] in addition to recreational consumers in permitting jurisdictions.[18] For comparison, roughly 67,800 pharmacies,[19] 7,450 breweries,[20] 4,000 bowling alleys,[21] and 1,500 ice staking rinks[22] operate nationally. This ecosystem of physical marijuana marketplaces has created a burgeoning $13.6 billion "legal" industry[23] that employs more than 250,000[24] people in the United States.

II. TITLE III OF THE AMERICANS WITH DISABILITIES ACT

Cannabis's impressive market growth has spawned a range of legal quandaries, disquieting policymakers, marijuana–business shareholders, and law enforcement officials alike.[25] Some of these issues have attracted extensive

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nv.gov/uploadedFiles/taxnvgov/Content/Forms/Retail%20Store%20Licenses(1).pdf [https://perma.cc/NC62-BX64]. The estimated dispensary count is well below the 9,397 active licenses for marijuana businesses in the United States. *See* Aaron Smith, *The U.S. Legal Marijuana Industry is Booming*, CNN MONEY (Jan. 31, 2018, 4:03 PM), https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html [https://perma.cc/H9AZ-436V].

17. *See Medical Marijuana Patient Numbers*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/ [https://perma.cc/93U8-WCV9] (last updated July 10, 2019). Again, these values were cross-referenced against other sources to ensure rough order of magnitude accuracy. *See, e.g.*, Elisabeth Garber-Paul & Tana Ganeva, *The State-by-State Guide to Weed in America*, ROLLING STONE (Apr. 20, 2018, 9:02 PM), https://www.rollingstone.com/culture/culture-news/the-state-by-state-guide-to-weed-in-america-627968/ [https://perma.cc/3R64-7HY6].

18. *See* Nick Kovacevich, *The Next Big Thing in Cannabis: Tourism*, FORBES (Aug. 16, 2018, 6:32 PM), https://www.forbes.com/sites/nickkovacevich/2018/08/16/the-next-big-thing-in-cannabis-tourism/#1315ea585d9b [https://perma.cc/WDT8-BEAA] (discussing the proliferation of dispensary "tourists" incident to legalization of recreational use of marijuana in Nevada, Colorado, and California).

19. Dima M. Qato et al., *The Availability of Pharmacies in the United States: 2007–2015*, PLOS ONE (Aug. 16, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0183172 [https://perma.cc/7HG3-XE8P].

20. *National Beer Sales & Production Data*, BREWERS ASS'N FOR SMALL & INDEP. CRAFT BREWERS, https://www.brewersassociation.org/statistics/number-of-breweries/ [https://perma.cc/SY5N-5P8T] (last visited Feb. 28, 2020).

21. Patrick Clark, *America's Vanishing Bowling Alleys*, BLOOMBERG (July 11, 2014, 4:45 PM), https://www.bloomberg.com/news/articles/2014-07-10/americas-vanishing-bowling-alleys.

22. Source data available at RINKTIME, https://www.rinktime.com/ [https://perma.cc/F2YQ-H9CN] (last visited Mar. 4, 2020).

23. Chris Hudock, *U.S. Legal Cannabis Market Growth*, NEW FRONTIER DATA (Sept. 8, 2019), https://newfrontierdata.com/cannabis-insights/u-s-legal-cannabis-market-growth/ [https://perma.cc/4U8X-GN8T].

24. *See* Alexia Fernández Campbell, *The Push to Unionize Cannabis Workers, Explained*, VOX (Oct. 14, 2019, 4:30 PM), https://www.vox.com/identities/2019/10/14/20913631/marijuana-workers-labor-unions [https://perma.cc/L44W-6335] (citing New Frontier Data estimates); *see also* Debra Borchardt, *Marijuana Industry Projected to Create More Jobs Than Manufacturing by 2020*, FORBES (Feb. 22, 2017, 10:51 AM), https://www.forbes.com/sites/debraborchardt/2017/02/22/marijuana-industry-projected-to-create-more-jobs-than-manufacturing-by-2020/#204d51f23fa9 [https://perma.cc/CMS2-G9D2] (estimating up to 150,000 employees in the U.S. marijuana industry in 2017); Maggie Cowee, *Chart: US Cannabis Employment to Jump 34% in 2019 Thanks to California, Growth in New Markets*, MARIJUANA BUS. DAILY (June 19, 2019), https://mjbizdaily.com/us-cannabis-employees-increase-34-percent-2019/ [https://perma.cc/SP9Q-MGJL] (estimating 215,000 full-time workers in the U.S. marijuana industry in 2019).

25. *See Conflicts Hearing*, *supra* note 11, at 8 (statement of Sen. Leahy) ("[Marijuana dispensaries] operat[e] as a cash-only business, with no access to bank accounts or credit card transactions. That is a prescription for problems, tax evasion and so on."); *id.* (statement of James Cole, Deputy Att'y Gen.,

scholarship,[26] including the industry's murky status under federal taxation policies[27] and its limited access to banking,[28] patent protections,[29] insurance,[30] and capital.[31] But other issues, including whether generally applicable federal statutory protections for customers and employees reach cannabis businesses, have received limited attention.[32] In particular, there exists a dearth of research and caselaw addressing whether private litigants can deploy Title III of the ADA against dispensaries and other public-facing marijuana businesses.[33]

U.S. Department of Justice) ("Obviously, there is a public safety concern when businesses have a lot of cash sitting around. There is a tendency that there are guns associated with that, so it is important to deal with that kind of issue.").

26. *See, e.g.*, Robert A. Mikos, *Marijuana Law, Policy, and Authority* 12–13 (Aspen/Wolters Kluwer, Working Paper No. 17-5, 2017) (overviewing legal issues in marijuana law, including civil RICO, trademark, licensing, advertising restrictions, labeling and packaging laws, taxes, money laundering, rules of professional conduct, prescription authority, and employment and housing discrimination).

27. *See, e.g.*, Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 523 (2014) ("[M]arijuana industry insiders consider not federal criminal law but federal tax law to be the biggest impediment to the development of a legitimate marijuana industry.").

28. *See* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 600 (2015) ("It is well documented that marijuana-related entities in states where marijuana is legal have difficulty obtaining banking services. The banking drought extends beyond businesses that directly handle marijuana. For example, Wells Fargo Bank closed the account of Marijuana Ventures, a magazine aimed at cannabis growers and retailers. When the marijuana industry asks federal and state financial institutions why they will not provide banking services, the institutions point to federal law." (footnotes omitted)); Kerry Zinn, Opinion, *It's Time for Congress to Resolve the Cannabis Banking Conundrum*, CREDIT UNION J. (Jan. 28, 2020, 9:10 AM), https://www.cujournal.com/opinion/its-time-for-congress-to-resolve-the-cannabis-banking-conundrum [https://perma.cc/27WH-4NZ4].

29. *See generally* William J. McNichol, Jr., *The New Highwayman: Enforcement of U.S. Patents on Cannabis Products*, 101 J. PAT. & TRADEMARK OFF. SOC'Y 24 (2019) (discussing the U.S. Patent and Trade Office's limited authority to grant patents on illegal cannabis inventions).

30. *See, e.g.*, Francis J. Mootz III, *E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43, 50 (2017) ("[C]ourts read insurance coverage narrowly when the loss is related to the business of marijuana."); Ryan B. Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297, 347 (2017) ("Marijuana is not a crop eligible for crop insurance under the FCIC. Nor have marijuana farmers ever received federal disaster relief . . . Without insurance or disaster relief, marijuana farmers are more vulnerable to extreme events than other farmers, such as droughts, floods, and, increasingly, wildfires." (footnote omitted)).

31. *See* Adrian A. Ohmer, Note, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 97, 112–18 (2013).

32. Most articles or blog posts are short and superficially raise the issue. *See, e.g.*, William Goren, *Medical Marijuana and the ADA: Interactive Process is Everything*, UNDERSTANDING THE ADA (July 23, 2017), https://www.williamgoren.com/blog/2017/07/23/medical-marijuana-ada-interactive-process/ [https://perma.cc/SQF4-JZ8M]; Jon Hyman, *The (High) Times They are a Changin': Medical Marijuana and Disability Discrimination*, OHIO EMPLOYER L. BLOG (July 19, 2017), https://www.ohioemployerlawblog.com/2017/07/the-high-times-they-are-changin-medical.html [https://perma.cc/CR3B-HUSX]; Dianna D. McCarthy, *The Changing Tides of Disability Discrimination Claims: The ADA, Website Accessibility and Medical Marijuana*, WILLIS TOWERS WATSON (Nov. 16, 2017), https://www.willistowerswatson.com/en-US/insights/2017/11/epl-brief-the-changing-tides-of-disability-discrimination-claims [https://perma.cc/2XVZ-FPKX]; Eric B. Meyer, *Can a Marijuana Dispensary be Responsible for a Manager's Sexual Harassment?*, EMPLOYER HANDBOOK (June 21, 2019), https://www.theemployerhandbook.com/can-a-marijuana-dispensary-be-responsible-for-a-managers-sexual-harassment/ [https://perma.cc/8LES-FCW3].

33. The only discussion identified through research is a blog post published in 2017 by ADA expert William Goren. *See* William D. Goren, *Marijuana Dispensaries and Title III of the ADA*,

Enacted in 1990, Title III was a response to the pervasive problem of "unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[34] Prior to its enactment, federal antidiscrimination protections for persons with disabilities "only address[ed] discrimination by Federal agencies and recipients of Federal financial assistance."[35] Title III closed this coverage gap by extending antidiscrimination requirements to private entities.[36] It provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[37] The Act defines "place of public accommodation" as any privately owned entity that affects commerce and falls within one of twelve broadly defined functional categories,[38] including sales establishments,[39] places of entertainment,[40] and health care providers.[41] Title III requires businesses to design and build places of public accommodation to parameters that provide access to disabled persons. In the case of existing facilities, entities must "make reasonable modifications" and "remove architectural barriers . . . where such removal is readily achievable."[42]

UNDERSTANDING THE ADA (Aug. 23, 2017), https://www.williamgoren.com/blog/2017/08/23/marijuana-dispensary-marijuana-store-title-iii-ada/ [https://perma.cc/B2TU-UVFK].

34. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165, 1166 (July 26, 1990); *see also* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 377 (2000).

35. S. REP. NO. 101-116, at 18–19 (1989). "Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of title III of the legislation is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life." *Id.* at 58; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 701(b)(2) (2012) (stating that a purpose of the Act is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities").

36. *See* 42 U.S.C. § 12182 (2012). Beyond Title III, the Americans with Disabilities Act of 1990 prohibits disability discrimination in employment (Title I, 42 U.S.C. § 12112), public services (Title II, 42 U.S.C. § 12132), and telecommunications (Title IV, 47 U.S.C. § 225). *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327. Title V contains miscellaneous provisions that apply to the EEOC's enforcement of Title I. *See* 42 U.S.C. § 12209(1)(5)–(6).

37. 42 U.S.C. § 12182(a).

38. *See id.* § 12181(7).

39. *Id.* § 12181(7)(E).

40. *Id.* § 12181(7)(C).

41. *Id.* § 12181(7)(F).

42. *Id.* § 12182(b)(2)(A)(ii), (iv). "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 28 C.F.R. § 36.104 (2019). Readily achievable modifications include, *inter alia*, the removal of barriers, the installation of ramps, the repositioning of shelves, and the widening of doors. *See* 28 C.F.R. § 36.304 (2019). Title III provides an affirmative defense for modifications that are not "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv)–(v). However, this affirmative defense applies only to facilities built prior to the ADA's enactment. A facility built after Title III's enactment must comply with the administrative guidance in effect at the time of its construction. *See* 28 C.F.R. § 36.401 (2019) (providing rules for new construction); E-mail from William Goren to Chris Conrad (Sept. 27, 2019) (on file with author); Leah Riley, *A Misunderstood Area of ADA Compliance: Existing Facilities*, FINAL REV., BURNHAM NATIONWIDE (June 22, 2016, 8:00 AM), https://www.burnhamnationwide.com/final-review-blog/a-misunderstood-area-of-ada-compliance-existing-facilities [https://perma.cc/GQF9-HF6M]. Even when the affirmative defense

Noncompliance with these requirements can result in legal liability, imposed through private suits and enforcement actions brought by the Justice Department.[43]

III. WHETHER DISPENSARIES FIT WITHIN TITLE III'S STATUTORY SCHEME

Do Title III's protections extend to disabled would-be patrons of marijuana dispensaries? A canvasing of the ADA's legislative history, text, and administration reveals that granting this relief comports with the letter and spirit of the Act.

A. LEGISLATIVE HISTORY

At the time of the ADA's passage in 1990, the prospect of legally operating cannabis dispensaries was a pipe dream for marijuana advocates. The first state medical marijuana law did not pass until 1996, when Californians approved Proposition 215 through a statewide ballot initiative.[44] Assuredly, then, barriers to disabled persons' access to these establishments were "not the principal evil Congress was concerned with" when enacting Title III.[45] Nonetheless, whether dispensaries were "perceived at all" during the legislative drafting does not decisively bear on whether they fit within the ADA's remedial mechanics.[46]

For one, Title III ambitiously and unambiguously set out to cure the social ill of disabled persons' diminished participation "in *all aspects of society*."[47] In floor debates, early sponsors referred to the ADA as the "20th century Emancipation Proclamation for all persons with disabilities"[48] because the bill sought to release

applies, it is elastic and "takes into account the financial means of the business in question." Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 94 (2006). A dispensary that starts small may initially be excused from expensive, large-scale modifications to facilities under Title III. However, continued growth will typically trigger the obligation to eliminate architectural barriers to access. *See id.*

43. *See* 42 U.S.C. § 12188(a). The Attorney General can also pursue enforcement against a business if there exists a "pattern or practice of discrimination" or if the discriminatory conduct "raises an issue of general public importance." *Id.* § 12188(b)(1)(B). However, owing to the Attorney General's limited resources, private suits are the primary means by which Title III injuries are redressed. *See* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007).

44. *See* Stephen Gutwillig, *Medical Marijuana in California: A History*, L.A. TIMES (Mar. 6, 2009, 12:00 AM), https://www.latimes.com/health/la-oew-gutwillig-imler6-2009mar06-story.html.

45. *Cf.* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (making this point in the context of "male-on-male" sexual harassment in the workplace).

46. *Cf.* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring) (observing that the absence of an expressed legislative purpose to legalize race-conscious affirmative action plans under Title VII should not serve as a per se bar to these plans); *see also* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 324–26 (1989) (discussing "meta-intent" as a mode of divining legislative purpose).

47. *See* 42 U.S.C. § 12101(a) (emphasis added). The positions of the Attorney General and the Senate Committee on Labor and Human Resources preceding the ADA's enactment embrace this sentiment, recognizing the directive of "bring[ing] Americans with disabilities into the mainstream of society 'in other words, full participation in and access to *all aspects of society*.'" S. REP. NO. 101-116, at 11 (1989) (emphasis added).

48. 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin); *see also* Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165, 1165 (July 30, 1990) ("[The ADA] signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.").

an estimated forty-three million people[49] from the "bondage of unjust, unwanted dependency."[50] This dependency, which resulted in social isolation of the disabled population,[51] followed, in large part, "from the discrimination [disabled persons] encounter[ed] when attempting to engage in the ordinary social and commercial transactions of daily life."[52]

Against this backdrop, early proposals of Title III pressed for an extremely broad definition of "place of public accommodation" which would have extended the Act's reach to any privately-owned business affecting commerce and "used by the general public as customers, clients, or visitors."[53] This sweeping classification, unsurprisingly, roused concern among business interests within the political branches. Attorney General Dick Thornburgh, presenting the first Bush Administration's position to the Senate, suggested that the proposed coverage "was not specific enough."[54] Ensuing negotiations led the bill's sponsors in Congress to adopt an approach that defined "place of public accommodation" by providing an enumerated list of twelve establishment categories subject to Title III's protections.[55] This list included "sales or rental establishment[s]."[56] This narrowed coverage with respect to the initial proposal, but still expanded Title III's strictures well beyond the "place of public accommodation" provisions of Title II of the 1964 Civil Rights Act, which encompass only places of eating, lodging, and entertainment.[57]

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49. Sutton v. United Air Lines, 527 U.S. 471, 485–87 (1999).

50. S. REP. NO. 101-116, at 16 (1989) (quoting Sandy Parrino, chairperson of the National Council on Disability).

51. *See* HUMPHREY TAYLOR ET AL., INT'L CTR. FOR THE DISABLED, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 33–46 (1986); *see also* Robert L. Burgdorf Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551, 553 (1991) (describing a poll finding "that people with disabilities are an extremely isolated segment of the population").

52. Burgdorf, *supra* note 51, at 555; *see also* S. REP. NO. 101-116, at 2 ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life . . . .").

53. *See Americans with Disabilities Act of 1989: Hearings on S. 933 Before the S. Comm. on Labor and Human Res. & the Subcomm. on the Handicapped*, 101st Cong. 534 (1989) [hereinafter *Hearings on S. 933*] (statement of Robert L. Burgdorf, Jr., Vice President, Project ACTION of the National Easter Seal Society).

54. Burgdorf, *supra* note 51, at 558.

55. *See* 42 U.S.C. § 12181(7) (2012).

56. *Id.* § 12181(7)(E).

57. *See id.* § 2000a; *see also* H.R. REP. No. 101-485, pt. 3, at 54 (1990) ("A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public."); S. REP. NO. 101-116, at 97 (providing additional views of Sen. Hatch) ("The term 'public accommodation' is defined very broadly. It includes not only businesses covered by Title II of the 1964 Civil Rights Act, which bans racial, ethnic, and religious discrimination in public accommodations, defined as places of eating; places of lodging; places of entertainment; and gasoline stations, but it also includes retail stores, service establishments, and other elements of the private sector.").

Even with this compromise, many opponents to Title III's broad coverage continued to object. Senator Robert Dole, a key sponsor of the ADA, noted his continued reservations "about . . . what constitutes a public accommodation" on the day the updated provision was introduced.[58] But Senator Harkin, the primary advocate for Title III's expansive coverage, would entertain no further concessions.[59] Indeed, his contingent in Congress compromised with the opposition by instead stripping out monetary damages from the remedies available to private litigants.[60] This brought Title III's relief provisions in parity with Title II of the Civil Rights Act,[61] while leaving intact its broad coverage provisions. This fragile compromise held firm, and the bill was enacted shortly thereafter.[62]

Though this legislative history, "[a]s a formal matter . . . [is] not the law enacted by Congress,"[63] it nonetheless provides useful direction to resolve ambiguity in Title III's vigorously negotiated coverage provisions with respect to dispensaries.[64] Its guidance is clear: allowing sales establishments—including cannabis storefronts—to discriminate regarding access on the basis of disability keeps disabled persons from engaging in the ordinary social and commercial transactions of daily life and relegates them to bondage by segregating them from the mainstream of American life.[65] Much like "it makes no sense" to prohibit discrimination against disabled persons in local delicatessens but not in

58. 134 CONG. REC. 9,386 (1988) (statement of Sen. Dole); *see also* Colker, *supra* note 34, at 383–84 (contextualizing Sen. Dole's statement).

59. *See* 135 CONG. REC. 19,803 (1989) (statement of Sen. Harkin).

60. *See id.* ("The major component of the compromise was the agreement by the chief Senate sponsors to cutback the remedies included in the original bill in exchange for a broad scope of coverage under the public accommodations title of the bill; in other words to extend protections to most commercial establishments large and small open to the public. We would thus consider any amendment that pertains to either of these two aspects of the legislation an amendment designed to destroy this fragile compromise."); *see also* Colker, *supra* note 34, at 383 ("[T]he bill that was finally enacted permitted private parties to obtain only injunctive relief—a weaker remedy.") (footnote omitted).

61. *Compare* 42 U.S.C. § 12188(a)(2) *with id.* § 2000a-3. The remedies provision in the original bill would have provided for monetary damages under a private right of action. *See* H.R. 4498, 100th Cong. § 9(b)(1) (1988) ("Any person who believes that he or she or any specific class of individuals is being or is about to be subjected to discrimination on the basis of handicap in violation of this Act, shall have a right, by himself or herself, or by a representative, to file a civil action for injunctive relief, monetary damages, or both in a district court of the United States."); *see also* Colker, *supra* note 34, at 383.

62. *See* 135 CONG. REC. 19,803 (1989) (statement of Sen. Harkin); Colker, *supra* note 34, at 383.

63. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2149 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

64. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 319 (2005) (statement of John G. Roberts, Jr.) ("[Y]ou look to legislative history to clarify ambiguity. You don't look to legislative history to create ambiguity.").

65. *See supra* notes 47–52 and accompanying text. This view of legislative intent is further buttressed by Congress's express prohibition of the Executive Branch's use of budgetary funds to prevent the states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019). This language has been ratified in congressional budget riders going back to the Rohrabacher–Farr amendments of 2014. *See* Robert A. Mikos, *Congress Renews DOJ Spending Rider*, MARIJUANA L., POL'Y, & AUTHORITY BLOG (Mar. 28, 2018), https://my.vanderbilt.edu/marijuanalaw/2018/03/congresss-renews-doj-spending-rider/ [https://perma.cc/4AT3-HLWB].

pharmacies,[66] it also makes no sense to arbitrarily permit discrimination at dispensaries simply because they operate with tacit—rather than express—approval from the Justice Department. It does not matter if an establishment is loathsome for purposes of subjecting it to Title III's strictures.[67] The ADA's remedial design controls in judicial construction.[68] A hard bargain was struck by Congress on Title III's broad coverage.[69] Courts, in their ordinary course, defer to these legislative pacts.[70]

B. TEXT

Though the text of the ADA makes no direct reference to dispensaries, it offers certain clues about whether these storefronts fit within Title III's definition of "place of public accommodation."

Principally, section 12187 of the Act excludes from the ADA's regulatory sweep "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964[71] [and] religious organizations or entities controlled

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66. *See Hearings on S. 933*, *supra* note 53, at 534–35 (testimony of Robert L. Burgdorf Jr.).

67. *See* Dave Reynolds, *Strip Club Caught Trying to Ignore Accessibility Law*, INCLUSION DAILY EXPRESS (Feb. 16, 2006), http://mn.gov/mnddc/news/inclusion-daily/2006/02/021606inaccstripclub.htm [https://perma.cc/G4LC-96SV] ("When Shangri-La East opens, it will be Fort Wayne's largest strip club—and the only one designed specifically for that purpose. It will also be accessible to patrons with disabilities. Or it simply will not open. Allen County Building Commissioner Dave Fuller told the News-Sentinel that the new building's owner has been ordered to install an elevator in the five-level structure to comply with the 1990 Americans with Disabilities Act.").

68. The growing number of courts recognizing websites as places of public accommodation serve as a powerful example of this view. *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir. 2019) (holding that the ADA applies to a restaurant's website and mobile application), *cert. denied*, No. 18-1539, 2019 WL 4921438 (U.S. Oct. 7, 2019); Haynes v. Dunkin' Donuts, LLC, 741 Fed. Appx. 752, 754 (11th Cir. 2018) (refusing to dismiss claim alleging that restaurant's website violated ADA); *see also* Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RES. L. REV. 1079, 1087–90 (2019) (observing that courts in the First, Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits have applied Title III to websites under various standards).

69. *See* Colker, *supra* note 34, at 384 ("[C]ompromise was necessary to attain a bipartisan bill with a broad scope of coverage.").

70. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 195 (2005) (Thomas, J., dissenting) (arguing that the majority's approach "returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose" and "substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text").

71. It is true, as Robert Mikos has observed, that some cannabis businesses have been organized as cooperatives or private clubs, arguably placing them within § 12187's statutory exemption to Title III. *See* E-mail from Robert A. Mikos, Professor of Law, Vanderbilt Law School, to Chris Conrad (Oct. 4, 2019) (on file with author). But courts ruling on this issue have recognized that an organization's genuine selectivity in admission procedures serves as the lodestar in determining "private club" status for purposes of the Act. *See, e.g.*, Lobel v. Woodland Golf Club of Auburndale, 260 F. Supp. 3d 127, 140–45 (D. Mass. 2017); United States v. Lansdowne Swim Club, 713 F. Supp. 785, 797 (E.D. Pa. 1989); William Goren, *Just What Is a Private Club?*, UNDERSTANDING THE ADA (June 13, 2017), https://www.williamgoren.com/blog/2017/06/13/private-club-exemption-ada/ [https://perma.cc/2PUA-ZHGR]. Because these cooperatives and private clubs—entities already facing pressure in many legalizing states to sunset their operations, *see* Alison Malsbury, *California Announces End Date for Collectives and Cooperatives*, CANNA LAW BLOG (Jan. 18, 2018), https://www.cannalawblog.com/

by religious organizations, including places of worship."[72] These two set-asides mark the only direct licensing of disability discrimination in Title III. At the time of the bill's enactment, other "places open to the public" were thought to be protected by the overlapping provisions of the ADA, the Rehabilitation Act, and the Fair Housing Act (FHA).[73]

Congress's failure to reference establishments that vend cannabis among section 12187's exemptions does not serve as authoritative evidence of its intention to subject them to Title III's requirements. *Expressio unius*[74] applies only when "circumstances support[] a sensible inference that the term left out must have been meant to be excluded."[75] When it is not reasonable to assume that Congress "considered the unnamed possibility and meant to say no to it," courts generally avoid making negative inferences from textual omissions.[76]

Still, "context matters in interpreting statutes."[77] The meaning of a provision like section 12187 must be construed in light of its place in Title III's overall

california-announces-end-date-for-collectives-and-cooperatives/ [https://perma.cc/A384-N25Y]—rarely erect strict barriers to admission, this issue seems of limited practical consequence.

72. 42 U.S.C. § 12187 (2012). The private club exemption sought to allow these organizations to "choose a far less costly form of building," thereby offsetting the financial burden of complying with Title III's "complex . . . structural and architectural regulations." *See* 135 CONG. REC. 19,882–83 (1989) (statement of Sen. Humphrey). The religious organization exemption sought to avoid First Amendment concerns raised by burdens imposed on Free Exercise. *See Hearings on S. 933*, *supra* note 53, at 120–21 (statement of Sen. Harkin, Member, S. Comm. on Labor & Human Res.) ("Are bona fide religious institutions precluded by the ADA from imposing qualifications based on religion when such qualifications are related to a bona fide religious purpose? The answer is no. Any bona fide religious institution may continue to impose qualification standards based on religion when such standards are related to a bona fide religious purpose. That is exactly as it is in the Civil Rights Act. So they do have a bona fide religious exemption under the bill."); *id.* at 117 (statement of William Ball, Association of Christian Schools International) ("So the other problem we have had with the ABC bill is precisely the problem that we have here, in that it puts Government very heavily in a position of control of religious schools.").

73. *See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the H. Comm. on the Judiciary*, 101st Cong. 339–40 (1989) (testimony of Robert L. Burgdorf, Jr., Associate Professor, District of Columbia Law School) ("While the definition of public accommodations in the ADA is broad, it certainly does not include every new building in the U.S. Private homes, apartments, condominiums, cooperatives, and other private housing facilities and residences are not included (many multifamily residences are subject to the accessibility requirements of the Fair Housing Amendments Act). Buildings owned by the federal government are not included (these are already subject to accessibility requirements under the Architectural Barriers Act and section 504). Buildings owned by state and local governments are not within the definition of public accommodation, but most will be covered by the 'public service' provisions in Title II. Specifically exempted from the coverage of this Title of the bill are private clubs, and religious organizations and entities controlled by religious organizations. . . .").

74. The *expressio unius est exclusion alterius* canon of statutory interpretation provides that the express inclusion of one item implies the exclusion of other items not listed. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 911 n.1 (2016) (citing WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 852–54 (4th ed. 2007)).

75. NLRB v. SW General, Inc., 137 S. Ct. 929, 933 (2017) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002)).

76. Marx v. General Revenue Corp., 568 U.S. 371, 381 (2013) (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003)).

77. Yates v. United States, 135 S. Ct. 1074, 1092 (2015) (Kagan, J., dissenting).

statutory scheme—an island of exemption in a sea of robust coverage.[78] The ADA's legislative history, which reflects congressional intent to protect disabled persons from the discriminatory practices of "sales or rental establishments,"[79] rather than the other way around, "puts extra icing on a cake already frosted."[80] Had Congress, any time after the first cannabis dispensary opened in 1992,[81] wished to exclude these businesses from Title III's requirements, it had a preexisting provision for exclusions to which it could add.[82] And though "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle,"[83] the weight of structural evidence strongly favors subjecting dispensaries to Title III's requirements.

Second, though the text of the ADA is silent on dispensaries, it speaks expressly of "illegal drugs." Title V's miscellaneous provisions provide that "for purposes of [the ADA], the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[84] Title V defines the "illegal use of drugs" as "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act."[85] It also clarifies that "the term 'drug' means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act."[86]

Although these provisions can be strained to withhold Title III's protections from customers patronizing dispensaries, such an interpretation would be an unfaithful reading of the ADA. Title V's reference to illegal drugs, in fact, was a direct response to lawmakers' concerns that prohibitions against adverse employment actions taken against disabled persons on the basis of their disability could result in legal liability for private and public employers that terminate employees because of illegal drug use. House Reports observe that "[Title V] makes it clear that current users of illegal drugs are not protected from [employment] actions

78. *See id.* (citing Tyler v. Cain, 533 U.S. 656, 662 (2001)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts. . . . Context is a primary determinant of meaning.").

79. H.R. REP. No. 101-485, pt. 3, at 54 (1990)

80. *Yates*, 135 S. Ct. at 1093 (Kagan, J., dissenting).

81. *See* DAVID M. FAHEY, ALCOHOL AND DRUGS IN NORTH AMERICA: A HISTORICAL ENCYCLOPEDIA 124 (2013).

82. *See, e.g.*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)) (adding discrimination "on the basis of pregnancy, childbirth, or related medical conditions" to Title VII of the Civil Rights Act of 1964 in response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

83. Helvering v. Hallock, 309 U.S. 106, 121 (1940).

84. 42 U.S.C. § 12210(a) (2012). As William Goren has observed, the placement of the comma in § 12210(a) can arguably be construed to broaden the provision's reach beyond employees. *See* E-mail from William Goren to Chris Conrad, *supra* note 42. However, this uncertainty is abated by the weight of the ADA's legislative history. *See id.*; *see also infra* notes 87–94 and accompanying text.

85. 42 U.S.C. § 12210(d)(1).

86. *Id.* § 12210(d)(2).

based on their current use of illegal drugs."[87] Likewise, legislative history from the Senate directly ties Title V's provisions on illegal drug use to the employer-liability provisions of Title I.[88] Although the "whole act" canon—a standard textualist tool popular "across a broad spectrum of interpretative philosophies"[89]—requires that Title III's provisions be construed in light of the broader ADA,[90] it cannot override the plain text of Title V,[91] which makes clear that the "illegal use of drugs" is relevant only insofar as it immunizes from liability a "covered entity act[ing] on the basis of such use."[92] Title V's sole reference to "drug distribution" to define drugs, the use of which triggers liability protections for "covered entities," further buttresses this view—that the Act's illegal drug provisions do not pertain to Title III.[93] An alternative reading would create an absurd result, converting a provision structured by Congress as a shield for legitimate business decisions into a mechanism that grants federally illegitimate businesses a heightened, protected status.[94]

C. FEDERAL IMPLEMENTATION AND ADMINISTRATIVE INTERPRETATION

The Justice Department's administrative instructions for implementing the ADA's public accommodation provisions also support extending Title III's obligations to dispensaries. At minimum, the Department's well-reasoned views on Title III "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[95] At most, Congress's express administrative delegation to the Justice Department under Title III entitles the

87. *See, e.g.*, H.R. REP. NO. 101-485, pt. 1, at 45 (1990).

88. S. REP. NO. 101-116, at 106 (1989) ("[Section V] is intended to make clear that an individual applicant or employee who currently uses alcohol or illegal drugs is not protected by the ADA's nondiscrimination provisions. Similarly, this section makes clear that an individual who is an alcoholic or current or past user of drugs—illegal or legal—can be held to the same standards of job performance and behavior as other individuals, even if the unsatisfactory performance or behavior is related to the drug use or alcoholism.").

89. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 61 & n.357 (2014).

90. *See* RONALD DWORKIN, LAW'S EMPIRE 339–40 (1986); SCALIA & GARNER, *supra* note 78, at 167–69.

91. *See* Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

92. 42 U.S.C. § 12210(a) (2012); *see also* H.R. REP. NO. 101-485, pt. 2, at 77 (1990) ("The phrase 'when the covered entity acts on the basis of such use' is intended to make clear that if an adverse action is taken against a current user of illegal drugs who is otherwise disabled, to the extent the adverse action is taken on the basis of the disability still covered by the Act, the covered entity must comply with the Act and may not unjustly discriminate. However, if the action is taken on the basis of the current use of illegal drugs, the disabled person does not have protection simply by virtue of his or her disability. The Committee understands that this was the intent of the Senate in passing its version of [Section V].").

93. *See* 42 U.S.C. § 12210(d)(1).

94. *See* H.R. REP. NO. 101-485, pt. 2, at 77 (1990).

95. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 598 (1999) (internal quotation marks omitted) (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

agency to *Chevron* deference.[96] In either case, the history of the DOJ's implementation of the Act suggests that the areas leading to and around dispensary "shelf-space" committed to lawful products like merchandise, magazines, and albums[97] qualify as "places of public accommodation" for purposes of Title III.

When the ADA was enacted, many businesses struggled to ascertain whether they were subject to Title III's requirements.[98] Professional offices of dentists, doctors, and psychologists, located in residences, fit into two conflicting categories of coverage: private homes, which were exempted from Title III,[99] and "professional office[s]," which were defined as "places of public accommodation" and therefore subject to Title III.[100] Compounding this issue, the Act's provisions failed to articulate the obligations of places of public accommodation to modify "mixed-use facilities"—facilities not entirely accessible to the public.[101]

To assuage these concerns, the Justice Department promulgated a rule pursuant to its statutory authority under section 12186(b) of the Act that provided that any *portion* of a facility "open to the general public" that otherwise qualifies as a "place of public accommodation" is "subject to the requirements for public accommodations."[102] This position embraced the concept of spatial severability: "the portion of [a] home dedicated to office use [like an entryway also used as the public entrance to the office] would be considered a place of public accommodation," whereas exclusively private portions of the home would be exempted.[103] The Department explained that this system applied generally:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation

96. *See* 42 U.S.C. § 12186(b); *see also Bragdon*, 524 U.S. at 646 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

97. Most dispensaries sell lawful goods. *See, e.g.*, *Glass & Goods*, UNCLE IKE'S, https://ikes.com/locations/glass-and-goods/ [https://perma.cc/EK4H-KQ4K]. Note that the sale of drug paraphernalia, including bongs, pipes, airtight containers, hydroponic products, and marijuana Miracle-Gro, can fall within federal prohibitions. *See* Breanna C. Philips, Note, *The Authorization Continuum: Investigating the Meaning of "Authorization" Through the Lens of the Controlled Substances Act*, 72 VAND. L. REV. 1335, 1338–39, 1347–50 (2019).

98. *See* Colker, *supra* note 34, at 384 (discussing Attorney General Thornburgh's concerns about the impact of Title III on businesses); *supra* note 42 (discussing the complexity of Title III's "readily achievable" affirmative defense).

99. *See, e.g.*, Lancaster v. Phillips Invs., LLC, 482 F. Supp. 2d 1362, 1366 (M.D. Ala. 2007); Indep. Housing Servs. of S.F. v. Fillmore Ctr. Assocs., 840 F. Supp. 1328, 1344 (N.D. Cal. 1993).

100. *See* 28 C.F.R. § 36.104 (2019); *id.* pt. 36, app. C, § 36.102.

101. *See* 28 U.S.C. § 12182(b)(2)(A).

102. *See, e.g.*, 28 C.F.R. § 36.104 (defining a "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located"); *see also id.* pt. 36, app. C, § 36.102.

103. *Id.* pt. 36, app. C, § 36.104.

> defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route.[104]

The Department's guidance demonstrates a simple rule: areas used to access portions of facilities that function as places of public accommodation are places of public accommodation for purposes of Title III.[105] Courts, ruling on the ADA classification of "mixed-use" facilities, agree: "where only part of [a] facility is open to the public, the portion that is closed to the public is not a place of public accommodation and thus is not subject to Title III of the ADA."[106] Applying this rule to dispensaries invariably leads to the conclusion that access to all portions of cannabis storefronts that offer lawful products is protected under Title III, even if areas exclusively dedicated to selling cannabis are not.

Interestingly, this incentivizes noncompliant dispensaries to segregate illegal offerings into inaccessible store space that would otherwise violate Title III. But, as Robert Mikos—author of the *Marijuana Law, Policy, and Authority Blog*—observes, there are also compelling tax reasons under 26 U.S.C. § 280E for dispensaries to commingle their legal and illegal inventory.[107] Provided that these incentives offset, the Justice Department's administrative implementation of Title III suggests that, at least for cannabis storefronts selling legal goods, injunctive relief ordinarily ought to issue.[108]

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104. *Id.*; *see also* U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL § III-1.2000 (1993), https://www.ada.gov/taman3.html [https://perma.cc/K3D4-9FUG] ("Although title III does not apply to strictly residential facilities, it covers places of public accommodation within residential facilities. Thus, areas within multifamily residential facilities that qualify as places of public accommodation are covered by the ADA if use of the areas is not limited exclusively to owners, residents, and their guests. . . . A private residential apartment complex contains a rental office. The rental office is a place of public accommodation.").

105. *See* 28 C.F.R. pt. 36, app. C, § 36.104; 42 U.S.C. § 12181(7) (2012). This guidance represents a permissible interpretation of § 12182's use of "facility" under *Chevron* Step Two. *See* Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

106. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1048 (9th Cir. 2008); *see also* Olinger v. U.S. Golf Ass'n, 205 F.3d 1001, 1004–05 (7th Cir. 2000), *vacated on other grounds*, 532 U.S. 1064 (2001) (approving of the "mixed-use" rule, but not resting the holding on it); Kindle v. Fifth Third Bank, No. 1:14 CV 6502, 2015 WL 5159890, at *3 (N.D. Ill. Sept. 1, 2015); Rodriguez v. Barrita, Inc., 10 F. Supp. 3d 1062, 1072 (N.D. Cal. 2014); No Barriers, Inc. v. BRH Tex. GP, LLC, No. CV.A. 301CV0344-R, 2001 WL 896924, at *3–4 (N.D. Tex. Aug. 2, 2001).

107. *See* Robert A. Mikos, *Interesting New Tax Court Decision on Section 280E*, MARIJUANA L., POL'Y, & AUTHORITY BLOG (Jan. 23, 2019), https://my.vanderbilt.edu/marijuanalaw/2019/01/564/ [https://perma.cc/XH2Y-FA55]; *see also* Patients Mut. Assistance Collective Corp. v. Comm'r, 151 T.C. 176, 186 (2018).

108. Even the smallest marijuana dispensaries (by revenue) in Washington State sell lawful goods. *See, e.g.*, *Check Out the New Oasis Vision Pipe!*, 2020 CANNABIS SOLUTIONS (Oct. 2, 2019), https://www.2020-solutions.com/single-post/2019/10/02/Check-out-the-new-Oasis-Vision-Pipe [https://perma.cc/F3ZZ-2NVH] ("Our buyers travel to Las Vegas twice a year to look for the latest and greatest gadgets to enhance your cannabis experience. Though we mostly purchase glass . . . we always have our eyes open for new products that we know you will fall in love with."); *Gallery*, LINK CANNABIS CO., https://thelinkcannabis.business.site/ [https://perma.cc/5PYA-YTEG] (last visited Mar. 1, 2020); *Gallery*, EVERGREEN MEADOWS CANNABIS, https://evergreen-meadows-cannabis.business.site/#gallery [https://perma.cc/JF2H-RPDF] (last visited Mar. 11, 2020). These dispensaries' revenues were calculated

IV. LEGAL DOCTRINES THAT COMPLICATE TITLE III'S REACH TO DISPENSARIES

The legislative history, text, and administration of Title III make clear that dispensaries should fit within the ADA's zone of statutory protection. Perhaps no more is needed to subject these businesses to potential liability. After all, if the Justice Department approves of marijuana distribution in the states, correlative protections should extend to customers and employees that serve instrumental roles in the marketplace.[109] It also defies logic to permit cannabis businesses to profit from the Justice Department's unprecedented nonenforcement policy while not requiring them to incur obligations that other legitimate businesses must bear. These concerns have apparently resonated with the few federal courts that have ruled on civil litigation involving marijuana businesses to date.[110]

On the other hand, fairness considerations may not necessarily trump long-standing principles of equity—the rule against illegal injunctions, *in pari delicto*, and the "unclean hands" doctrine—that deter courts from issuing relief to parties engaged in wrongdoing.

A. THE RULE AGAINST ILLEGAL INJUNCTIONS

In general, courts "will not exert their powers . . . to compel wrong-doing."[111] The Supreme Court has applied this bedrock principle to civil rights cases in the past without hesitation.[112] But where, as here, an injunctive order would not constitute a per se command to perform an illegal activity, the law is less settled.

The Supreme Court has recognized a distinction between cases in which the courts are made "a party to the carrying out of [illegal acts]"[113] and cases in which they can stop short of "enforcing . . . precise conduct made unlawful."[114] The former category of cases usually involves agreements that, by their letter, seek to violate federal or state law—for example, contracts to restrain trade or to commit

using data published by Washington State. *See Retailers*, 502 DATA, https://502data.com/retailers [https://perma.cc/R9NB-VQBL] (last visited Mar. 1, 2020).

109. I thank Mike Gottesman for this helpful framing.

110. *See infra* Section V.A.

111. D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 172 (1915).

112. For this principle applied in the context of the National Labor Relations Act, see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002) (NLRB order conflicted with immigration laws); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 542 n.9 (1984) (NLRB order conflicted with the Bankruptcy Code); *Connell Construction Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (NLRB order conflicted with antitrust policies). The Supreme Court has not taken up this issue with respect to Title VII, though lower courts have suggested that *Hoffman Plastic* would not preclude illegal immigrants from obtaining relief under its protections. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004) (stating in dicta that, even after *Hoffman Plastic*, "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases"); *see also* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1286 (N.D. Okla. 2006); Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006).

113. Kelly v. Kosuga, 358 U.S. 516, 520 (1959) (citing Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261 (1909)).

114. Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 80 (1982); *see also* Bassidji v. Goe, 413 F.3d 928, 936–37 (9th Cir. 2005).

bank robbery.[115] In these cases, courts cannot grant relief for reasons of public policy.[116]

However, where "relief sought does not seek directly to order illegal activity,"[117] courts can issue relief. The case of *Ginsburg v. ICC Holdings* is instructive.[118] In *Ginsburg*, defendant ICC Holdings used "wildly optimistic forecasts" and other misrepresentations to solicit funding from an investor, Ginsburg, for the development of a medical marijuana business.[119] After ICC's business floundered, Ginsburg called for repayment on the loans, which were structured as generic convertible notes. ICC could not repay its debts, so Ginsburg sued for breach of contract.[120] ICC moved to dismiss the complaint, contending that the notes were void and unenforceable because their illegal purpose under the CSA required the court to exert its power to enforce an illegal contract and compel wrongdoing.[121] The court rejected this argument:

> On their faces, the Notes do not violate the CSA. Nothing contained in the Notes requires Ginsburg or ICC to manufacture, distribute, dispense, or possess marijuana. In fact, the Notes do not mention marijuana, ICC's business, or how ICC is to obtain the funds to repay its loan obligations. Instead, the Notes simply set forth the terms of Ginsburg's loans to ICC and provide for the repayment of the loans at a certain rate of interest.
>
> Nor would granting relief in this case require that . . . ICC violate the CSA. Ginsburg seeks repayment of the $9,340,000 that he loaned ICC, plus interest, attorney's fees, costs, and expenses. Obtaining this relief does not require that ICC manufacture, distribute, dispense, or possess marijuana.[122]

The court concluded its analysis by observing that "federal courts do not take [] a 'black-and-white' approach" to the equitable bar posed by illegal injunctions.[123]

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115. *See* Ginsburg v. ICC Holdings, LLC, No. 3:16-CV-2311-D, 2017 WL 5467688, at *7 (N.D. Tex. Nov. 13, 2017) (citing *Kaiser*, 455 U.S. at 78). Courts have said that this category also includes cases that deal with contracts that, though not illegal on their face, require one party to violate a statute or regulation to fulfill its obligation. *See* N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 273 (7th Cir. 1986); *see also* Costello v. Grundon, 651 F.3d 614, 628 (7th Cir. 2011).

116. *See Goe*, 413 F.3d at 937; *see also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42 (1987) ("[A] court may refuse to enforce contracts that violate law or public policy.").

117. *Goe*, 413 F.3d at 936; *see also* Shanehsaz v. Johnson, 259 F. Supp. 3d 894, 901 (S.D. Ind. 2017) ("[T]he critical distinction is . . . between lawsuits that do not request illegal relief and those that would 'demand conduct that is inherently contrary to public policy.'" (quoting *Kaiser*, 455 U.S. at 79)).

118. 2017 WL 5467688.

119. *Id.* at *2.

120. *Id.* at *3–4.

121. *Id.* at *4–7.

122. *Id.* at *7–8 (footnotes omitted).

123. *See id.* at *9; *see also* Mann v. Gullickson, No. 15-cv-03630-MEJ, 2016 WL 6473215, at *7 (N.D. Cal. Nov. 2, 2016) (holding, in case where defendant failed to make payments under contract for sale of consulting business related to marijuana industry, that the court "could grant relief in this case that does not require [defendant] to violate the CSA. [Plaintiff]'s suit seeks [defendant's] full payment for the businesses he sold to her. Mandating that payment does not require [defendant] to possess, cultivate, or distribute marijuana, or to in any other way require her to violate the CSA").

The holding in *Ginsburg* translates directly to the analogous context of a Title III action brought against a dispensary. Ordering a cannabis storefront to modify its entryway so that a wheelchair-bound customer can access legal offerings is a case in which "relief sought does not seek directly to order illegal activity."[124] A disabled patron's purchase of a vinyl reissue of *Workingman's Dead*[125] would not violate the CSA, so such a transaction could validly form the factual predicate of a viable federal suit.[126]

The case is not open and shut. "[C]onsideration of the public interest [is] pertinent in assessing the propriety of any injunctive relief."[127] A comparison between total revenues and revenues from marijuana sales of the largest dispensaries in Washington State makes clear that these businesses, to no surprise, are mostly selling cannabis.[128] A court might therefore feel that the elimination of access barriers at a dispensary contravenes the public interest because it would empower other similarly disabled persons to purchase illegal drugs.[129] But balancing the public interest "generally call[s] for weighing the benefits to the private party from obtaining an injunction against the harms to the government and the public."[130] The equities at stake for plaintiffs are weighty, with enforcement of Title III's provisions necessary to reverse the exclusion of disabled persons from "the mainstream of American life."[131] Further, the federal government's nonprosecution of marijuana offenses in legalizing states—along with the multitude of

124. Bassidji v. Goe, 413 F.3d 928, 936 (9th Cir. 2005); *see also* Shanehsaz v. Johnson, 259 F. Supp. 3d 894, 901 (S.D. Ind. 2017) ("[T]he critical distinction is . . . between lawsuits that do not request illegal relief and those that would 'demand conduct that is inherently contrary to public policy.'" (quoting *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 79 (1982))).

125. GRATEFUL DEAD, WORKINGMAN'S DEAD (Warner Bros. 1970).

126. Pleadings are entitled to an assumption of truth, so a plaintiff that seeks access only to a dispensary's lawful goods should normatively sidestep the "illegal injunction" defense. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679–81 (2009) (recognizing that aside from "legal conclusions," pleadings are entitled to an "assumption of truth").

127. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 32 (2008); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987).

128. In January 2019, Washington State's two largest recreational marijuana chains—Uncle Ike's and Main Street Marijuana—united in an attempted joint sale of both companies. *See* John Schroyer, *Two of Washington's Largest Recreational Marijuana Chains on the Selling Block*, MARIJUANA BUS. DAILY (Jan. 17, 2017), https://mjbizdaily.com/washingtons-two-top-selling-cannabis-stores-for-sale/ [https://perma.cc/4M87-QZF5]. The owners of both businesses boasted of "$50 million in [collective] revenue [in 2016]." *Id*. During that same year, the two dispensaries reported approximately $39 million in marijuana sales—roughly 78% of their revenue. *See* 502 DATA, https://502data.com/ [https://perma.cc/R9NB-VQBL] (last visited Mar. 1, 2020).

129. This aligns with the general principle that courts are resistant to issue awards that "encourage future violations" of the law. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002); *cf.* McNichol, *supra* note 29, at 49 ("It is similarly difficult to imagine a scenario where a *Cannabis* patent owner could avoid arguing that it is somehow in the 'public interest' to protect the patent owner's criminal enterprise.").

130. Doe v. Mattis, 889 F.3d 745, 766 (D.C. Cir. 2018); *see also* Nken v. Holder, 556 U.S. 418, 435 (2009); *Amoco Prod. Co.*, 480 U.S. at 545.

131. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165, 1165 (July 30, 1990).

customers that already access dispensaries[132]—render countervailing harms slight. On balance, then, Title III injunctions against dispensaries seem unoffensive to the public interest.

That is not to say that a plaintiff who tests the principle by directly pleading for access to cannabis products should be granted an injunction. On the contrary, the CSA expressly bars "any person [from] knowingly or intentionally . . . possess[ing] a controlled substance,"[133] and recognizes that "[a]ny person who attempts or conspires to [do so] shall be subject to the same penalties as those prescribed for the offense."[134] Were a court to grant relief to a plaintiff pleading for the ability to transact with a dispensary for cannabis, it would be "commanding unlawful conduct" and acting ultra vires.[135] Likewise, if a court granted relief to a Title III plaintiff seeking an injunction against a dispensary that *only* sells cannabis, it would undeniably be providing access to illegal products sold illegally by a business operating in derogation of federal law. Absent the creative deployment of a window-shopping rationale,[136] a court could not sidestep the issuance of an illegal injunction. This obstacle represents an important equitable limit because it prevents courts from granting plaintiffs access to wholly illicit enterprises like trap houses and brothels.

B. *IN PARI DELICTO*

Plaintiffs that plead for access to cannabis or access to dispensaries that only sell cannabis would also need to overcome the affirmative defense of *in pari delicto*: "In a case of equal or mutual fault . . . the condition of the [defending] party . . . is the better one."[137] This doctrine of equity bars recovery by plaintiffs that, in coordination with a culpable defendant,[138] engage in illegal contracts[139] and other violations of federal law.[140]

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132. *See* Eli McVey, *Chart: Number of Customers Served Per Day by Medical Marijuana Dispensaries, Recreational Shops*, MARIJUANA BUS. DAILY (July 24, 2017), https://mjbizdaily.com/chart-number-customers-served-per-day-dispensaries-rec-stores/ [https://perma.cc/85ER-DNMR].

133. 21 U.S.C. § 844(a) (2012).

134. *Id.* § 846.

135. Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 79 (1982).

136. A window-shopping rationale would argue that patrons could enter a dispensary not to purchase but to gawk.

137. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

138. *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring) ("[T]he '*delictum*' [must be] approximately '*par*' . . . .").

139. *See, e.g.*, Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308–09 (11th Cir. 2013); Brubaker v. Hi-Banks Resort Corp., 415 N.W.2d 680, 681, 685–86 (Minn. Ct. App. 1987); Meador v. Hotel Grover, 9 So. 2d 782, 784, 786 (Miss. 1942); McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 494, 496–97 (N.Y. 1960); Sinnar v. Le Roy, 270 P.2d 800 (Wash. 1954).

140. *See, e.g.*, Pinter v. Dahl, 486 U.S. 622, 635 (1988) (making an *in pari delicto* defense available in actions brought under § 12(1) of the Securities Act of 1933); Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1155 (11th Cir. 2006) (extending *in pari delicto* to the RICO context, where "the public policy objectives . . . are similar to those of the antitrust laws"); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 347 (10th Cir. 2001) (authorizing *in pari delicto* in bankruptcy actions); *In re* Dublin Securities, Inc., 133 F.3d 377, 380 (6th Cir. 1997) (same); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094–95 (2d Cir. 1995) (same). *But*

At its core, *in pari delicto* requires equal fault.[141] This element can be satisfied in a Title III case only if the attempted purchase of marijuana qualifies as a reciprocal wrong "reasonably within the same scale" as a dispensary's commercial distribution of marijuana[142]—a dubious proposition.

But even granting the equivalency of the parties' wrongs, *in pari delicto* can only be raised after misconduct occurs.[143] It also demands cooperation between the parties[144] and is based on the idea that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.[145] A defendant–dispensary in a Title III suit would be hard-pressed to satisfy these requirements. Unless a court considers a plaintiff's inability to physically enter a dispensary due to architectural barriers an "attempt" for purposes of section 846 of the CSA, the case would not be "ripe for the application of [the defense]."[146] Even if a plaintiff's failed entry could constitute a wrong sufficient to trigger *in pari delicto*, the defendant's "rejection" of the plaintiff at the entryway would probably fall short of what is needed to show cooperation among the parties. Finally, judicial authorization of discrimination of disabled persons at a single dispensary would be unlikely to discourage violations of the CSA in the aggregate, especially in a jurisdiction featuring a rich ecosystem of state-sanctioned providers. In fact, such a ruling might have the effect of *encouraging* future violations of the law, as dispensaries could raise *in pari delicto* to ignore Title III's requirements.[147] Concededly, were a court to perform a specific deterrence inquiry, it might reasonably find that denying relief discourages an individual plaintiff's wrongful conduct, especially if a defendant–dispensary is located in a geographically remote area.[148] But courts have rejected this tailored approach, instead analyzing *in pari*

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see Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 314–19 (1985) (declining to extend *in pari delicto* defense to private suits brought by defrauded tippees against corporate insiders and broker–dealers).

141. *See Pinter*, 486 U.S. at 635–36; *see also* Blum, *supra* note 2, at 803 n.104 (collecting cases).

142. *Perma Life*, 392 U.S. at 147 (Fortas, J., concurring).

143. *See* BLACK'S LAW DICTIONARY 794 (7th ed. 1999) ("[A] plaintiff who *has participated* in wrongdoing may not recover damages resulting from the wrongdoing." (emphasis added)). In the case of illegal contracts, misconduct occurs at formation.

144. *See Pinter*, 486 U.S. at 636.

145. *See Bateman*, 472 U.S. at 306.

146. *Cf.* James v. DuBreuil, 500 F.2d 155, 160 (5th Cir. 1974) (citing *Perma Life*, 392 U.S. at 153) ("The benefit to defendant arose only through the active participation of plaintiff in the fraudulent scheme. The fault of the parties being clearly mutual, simultaneous, and relatively equal, this case is ripe for the application of the in pari delicto defense."); *see also In re* Mrs. Weinberg's Kosher Foods, Inc., 278 B.R. 358, 363 (Bankr. S.D.N.Y. 2002) ("But for the New Jersey cases cited above, the case seems ripe for the application of *in pari delicto* to bar the trustee's contemplated lawsuit.").

147. *Cf.* Kenney v. Helix, TCS, Inc., 939 F.3d 1106, 1111–12 (10th Cir. 2019) ("Denying FLSA protection to workers in the marijuana industry would consequently encourage employers to engage in illegal markets where they are subject to fewer requirements. But together the FLSA and CSA discourage businesses from participating in the marijuana industry by alternatively subjecting them to federal labor obligations and imposing criminal sanctions.").

148. Take, for example, Rocky Mtn Dispensary, which, at the time of this Note's writing, is the only dispensary within an hour's drive in every direction in central Oregon. *See Oregon Marijuana*

delicto's deterrent effect at the aggregate class-level.[149]

C. "UNCLEAN HANDS"

Assuming the rule against illegal injunctions and *in pari delicto* do not apply, the alternative defense of "unclean hands" may still bar injunctive relief, even if a plaintiff only pleads for access to a dispensary's lawful goods. Originating in courts of equity,[150] this maxim operates in limine to bar suitors engaged in reprehensible conduct proximately related to the subject matter in controversy and offensive to the dictates of natural justice from invoking the aid of the court.[151] In contrast to *in pari delicto*, "unclean hands" requires no parity or even comparison between the respective faults of the plaintiff and the defendant.[152] And courts, in deciding whether to apply the "unclean hands" doctrine, "are not bound by formula or restrained by any limitation that tends to trammel the . . . just exercise of discretion."[153] Rather, they wield wide latitude in any cause of action[154] to dismiss plaintiffs they believe possess offensive motives proximately related to their underlying claims.[155]

Dispensaries, POTGUIDE, https://potguide.com/oregon/marijuana-dispensaries/ [https://perma.cc/SS7E-QXXP] (last visited Mar. 2, 2020).

149. *See, e.g.*, Lawler v. Gilliam, 569 F.2d 1283, 1293 (4th Cir. 1978) ("Thus, *persons such as* [defendants] would escape liability under § 12(1) simply because their vendees also sold some unregistered securities in violation of the Act. To be sure, promoters who are lower on the chain of distribution should also be deterred from violating the Act, but allowing the defense of *in pari delicto* against them is not the only means of achieving this end." (emphasis added)); Gordon v. duPont Glore Forgan Inc., 487 F.2d 1260, 1263 (5th Cir. 1973) ("But, it can be argued, if we give stock purchasers a broad right of action unencumbered by an *in pari delicto* defense, we will help enforce the stock exchange rules by deterring the brokers who might desire to violate them.").

150. *See* Olmstead v. United States, 277 U.S. 438, 483–84 (1928) (Brandeis, J., dissenting).

151. *See* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995) ("Equity's maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands [is] a rule which in conventional formulation operated *in limine* to bar the suitor from invoking the aid of the equity court . . . ."); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245–46 (1933) (observing that the unclean hands maxim applies "only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation"); Deweese v. Reinhard, 165 U.S. 386, 390 (1897) ("A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.").

152. *See* In Pari Delicto *and Unclean Hands as Defenses to Private Suit Under SEC Rule 10b-5—* Kuehnert v. Texstar Corp., 30 MD. L. REV. 75, 81 (1970) [hereinafter *Defenses to Private Suit Under SEC Rule 10b-5*].

153. *Keystone Driller Co.*, 290 U.S. at 245–46.

154. *See* Blum, *supra* note 2, at 794.

155. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). As far back as the eighteenth century, courts raised the defense sua sponte to foreclose claims based on illegal contracts. *See, e.g.*, Holman v. Johnson, 98 Engl. Rep. 1120, 1121, 1 Cowp. 341, 343 (1775); *see also* McMullen v. Hoffman, 174 U.S. 639, 654 (1899) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."); Higgins v. McCrea, 116 U.S. 671, 685–86 (1886) ("We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for

The Supreme Court has thus denied plaintiffs with "unclean hands" civil rights protections in the past. In *Southern S.S. Co. v. NLRB*, the Court overturned a Board order reinstating seamen that had been fired after engaging in an on-board strike against their officers.[156] The Court's decision was premised on its finding that the strike constituted revolt and mutiny "on the high seas" in violation of 18 U.S.C. § 2192.[157] It reasoned that "the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another."[158] Similarly, in a ruling three years earlier, the Court vacated a Board reinstatement order after several employees had unlawfully commandeered two of their employer's factories in a "sit-down strike."[159] Despite the employer's separate violations of the NLRA, the Court was "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct."[160]

However, in recent years, the Court has embraced a more nuanced position with respect to "unclean hands" when dealing with plaintiffs that seek the refuge of civil rights protections. Although it continues to treat NLRB decisions that provide remedial awards to "employees found guilty of serious illegal conduct" with harsh disapproval,[161] it has recognized "the inappropriateness of invoking broad . . . barriers to relief where a private suit serves important public purposes."[162] In *McKennon v. Nashville Banner Publishing Co.*, the Court found that an employee discharged in violation of the Age Discrimination in Employment Act (ADEA) was not entitled to reinstatement after her employer, subsequent to her termination, discovered that she had wrongfully removed confidential documents from the workplace.[163] Still, in a unanimous decision, the Court recognized that "[t]he proper measure of backpay present[ed] a more difficult problem" because its resolution required "proper recognition [of] the fact that an ADEA violation [had] occurred which must be deterred."[164] Although the Court conceded that "the employee's own misconduct [was not] irrelevant to" determining the

the accomplishment of a purpose made an offence [sic] by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate . . . . No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."); McNichol, *supra* note 29, at 33–38, 40–48 (collecting cases).

156. 316 U.S. 31, 38–45 (1942).

157. *Id.* at 40.

158. *Id.* at 47.

159. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 248 (1939).

160. *Id.* at 255.

161. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 143 (2002) ("Since the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment.").

162. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138–39 (1968); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 653 n.21 (1985) (Stevens, J., dissenting) (adopting the language in *Perma Life*, 392 U.S. at 138–39); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 307 (1985) (same); Bangor Punta Operations, Inc. v. Bangor & A. R. Co., 417 U.S. 703, 731 (1974) (Marshall, J., dissenting) (same); Kuehnert v. Texstar Corp., 412 F.2d 700, 705 (5th Cir. 1969) (Godbold, J., dissenting) (same).

163. 513 U.S. 352, 355, 361–62 (1995).

164. *Id.* at 362.

appropriateness of her remedy, it noted the importance of "recogniz[ing] the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the [ADEA]."[165] Ultimately reinstating the employee's backpay award, the Court directed reviewing courts to take "into further account extraordinary equitable circumstances that affect the legitimate interests of either party" when determining the proper scope of relief.[166] Consistent with *McKennon*, in cases dealing with the employment of undocumented immigrants, courts have opined that risks of employer abuse require the Judiciary to give effect to countervailing statutory protections of employees, regardless of legal status.[167]

Applying this reasoning to the consumer context, the ADA's important public purpose of alleviating the social isolation of persons with disabilities may still warrant issuing relief under Title III, even if courts impute a "reprehensible" motive to a plaintiff that seeks access only to a dispensary's lawful goods.[168] This is true even on balance with the competing congressional purpose evinced in the federal criminal prohibition of cannabis in the CSA. Courts, in weighing these competing interests, must recognize that the "unclean hands" doctrine "is not an inexorable rule, but [can] be relaxed where public policy would be better served."[169]

V. TITLE III RELIEF AND THE EMPLOYEE–CONSUMER DISTINCTION

In the broader scope of marijuana-business "immunity" to federal civil rights protections, Title III is the simpler case. It grants access to a "place."[170] A place can be lawful, even if darkened by the specter of some criminality. In private suits brought against dispensaries, courts can give effect to the

165. *Id.* at 360–61.

166. *Id.* at 362.

167. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 405 (2012) ("In the end, [the Immigration Reform and Control Act's] framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives."); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–98 (1984); Rivera v. NIBCO, Inc., 364 F.3d 1057, 1065 (9th Cir. 2004) ("[W]ere we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported."); *see also* Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895 (S.D. Tex. 2003) (applying statutory protections to undocumented employees); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (same); Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (same); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (same); Cortez v. Medina's Landscaping, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (same); Rodriguez v. Texan, Inc., 2002 WL 31061237 (N.D. Ill. Sept. 16, 2002) (same); Flores v. Albertsons, Inc., 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002) (same).

168. *See* S. REP. NO. 101-116, at 16 (1989).

169. Nagano v. McGrath, 187 F.2d 753, 759 (7th Cir. 1951); *see* Ground Control LLC v. Capsco Indus., 120 So.3d 365, 369–71 (Miss. 2013); Quick v. Samp, 697 N.W.2d 741, 747 (S.D. 2005); Furman v. Furman, 34 N.Y.S.2d 699, 704–05 (N.Y. Sup. Ct. 1941); *see also* Blum, *supra* note 2, at 783 ("[The unclean hands] principle may not bar relief where the plaintiff played a lesser role than the defendant in the illegal transaction or situation.").

170. *See* 42 U.S.C. § 12182(b)(2)(A) (2012).

unmistakable congressional purpose of Title III without doing violence to principles of equity. They can employ a legal fiction to link injunctive orders to lawful goods sold by a dispensary.[171] They can marginalize the deterrent effect of *in pari delicto* on violators of the CSA.[172] And they can balance "extraordinary equitable circumstances" at stake for plaintiffs to end run around the "unclean hands" doctrine.[173]

Assuming a plaintiff can bypass these obstacles, how is a court likely to craft its ruling? Recent cases involving civil rights claims brought by *employees* against marijuana-industry employers offer a working template.

A. FEDERAL EMPLOYMENT CLAIMS BROUGHT AGAINST DISPENSARIES

In employment cases, federal courts have held that federal civil rights statutes protect marijuana-industry employees. In September 2019, the Tenth Circuit ruled that an employee of a business that provides "security, inventory control, and compliance services to the marijuana industry" could sue his employer in federal court for overtime pay violations under the Fair Labor Standards Act (FLSA).[174] The District Court of Oregon reached a similar conclusion in 2017.[175] And in June 2019, the District Court of Colorado ruled in favor of a dispensary employee that claimed wrongful termination based on sex in violation of Title VII.[176]

The courts in these cases recognized that construing the CSA to limit the scope of civil rights protections impliedly repeals portions of the latter—a strongly disfavored result that requires "clear and manifest" expression of congressional intent.[177] As one court observed, "just because an employer 'is violating one federal law, does not give it license to violate another.'"[178]

The courts in these cases also used traditional canons of statutory interpretation to support their holdings.[179] They reasoned that federal employee

171. *See supra* Section III.A.

172. *See supra* Section III.B.

173. *See supra* Section III.C.

174. Kenney v. Helix TCS, Inc., 939 F.3d 1106, 1108 (10th Cir. 2019).

175. *See* Greenwood v. Green Leaf Lab LLC, No. 3:17-cv-00415-PK, 2017 WL 3391671 (D. Or. July 13, 2017).

176. *See* Ingle v. Ieros, LLC, No. 1:18-cv-02759-LTB, 2019 WL 2471152 (D. Colo. June 13, 2019). Notably, this opinion did not address the underlying illegality of the defendant employer's business. *See generally id.*

177. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018); *see also Kenney*, 939 F.3d at 1110 (presuming that "repeals by implication are disfavored" (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1624)).

178. *Greenwood*, 2017 WL 3391671, at *3 (quoting Taylor Sachs, *The Wellness Approach: Weeding Out Unfair Labor Practices in the Cannabis Industry*, 43 FLA. ST. U. L. REV. 287, 311 (2015)); *see also Kenney*, 939 F.3d at 1110 ("[E]mployers are not excused from complying with federal laws because of their other federal violations." (quoting Kenney v. Helix TCS, Inc., 284 F. Supp. 3d 1186, 1190 (D. Colo. 2018)) (internal quotation marks omitted)). In effect, these rulings harmonize the separate statutory schemes to effect to their sense and purpose, rather than reading them as "mutually inconsistent." *See id.* at 1110; *see also* Watt v. Alaska, 451 U.S. 259, 267 (1981).

179. In *Kenney*, for example, the Tenth Circuit recognized that the plaintiff–employee's claim was a mere "issue of statutory interpretation, which always begins with the plain language of the statute." 939 F.3d at 1109 (citing Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018)). It closely analyzed the

protections are remedial and must be construed broadly.[180] They inferred from the absence of corrective legislation that no exemptions for marijuana businesses were congressionally authorized.[181] They looked to the dual legislative purposes of the statutes at issue, noting that preventing unlawful businesses from procuring an unfair advantage over legitimate employers comports with national employment policies *and* the CSA.[182] And they deferred to Executive Branch interpretations and administrative guidance.[183]

FLSA's statutory text to find that because the plaintiff "show[ed] that he [was] an employee who [] worked more than forty hours per week, and . . . [was] employed in an enterprise engaged in commerce," unless the defendant–employer could show that it "fit[] plainly and unmistakably within the terms and the spirit" of an invoked exemption, it was subject to the FLSA's strictures. *Id.* (internal quotation marks omitted) (first quoting 29 U.S.C. § 207(a)(1) (2012); then quoting Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981).

180. *See Greenwood*, 2017 WL 3391671, at *2 (noting that exemptions should be "narrowly construed against employers" (quoting Haro v. City of Los Angeles, 745 F.3d 1249, 1256 (9th Cir. 2014))).

181. *See Kenney*, 939 F.3d at 1110–11 ("Congress ha[d] actually amended the FLSA many times since the enactment of the CSA without excluding employees working in the marijuana industry, despite specifically exempting other categories of workers. . . . Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." (internal quotation marks omitted)). The *Kenney* court also recognized that the "FLSA's specificity in stating exemptions" cuts against immunizing marijuana businesses from the statutory scheme. *Id.* (internal quotation marks omitted) (quoting Powell v. United States Cartridge Co., 339 U.S. 497, 516–17 (1950).

182. *See id.* at 1111. The *Greenwood* court also referenced the budget rider, discussed *supra* note 65, as evidence of congressional intent to tolerate state marijuana programs and, accordingly, to apply the FLSA's requirements to marijuana businesses. *See* 2017 WL 3391671, at *3 (citing United States v. Kleinman, 859 F.3d 825, 831 (9th Cir. 2017)).

183. In *Greenwood*, the court cited to a legal-advice memorandum written for the National Labor Relations Board's (NLRB) Regional Director of Region 1 by the NLRB's Division of Advice. *See* 2017 WL 3391671, at *2 (citing Advice Memorandum from Barry J. Keamey, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Jonathan B. Kreisberg, Reg'l Dir. Region 1 (Oct. 25, 2013) [hereinafter The Wellness Memorandum]). The relevant portion of the memorandum reads:

> [I]t is appropriate for the Board to assert jurisdiction here even though the Employer's enterprise violates federal laws. DOJ, which is charged with enforcing the federal law prohibiting the possession, cultivation, and distribution of marijuana, has indicated that it will not prosecute medical marijuana companies such as the Employer unless they undermine enforcement priorities such as preventing the diversion of marijuana from states where it is legal under state law to other states. This federal policy towards state-level marijuana legalization efforts creates a situation in which the medical marijuana industry is in existence, integrating into local, state, and national economies, and employing thousands of people, some of whom are represented by labor unions or involved in labor organizing efforts despite the industry's illegality. Moreover, another federal agency, OSHA, has exercised jurisdiction over employers in the medical marijuana industry, including the Employer, notwithstanding that such enterprises violate federal law. We also note that the Board continues to assert jurisdiction over employers who violate another federal law, the Immigrant Reform and Control Act (IRCA), by employing persons not authorized to work in the United States. Any limitations on the Act's applicability in the immigration context have been strictly remedial in nature. That the Employer is violating one federal law, does not give it licence [sic] to violate another.

The Wellness Memorandum, *supra*, at 1. The court found this memorandum persuasive. *See Greenwood*, 2017 WL 3391671, at *2; *see also* Sachs, *supra* note 178, at 311–12 (rebuffing challenges to abiding by The Wellness Memorandum).

Federal courts are likely to take a similar approach in the Title III context. Like federal civil rights protections for employees, Title III contains no specific language that justifies withholding relief from would-be patrons of marijuana businesses. Nor does the ADA's legislative history indicate any congressional intent to the contrary. Title III is remedial in character, favoring an expansive interpretation of its scope. It also contains a defined list of exemptions in Section 12187 in which Congress could have added dispensaries if it wished to exclude them. Finally, like the District Court of Oregon's crediting of Executive Branch interpretations, courts reviewing Title III claims against dispensaries might defer to the Justice Department's "spatial severability" guidance in the Title III Technical Assistance Manual and Title 28 of the Code of Federal Regulations.

In short, courts in these cases are likely to craft a legal gestalt, relying on legislative history, text, and administrative guidance to rule favorably for disabled claimants.

B. FEDERAL PROTECTIONS FOR MARIJUANA-INDUSTRY EMPLOYEES

Even if courts in Title III cases have the power to grant relief to *customers*, the same cannot necessarily be said for marijuana-industry *employees*. Notwithstanding the recent spate of rulings in the Ninth and Tenth Circuits, the success of these employee–plaintiffs in cases going forward may diminish as courts begin to factor the principles of equity outlined in Part IV.

Assuming marijuana businesses even qualify as employers for purposes of federal employment laws,[184] plaintiff–employees who advance claims under Title VII, the ADEA, Title I, and the FLSA[185] cannot surgically parse the legality of their employment in quite the same way that dispensary customers can seek access only to lawful goods. With perhaps a few exceptions, dispensary clerks sell cannabis. Likewise, in-house transportation, warehouse, and business staff handle both legal and illegal inventory—not one or the other. A court could not,

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184. *See* Gina M. Delahunt, Comment, *Pointing Fingers—Will the Real Employer Please Stand Up! When Is an Entity an Employer in a Sexual Harassment Claim?*, 7 J. SMALL & EMERGING BUS. L. 501, 504 (2003) ("The difficulties in identifying and defining an employer for purposes of Title VII are a problem that will progressively surface in future sexual harassment discrimination disputes as employment relationships evolve. The Supreme Court decisions . . . rely on existing common law doctrines that are not sufficiently clear to resolve the issues that may arise in this critical area because they are based on traditional employer-employee relationships.").

185. These federal statutes provide workplace protections for different protected classes. Title VII makes it an unlawful employment practice for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2012). The ADEA extends protections "because of such individual's age." 29 U.S.C. § 623(a) (2012). Title I commands that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2012). And the FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. *See* 29 U.S.C. §§ 201–19 (2012); *see also Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., https://www.dol.gov/whd/regs/compliance/hrg.htm [https://perma.cc/7KTR-V9WN] (revised Sept. 2016).

without commanding unlawful conduct, award backpay to a female methamphetamine trafficker that receives only 85% of her "cut" because of her gender. The same goes for employees of state-sanctioned medical-cannabis-cultivation businesses traded on the Nasdaq Stock Exchange.[186]

A court could potentially award a plaintiff–employee compensatory or punitive damages for pecuniary loss or emotional suffering resulting from a discriminatory employment practice.[187] Such an award would not technically run afoul of the rule against illegal injunctions. A court could also enjoin wrongful conduct. But ordering any more—front pay, back pay, or reinstatement—would make a court a party to the carrying out of the restraints forbidden by law.[188] None of the cases granting relief to marijuana-industry employees seem to recognize this issue.[189]

Beyond the illegal injunction issue, the extent of plaintiff–employees' involvement in illegal enterprises from which they derive their livelihood also magnifies the force of the "unclean hands" doctrine as a bar to relief.[190] Even though federal statutory protections for employees serve important public purposes, courts face a grave risk of undermining "confidence in the administration of justice" by extending legal protections to professionalized drug dealers.[191] This risk is plainly less pronounced when a court enjoins a dispensary to build a ramp that supports a patron's access to legal commerce.

True enough, the "unclean hands" doctrine does not demand that "suitors [lead] blameless lives."[192] A plaintiff's wrongdoing must bear proximate relation to the subject matter in controversy.[193] Only where "some unconscionable act of one coming for relief has *immediate and necessary relation* to the equity that he seeks in respect of the matter in litigation" will courts "close their doors because of [a] plaintiff's misconduct."[194] Through this lens of proximate cause, plaintiff–employees may, in fact, have a more forceful argument than Title III plaintiffs that the denial of relief would be "punishment for extraneous transgressions" rather than "advancement of right and justice."[195] After all, sexual harassment

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186. *See, e.g.*, *Tilray, Inc. (TLRY) IPO*, NASDAQ, https://www.nasdaq.com/markets/ipos/company/tilray-inc-1046264-87189 [https://perma.cc/U3TR-KSMC] (last visited Mar. 3, 2020); *see also* Frank Robison, *Going Green: Legal Considerations for Marijuana Investors and Entrepreneurs*, 6 AM. U. BUS. L. REV. 57, 108 (2016) (listing publicly traded cannabis companies as of 2015).

187. *See, e.g.*, 42 U.S.C. § 1981a(b) (2012); *id.* § 12117(a). *But see* Comm'r. v. Schleier, 515 U.S. 323, 326 (1995) (recognizing that the ADEA does not provide for emotional distress damages).

188. *Cf.* Kelly v. Kosuga, 358 U.S. 516, 520–21 (1959) (addressing the limits of the rule against illegal injunctions in the antitrust context).

189. *See* Kenney v. Helix TCS, Inc., 939 F.3d 1106 (10th Cir. 2019); Ingle v. Ieros, LLC, No. 1:18-cv-02759-LTB, 2019 WL 2471152 (D. Colo. June 13, 2019); Greenwood v. Green Leaf Lab LLC, No. 3:17-cv-00415-PK, 2017 WL 3391671 (D. Or. July 13, 2017).

190. *See* Olmstead v. United States, 277 U.S. 438, 483–84 (1928) (Brandeis, J., dissenting).

191. *Id.* at 484.

192. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (quoting Loughran v. Loughran, 292 U.S. 216, 229 (1934)).

193. *Defenses to Private Suit Under SEC Rule 10b-5*, *supra* note 152, at 81.

194. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933) (emphasis added).

195. *Id.* at 245; *see also* Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944) ("We may assume that because of the clean hands doctrine a federal court should not, in the ordinary case, lend its

and race-based discrimination hardly seem like foreseeable types of harms for those engaging in the enterprise of illegal drug distribution.[196] And, as *McKennon v. Nashville Banner Publishing Co.* makes clear, courts must "account [for] extraordinary equitable circumstances that affect the legitimate interests of either party" when determining whether "unclean hands" should bar relief.[197] Given that members of several identity-based groups have been disproportionately targeted by marijuana arrests and convictions in the past,[198] it seems extraordinarily inequitable to leave these individuals unprotected by federal workplace discrimination laws in this circumstance—especially when 81% of cannabis business owners are white.[199]

Assuming plaintiff–employees cannot obtain relief in federal court, they might also look to the states, which have "broad authority under their police powers to regulate the employment relationship."[200] In the state court systems in legalizing jurisdictions, employees can bring causes of action under state civil rights statutes and the common law, as exemplified by a recent $20 million suit brought against marijuana firm MedMen by a former employee in California Superior Court.[201] Still, state jurisdiction is always subject to federal preemption to the extent that it conflicts with national-level policies.[202] And even if federal preemption can be overcome by combining the Justice Department's enforcement guidance[203] with

judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law. But this does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law in the transactions involved. The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but upon considerations that make for the advancement of right and justice." (internal quotation marks omitted) (citing *Keystone Driller*, 290 U.S. at 245)); Armstrong v. Toler, 24 U.S. 258, 261–62 (1826) ("I understand the rule, as now clearly settled, to be, that where the contract grows *immediately* out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it . . . . But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." (internal quotation marks omitted)).

196. *See* Edwards v. Honeywell, Inc., 50 F.3d 484, 490–91 (7th Cir. 1995).

197. 513 U.S. 352, 362 (1995).

198. *See* ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 47–56 (2013).

199. Eli McVey, *Chart: Percentage of Cannabis Business Owners and Founders by Race*, MARIJUANA BUS. DAILY (Sept. 11, 2017) [https://perma.cc/74A2-57E9].

200. De Canas v. Bica, 424 U.S. 351, 356 (1976), *superseded by statute on other grounds*, 8 U.S.C. § 1101 (2012), *as recognized in* Kansas v. Garcia, No. 17-834, 2020 WL 1016170 (U.S. Mar. 3, 2020).

201. *See* James F. Peltz, *Fast-growing Pot Seller MedMen Faces Lawsuit by Former Insider*, L.A. TIMES (Feb. 24, 2019, 5:00 AM), https://www.latimes.com/business/la-fi-cannabis-medmen-lawsuit-20190224-story.html. The complaint is available at https://mjbizdaily.com/wp-content/uploads/2019/01/MedMen-CFO-lawsuit.pdf [https://perma.cc/XR53-C9UL]. It raises statutory claims and common law claims.

202. *See* Arizona v. United States, 567 U.S. 387, 416 (2012) (recognizing federal preemption of state immigration statutes).

203. *See Conflicts Hearing*, *supra* note 11, at 8 (statement of James Cole, Deputy Att'y Gen., U.S. Department of Justice) (noting that the Justice Department's nonenforcement of the CSA in legalizing states is premised on the expectation that states protect "the health and safety of every citizen").

the strong presumption against federal preemption of state employment laws,[204] questions remain over how federal courts would apply state protections in diversity actions brought against marijuana businesses under *Erie Railroad Co. v. Tompkins*.[205] Though early signs suggest that state courts are willing to protect employees of marijuana businesses, federalism concerns cast doubt on the staying power of localized remedies in the absence of nationwide guidance from Congress.

In sum, though states can (and do) extend workplace protections to marijuana-industry employees, Congress may override these statutory schemes. Because the interplay between federal law and the doctrines of equity outlined in Part IV suggests that federal courts are required to bar marijuana-industry employee-claimants from court, federal relief may prove elusive so long as marijuana's scheduling under the CSA and existing federal civil rights statutes remain unchanged.

CONCLUSION

The Executive's unprecedented approval of "illegal" state cannabis legalization initiatives is undoubtedly a harbinger of mounting public support for federal legalization. But until this process runs the gauntlet of Article I, the continued discretionary nonenforcement of the CSA risks granting legal immunity to marijuana businesses from certain federal statutory protections. Courts may understandably feel reticent to offset this anomalous risk, fearing contamination of the judicial process. Surely, some courts confronted with the issue will resort to the stale refrain that the solution to absurd outcomes lies with the lawmaking authority, and not with the courts.[206] But strict adherence to principles of equity is no excuse for abdication of judicial responsibility to give effect to the hard bargains struck by the political branches.

As evidenced by the foregoing discussion, there are ways in which courts can circumvent the equitable bars to relief in the consumer context, including the careful sidestepping of the rule against illegal injunctions, *in pari materia*, and the "unclean hands" doctrine. Courts hearing Title III cases should be willing to take this approach and to depart from judicial tradition in pursuit of the fair and equitable administration of justice where relief can technically be granted to disabled consumers.

On the other hand, judicial acrobatics may not be an equally viable option when marijuana-industry employees are victimized by their employers. True,

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204. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) ("[P]re-emption should not be lightly inferred . . . since the establishment of labor standards falls within the traditional police power of the State.").

205. *See generally* 304 U.S. 64 (1938) (clarifying that there is no "federal general common law," but leaving undisturbed the use of federal procedural rules in diversity actions in federal court). Under *Erie*, it is difficult to predict whether state substantive law would yield to the federal "unclean hands" maxim "sometimes spoken of as a rule of substantive law[,] [b]ut [which also] extends to matters of procedure." Olmstead v. United States, 277 U.S. 438, 484–85 (1928) (Brandeis, J., dissenting).

206. *See* Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

courts face a pyrrhic victory over the corrupting influence of "confirmed criminals" by barring these employees from court in the name of "self-protection."[207] Confidence won by denying aid to CSA violators may be far outweighed by the credibility lost from depriving them of their access to recourse for injuries sustained through exposure to flagrant exploitation and abuse. But until the legislature makes changes to the underlying statutory schemes or extirpates marijuana's CSA prohibition altogether, civil relief may prove unattainable to hapless members of protected classes suing their employers for federally proscribed conduct.

207. *Olmstead*, 277 U.S. at 485 (1928) (Brandeis, J., dissenting) ("The court protects itself.").